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The Rise Of the Summary Jury Trial



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LITIGATORS OFTEN HIRE jury consultants, conduct focus groups, and participate in mock jury trials. But ask a litigator if he or she has ever heard of a “summary jury trial” and the response you are likely to get is “a what?” Since its inception over 30 years ago, the summary jury trial (SJT) is one of the least used forms of alternate dispute resolution (ADR). However, as the SJT’s success had become more publicized, it is slowly gaining acceptance among the bench and bar as a very effective tool for resolving litigation.

The SJT was devised by Judge Thomas Lampros of the U.S. District Court for the Northern District of Ohio in 1980.¹ SJTs have since been used throughout the federal district courts and in at least 17 states’ courts.² The New York State Unified Court System Web page describes the SJT as follows:

In this adversarial dispute resolution process, each side presents its case in a shortened form to a jury. The jury then makes a decision, which is advisory only, unless parties request that it be a binding decision. A summary jury trial gives parties a preview of a potential verdict should the case go to trial.³

The rules for SJTs vary from jurisdiction to jurisdiction, but they are generally flexible. The SJT is typically conducted after discovery is completed. It normally lasts one to two days and is presided over by a judge or magistrate.

The SJT usually begins with abbreviated jury selection. The attorneys then deliver short opening statements. The plaintiff presents its evidence, after which the defendant does the same. The rules of evidence are relaxed so that, for example, depositions may be played or read in lieu of live witnesses.

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Particularly in non-binding SJTs, judges will allow the jurors to ask questions during the presentation of evidence. After both parties present their evidence, the lawyers give short closings, the judge charges the jury, and the jury deliberates for a limited time.

The jury then renders its verdict. If it is not unanimous, each juror renders an individual verdict. Counsel may then question the jurors about their reactions to the parties' presentations and rationales for their verdict. The proceedings are typically kept confidential.⁴

A Record of Success

As the experience in New York state and other jurisdictions suggests, the jury's feedback is crucial in encouraging the parties to settle. Justice Joseph Gerace, formerly of the Eighth Judicial District in western New York, pioneered New York's SJT program in 1998.⁵ Since 2000, the Eighth Judicial District has reported resolving over 475 cases through binding and non-binding SJTs.⁶

The program was so successful that, in 2005, then First Deputy Chief Administrative Judge Ann Pfau recommended that it be expanded throughout the state.⁷ The next year, Justice Lucindo Suarez of the Bronx County Supreme Court was appointed the Statewide Coordinating Judge for Summary Jury Trials.⁸

According to statistics compiled by Justice Suarez, nearly 1,500 binding SJTs have since been conducted throughout the state.⁹ Justice Suarez further reports that "[t]he distribution between plaintiff and defendant verdicts reflect the distribution of conventional trials of the judicial district" in which the SJT was held.¹⁰

Although statistics on the success of non-binding SJTs are sparse, the available data is encouraging. For example, Justice Gerace reported that, between October 1998 and October 2004, of the 59 cases that went to non-binding SJT verdicts in Chautauqua County, 43 settled, 10 were discontinued, and only six proceeded to regular trial.¹¹

In neighboring New Jersey, Judge Samuel G. DeSimone reported that he had presided over 12 non-binding SJTs, of which eleven settled after the SJT.¹² The one case that went to a real trial resulted in the same verdict as the SJT.¹³

Judge Robert Dry Jr. from Texas reported that he scheduled approximately two non-binding SJTs a month for a period of over five and a half years. In all that time, only one and a half

cases failed to settle (the half being a multi-party case in which all but one party settled, which reduced the trial time from two weeks to three days).¹⁴

In the federal system, one judge reported that, over a six-year period, he assigned approximately 150 cases to non-binding SJTs. Of those cases, 70 settled before the SJT. "Of the remaining 80 cases that went to summary jury trial, only five ended up going to trial and only one resulted in a verdict different than that reached by the advisory jury."¹⁵ Other federal judges have reported similar positive results.¹⁶

Why It Works

Reasons for the SJT's success are well-documented. As one commentator explained, the SJT's "settlement-enhancing powers have been explained under at least four different theories."¹⁷

The first and most obvious theory is the so-called "jury preview effect."¹⁸ The SJT allows the parties to present their cases to a real jury and thus provides an important predictor of how a jury would decide the case. This preview can be particularly helpful when the parties have divergent views of the strengths of their respective positions and thus causes them to recalculate their odds.

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Second, SJTs provide the "cathartic" effect of having one's proverbial "day in court." That day in court also forces each party to hear the other side's position directly without filtering by counsel.¹⁹ By presenting their cases in abbreviated form to each other and a jury, the parties often gain the personal satisfaction of telling their stories, obtain a better understanding of the other side's position, and subsequently are better positioned to agree on a settlement.

