

1989

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THWARTING JUDICIAL POWER TO ORDER SUMMARY JURY
TRIALS IN FEDERAL DISTRICT COURT: *STRANDELL V. JACKSON
COUNTY*

Federal district court judges are increasingly using alternative dispute resolution techniques in an effort to reduce court delay and clear congested dockets. One such technique is the summary jury trial, a non-binding, abbreviated version of a trial used to help litigants reach a settlement. One controversy surrounding the summary jury trial is whether district court judges may compel parties to participate in summary jury trial proceedings. The Author examines a recent case to consider this issue and concludes that federal district court judges are authorized to order summary jury trials.

IN *STRANDELL v. JACKSON COUNTY*,¹ plaintiff's counsel was held in criminal contempt for disobeying a court order requiring plaintiff to submit his case to a summary jury trial (SJT).² On appeal, the Seventh Circuit vacated the contempt judgment and held that a district court does not have the authority to compel participation in a non-binding SJT.³

Balancing the substantive rights of individuals against the legitimate desire of the court to clear its docket and reduce delay, the Seventh Circuit concluded that the Federal Rules of Civil Procedure and the court's inherent power to control its docket do not permit the court to order a non-binding SJT against the wishes of the litigants. The Seventh Circuit is the only court to so limit a federal district court's ability to control its docket, a power that is important to the trial process in reducing delay and facilitating settlements.

This Note outlines the holding in *Strandell*, and offers reasons to uphold judicial power to mandate SJTs.⁴ Part I discusses

1. 115 F.R.D. 333 (S.D. Ill.), *vacated*, 838 F.2d 884 (7th Cir. 1987).

2. For a discussion explaining the SJT process, see *infra* notes 14-26 and accompanying text.

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

4. This Note does not reach the question of whether SJT or other forms of alternate dispute resolution (ADR) violate the Constitution. For a discussion of the right to a jury trial, due process and equal protection, see Levin and Golash, *Alternative Dispute Resolution in Federal District Courts*, 37 U. FLA. L. REV. 29, 45-48 (1985). Furthermore, because the issue was not raised in *Strandell* this Note does not consider whether judges have

the benefits of the SJT, and the importance of judicial power and discretion to effectuate settlements through the SJT. Part II refutes the *Strandell* analysis, and proposes different reasons for the *Strandell* outcome. This Note concludes that the holding of *Strandell* is wrong, and that district court judges are authorized to order SJTs.

I. BACKGROUND

A. SJT: A Form of Court-Annexed Alternate Dispute Resolution

Federal district court judges are becoming increasingly innovative⁵ by using various forms of alternative dispute resolution (ADR).⁶ ADR is encouraged by the amended Federal Rules of

the authority to empanel jurors for SJT pursuant to the Jury Selection and Service Act, 28 U.S.C. § 1866(a) (1982). For a persuasive argument against using summoned jurors for SJT, see *Hume v. M&C Management*, No. C87-3104 (N.D. Ohio Feb. 15, 1990) (LEXIS, Genfed Library, Dist. File); see also Maatman, *The Future of Summary Jury Trials in Federal Courts: Strandell v. Jackson County*, 21 J. MARSHALL L. REV. 455 (1988) (Gerald Maatman, plaintiff's counsel in *Strandell*, discusses the arguments for and against empanelling jurors for SJTs); Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 385-87 (1986) (questioning a judge's authority to empanel jurors for SJT pursuant to Federal Rule of Civil Procedure 39(c) and the Jury Selection and Service Act); *Ruling Against Use of Jurors in SJT Is 'Out of Sync,' Judge Lambros Says*, 4 ADR REPORT 83-84 (arguing that judges do have the power to empanel jurors for SJT).

5. This innovation has been lauded and encouraged by former Chief Justice Warren Burger.

In his 1983 Year-End Report on the Judiciary, . . . Chief Justice [Burger] called upon the bar and the bench to actively seek alternatives to the high cost of litigation and the ever increasing case overload problem, saying in part: '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.'

A. LEVIN, E. GREEN, J. ETHERIDGE, C. MENKEL-MEADOW & T. LAMBROS, DISPUTE RESOLUTION IN A DEMOCRATIC SOCIETY: FINAL REPORT OF THE 1985 CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES 118 (1985) [hereinafter WARREN CONFERENCE].

6. No one form of ADR has prevailed among the judiciary.

[I]ndividual approaches vary widely, and . . . the impact of many techniques seems to depend both on the personal qualities a judge brings to the task and on

Civil Procedure to reduce court delay and clear congested dockets.⁷ The SJT is one of several ADR techniques being used by district court judges.⁸

There are many types of ADR but most can be categorized as either private or court-annexed.⁹ Private ADR may take the form of mediation, private arbitration, or mini-trials.¹⁰ Private ADR is consensual and can be individualized by the parties to suit their needs.

The overarching point [regarding private ADR procedures] is that the parties can design processes that determine not only who will host their negotiations, and what role he or she will play, but also what kinds of information will be considered, whether (or to what extent) the information will be subject to the filtering of the rules of evidence, what the tone of the proceedings will be, in what order various elements of the program will be placed, when the events shall occur, whether, for how long, and for what purposes they shall be interrupted, and so forth. In other words, the parties enjoy a level of freedom in

the local legal environment . . . Success in promoting settlements thus depends on a marriage of technique with personal and institutional resources, a dynamic that tends to confound cross-court comparisons . . . The unavoidable linkage of judicial settlement initiatives with personal and institutional capacities suggests that judges must rely heavily on their own assessments in deciding how to enhance settlement possibilities.

D. Provine, Settlement Strategies For Federal District Court Judges 9-10 (1986).

7. "The 1983 amendments to the Federal Rules of Civil Procedure encourage judges to take an active role in the settlement of civil suits . . . These changes can be interpreted both as an endorsement of what some judges were already doing and as a call to future action." *Id.* at 8-9 (footnote omitted).

8. Since 1980, approximately 65 federal district courts have held SJTs. Maatman, *supra* note 4, at 457. Chief Justice Burger has commended SJT as innovative and useful. *Id.* at 457 n.12 (citing W. BURGER, 1984 YEAR-END REPORT ON THE JUDICIARY 15-16).

9. For an overview of different types of ADR, see W. BRAZIL, EFFECTIVE APPROACHES TO SETTLEMENT: A HANDBOOK FOR LAWYERS AND JUDGES 15-82 (1988); S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 3-309 (1985) [hereinafter S. GOLDBERG]; Levin and Golash, *supra* note 4, at 32-42; Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 U. FLA. L. REV. 1 (1985).

10. This list of private ADR techniques is not exhaustive. For more complete descriptions of private ADR techniques, see sources cited *supra* note 9.

SJT is often confused with privately conducted mini-trials. In a mini-trial, after agreeing to the process, the parties usually choose a neutral advisor to accept briefs and exhibits, and manage the procedure. Advocates for each party conduct limited discovery and present their case at the mini-trial which lasts one to two days. The tone of the mini-trial is less like a trial and more like a business meeting. After the mini-trial, the parties will hopefully participate in negotiations, which can last several weeks, to settle the matter. Mini-trials have been used primarily in the business world, and they "are not designed to provide accurate trial forecasts," as opposed to SJT. Lambros, *The Judge's Role in Fostering Voluntary Settlements*, 29 VILL. L. REV. 1363, 1365 n.11 (1984).

shaping processes to fit their situation that is without parallel in formal, public adjudication.¹¹

Court-annexed ADR can be as flexible as private ADR, but it is ordered and/or conducted by the trial judge.¹² Examples of court-annexed ADR include court-ordered arbitration, neutral experts, fact finders, special masters, and SJTs.¹³

SJT is a court-annexed abbreviated version of a trial that is used to help litigants reach a settlement. Although SJT procedures vary,¹⁴ a conference is usually held before the SJT to discuss the rules and submit motions, witness lists, proposed jury instructions and voir dire questions.

On the day of the SJT, a jury is selected from the regular jury pool, and the attorneys summarize and present their arguments to the jury. Usually counsel may only present evidence that would be admissible at trial pursuant to the Federal Rules of Evidence, and may not call witnesses but can read from depositions. Counsel are usually given an opportunity to rebut opposing counsel's presentation and also may give a closing argument. A SJT typically lasts one or two days.

After the trial, the jury is asked to return a unanimous verdict, which is not binding on the parties. Individual verdicts are acceptable when unanimity is impossible. The court requests that the jury answer interrogatories, which help counsel to pinpoint specific weaknesses in their cases. In addition, counsel are sometimes permitted to question the jury directly, after the verdict is returned, for the purpose of better understanding the strengths and weaknesses of their cases. The verdict, interrogatories, and questioning session help counsel predict the possibility of success

11. W. BRAZIL, *supra* note 9, at 16.

12. Judge Lambros refers to these alternatives as "judicially-managed." Lambros, *supra* note 10, at 1365. One commentator says modification of the adversary system through court-annexed ADR is the wave of the future. "The likeliest prospect is that the adversary process will be modified, even in court settings, where judicial management is increasing rapidly and shunting devices [like SJT] that impose conditional decisions or promote settlements are also used increasingly." Rosenberg, *Resolving Disputes Differently: Adieu to Adversary Justice?*, 21 CREIGHTON L. REV. 801, 822 (1988).

13. This list is not exhaustive. For more complete descriptions of court-annexed ADR, see sources cited *supra* note 9. This Note focuses on SJT as a court-annexed ADR procedure. Some of the analysis, though, may be applicable to other court-annexed or even private ADR procedures.

14. For example, SJT may be conducted by a judge or a magistrate. Lambros, *supra* note 10, at 1376. For other procedural descriptions of SJT, see Lambros, *supra* note 10, at 1373-78; Lambros & Shunk, *The Summary Jury Trial*, 29 CLEV. ST. L. REV. 43 (1980); Spiegel, *Summary Jury Trials*, 54 U. CIN. L. REV. 829 (1986).

or failure at trial, which serves as an impetus to settle. If the parties do not negotiate a settlement on their own, the judge may call a settlement conference or schedule an immediate trial date.

The following cases illustrate the flexibility of the SJT where the SJT procedure was modified to meet specific needs of the parties and the court. In November 1987, Judge S. Arthur Spiegel¹⁵ departed from the standard SJT procedure using a two week SJT to settle a complex case¹⁶ brought by three utility companies against General Electric for selling a defective nuclear reactor.¹⁷ An eight member jury deliberated for a little over two days and returned a unanimous verdict for General Electric.¹⁸ Two months later, the parties settled the case with Judge Spiegel's assistance, and avoided the estimated four or five-month trial.¹⁹

In another recent case, Judge Richard A. Enslen²⁰ conducted a SJT at the request of the parties in a complex ground-water toxic tort case.²¹ The case involved 29 plaintiffs, and the issue of causation was anticipated to lead to testimony by 80 expert witnesses.²² A jury of ten was selected and heard the case, but later was split into two separate groups of five to deliberate.²³ After a three day SJT, one jury returned a \$2.8 million verdict for the plaintiffs and the other jury returned a verdict for the defendant.²⁴ The jurors were questioned after returning their verdicts, in order for counsel to obtain insight about the case. The uncertainty of how a real jury would resolve the case (or the risk of losing) compounded by the high costs of further litigation prompted settlement negotiations.²⁵ The case was settled with Judge Enslen's as-

15. United States District Judge, Southern District of Ohio, Western Division.

16. One commentator warns against using SJT in complex cases because the evidence may not be effectively summarized for the jury. W. BRAZIL, *supra* note 9, at 70.

