REQUEST FOR COMMENTS

The Supreme Court of Mississippi's Rules Committee on Civil Practice and Procedure seeks comments from the bench, the bar, and the public on a proposed rule to allow summary jury trials, filed by the Mississippi Chapter of the American Board of Trial Advocates. The proposal is attached.

Comments must be filed with the Clerk of Appellate Courts at Post Office Box 249, Jackson, Mississippi 39205. **The filing deadline is April 7, 2016.**

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CLAUDE F. CLAYTON, JR.
cclayton@claytonodonnell.com

FIRM OFFICES
TUPELO
OXFORD
CORINTH

June 30, 2015

Honorable William L. Waller, Jr.
Chief Justice, Mississippi Supreme Court
P.O. Box 117
Jackson, MS 39205

RE: Proposed Rule Summary Jury Trial

Dear Chief Justice Waller:

I am writing in my role as President of the Mississippi Chapter of the American Board of Trial Advocates. Several years ago a number of our members became interested in the idea of investigating the possibility of Summary Jury Trials in our state. As you know, one of the primary missions of the American Board of Trial Advocates is to preserve the right to jury trial in civil cases. We along with most attorneys who try cases have become alarmed by the diminishing role of civil jury trial in our democracy. Not only does this result in fewer opportunities for young attorneys to advance their skills, but the lack of trials effectively disenfranchises our citizens from their role in our self–governance.

Against that backdrop, we established an Ad Hoc Committee chaired by John Banahan and comprised of the following members: John Daniels, Ben Galloway, William Liston, Ray McNamara, Collette Oldmixon, Vick Smith, Carey Varnado, and Jennifer Wilkinson. That Committee has worked diligently to identify the Summary Jury Trial procedures throughout the country in order to propose a rule change here in Mississippi. In September of 2013, you were kind enough to meet with our Executive Committee, along with Presiding Justice Dickinson, Presiding Justice Randolph, and Justice Coleman. Following that meeting, Chief Judge Joe Lee attended a National Jury Summit in Austin as your designee. Ultimately, the Ad Hoc Committee focused on the South Carolina Rule which was signed into law by Chief Justice Jean Toal on March 7, 2013. That Rule in South Carolina has resulted in a significant number of cases being tried because it is voluntary, reduces cost, expedites trials and jury verdicts cannot be appealed. We have interviewed attorneys from South Carolina and confirmed the significant benefits of the Rule change in that state.

After the Committee modified the South Carolina Rule, to more closely fit our needs in Mississippi, seventy-three of our members voted and all of them are in favor of the proposed Rule and ABOTA submitting the proposed Rule to you and to the members of the Mississippi Supreme Court for your consideration. I am attaching a roster of our membership which includes lawyers who represent plaintiffs and defendants throughout the state. It is our sincere hope that the Supreme Court will enact this rule change and allow parties to enter into an agreement to try civil cases in a day with the certainty of a final result without the concern created by delay and the burden of financing litigation over several years. I am attaching for your consideration the proposed Rule change and supporting documentation compiled by the Committee, which consists of the Administrative Order entered by Chief Justice Jean Toal in South Carolina, a publication of the National Center for State Courts on the Evolution of Civil Jury Trials, a joint publication of IAALS, ABOTA and NCSC titled A Return to Trials, as well as an example Referral Order for fast track trials utilized in South Carolina.

If you think it would be of assistance, the Mississippi Chapter of ABOTA would be happy to sponsor Chief Justice Toal or several lawyers who were heavily involved in this initiative to come to Mississippi to discuss the summary jury trial process in South Carolina.

The members of our Summary Jury Trial Committee are requesting the opportunity to meet with the Court to discuss the proposed Rule change and offer any additional information that may be needed. Please let us know if we can present this matter to you and the other members of the Court or provide any other information that you may need. We appreciate the opportunity to present this proposed Rule and thank you for your courtesies extended during this process.

With kindest regards, I remain

Respectfully yours,

Claude Clayton Jr.

Claude F. Clayton, Jr.
President, Mississippi Chapter of ABOTA

CFC/
Enclosures
Cc: John A. Banahan, Chair Ad Hoc Committee
John Daniels, Ad Hoc Committee Member
Ben Galloway, Ad Hoc Committee Member
William Liston, Ad Hoc Committee Member
Ray McNamara, Ad Hoc Committee Member
Collettee Oldmixon, Ad Hoc Committee Member
Vick Smith, Ad Hoc Committee Member

Carey Varnado, Ad Hoc Committee Member
Jennifer Wilkinson, Ad Hoc Committee Member
David Mockbee, Immediate Past President
Don Dornan, Vice President
David Kaufman, Secretary/Treasurer

The Supreme Court of Mississippi

Re: Fast Track Jury Trials

ORDER

The Court finds that a Fast Track jury trial process has been used in other jurisdictions and has proven to be successful. Allowing implementation in our state will be beneficial to the public and aid in the efficient use of limited judicial resources,

The Court adopts the attached procedures and form for the voluntary use of the Fast Track jury trial process. This order is effective upon the date of entry.