Third, an SJT forces counsel to review their cases in detail.²⁰ Cases can often languish and lawyers delay preparing for judgment day. Setting an SJT date, like setting a regular trial date, forces the lawyers to prepare their cases and may change their appraisal of the likely outcome. In addition, as one court noted, "[e]ven if the summary jury procedures do not culminate in settlement of the case, the value of the summary trial in crystalizing [sic] the issues and the proof is immeasurable to the later binding trial, to which all parties come more fully prepared and rehearsed in their roles and trial procedure."²¹

Finally, there is the "fear/exhaustion" factor.²² SJTs "foster settlement by exposing litigants to the vagaries and expense of the jury system, which tends to discourage interest in further litigation."²³ SJTs also force the parties to get a taste of the costs and emotional stress of trial (including often grueling trial preparation), serving as a form of "reality therapy" for lawyers and clients alike.²⁴

SJTs also benefit the court system by reducing judges' workloads and minimizing the time jurors have to spend on jury duty. Justice Suarez summed up the benefits of SJTs to the litigants, attorneys, judges, and jurors as follows:

"Summary jury trials provide a win-win situation: Attorneys benefit because they need not invest the time and expense required to conduct a traditional trial and in the non-binding scenario, the advisory verdict can serve as a "reality check" to a client who is reluctant to settle; clients benefit because it gives them their day in court, and in the binding scenario, it affords finality; courts benefit because it reduces court calendars and allows reallocation of limited judicial resources; and jurors benefit by fulfilling their civic duty with a minimum of inconvenience. Unlike conventional trials, the jurors in a summary jury trial can provide the attorneys with immediate specific feedback."²⁵

Despite the success of SJTs, there are still detractors. For example, critics note that, compared with other forms of ADR, SJTs typically occur late in the litigation and thus result in less cost savings by requiring the parties to incur often significant discovery costs.²⁶ Conducting an SJT is also typically more expensive than conducting a mediation.²⁷ SJTs may not be suited for particularly complex cases involving multiple issues.²⁸ Finally, some have challenged SJT advocates to prove empirically

that SJTs have, in fact, reduced crowded court dockets.²⁹

Answering the Critics

Empirical and anecdotal evidence refute these criticisms.

SJTs are not less useful because they often occur late in the litigation. Other forms of ADR (including mediation) often occur just before trial. In addition, whether a case will settle before or after discovery often depends on how much information each party possesses prior to discovery. In certain cases, even complex ones, an SJT can be effective even before full-blown discovery, particularly when both parties already have access to much of the information that will be at issue in the case.

For example, the authors were recently ordered by a federal judge to participate in a two-day SJT just six weeks after the initial scheduling conference in a complex breach of contract dispute between two large companies. Because of their business relationship, both parties already possessed much of the key evidence. The judge permitted the parties to decide what, if any, additional information they would exchange in advance of the SJT.

To enhance settlement prospects, the judge required each party's CEO or CFO to attend the SJT. The judge picked the jury himself, permitted each side to call up to three live witnesses subject to cross-examination, did not enforce the rules of evidence, and allowed the jury to ask questions during the parties' presentations.

After each side presented its case, the jury deliberated and rendered its verdict on both liability and damages for each claim and counterclaim. Each juror then gave the rationale for his or her votes.

The process worked even better than hoped. The parties not only settled the case, but also resolved two other pending cases and entered into a new contractual arrangement designed to address various problems in their business relationship that had caused litigation.

This real life example answers the criticisms that SJTs cost more than other forms of ADR and are inappropriate for complex cases. It is true that an SJT typically costs more than a mediation. However, unlike a mediation, the SJT is a true "dry run" that forces the parties to assess (or reassess) their positions in light of a jury's actual reactions, not a mediator's take on how a jury might react. Indeed, an SJT may be particularly useful after mediation fails.

The SJT in which the authors participated

was not cheap. However, it likely saved both parties millions in legal fees from protracted litigation and spurred them to restructure their business relationship. The authors are dubious that such a settlement would have been reached at such an early stage of the litigation as a result of mediation or other form of ADR. In fact, the parties had previously mediated a related case with no success.

As for complex cases, the relaxed rules of evidence that apply to SJTs facilitate presenting complex issues much more quickly than in a regular trial. Demonstratives can be used to explain difficult concepts or summarize evidence. In addition, as discussed above, distilling a complex case into a short presentation can be instructional if the case ever proceeds to a real trial. The parties can also agree to try particular issues rather than the entire case or even have multiple SJTs on different issues.

Finally, the empirical data discussed above suggest that SJTs, while not a panacea, are in fact helping to reduce crowded court dockets. Even so, as a federal judge from Kentucky explained soon after the introduction of the SJT:

It is true to date we have only unscientific anecdotal evidence of the effectiveness of summary jury trials. But not everything in life can be scientifically verified. I have only unscientific anecdotal evidence that Hawaii is more beautiful than Covington (Kentucky), but I intend to spend a considerable sum to go there as soon as I get the chance.³⁰

Despite the SJT's record of success, an SJT is not right for every case. If the case turns principally on issues of law, then an SJT is inappropriate. If the real trial is projected to be four days or less, then there is little point in holding an SJT in lieu of a real trial.³¹ Finally, both parties must take the process seriously and not hold back relevant arguments or evidence in the hope of ambushing the other side at the real trial.

Conclusion

The SJT is an underutilized tool that, if properly employed, can resolve both small ticket and big ticket cases at a reasonable cost. Because the SJT is such a flexible procedure, the court and the parties can tailor its rules to the needs of their case, thus maximizing the potential for settlement. More judges and lawyers should consider utilizing the procedure.

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