17. The SJT was conducted in *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 117 F.R.D. 597 (S.D. Ohio 1987), *aff'd*, 854 F.2d 900 (6th Cir. 1988); see *GE, Utilities End \$1B Case With Summary Jury Trial*, 6 ALTERNATIVES TO THE HIGH COST OF LITIGATION, Feb. 1988, No. 2, at 17, 22 [hereinafter *Utilities*].

18. *Utilities*, *supra* note 17, at 22.

19. *Id.* at 17.

20. United States District Judge, Western District of Michigan.

21. *An SJT With Two Juries Helps in Resolving Major Mich. Water-Contamination Dispute*, 6 ALTERNATIVES TO THE HIGH COST OF LITIGATION, Feb. 1988, No. 2, at 19 [hereinafter *SJT With Two Juries*].

22. *Id.*

23. *Id.* at 20.

24. *Id.*

25. *Id.* Judge Lambros explained the considerations that prompt settlement negotiations: "[T]he decision [to settle] is a voluntary one, based on the disputants' balancing of a

sistance early the following morning, thus avoiding an estimated nine to fourteen month trial.²⁶ These cases illustrate the utility, versatility, and success of the SJT which sets the stage for this Note's discussion.

B. The Pros and Cons of Summary Jury Trials

There is no panacea for alternative dispute resolution.²⁷ SJT is not the best, nor the only, form of ADR for every situation.²⁸ Judge Thomas Lambros²⁹ observed:

Summary Jury Trial is but one of a variety of alternative dispute resolution processes in use today. Each has its own particular merit, . . . [t]he processes are not in competition with each other. They simply serve varying needs based on particular circumstances and the particular place any one case finds itself on the time line toward resolution. Summary Jury Trial is a final alternative before full trial.³⁰

The use of SJT has met with overwhelming approval. In September 1984, SJT was endorsed by the Judicial Conference of the United States to be used as an experimental settlement tech-

wide variety of factors, including cost, time, and uncertainty of results." Lambros, *supra* note 10, at 1367.

26. *SJT With Two Juries*, *supra* note 21, at 19.

27. "[T]here is no single technique that is best for every judge, for every case. There is no panacea; there is no universal solvent." WARREN CONFERENCE, *supra* note 5, at 3.

28. In *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 854 F.2d 900 (6th Cir. 1988), the court affirmed that there is no First Amendment right of access or public right to know of SJT proceedings and stated:

[W]hile the summary jury trial is a highly reliable predictor of the likely trial outcome, there are manifold differences between it and a real trial.

At every turn the summary jury trial is designed to facilitate pretrial settlement of the litigation, much like a settlement conference.

The summary jury trial can play a particularly useful role in facilitating the settlement of complex cases and is typically employed in cases that either will consume significant judicial resources if they proceed to trial, or that are not amenable to settlement through other techniques.

Id. at 904.

29. United States District Judge, Northern District of Ohio. Judge Lambros created the SJT in 1980. S. GOLDBERG, *supra* note 9, at 283.

30. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution, A Report to the Judicial Conference of the United States*, 103 F.R.D. 461, 463 (1984). "[S]ummary jury trial work[s] well in settling cases that might have gone on to full trial had they not been assigned to such a procedure." M. JACUBOVITCH & C. MOORE, *SUMMARY JURY TRIALS IN THE NORTHERN DISTRICT OF OHIO* 7 (1982).

nique.³¹ Most lawyers who have participated in SJT indicate that they would like to do it again.³²

Although the success of the SJT is difficult to measure,³³ it is reported that thirty to forty percent of the cases set for SJT settle before it occurs.³⁴ Most cases that go through SJT settle before trial, and only a few go through a trial on the merits.³⁵ Judge Lambros reports a ninety percent settlement rate,³⁶ and of the fifty cases Judge Enslen has submitted to SJT, only three have not settled.³⁷ Even if SJT does not induce a settlement, advocates say

31. WARREN CONFERENCE, *supra* note 5, at 43; S. GOLDBERG, *supra* note 9, at 283. The Conference resolution is set forth below:

RESOLUTION

Whereas trial by jury is the cornerstone of the American system of justice;

Whereas the use of court-annexed alternative methods of dispute resolution in appropriate cases may facilitate the voluntary settlement of cases before trial; and

Whereas each case is unique and can only be settled fairly if the settlement devices used to foster its resolution are tailored to its particular characteristics:

Now therefore it is RESOLVED:

That courts should employ alternative methods of dispute resolution as catalysts to settlement, but that these alternatives should in no way impair the litigants' ultimate rights to a full trial;

That studies should be conducted concerning the effectiveness of alternative methods of dispute resolution in comparison with traditional procedures;

That a comprehensive system of alternative methods of dispute resolution should be integrated into the existing judicial framework; and

That the use of alternative dispute resolution in the courts be conducted consistent with the traditions of public accountability, access, and privacy embedded in our judicial system.

WARREN CONFERENCE, *supra* note 5, at 119-20.

32. D. PROVIN, *supra* note 6, at 75. These lawyers also report that they would like to have a say in whether or not a case goes to SJT. *Id.* "[T]he attorney who objected to the first summary jury trial he was required to participate in is now the biggest local fan of the procedure." *McKay v. Ashland Oil, Inc.*, 120 F.R.D. 43, 49 (E.D. Ky. 1988) (comment by Judge Bertlesman).

33. See Posner, *supra* note 4, at 388-89.

34. D. PROVIN, *supra* note 6, at 75. United States District Judge Bertelsman of the Eastern District of Kentucky said:

In my own experience summary jury trials have netted me a savings in time of about 60 days and I have only used the procedure five times. It settled two of these cases that were set for 30-day trials. It is true that I cannot prove scientifically that the cases would not have settled anyway but my experience tells me they would not. I do know that but for my making summary jury trials mandatory in these cases, they would not have occurred.

McKay, 120 F.R.D. at 49 (footnote omitted). Furthermore, "[i]f the procedure is ineffective and wastes time, we may expect it to be abandoned, since most federal trial judges are not profligate of their time." *Id.*

35. D. PROVIN, *supra* note 6, at 75-76.

36. Lambros, *supra* note 10, at 1377.

37. Maatman and Gilbert, *Summary Jury Trial: The Long & Short of It*, CHI. B. A.

there are advantages to it such as "better prepared lawyers and enhanced judicial familiarity with the case, which may allow the judge to expedite the trial."³⁸

Arguably a higher degree of judicial involvement will strike fear in the hearts of lawyers because of pressure or "pollution" from the trial judge.³⁹ Lawyers may believe "[t]here is a risk that by participating in settlement negotiations the judge will acquire contaminating information that either makes it difficult . . . to preside impartially at trial or that causes the parties to believe that [the judge] could not preside impartially at trial."⁴⁰ Empirical evidence shows that lawyers' fear of judicial taint due to a settlement conference is not as great in cases that will be heard by a jury instead of a judge.⁴¹ Because cases heard at a SJT are jury cases, arguably lawyers will fear judicial involvement in a SJT less than in a settlement conference regarding a nonjury case. Most important though, while the fear of judicial taint is ubiquitous, there is no empirical data that measures the size or even confirms the reality of these potential problems.⁴²

There are benefits from close judicial involvement, such as the judge's increased incentive to settle a case to clear his docket,⁴³ and the litigant's desire to put his best foot forward to settle because the same judge probably will continue to be involved in the case.⁴⁴ Furthermore, statistics show that litigators desire judicial involvement in the settlement process, particularly because they feel that judges increase the likelihood of settlement.⁴⁵ High percentages of attorneys also feel that: (1) judges

REC. 18, 19 (April 1988).

38. D. PROVIN, *supra* note 6, at 75; see also *Arabian American Oil Co. v. Scarfone*, 119 F.R.D. 448, 449 (M.D. Fla. 1988) ("[I]t is an embarrassing professional exercise before the court and jury to see lawyers floundering in their presentations due to inadequate preparation . . . [A] summary jury trial *forces* [adequate] preparation.").

39. W. BRAZIL, *supra* note 9, at 104. Brazil addresses fear from judicial pressure in the context of judicially hosted settlement conferences, but this fear is also likely to arise in SJTs because both settlement conferences and SJTs increase judicial involvement.

40. *Id.* at 106.

41. *Id.* at 105.

42. *Id.* at 106.

43. *Id.* at 107.

44. *Id.* at 108.

45. *Id.* at 392. The data, part of an American Bar Association (A.B.A.) survey, indicates that 92 percent of the lawyers in a sample group for Northern California agreed that judicial involvement significantly improves the prospect of settlement. 75 percent of the lawyers in a sample group from Northern Florida, who are the most conservative about judicial involvement, also agreed with this proposition. *Id.* at 392-93.

should "try to facilitate settlement in cases where they have not been asked to do so;"⁴⁶ (2) "a settlement conference hosted by a judge [should] be mandatory in most cases in federal court;"⁴⁷ and (3) judges should take a more active role in settlement.⁴⁸ Judge Lambros believes judicial involvement is essential to the development of ADR:

Because of [the] enduring public confidence in the judiciary, judges must play a central role in the development and implementation of effective alternative means of dispute resolution. If judges play an effective role in the development of alternatives to the traditional jury trial, they can aid in the efficient resolution of disputes without impairing the ability of courts to provide their traditional services.⁴⁹

There are advantages to SJT compared to other ADR procedures.⁵⁰ SJT is helpful to attorneys because it provides a formal forum for hearing a case⁵¹ that forces them to fully prepare the case and examine its true worth and viability. This well-informed evaluation encourages settlement discussions.⁵²

In cases where the client is preventing settlement,⁵³ a

[s]ummary jury trial . . . is a powerful tool for disabusing clients of unrealistic notions about their chances of success and for providing emotional clients a forum to vent their feelings. The primary obstacle to settlement these procedures are designed to

46. *Id.* at 394-96. 70 percent of lawyers polled by the A.B.A. wanted judges to "push" for settlement, but only 57 percent of judges actually did so. *Id.* at 394.

47. *Id.* at 394-96.

48. *Id.* at 398-99. 73 percent of litigators polled would "prefer a settlement judge who actively offers suggestions and observations" to "one who simply facilitates communication between the parties." *Id.*

49. Lambros, *supra* note 10, at 1367-68.

50. Privacy is an attractive quality of many ADR techniques, and SJT may provide as much privacy as any other ADR procedure. For example, the Sixth Circuit recently affirmed a decision barring public access to SJT proceedings. *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 117 F.R.D. 597 (S.D. Ohio 1987), *aff'd*, 854 F.2d 900 (6th Cir. 1988).

51. SJT resembles a trial on the merits more closely than other forms of ADR. This is helpful because lawyers' "training has schooled them to believe first, last and always in litigation and the adversary process. They think real advocates don't give ground when their client has a just cause; and that covers almost all cases, and both sides of them." Rosenberg, *supra* note 12, at 816. In other words, perhaps SJT satisfies the adversarial urge of lawyers, so they can move on to discuss settlement.

52. D. PROVINCE, *supra* note 6, at 16.

53. "Frequently each side regards it as a betrayal of the righteousness of its position to do anything but litigate to the finish. Some clients would rather go down in flames after trial than settle without one." Rosenberg, *supra* note 12, at 816.

remedy is lack of information upon which to make an evaluation of the case.⁵⁴

SJT also satisfies the litigant's urge to have his day in court.⁵⁵ Participation of the client has long been recognized as essential to the settlement process.⁵⁶

Furthermore, SJT and other court-annexed alternatives "preserve access to the courts and at the same time avoid both the constitutional and the policy level objections that the [private] alternatives provoke if they are made compulsory and exclusive of the courts."⁵⁷ The objection to mandatory private alternatives is that at best they violate society's strong commitment to permitting access to the courts and at worst they may deny litigants their constitutional right to a jury trial, while mandatory court-annexed procedures give litigants the option of returning to court if they are unable to settle.⁵⁸

The benefits of SJT over a pretrial settlement conference are similar to the benefits of SJT over other ADR procedures.⁵⁹ The formality of the procedure forces litigants to fully prepare. For example, in a settlement conference, parties may not accurately specify the worth of their case, either because the parties don't know its worth or because they unrealistically estimate the actual amount.⁶⁰ SJT forces litigants to know the worth of their case

54. D. PROVIN, *supra* note 6, at 86; see *McKay v. Ashland Oil, Inc.*, 120 F.R.D. 43, 50 (E.D. Ky. 1988); W. BRAZIL, *supra* note 9, at 68-69.

55. As one commentator has explained it:

Proponents [of the adversary system] argue that the opportunity to play an active role in the proceedings that decide their rights satisfies people's deep-seated desire to have their day in court. They point to empirical evidence showing that both litigants and non-litigants are better satisfied with the process and the outcome if they have significantly participated in the case in the way the adversary process allows.

Rosenberg, *supra* note 12, at 812 (footnote omitted); see *McKay*, 120 F.R.D. at 50.

56. "Participation in settlement negotiations sensitizes clients to . . . problems, provides an opportunity for catharsis, and encourages clients to impose 'economic discipline' on their lawyers. The presence of clients at a settlement proceeding also helps ensure better preparation by counsel." D. PROVIN, *supra* note 4, at 16 (footnote omitted).

57. Rosenberg, *supra* note 12, at 817.

58. *Id.* at 816-17.

59. See *supra* notes 50-58 and accompanying text (regarding the benefits of SJT over other ADR procedures).

60. See D. PROVIN, *supra* note 6, at 26.

[I]t is not so easy for the parties to assess the strengths and weaknesses of their case or the value of the claims, and often the lack of this kind of information makes meaningful settlement conferences impossible.

The Courts, out of concern that the barriers to settlement of complex cases

with specificity and present it to a jury with no more inflation than would occur during a trial on the merits. Ultimately, SJT provides more impetus to settle than other pretrial procedures, because scheduling SJT provides impetus similar to scheduling a trial.⁶¹ Scheduling a date for trial has long been viewed as one of the most effective techniques for promoting settlements.⁶²

Keep in mind that SJT is a last resort, saved for cases where other settlement procedures have failed,⁶³ and which will take more than a few days to try.⁶⁴ Even then, there are situations where SJT is inappropriate, such as in cases against the government,⁶⁵ in cases likely to set precedent,⁶⁶ where the credibility of a witness is a critical issue,⁶⁷ or where counsel is inexperienced or

result in great costs to the legal system because a case like this can go on for months on end — other litigants are at the courthouse door and want their cases tried and their cases get backed up which causes problems for everyone — have devised a range of settlement techniques to assist the parties in resolving disputes without going to trial, if at all possible.

Cincinnati Gas & Elec. Co. v. General Elec. Co., 117 F.R.D. 597, 604 (S.D. Ohio 1987), *aff'd*, 854 F.2d 900 (6th Cir. 1988) (emphasis added).

61. M. JACUBOVITCH & C. MOORE, *supra* note 30, at 31.

62. D. PROVIN, *supra* note 6, at v.

63. W. BRAZIL, *supra* note 9, at 68; *see supra* text accompanying note 30.

64. "Most participants [at the Federal Judicial Center's 1985 Conference on the Judicial Role in Settlement] agreed . . . that summary jury trial should be reserved for cases that are likely to take more than a few days to try." D. PROVIN, *supra* note 6, at 15 (footnote omitted).

65. M. JACUBOVITCH & C. MOORE, *supra* note 30, at 3. It is unclear why SJT is inappropriate in cases against the government. Perhaps because access to SJT can be closed to the public, *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 117 F.R.D. 597 (S.D. Ohio 1987), 854 F.2d 900 (6th Cir. 1988); *see supra* notes 28 and 50, it would violate the First Amendment right of public access to government proceedings. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) [hereinafter *Press-Enterprise II*]; *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) [hereinafter *Press-Enterprise I*]; *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1179 (6th Cir. 1983).

66. M. JACUBOVITCH & C. MOORE, *supra* note 30, at 3.

67. *Id.* Where credibility is essential to the case, summary jury members will not hear directly from witnesses, and will be less capable of assessing witness credibility. But a credibility issue should not always preclude the use of SJT. A solution may be to instruct the jury on credibility, for example:

[I]n weighing the evidence relating to an anticipated witness, you should consider his relationship to the plaintiff or to the defendant; his interest, if any, in the outcome of the case; his opportunity to observe or acquire knowledge concerning the facts about which he would have testified; and the extent to which his testimony would have been supported or contradicted by other credible evidence.

ANTITRUST LAW SECTION OF THE OHIO STATE BAR ASSOCIATION, SUMMARY JURY TRIAL OF AN ANTITRUST/RICO CASE, (presented at the Twenty-First Annual Antitrust Institute,

unprepared.⁶⁸

The primary courtroom controversy surrounding the SJT is the extent of judicial power used to compel parties to participate in them.⁶⁹ Mandatory⁷⁰ SJT is not appropriate in every situation, but when SJT is appropriate, judicial power and discretion are necessary to enforce it.⁷¹ Judges are in the best position to reduce delay in the process and clear their dockets.⁷² This is particularly true where there are few incentives for counsel to speed up the judicial process.⁷³ Since court-annexed ADR is designed to deal

Cleveland, Ohio, December 4, 1987). United States Magistrate Wayne Brazil suggests modifying the SJT by asking "the court for permission to have each key witness present in narrative form his or her version of the facts." W. BRAZIL, *supra* note 9, at 67.

68. D. PROVINE, *supra* note 6, at 70. The success of mandatory settlement conferences has always been vitally dependent on the seniority of the attorneys and the amount of preparation. Church, *The "Old and the New" Conventional Wisdom of Court Delay*, 7 JUST. SYS. J. 395, 402 (1982). Experience and preparation are especially important in mandatory summary jury trials because the jury reacts only to counsel, whereas in a trial on the merits the jury also considers the testimony and credibility of several witnesses. W. BRAZIL, *supra* note 9, at 66-67.

69. See Lambros, *supra* note 10, at 1370 ("Today, there are serious questions with respect to the judge's participation in the pretrial mechanism. A primary concern is whether the judge has sufficient power and resources to keep from being overwhelmed by the backlog of cases.").

70. "Mandatory" refers to SJT being mandatory upon a judge's order, not mandatory in every case. This was explained in the Warren Conference:

[I]t is helpful to make a point concerning terminology, specifically about the use of the term 'mandatory'. There is an inherent ambiguity in the word. Sometimes we mean . . . that the procedure ha[s] to be used in every case But 'mandatory' today . . . mean[s] something very different: the judges, after determining that a particular technique . . . is appropriate, orders the parties to use the procedure, which then becomes mandatory for that particular case. In this sense many ADR techniques are mandatory, although not intended to be used except in a relatively small number of cases.

WARREN CONFERENCE, *supra* note 5, at 9.

71. "There is no attempt to mandate alternatives in every case. There will, rather, be a *large degree of dependence on the discretion of the judge* in determining what is appropriate in individual cases." *Id.* at 118 (emphasis added).

72. "The trial judge . . . is in a good position to assess the obstacle(s) present in a particular case and to respond with a pretrial plan that will enhance settlement opportunities [B]y tailoring assistance, a judge can promote more and better settlements than can be achieved though any other approach." D. PROVINE, *supra* note 6, at 13-14.

Empirical data shows that limited judicial participation in settlement is valuable to reducing courtroom delay, but at some point it becomes counter-productive. See S. FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS 37 (FEDERAL JUDICIAL CENTER 1977). Consequently, because SJT places a greater burden on the court than other forms of ADR, it should be used sparingly. D. PROVINE, *supra* note 6, at 85.

73. Church, *supra* note 68, at 402. Church cites incentives for causing delay, such as the attorneys' desire to receive interim billings and space their workloads, and the fact that clients do not always push for a speedy resolution. *Id.* "Procrastination and the desire to

with congested dockets, judges should have the power to enforce it.⁷⁴ The *Strandell* decision though, undermines the power of district court judges to reduce court delay by instituting ADR procedures such as SJT.

II. CASE DESCRIPTION AND ANALYSIS

A. The Events Leading Up to *Strandell*

In *Strandell v. Jackson County*,⁷⁵ the plaintiffs' attorney filed a report concerning the prospects of settlement prior to a pretrial conference. Plaintiffs requested a \$500,000 settlement, but defendants would not discuss it. At the pretrial conference, the plaintiffs rejected the court's suggestion to use a SJT, and filed a motion to advance the case for trial.

After the close of discovery, the court denied defendants' motion to compel production of work product.⁷⁶ The defendants requested production of witness statements obtained by plaintiffs during discovery. Plaintiffs argued that defendants could have discovered the information through normal discovery, but did not. The district court held that defendants failed to prove "substantial need" and "undue hardship," as required by Federal Rule of Civil Procedure 26(b)(3), thereby denying production.⁷⁷

Seven months after the pretrial conference, the district court, over plaintiff's objection, ordered a SJT.⁷⁸ On the day of the SJT, plaintiffs' counsel was held in criminal contempt for refusing to participate. The court entered a \$500 judgment of criminal contempt against plaintiffs' counsel, and held that it had the power to

use delay to soften the other side [also] play a role." D. PROVINE, *supra* note 6, at 17.

74. "There is certainly no ambiguity in the relationship between judge power and the pace of litigation . . ." Church, *supra* note 68, at 404. Delay is greatly affected by "weak leadership and judicial vacillation." Ryan, Lipetz, Luskin & Neubauer, *Analyzing Court Delay-Reduction Programs: Why Do Some Succeed?*, 65 JUDICATURE 58, 62 (1981).

75. 115 F.R.D. 333 (S.D. Ill.), *vacated*, 838 F.2d 884 (7th Cir. 1987) (The plaintiffs filed a civil rights action against the county relating to the arrest, strip search, imprisonment, and suicide of their son, Michael Strandell.).

76. *Strandell v. Jackson County*, 838 F.2d 884, 885 (7th Cir. 1987).

77. *Strandell v. Jackson County*, 7 Fed. R. Serv. 3d (Callaghan) 715, 718 (S.D. Ill. 1987).

78. Sometimes ADR, or SJT specifically, is authorized by a local rule of the court. In the absence of a local rule, the district court in *Strandell* referred to the procedure outlined by Judge Thomas Lambros in *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution, A Report to the Judicial Conference of the United States*, 103 F.R.D. 461 (1984).

compel participation in a non-binding SJT.⁷⁹ The Seventh Circuit Court of Appeals vacated the district court's holding that district court judges have the authority to compel participation in non-binding SJTs.

B. The *Strandell* Decision

In *Strandell*, the Seventh Circuit held that the district court did not have the power under Federal Rule of Civil Procedure 16 to compel participation in SJT, and that mandated SJTs intrude on pretrial discovery and the work product doctrine.⁸⁰ First, the court narrowly interpreted Federal Rule of Civil Procedure 16. Even though Rule 16 refers to the possible use of extrajudicial procedures⁸¹ or ADR, the court concluded that Rule 16 "was not intended to require that an unwilling litigant be sidetracked from the normal course of litigation."⁸² Further, the Advisory Committee did not intend that Rule 16 would "impose settlement negotiations on unwilling litigants."⁸³

The *Strandell* court looked to *J.F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp.*⁸⁴ and *Identiseal Corp. v. Positive Identification Sys.*⁸⁵ in interpreting Rule 16. In *J.F. Edwards*, the Seventh Circuit determined that Rule 16 did not give district court judges the power to compel parties to stipulate to facts.⁸⁶ Similarly, in *Identiseal*, the Seventh Circuit found that Rule 16 did not give district court judges the power to compel

79. *Strandell*, 115 F.R.D. at 334-36. The court reached its decision in part because it was unable to promptly hear a five or six-week trial, the parties were "poles apart" from a settlement, and they used SJT successfully in the past. The court was further persuaded by the Resolution of the 1984 Judicial Conference of the United States, FED. R. CIV. P. 16, and the Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1988).

80. *Strandell*, 838 F.2d at 887-88.

81. It has been argued that SJT is not extrajudicial because it "is conducted inside the courtroom of a federal courthouse, before an Article III judge, and with jurors selected from the court's master jury wheel who are paid from congressionally apportioned funds." Maatman, *supra* note 4, at 478.

82. *Strandell*, 838 F.2d at 887. "To the extent a federal judge interferes with a party's determination of settlement techniques, a court exceeds the scope of its case management powers under Rule 16." Maatman, *supra* note 4, at 471.

83. FED. R. CIV. P. 16 advisory committee's note. "Rule 16 . . . was not designed as a means for clubbing the parties — or one of them — into an involuntary compromise." *Strandell*, 838 F.2d at 887 (quoting *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985)).

84. 542 F.2d 1318 (7th Cir. 1976).

85. 560 F.2d 298 (7th Cir. 1976).

86. *J. F. Edwards Constr. Co.*, 542 F.2d at 1325.

counsel to initiate discovery.⁸⁷ Interpreting these cases, the *Strandell* court concluded that Rule 16 likewise did not give district courts coercive power to compel participation in summary jury trials.⁸⁸

Second, *Strandell* considered whether SJT intruded on pre-trial discovery and the work product doctrine.⁸⁹ The plaintiffs referred to SJT as a device to allow "one litigant to make unfair use of his opponent's diligent preparation for trial" after the close of discovery.⁹⁰ "Hence, [according to the plaintiffs] a mandatory summary jury trial necessarily destroys the basis upon which the work-product doctrine rests, as it would be inconsistent with the doctrine's role of *promoting the adversary system by safeguarding the fruits of an attorney's trial preparation* from their opponent."⁹¹

The plaintiffs in *Strandell* also maintained that a mandatory SJT required them to adopt a trial strategy confined to conclusory arguments in order to prevent the revelation of protected witness statements, which the trial court denied to defendants in an earlier motion to compel.⁹² If counsel were in fact forced to use a different strategy during SJT than would be used at trial, it would defeat the purpose of the SJT to determine the possible outcome of a jury trial on the merits.⁹³

The Seventh Circuit opined that SJT upsets the balance between "pretrial disclosure and party confidentiality"⁹⁴ because it requires "disclosure of information obtainable, if at all, through the mandated discovery process."⁹⁵ The court stated that mandatory SJT radically alters "the considered judgments contained in Rule 26 and in the case law" regarding pretrial discovery and the work product doctrine.⁹⁶ The court concluded it was

87. *Identiseal Corp.*, 560 F.2d at 302.

88. *Strandell*, 838 F.2d at 888. Prior to *Strandell*, the Seventh Circuit also held that Rule 16 did not permit district court judges to compel a case to be tried in front of a magistrate. *Adams v. Heckler*, 794 F.2d 303, 307 (7th Cir. 1986); *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1040-41 (7th Cir. 1984). It is of no consequence that SJT is sometimes conducted by a magistrate because SJT is not a final determination on the merits, but rather a non-binding settlement procedure.

89. *Strandell*, 838 F.2d at 888.

90. *Maatman*, *supra* note 4, at 476.

91. *Id.* at 476-77 (emphasis added) (footnote omitted).

92. *Id.* at 475. See *supra* text accompanying notes 76-77.

93. *Maatman*, *supra* note 4, at 475-76.

94. *Strandell*, 838 F.2d at 888.

95. *Id.*

96. *Id.*

the job of Congress and the Supreme Court to amend the Federal Rules of Civil Procedure, if such "radical surgery" was required.⁹⁷

C. The Response to *Strandell*

1. District Courts Have the Power to Order Mandatory Summary Jury Trials

Four federal district courts have addressed the *Strandell* issue since it was decided, and all have held that district court judges have the power to require participation in SJTs.⁹⁸ In *McKay v. Ashland Oil, Inc.*, Judge Bertelsman upheld the validity of a local rule that read: "A judge may, in his discretion, set any civil case for summary jury trial or other alternative method of dispute resolution."⁹⁹ However, the judge made it clear that his holding applied even in the absence of the rule.¹⁰⁰ Judge Bertelsman urged the legal community not to "smother a promising infant in the cradle," and speculated that after an experimentation period, uniform rules might be promulgated or attorneys might agree to be bound by SJT verdicts.¹⁰¹

District courts have the power to order mandatory SJT as a matter of inherent power to control the docket,¹⁰² and pursuant to the Federal Rules of Civil Procedure.¹⁰³ Rule 1 provides that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."¹⁰⁴ Courts use SJT in an effort to give civil litigants a just, speedy, and inexpensive determination of their claims. Litigants might otherwise be deprived of a timely resolution of their dispute due to the overwhelming and overbur-

97. *Id.*

98. *Home Owners Funding Corp. of Am. v. Century Bank*, 695 F. Supp. 1343 (D. Mass. 1988); *Federal Reserve Bank v. Carey-Canada, Inc.*, 123 F.R.D. 603 (D. Minn. 1988); *McKay v. Ashland Oil, Inc.*, 120 F.R.D. 43 (E.D. Ky. 1988); *Arabian Am. Oil Co. v. Scarfone*, 119 F.R.D. 448 (M.D. Fla. 1988).

99. *McKay*, 120 F.R.D. at 44. Judge Bertelsman indicated that his intent as the drafter was to "afford trial judges full authority to employ" SJT and other forms of ADR. *Id.* at 44 n.3.

100. *Id.* at 49.

101. *Id.* at 50-51. This would not be very unusual. For example, litigants often agree to be bound by the results of arbitration and mini-trials.

102. *Id.* at 48; *Arabian Am. Oil Co.*, 119 F.R.D. at 449; *Carey-Canada, Inc.*, 123 F.R.D. at 604.

103. *Federal Reserve Bank v. Carey-Canada, Inc.*, 123 F.R.D. 603, 605 (D. Minn. 1988); *Cincinnati Gas & Elec. Co. v. Gen. Elec. Co.*, 117 F.R.D. 567, 599 (S.D. Ohio 1987), *aff'd*, 854 F.2d 900 (6th Cir. 1988).

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

dening caseloads in many federal courts.¹⁰⁵

District courts also have the power to order SJTs pursuant to Federal Rule of Civil Procedure 16.¹⁰⁶ Rule 16(a) provides that "[i]n any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as (1) expediting the disposition of an action . . . and (5) facilitating the settlement of the cause." In addition, Rule 16(c) states:

The participants at any conference under this rule may consider and take action with respect to . . . (7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute . . . (10) the need for adopting special procedures for managing potentially difficult or protracted actions . . . and (11) such other matters as may aid the disposition of the action.

Even though SJT is not a typical pretrial proceeding, it is recognized as a "conference" for purposes of Rule 16.¹⁰⁷

J.F. Edwards and *Identiseal*, the cases relied upon by the *Strandell* court, predate the 1983 Amendment to Rule 16.¹⁰⁸

105. *Carey-Canada, Inc.*, 123 F.R.D. at 605.

106. *Home Owners Funding Corp. of Am. v. Century Bank*, 695 F. Supp. 1343, 1347 n.3 (D. Mass. 1988).

107. *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 117 F.R.D. 567, 602 (S.D. Ohio 1987), *aff'd*, 854 F.2d 900 (6th Cir. 1988). "[W]e consider the summary jury trial to be a pretrial proceeding; we recognize that it is not a 'conference' in the traditional sense The summary jury trial is the final settlement technique undertaken by the Court before trial on the merits." *Id.* "Rule 16 calls these procedures conferences, but what is in a name Whatever name the judge may give to these proceedings their purposes are the same and are sanctioned by Rule 16." *Arabian Am. Oil Co.*, 119 F.R.D. at 448.

108. The 1983 amendments were a response to four major criticisms.

First, conferences [were] often seen as a mere exchange of legalistic contentions without any real analysis of the particular case. Second, the result frequently [was] nothing but a formal agreement on the minutiae. Third, the conferences [were] seen as unnecessary and time-consuming in cases that [would] be settled before trial. Fourth, the meetings [were] ceremonial and ritualistic, having little effect on the trial and being of minimal value

Amendments to the Federal Rules of Civil Procedure, 97 F.R.D. 165, 206 (1983) (emphasis added). Rule 16 was designed to eliminate surprise and promote settlement. 6A C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 1522 (1971).

Pre-1983 cases do not support the *Strandell* interpretation of Rule 16. In *Buffington v. Wood*, 351 F.2d 292 (3d Cir. 1965), the court compelled full discovery as a prerequisite to an effective pretrial conference. In *McCargo v. Hedrick*, 545 F.2d 393, 397 (4th Cir. 1976), the court took a different view of what "compulsory" means in the context of Rule 16. "Wisely, Rule 16 is not compulsory. If the judge views the case as a simple one, he is not compelled to spin the judicial wheels and may simply order the case calendared for trial." *Id.* The Fourth Circuit held that *Rule 16 does not compel the judge to conduct a*

[T]he 1983 amendment was necessary to "meet the challenge of modern litigation." Empirical studies reveal, as the committee explained, that "efficient disposition of cases by 'settlement or trial' is more likely when a trial judge intervenes personally." *Although Rule 16 does not require settlement negotiations, it does express a clear preference for encouragement and facilitation of settlements.*¹⁰⁹

Additionally, "[t]he clear intention of the recent amendments to the Federal Rules is to provide the court with the tools that are required to manage their caseloads effectively and efficiently."¹¹⁰ Thus, the precedential value of *J.F. Edwards* and *Identiseal* must be questioned in light of the 1983 amendments.

The 1983 amendment to Rule 16 "was designed to encourage pretrial settlement discussions, it was not its purpose to 'impose settlement negotiations on unwilling litigants.'"¹¹¹ Mandatory SJT is a settlement tool that is consistent with the Federal Rules of Civil Procedure and the goal of settling cases effectively and efficiently.¹¹² Mandatory SJT does not impose negotiations on the parties, it just compels the use of a technique that might lead to effective negotiations. Likewise, mandatory SJT does not require the parties to settle a case.

Neither *J.F. Edwards* nor *Identiseal* involve a settlement procedure. Both cases involve coercive judicial power applied under the guise of Rule 16 which bore a direct impact on the outcome of the case. In contrast, mandatory SJT and other settlement procedures contemplated under Rule 16 are nonbinding processes aimed to aid a voluntary settlement of the dispute.¹¹³

pretrial conference, though the parties are obligated to attend one.

109. *Panola Land Buying Assoc. v. Clark*, 844 F.2d 1506, 1519 (11th Cir. 1988) (Clark, J., dissenting) (emphasis added) (quoting FED. R. CIV. P. 16 advisory committee note).

110. *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 107 F.R.D. 275, 277 (W.D. Wis. 1985), *rev'd*, 848 F.2d 1415 (7th Cir. 1988), *vacated and reh'g granted en banc*, No. 86-3118, (7th Cir. July 22, 1988) (LEXIS, Genfed library, U.S. App. file), *aff'd*, 871 F.2d 648 (7th Cir. 1989). The Seventh Circuit's first opinion held that the specific language of Rule 16 gave district courts discretion to "order attorneys and unrepresented parties, but not represented parties, to appear for settlement conferences." 848 F.2d at 1422. The second opinion went further, and, in affirming the trial court, held that Rule 16 also empowered courts to order represented parties to attend settlement conferences. 871 F.2d at 656.

111. *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985) (quoting advisory committee notes, 97 F.R.D. 205, 210 (1983)). The Kothe court held the district court did not have the power to compel parties to settle a case. *Id.*

112. See *supra* text accompanying notes 15-26; *infra* note 114.

113. The court in *Cincinnati Gas & Elec. Co. v. General Elec.*, 117 F.R.D. 597, 602

Requiring attorneys, and in some cases clients, to attend settlement conferences pursuant to Rule 16 is becoming commonplace,¹¹⁴ and, arguably, a mandatory SJT is no more coercive than a mandatory settlement conference.¹¹⁵ SJT probably is more expensive, and therefore in some respect is more coercive than a settlement conference. However, judges use SJT as a last resort technique, after less expensive techniques have failed.¹¹⁶ Furthermore, the fact that judges order SJT on the eve of a full trial on the merits for which the parties have diligently prepared¹¹⁷ does not mean that counsel's work is wasted, as it has at least prepared him for SJT and will be used in a trial if no settlement occurs. Besides, cases settle every day in spite of their full preparation because the risks and costs of further litigation far outweigh the costs of preparation already incurred.¹¹⁸ Consequently,

the only real limitation placed on a court's power under Rule 16 appears to be when the court's action would adversely prejudice a party's position or would compel counsel to adopt one line of

(S.D. Ohio 1987), *aff'd*, 854 F.2d 900 (6th Cir. 1988), considered Rule 16: "[I]t should be remembered that these proceedings are nonbinding and, other than fostering the hope of settlement, they have no effect on the merits or outcome of this case." *Id.* See *infra* note 120.

114. Again, compulsory attendance is ordered with an eye toward encouraging, but not forcing, settlement.

[T]he exigencies of *modern dockets demand the adoption of novel and imaginative means* lest the courts, inundated by a tidal wave of cases, fail in their duty to provide a just and speedy disposition of every case. *These means may take the form of* compulsory arbitration, *summary jury trials*, imposing reasonable limits on trial time, or, as here, the relatively innocuous device of requiring a settlement conference attended by the clients as well as the attorneys.

Of course, the court cannot require any party to settle a case, whether the court thinks that party's position is reasonable or not, but *it can require [parties] to make reasonable efforts, including attending a settlement conference with an open mind.*

Lockhart v. Patel, 115 F.R.D. 44, 47 (E.D. Ky. 1987) (emphasis added) (footnotes omitted). Similarly in *In re LaMarre*, 494 F.2d 753 (6th Cir. 1974), the court held that:

[W]e have no doubt that the District Judge had the right and the power to issue an order to Mr. LaMarre to attend a pretrial session of the court and, on refusal, to enforce said order by contempt proceedings . . . It is, of course, clear that on due process grounds, no judge can compel a settlement prior to trial on terms which one or both parties find completely unacceptable.

Id. at 756. "We ought not to impair the power and authority of a Judge to conduct efficiently a pretrial conference or a trial." *Id.* at 761 (Weick, J., concurring in part and dissenting in part).

115. See *supra* note 39.

116. W. BRAZIL, *supra* note 9, at 69.

117. *Id.*

118. Lambros, *supra* note 10, at 1367.

trial strategy over another Neither of these two latter considerations is present in the summary [jury] trial procedure.¹¹⁹

SJT does not prejudice a party's position and it does not require a party to adopt one line of strategy over another because SJT does not affect the final outcome of a case¹²⁰ and parties may still obtain a trial on the merits after SJT if they are unable to settle.

In addition to Rules 1 and 16, advocates find justification for SJT in Rules 39 and 83 as well.¹²¹ Federal Rule of Civil Procedure 39(c) provides for the use of an advisory jury in cases not triable to a jury as of right.¹²² Therefore, SJT, consistent with Rule 39(c), recognizes the importance of lay juror opinions in the legal system.¹²³

Federal Rule of Civil Procedure 83 allows district courts to make local rules not inconsistent with the Federal Rules of Civil Procedure, and "[i]n all cases not provided for by rule, [such as *Strandell*] the district courts may regulate their practice in any manner not inconsistent with these rules."¹²⁴ Court practices, like local rules, are inconsistent with the Federal Rules of Civil Procedure when they "bear upon the ultimate outcome of the litigation."¹²⁵ A SJT does not affect the outcome of the merits, so it does not violate Rule 83.¹²⁶

Strandell is not the definitive answer to the question of whether or not district court judges have the power to mandate

119. M. JACOBVITCH & C. MOORE, *supra* note 30, at 41 (citation omitted).

120. *McKay v. Ashland Oil, Inc.*, 120 F.R.D. 43, 46 (E.D. Ky. 1988) ("[i]n no way is the summary jury trial 'outcome-determinative'"); *Cincinnati Gas & Elec. Co. v. General Elec.*, 117 F.R.D. 597, 602 (S.D. Ohio 1987) (SJT has "no effect on the merits or outcome of this case"), *aff'd*, 854 F.2d 900 (6th Cir. 1988); *Jones-Hailey v. Corporation of TVA*, 660 F. Supp. 551, 553 (E.D. Tenn. 1987) (SJT "neither limits or [sic] expands the rights of the parties involved"); *Rosenberg*, *supra* note 12, at 817 (SJT "preserve[s] access to the courts").

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

122. *Id.* at 335.

123. *Id.* The Rule 39(c) argument is not very persuasive in justifying the existence of judicial power to mandate SJT. See *Hume v. M&C Management*, No. C87-3104 (N.D. Ohio Feb. 15, 1990) (LEXIS, Genfed library, Dist file). Rather, it is yet more evidence that the spirit of the Rules endorses the procedure.

124. FED. R. CIV. P. 83. For a more complete analysis of the local rule-making procedure and SJT, see *infra* notes 189-200 and accompanying text. The rule-making analysis applies to cases like *Strandell* where SJT is not promulgated by local rule.

125. *Levin & Golash*, *supra* note 4, at 50 (quoting *Colgrove v. Battin*, 413 U.S. 149, 164 n. 23 (1972)).

126. See *supra* notes 120 and 124.

SJTs. In fact, the *Strandell* court stands alone. All courts addressing the issue since *Strandell* have held that district court judges have the power to mandate SJTs either as a matter of inherent power or pursuant to the Federal Rules of Civil Procedure.

2. Further Authority for Mandatory Summary Jury Trials

There is further authority supporting the use of mandatory summary jury trials. The 1984 Judicial Conference of the United States rejected the idea of strictly voluntary use of summary jury trials.¹²⁷ The Conference justified judicial discretion to impose mandatory ADR on the basis of variations in local legal culture, the needs of the parties, and the fact that ADR is new — so it is still unclear which type is best in different situations.¹²⁸ Further, the Conference announced that mandatory ADR is acceptable because attorneys may be reluctant to use a new procedure.¹²⁹ There is evidence that if SJT was not mandatory, litigants might not ask to use it or would refuse to use it.¹³⁰

SJT may be most effective where the parties do not want to participate and are opposed to settlement.¹³¹ This supports its mandatory use because parties who refuse to participate or consider settlement might not voluntarily submit to a SJT. Judge Thomas Lambros said that SJT is most “effective when settlement seems impossible because of a client’s unyielding attitude. The procedure is a safe and inexpensive way to show a recalcitrant client that his case is weak.”¹³² “I [Judge Lambros] have found

127. S. GOLDBERG, *supra* note 9, at 283; WARREN CONFERENCE, *supra* note 5, at 43.

128. WARREN CONFERENCE, *supra* note 5, at 118.

129. *Id.*

130. “[J]udges who make no effort to acquaint litigants with court-sponsored settlement procedures rarely get requests for assistance.” D. PROVIN, *supra* note 4, at 12. But Henry and Lieberman suggest that lawyers seek and get help from judges in settling their cases. J. HENRY & J. LIEBERMAN, *THE MANAGER’S GUIDE TO RESOLVING LEGAL DISPUTES* 113-19 (1985).

Compulsory arbitration rules have been justified on similar grounds. In *New England Merchants Nat’l Bank v. Hughes*, 556 F. Supp. 712 (E.D. Pa. 1983), a local rule providing for mandatory arbitration was held valid because “the goals of the arbitration program and the authority of this Court would be seriously undermined if a defendant were permitted to refuse to attend an arbitration hearing” *Id.* at 715.

131. *Annual Judicial Conference - Second Circuit of the United States*, 115 F.R.D. 349, 367 (1984) (remarks of Judge Lambros) [hereinafter *Judicial Conference*].

132. *Id.* at 368. In addition, “[s]ummary jury trials . . . do not require cooperative or highly rational litigants. These procedures may be called for even if the parties are vindictive, emotional, or obstinate, for the active participants in each procedure are the lawyers, not their clients.” D. PROVIN, *supra* note 6, at 86.

where the lawyers kick and scream, that case lends itself more to a summary jury trial than those cases where the lawyers come arm and arm"¹³³

Although no legislation has passed concerning SJTs,¹³⁴ in October 1988, Congress passed the Court Reform and Access to Justice Act of 1988,¹³⁵ authorizing the passage of local rules to allow mandatory court-annexed arbitration¹³⁶ in twenty federal district courts.¹³⁷ Congress' enactment of the five-year pilot program demonstrates that they have recognized the need for alternatives to litigation. However, not all cases are fit for mandatory arbitration. Congress has indicated that cases regarding new issues or Constitutional rights are inappropriate for mandatory arbitration under the new law.¹³⁸ A similar view has been expressed with respect to SJT.¹³⁹

The import of this legislation is that Congress encourages ADR experimentation by district courts,¹⁴⁰ and that Congress supports mandatory court-annexed procedures as alternatives before a full trial on the merits.¹⁴¹

133. *Judicial Conference*, *supra* note 131, at 373 (remarks of Judge Lambros).

134. H.R. 3898, 101st Cong., 2d Sess. (1990) and S. 2027, 101st Cong., 2d Sess., 136 CONG. REC. S493-97 (daily ed. Jan. 23, 1990) ("Civil Justice Reform Act of 1990") recently were introduced in Congress requiring, as part of a judicial expense and delay reduction plan, the availability and use of appropriate ADR techniques including SJT. H.R. 473, 100th Cong., 1st Sess. (1987) ("Alternate Dispute Resolution Promotion Act of 1987") and S. 2038, 99th Cong., 2d Sess. (1986) ("Alternative Dispute Resolution Promotion Act of 1986") (printed in full in *Hearings before the Senate Committee on the Judiciary on S.2038 and S.2046*, 99th Cong., 2d Sess. 292-98 (1986)) were introduced, but never passed. They were intended "to encourage the use of alternatives to traditional litigation, by requiring attorneys to advise their clients of the alternatives and permitting clients to make offers engage in those alternative proceedings." *Hearings before the Senate Committee on the Judiciary on S.2038 and S.2046*, 99th Cong., 2d Sess. 4 (1986) (statement of Senator Mitch McConnell).

135. Pub. L. No. 100-702, 102 Stat. 4662 (codified at 28 U.S.C.A. §§ 651-58 (Supp. 1989)).

136. Pub. L. No. 100-702, 102 Stat. 4659 (codified at 28 U.S.C.A. § 651 (Supp. 1989)); H. REP. NO. 889, 100th Cong., 2d Sess. 6 (1988).

137. Pub. L. No. 100-702, 102 Stat. 4662 (codified at 28 U.S.C.A. § 658 (Supp. 1989)); H. REP. NO. 889, 100th Cong., 2d Sess. 8 (1988).

138. Pub. L. No. 100-702, 102 Stat. 4659 (codified at 28 U.S.C.A. § 652 (Supp. 1989)); H. REP. NO. 889, 100th Cong., 2d Sess. 6 (1988).

139. See *supra* notes 65-66 and accompanying text.

140. See H. R. REP. NO. 889, 100th Cong., 2d Sess. 31 (1988) ("it is no longer feasible to use a single procedure, adjudication, for the myriad disputes of a complex society").

141. This legislation "recognizes the importance of alternative methods of dispute resolution, even those that are court-annexed." *Id.* at 33.

3. Mandatory Summary Jury Trial Does Not Violate Pretrial Discovery or the Work Product Doctrine

In *Strandell*, the court held that mandatory SJT intrudes on pretrial discovery and the work product doctrine. The court found that SJT radically alters the balance struck in Federal Rule of Civil Procedure 26 between the need for pretrial disclosure and the interest of the parties in confidentiality.¹⁴² The court implied that mandatory SJT violates Rule 83 because the district court's practice is inconsistent with Rule 26 and the work product doctrine.¹⁴³ *Strandell* is unclear as to whether this objection was directed to the discovery of work product in the form of witness statements, or the mental impressions, opinions, and theories of the lawyer.¹⁴⁴ The argument is that mandatory SJT is being used as an ostensible discovery device¹⁴⁵ to expose both types of materials.¹⁴⁶

*Hickman v. Taylor*¹⁴⁷ and Federal Rule of Civil Procedure 26(b)(3)¹⁴⁸ are the basis of the work product doctrine, which pro-

142. See *Strandell v. Jackson County*, 838 F.2d 884, 888 (7th Cir. 1988); Maatman, *supra* note 4, at 476.

143. *Strandell*, 838 F.2d at 888.

144. I suspect that the Seventh Circuit was concerned about both. The court focuses, however, on witness statements that were protected by the district court's denial of defendants' motion to compel production. See *supra* text accompanying notes 76-77. SJT, arguably, would expose this information, thus violating the work product protection granted by the district court.

145. Similarly, Federal Rule of Civil Procedure 11 may also be susceptible to abuse as a discovery device all its own as litigants seek to discover the factual basis for their opponents' claims in order to make a Rule 11 motion. However, the Advisory Committee addresses this problem of satellite litigation by suggesting that Rule 11 proceedings be limited to the record, with discovery allowed only in extraordinary circumstances.

Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 196 (1988) (footnote omitted); see FED. R. CIV. P. 11 advisory committee's note on proposed amendment, 97 F.R.D. 165, 201 (1983).

146. It could also be argued that SJT allows early exposure of impeachment evidence that normally would not be discoverable. Therefore, a lawyer will not know whether to bring out impeaching evidence during SJT, or whether to reserve the impeaching evidence so as not to diminish its impact in the event of a trial on the merits. Because SJT is inappropriate in cases where credibility is an issue, the use of impeachment evidence in SJT will likely not be a concern.

147. 329 U.S. 495 (1947) (creating the work product doctrine by declaring that witness statements collected in anticipation of litigation are protected from discovery).

148. Federal Rule of Civil Procedure 26(b)(3) states in part:

[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . only upon a showing that the party seeking discovery has

protects an attorney's work product from discovery unless a proper showing of necessity is made by the requesting party. While the work product doctrine does not prevent the discovery of facts, it does protect an attorney's opinion work product, including written and unwritten legal theories, opinions and mental impressions.¹⁴⁹ *Hickman* states that witness statements should be discoverable only in a "rare situation."¹⁵⁰ Rule 26 expanded the scope of opinion work product, but "did not make clear whether such work product was always immune from discovery, and if not, what standard should be applied to determine when discovery should be allowed."¹⁵¹ Nevertheless, a greater showing of necessity is generally required to expose opinion work product.

Federal Rule of Civil Procedure 33 diminishes the protection of opinions by allowing interrogatories regarding "an opinion or contention that relates to fact or the application of law to fact."¹⁵² The advisory committee note states that this kind of information "can be most useful in narrowing and sharpening the issues, which is a major purpose of discovery."¹⁵³ Similarly, Rule 36 allows requests for admissions "that relate to statements or opinions of fact

substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney

149. Keep in mind that

[t]hrough [other] discovery vehicles available under the Rules, the existence, identity, location and material factual content of the document or thing may be discovered. *Only the production of the document or thing itself is protected* Further, *protection of the production of any document intended as an exhibit at trial disappears at a scheduling or pretrial conference under Rule 16* where the court normally orders an exchange of exhibits at a time prior to trial.

Smith, *The Work Product Doctrine: Its Origin, Evolution and Status in Modern Practice*, 33 S.D.L. REV. 224, 230 (1988) (emphasis added).

150. *Hickman*, 329 U.S. at 513.

[T]he Court found no showing of necessity sufficient to justify production of the material in question; the plaintiff's counsel made clear that he sought the statements only to ensure that he had fully prepared his case. The Court stressed that the lawyer could have obtained the material from . . . other sources.

Note, *The Work Product Doctrine in Subsequent Litigation*, 83 COLUM. L. REV. 412, 418 (1983) (footnotes omitted).

151. Note, *supra* note 150, at 420. In 1981, the Supreme Court said, "we are not prepared at this juncture to say that [opinion work product] is always protected by the work-product rule." *Upjohn Co. v. United States*, 449 U.S. 383, 401-02 (1981).

152. FED. R. CIV. P. 33(b).

153. *Federal Rules of Civil Procedure Amended Rules*, 48 F.R.D. 459, 524 (1970) (citations omitted).

or of the application of law to fact.”¹⁵⁴ Ultimately,

[s]uch a distinction [between fact and opinion] may not matter in many cases because *the . . . general practice of the courts to order the exchange and submission of trial briefs in advance of trial seems to effectively cause disclosure of any purely legal opinions which have any relevance to the issues involved.*¹⁵⁵

Since the development of ADR is relatively recent, “the law is only now beginning to catch up.”¹⁵⁶ Two district courts have commented on and disagreed with the *Strandell* work product doctrine argument. Judge Bertelsman of the Eastern District of Kentucky said:

The concern of the Seventh Circuit [in *Strandell*] with violation of . . . protection of work product . . . seems misplaced. Modern federal courts require a comprehensive pretrial order, exchange of witness lists and summaries of anticipated testimony, and the listing and marking of all exhibits. Because a summary jury trial is based on facts disclosed by discovery and is to be a synopsis of the actual trial, it is hard to see how anything would be disclosed by a summary jury trial that would not be disclosed at the real trial and would not already be contained in the pretrial order, which is also an overview of the real trial. If the Seventh Circuit means that a summary jury trial prevents a litigant from saving some juicy tidbit as a surprise for the trial *la la Perry Mason*, the pretrial orders used by most courts are supposed to do the same thing. Trial by ambush has long since been eliminated from the federal system.¹⁵⁷

Magistrate Janice M. Symchych of the District Court of Minnesota made a similar comment.¹⁵⁸ As further support, the implication from a recent Sixth Circuit decision that considered the impact of post-SJT discovery is that either the court thought

154. FED. R. CIV. P. 36(a).

155. Smith, *supra* note 149, at 232 (emphasis added). Indeed, in *Harvey v. Eimco Corp.*, 33 F.R.D. 360 (E.D. Pa. 1963), the court held that “[t]he plaintiff cannot subvert the clear intent of the pretrial rules by withholding his theory of liability under the cloak of privilege.” *Id.* at 361.

156. Dauer, *Confidentiality in ADR*, in CONTAINING LEGAL COSTS 18 (1988) (footnote omitted).

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

158. *Federal Reserve Bank v. Carey-Canada, Inc.*, 123 F.R.D. 603, 606 (D. Minn. 1988). Magistrate Symchych explained that:

Because of the extensive pretrial procedures involved in preparing litigation in Federal courts and because a SJT is based on facts disclosed by discovery and is to be a synopsis of the actual trial, it is difficult to believe that anything would be disclosed at a SJT that would not ultimately be disclosed at the actual trial.

discovery after SJT was an acceptable practice or that they simply were not concerned about it.¹⁵⁹

The theory behind the work product doctrine is that it protects the trial process by reducing lawyers' incentives to be less than fully prepared for trial, or to hide or misplace materials.¹⁶⁰ The doctrine protects the adversary system by protecting the lawyer's work.¹⁶¹ *Hickman* also encompasses the idea that the lawyer has an economic interest in his work and "should not be required to sacrifice the 'fruits of [his] labor.'"¹⁶²

Essentially, advocates fear that without work product protection parties will not do their own preparation, either because "they might eventually have to turn their work product over to the other side,"¹⁶³ or because they know that they can obtain the information from the other side.¹⁶⁴ Professor Kathleen Waits suggests that

159. *Compressed Gas Corp. v. U.S. Steel*, 857 F.2d 346 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 1641 (1989). The case was tried as a SJT in February, 1985. After SJT, a settlement could not be reached, so the case was reassigned to a district court judge who allowed further discovery. A full trial on the merits followed in October, 1986, and the verdict was for the plaintiffs. The district court denied defendants' motions for judgment notwithstanding the verdict and new trial. Defendants' appeal to the Sixth Circuit included a claim that the district court "abused its discretion in allowing [plaintiffs] to conduct additional discovery following [the SJT]." *Id.* at 348. The Sixth Circuit reversed and remanded on two other issues, but affirmed the discovery issue as they were unable to conclude that it constituted reversible error. *Id.* at 354.

160. Note, *supra* note 150, at 425-27. One of *Hickman's* "major purposes . . . was to safeguard those aspects of the attorney's role most necessary to the integrity of the trial process." *Id.* at 425. *But see* Waits, *Work Product Protection for Witness Statements: Time for Abolition*, 1985 Wis. L. REV. 305. The work product doctrine protects both data collection and interpretation. The adversarial system, however, depends on competitive interpretation, not competitive collection. *Id.* at 338-39. The evolving federal rules have generally emphasized liberal information exchange. Repeal of the work product doctrine with regard to witness statements would be consistent with the goals of the rules. *Id.* at 344-45.

161. Note, *supra* note 150, at 428-29. "[T]he only aspect that keeps the trial adversarial is each side's strategy and thoughts." *Id.* (footnote omitted).

162. *Id.* at 430 (citing *United States v. Swift & Co.*, 24 F.R.D. 280, 284 (N.D. Ill. 1959) (ordering discovery)). This was plaintiffs' primary work product argument in *Strandell*. See *supra* text accompanying notes 89-91. While this argument generally is characterized as a proprietary one, it also can be characterized as an argument dealing with notions of fairness.

163. Waits, *supra* note 160, at 327-28.

164. Professor Waits acknowledges that many people believe this but she points to other incentives for diligent investigation:

Hickman's supporters seem to think that lawyers will be lazy unless the rules force them to be diligent. They further suppose that individuals will be productive only if they are given exclusive dominion over the goods produced. Their theories thus ignore the possibility that other incentives to full investigation and fair recording might exist even if work product had to be shared. Finally, work product apologists overlook resource imbalances and therefore equate diligence

nevertheless, there are strong incentives to prepare fully because "it is too dangerous to rely on an opponent's diligence . . . [or] on an opponent's laziness."¹⁶⁵ In order to achieve justice, the adversary system arguably requires a determination of the truth which, in turn, requires the discovery and evaluation of relevant information.¹⁶⁶ Therefore, discovering information is only half the battle, as the attorney must do the evaluation for himself.

Theorists will argue that . . . if in fact there are two legitimate sides to a dispute the sharing of information concerning it in advance of its actual resolution should not diminish the effectiveness of the presentation of the positions of the adversaries. The argument continues . . . that the ultimate decision with respect to the disputes should not be influenced by or actually turn on a 'cat and mouse' approach with its last minute surprises. It is hard to argue against that position . . .¹⁶⁷

The proprietary interest rationalization of the work product doctrine has been extensively criticized.

It has been suggested that the *Hickman* decision was a "rough political judgment," calculated to gain acceptance of the then new discovery rules by the bar. Thus, the Supreme Court's decision in *Hickman* may have been intended in part to placate attorneys' sense of proprietary interest in their work product.

. . . Attorneys, as officers of the court, are in many situations forced to subordinate their own self-interest or proprietary interest to that of the judicial system.¹⁶⁸

The work product doctrine assumes that an attorney will not prepare if he is unable to control the fruits of his labor.¹⁶⁹ In fact,

with productivity. They conclude that rewarding productivity is fair because they assume that anyone who will produce, can produce.

Id. at 328 (footnotes omitted).

If in fact the work product doctrine does not deter naturally lazy attorneys from being lazy, then hard-working attorneys who need work product are penalized by a rule that is ineffective, as are clients and the justice system generally. *Id.* at 329 n.122.

165. *Id.* at 332.

166. *Id.* at 338. I recognize that any "truth-finding" function of the adversary system is frustrated by other concerns such as those exemplified in the Federal Rules of Evidence.

167. Smith, *supra* note 149, at 235.

168. Comment, *The Potential for Discovery of Opinion Work Product under Rule 26(b)(3)*, 64 IOWA L. REV. 103, 115 (1978) (footnotes omitted). The work product doctrine reflects and perpetuates lawyers' self-interest because lawyers must litigate conflicts over work product, and lawyers must duplicate each other's work. Waits, *supra* note 160, at 340-41.

169. Waits, *supra* note 160, at 331.

"[b]ecause preparation increases the chances of a favorable outcome, it is its own reward."¹⁷⁰

The goals of the work product doctrine must be balanced with the opposing goals of the Federal Rules of Civil Procedure. The 1983 Amendments to the Federal Rules of Civil Procedure were specifically designed to prevent surprise during trial.¹⁷¹ The amendments liberalized discovery and the pretrial process in order to simplify and narrow issues, crystalize remaining claims and defenses, and eliminate uncontroverted issues and surprise that could delay the trial.¹⁷² The purposes of open discovery include all of the above, as well as setting a climate that increases the possibility of settlement, and disclosing "fully the nature and scope of the controversy."¹⁷³ In response to the "sporting theory of justice," the Advisory Committee hoped to end the "fortuitous availability of evidence or [dependency on] the skill and strategy of counsel,"¹⁷⁴ and to start focusing on the merits. Inherent in this argument is a sense that during all stages of litigation we are dealing with justice and not playing games;¹⁷⁵ if a litigant thinks he has a strong case, he should lay his cards on the table and let justice be done.¹⁷⁶

170. *Id.*

171. 10 Fed. Proc. § 26:1, at 247-48 (T. Travers m. ed., R. Davis, W. Foster, J. Smith, D. Ytreberg eds. 1988). The amendments were designed to prevent surprise regarding facts, not opinions.

172. P. EBENER, COURT EFFORTS TO REDUCE PRETRIAL DELAY 69 (1981).

173. 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2001 (1970) (footnote omitted).

174. *Id.* at 19 (citing *Teller v. Montgomery Ward & Co.*, 27 F. Supp. 938, 941 (E.D. Pa. 1939) (The court is moving closer to "the day when the outcome of . . . litigation will depend less upon the skill and strategic maneuvering of respective counsel and more upon the merits of the issues involved.")).

175. "Modern instruments of discovery serve a useful purpose . . . They together with pretrial procedures make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practical extent." *United States v. Proctor & Gamble*, 356 U.S. 677, 682-83 (1958). Rule 16 goes hand in hand with Rule 26 — "Rule 16 provides an important mechanism for carrying out one of the basic policies of the federal rules — the *determination of disputes on their merits rather than on the basis of procedural niceties or tactical advantage.*" 6A C. WRIGHT & A. MILLER, *supra* note 108, § 1522 at 219 (emphasis added).

176. When an attorney refuses to submit to SJT, he may be trying to conceal his weak case or his lack of confidence in the case. If he is fully prepared and thinks his case is strong, he will not hesitate to submit it to a settlement process like SJT. Brazil makes this argument in considering submitting a case to a judicially hosted settlement conference:

It is a sign of strength, not weakness, to want to have a judge at a settlement conference frankly assess the merits of each side's position. A lawyer who suggests a judicially hosted settlement conference is saying, in effect, "I want an

The work product doctrine is not an inflexible rule, but a counterweight to the trial process.

In each instance when the protection of the work product doctrine is sought, the benefits of protection must be weighed against the advantages *to the trial* of releasing the material. The protection that an attorney's work product receives can always be pierced to further the trial process. It is its role in the overall trial process that keeps work product inviolate, not some aspect of the material itself.¹⁷⁷

Furthermore, the application of the work product doctrine is within the discretion of the court,¹⁷⁸ and judicial necessity is good cause to expose otherwise protected information. Finally, it may be argued that because SJT is ADR and not adjudication, the work product doctrine should not apply or at least should be compromised to allow SJT to happen.

To protect litigants, the judge can set an immediate trial date to prevent the opposition from using ostensible discovery disclosed during SJT. The judge can further protect litigants by disallowing additional formal discovery after the SJT.¹⁷⁹

The judge also can follow standard pretrial conference procedures to protect litigants from the effects of SJT on a future trial. The presumption in a pretrial conference is that after discovery is complete, lawyers know of almost all evidence relating to their case. Accordingly, "it would not be unreasonable to hold them to the statements they make and the agreements they enter into at the conference or restrict their proof at trial to the issues set forth

independent judgment about this matter because I believe that such a judgment will do more for my client than for yours." That lawyer also is saying that he knows his case well enough to cast it into a process he cannot fully control, and that he is prepared to live with the consequences.

W. BRAZIL, *supra* note 9, at 94-95.

In the situation where one party has a considerably stronger case and there is, for all practical purposes, no genuine dispute, the advocate with the stronger case may not want to disclose further information at a SJT because it may be used by the other advocate to supplement a weak case in order to obtain a more favorable settlement. SJT should be used only in cases where a genuine dispute exists. The above-described situation should be resolved by summary judgment and not by SJT.

177. Note, *supra* note 150, at 431.

178. See Dauer, *supra* note 156, at 12. "Trial courts have considerable discretion in the application of Rule 26." *Id.*

179. See Lambros, *supra* note 10, at 1376. *But see* Compressed Gas Corp. v. U.S. Steel, 857 F.2d 346 (6th Cir. 1988) (affirming allowance of additional discovery after a SJT).

in the pretrial order.”¹⁸⁰ In practical terms, because SJT is typically ordered long after discovery is completed, in cases where settlement cannot be reached at the final pretrial conference,¹⁸¹ the conference could still fulfill the purpose a final pretrial conference by limiting parties in a later trial on the merits to issues, evidence, witnesses listed, and other pretrial matters.¹⁸² This would give some protection to counsels’ opinions, theories, and arguments without resorting to the work product doctrine.

With these further protections, there is nothing unfair about SJTs, and they have the benefit of increasing the efficiency of the judicial system.¹⁸³ In response to *Strandell*, mandatory SJT is consistent with Rule 26(b)(3), and does not intrude on pretrial discovery and the work product doctrine.

D. Reasons for the *Strandell* Outcome

1. *Strandell* May Have Been an Inappropriate Case for a Summary Jury Trial

Because the decision to mandate a SJT is within the discretion of the district court, the *Strandell* outcome might have been a result of using SJT in a case in which SJT was inappropriate. SJT is inappropriate for cases in which the credibility of the witnesses is an important issue,¹⁸⁴ and credibility was an important issue in

180. 6A C. WRIGHT & A. MILLER, *supra* note 108, § 1527 at 600. “[A]n attempt to pursue any issue not listed in the order may be rejected by the trial court.” *Id.*, § 1527 at 600 (footnote omitted).

181. Lambros, *supra* note 10, at 1376.

182. One federal district court clarified the purpose of final pretrial conferences and orders when SJTs are used.

[M]ovants . . . also attach some importance to the fact that the “final pretrial conference” has occurred in this case. First, we consider the summary jury trial to be a pretrial proceeding; we recognize that it is not a “conference” in the traditional sense. Second, we want to dispel what appears to be movants’ misunderstanding that the final pretrial conference in this case relates to the summary jury trial. The final pretrial conference in this case, as in all cases, relates to the trial on the merits. The summary jury trial is the final settlement technique undertaken by the Court before trial on the merits. The final pretrial conference and the final pretrial order resulting therefrom delineate the issues of fact and law that must be resolved in the litigation.

Cincinnati Gas & Elec. Co. v. General Elec., 117 F.R.D. 597, 601-02 (S.D. Ohio 1987), *aff’d* 854 F.2d 900 (6th Cir. 1988).

183. See Lambros, *supra* note 10, at 1378 (noting the efficiency of ADR methods when integrated with the existing pre-trial and trial process).

184. See *supra* note 67 and accompanying text.

Strandell.¹⁸⁵ SJT also is inappropriate in actions against the government.¹⁸⁶ The fact that *Strandell* was a civil rights action against Jackson County, Illinois, is another factor that made the case inappropriate for SJT. For these reasons the Seventh Circuit should have found that *Strandell* was inappropriate for SJT, and for that reason the litigants should not have been compelled to participate.

Even if *Strandell* was inappropriate for SJT, plaintiffs' counsel was properly held in contempt for refusing to obey the court's order to compel a SJT.¹⁸⁷ Plaintiffs' remedy was to appeal the district court's order after the trial on the merits for abuse of discretion because orders made pursuant to Rule 16 are interlocutory and not appealable until a final determination on the merits.¹⁸⁸ The Seventh Circuit then might have found that the district court had abused its discretion because *Strandell* was inappropriate for mandatory SJT.

2. The Local Rules Did Not Provide for Summary Jury Trial

The fact that local rules did not formally provide for a SJT makes the *Strandell* outcome somewhat more justifiable. District courts can "prescribe rules for the conduct of their business" consistent with the Federal Rules of Civil Procedure.¹⁸⁹ In addition,

185. "The plaintiffs and defendants differed greatly on what actually happened to Strandell after he was arrested on a charge of disorderly conduct." Marcotte, *No Forced Summary Jury Trials: Trial Judge Can't Order Parties to Try Settlement*, A.B.A. J., Apr. 1, 1988, at 32.

186. See *supra* note 67 and accompanying text.

187. Federal Rules of Civil Procedure 16(f) provides in part: "[i]f a party or party's attorney fails to obey a scheduling or pretrial order . . . the judge . . . may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B),(C),(D)."

Among other things, Rule 37(b)(2) allows the judge to treat the failure to obey a court order as contempt. FED. R. CIV. P. 37(b)(2).

188. See 6A C. WRIGHT & A. MILLER, *supra* note 108, § 1526 at 259 ("There can be no direct appeal from a pretrial order because it is not final and may be modified at a later stage in the proceedings."). Perhaps a party could likewise appeal a judicial decision not to compel a SJT, especially where SJT is regularly used or is ordered by a local rule.

This is a difficult remedy for litigants because they will need to participate in the SJT before appealing the district court's order compelling participation. Perhaps in extreme circumstances a writ of mandamus would be an appropriate means of appeal. Furthermore, because I have concluded that district court judges do have the power to mandate SJTs, litigants will be able to challenge only the appropriateness of SJT on a case-by-case basis by claiming on abuse of discretion by the trial judge. See Comment, *Compelled Participation in Summary Jury Trials: A Tale of Two Cases*, 77 Ky. L.J. 421, 438-39 (1988-89).

189. 28 U.S.C. § 2071 (1982).

district courts can follow these rules even if they are not formally written.¹⁹⁰

Federal Rule of Civil Procedure 83 and 28 U.S.C. § 2071 go hand-in-hand.¹⁹¹ Rule 83 allows district courts to make local rules not inconsistent with the Federal Rules of Civil Procedure, and "[i]n all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules."¹⁹² Inconsistency between a local rule and the Federal Rules of Civil Procedure under Rule 83 must either be express or "bear upon the ultimate outcome of the litigation."¹⁹³ Under Rule 83, the public must be notified of proposed local rules and given an opportunity to comment on them.¹⁹⁴

Local rules designed to conserve court resources have been held not to violate the Federal Rules of Civil Procedure.¹⁹⁵ Likewise, local rules providing for compulsory arbitration have been held not inconsistent with the Federal Rules of Civil Procedure.¹⁹⁶ Therefore, local rules providing for mandatory SJT in order to reduce court delay are not inconsistent with the Federal Rules of Civil Procedure as well.¹⁹⁷ Such a rule is not expressly inconsis-

190. See *Duncan's Heirs v. United States*, 32 U.S. (7 Pet.) 535, 540 (1833) ("It is not essential that any court, in establishing or changing its practice, should do so by the adoption of written rules. Its practice may be established by a uniform mode of proceeding for a series of years, and this forms the law of the court.").

191. Levin and Golash, *supra* note 4, at 49.

192. FED. R. CIV. P. 83.

193. *Colgrove v. Battin*, 413 U.S. 149, 164 n.23 (1973) (upholding the use of a six-person jury in civil cases). A local rule is inconsistent if it is expressly inconsistent, or it is a "basic procedural innovation," meaning that if a local innovation is "so radically different from past practice as to be considered 'basic,' [it is] inappropriate for local rule making." Levin and Golash, *supra* note 4, at 50 (footnote omitted). A local rule is a "basic procedural innovation" if it "bear[s] upon the ultimate outcome of the litigation." *Colgrove*, 413 U.S. at 164 n.23.

194. FED. R. CIV. P. 83.

195. In *United States v. Reaves*, 636 F. Supp. 1575, 1580 (E.D. Ky. 1986), the court held that placing reasonable time limits on a trial to spare court resources was within the court's rule-making power, and its inherent power to control its docket. Similarly, in *White v. Raymark Industries, Inc.*, 783 F.2d 1175, 1178 (4th Cir. 1986), the court held that a local rule imposing costs on parties refusing to settle until the day of trial was within the court's power.

196. See *New England Merchants Nat'l Bank v. Hughes*, 556 F. Supp. 712, 714 (E.D. Pa. 1983); *Kimbrough v. Holiday Inn*, 478 F. Supp. 566, 574 (E.D. Pa. 1979); *Davison v. Sinai Hosp. of Baltimore*, 462 F. Supp. 778 (D. Md. 1978), *aff'd*, 617 F.2d 361, 362 (4th Cir. 1980). Similarly, in *Rhea v. Massey-Ferguson, Inc.*, 767 F.2d 266, 268 (6th Cir. 1985), the court upheld a rule authorizing district judges to refer cases to mandatory mediation, even where it imposed extra costs.

197. *McKay v. Ashland Oil*, 120 F.R.D. 43, 46 (E.D. Ky. 1988). "Under the standards laid down by the Supreme Court, it is highly unlikely that any federal ADR program

tent, and it does not bear on the outcome of litigation.¹⁹⁸

A formal local rule is scrutinized by the public who are given an opportunity to express their opinions as to its desirability. A rule also puts litigants and their attorneys on notice that a SJT may be required.¹⁹⁹ Mandating SJT by a formal local rule is a more equitable procedure²⁰⁰ than that evidenced in *Strandell* and consequently, litigants may be more amenable to participating in mandatory SJT. The fact that the district court had not promulgated a local rule mandating SJT may also have contributed to the Seventh Circuit's outcome in *Strandell*.

CONCLUSION

There is no reason to limit judicial discretion to mandate the use of SJT. SJT does not affect the outcome of the merits or otherwise compromise litigants' substantive rights. Judges who use SJT rave of its success in settling cases and reducing delay. Further, federal district court judges have the power and discretion to mandate SJT as a matter of their inherent power to control the docket, and pursuant to the Federal Rules of Civil Procedure. The use of the SJT should be encouraged in appropriate cases.

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would fail for inconsistency with the national rules." Levin and Golash, *supra* note 4, at 51 (footnote omitted).

198. See *supra* text accompanying note 119.

199. In *Strandell*, the district court used SJT in the past, which arguably provided some form of notice to the litigants. *Strandell v. Jackson County*, 115 F.R.D. 333, 334 (S.D. Ill.), *vacated*, 838 F.2d 884 (7th Cir. 1987).

200. United States District Judge Jack B. Weinstein of the Eastern District of New York, who is uncertain about compelling parties to participate in ADR procedures, agrees: "If compulsion is to be used, it at least ought to be authorized by adoption of a formal local rule, so that the matter can be debated publicly and the full district court and the Circuit Council can pass on it." J. Weinstein, *Judges and Alternative Dispute Resolution*, presented to American Bar Association Session on Judicial Power and ADR, Toronto, Canada, August 9, 1988, at 8 (citation omitted). *But cf. McKay*, 120 F.R.D. at 49. "This court holds that participation in summary jury trials may be mandated by trial courts in their discretion even aside from the existence of a local rule." *Id.*