_____

Chief Justice Mississippi Supreme Court

RULES AND PROCEDURES FOR THE FAST TRACK JURY TRIAL PROCESS

Nature of the Binding Fast Track Jury Trial: A Fast Track jury trial is a voluntary, binding jury trial before a reduced jury panel and a mutually selected Special Hearing Officer. The mode and method of presentation of evidence can be traditional or the parties may agree on procedures to streamline the process, often in a manner similar to what is done in arbitrations. In the absence of agreement of counsel, adopted in the Consent Order Granting a Fast Track Jury Trial and Appointing a Special Hearing Officer, the process and rules that follow shall apply:

1. Consent of Parties: The parties to the Consent Order Granting a Fast Track Jury Trial and Appointing a Special Hearing Officer represent that they have the authority of their respective clients and/or insurance carriers to enter into the agreement. This agreement shall be irrevocably binding upon the parties absent fraud.

2. Stipulation: If the parties agree to a Fast Track jury trial, the parties shall file a Consent Order Granting a Fast Track Jury Trial and Appointing a Special Hearing Officer. Additionally, a written stipulation may be signed by the attorneys reciting any high/low parameters. The high/low parameters of a Fast Track jury trial, if any, shall not be disclosed to the jury. Unless otherwise stated herein or agreed by the parties, the Mississippi Rules of Civil Procedure, Mississippi Rules of Evidence, and the Uniform Rules for Circuit and County Courts shall apply.

3. No Right to Appeal and Costs: The parties further agree to waive the right to appeal from the determination of this matter, absent allegations of fraud. Written Findings of Fact and Conclusions of Law shall not be required. The parties agree to waive costs. No Judgment shall be

entered unless the jury's verdict has not been satisfied within thirty (30) days following the date of the verdict.

4. Mediation and Arbitration: Where the parties consent to a Fast Track jury trial, the case is exempt from mandatory mediation and/or arbitration that may otherwise be required by the Court or by any prior agreement of the parties.

5. Scheduling: Fast Track jury trials are scheduled with the Clerk of Court in the county where the case is filed. The parties shall provide the Clerk of Court with a filed copy of the Consent Order Granting a Fast Track Jury Trial and Appointing a Special Hearing Officer. The case shall be removed from the docket and a mutually convenient trial date shall be set. Fast Track jury trials shall not have any priority over any regularly scheduled courtroom proceeding or courtroom staff. The Clerk of Court shall allocate such space or staff as may be available and suitable only after all of the needs of regularly scheduled courtroom business are met.

6. Pretrial Submissions:

a. Documentary Evidence. Any party intending to offer documentary evidence at trial, including, but not limited to medical bills, medical records, and lost income records, shall serve copies of such documentary evidence upon all parties not less than thirty (30) days before the scheduled trial, unless that period is modified by the order setting the case for a Fast Track jury trial.

b. Pretrial Conference. No later than ten (10) days before trial, unless that period is modified by the order setting the case for a Fast Track jury trial, the Special Hearing Officer assigned to the case shall conduct a pretrial conference, at which time objections to any documentary evidence previously submitted shall be determined and witness lists shall be exchanged. At the pretrial conference the parties shall submit any jury instructions that cannot be agreed upon for determine by the Hearing Officer. If there are no objections at the time of the hearing, counsel shall so stipulate in writing. Documentary evidence and any jury instructions that are not served at the pretrial hearing ~~is~~ shall not be utilized absent the consent of all parties.

7. Record: A Fast Track jury trial will not be recorded by an Official Judicial Department court reporter. If either party desires to have a transcript of the proceeding, it shall be at that party's expense.

8. Existing Offer and Demand: The parties may stipulate in writing that the pretrial offer and demand remain unaltered through the Fast Track jury trial. If the parties enter into this stipulation, either party may elect to accept the last settlement proposal of the opponent at any time before the verdict is announced by the jury.

9. Jury Selection: Fast Track juries shall consist of no more than six (6) jurors, selected from a venire called for a regular term of court. The jurors shall serve only during regular court hours during the term of court for which the Fast Track jury trial is called. In addition to challenges for cause the Court shall allow each side two (2) peremptory challenges. Jurors may be selected for a Fast Track jury trial only to the extent that the presiding Circuit Court Judge or County Court Judge finds that such selection will not impede jury trials for either the Circuit or County Court. The Circuit or County Court Judge may select the jury or direct that the Special Hearing Officer select the jury.

10. Time Limits: The parties are encouraged to expedite the trial process by limiting the number of live witnesses. Generally, a Fast Track jury trial should not last longer than one (1) day.

11. Rules of Evidence: The parties may offer such evidence as is relevant and material to the dispute. The parties may, in the Consent Order Granting a Fast Track Jury Trial and Appointing a Special Hearing Officer, agree to modify the rules of evidence. The parties are encouraged to stipulate to modes and methods of presentation that will expedite the process. Such methods may include, but are not limited, to the following:

a. The parties may agree to the admissibility of video or written depositions, affidavits, and if appropriate, ex parte depositions.

b. The parties can agree to the admissibility, without the usual requirements of authentication and other technical requirements, of medical records, including, but not limited to: hospital records, ambulance records, medical records and/or reports from plaintiffs health care providers, diagnostic test results including, but not limited to, X-rays, MRI, CT scan, and EMT reports, or any other graphic, numerical, symbolic, or pictorial representation of medical or diagnostic procedures or tests.

c. Past lost income may be proven by the submission of documentary evidence from the plaintiff's employer, including, but not limited to, pay stubs, tax returns, W-2 and/or 1099 forms, or lost wage statements. Any claim for future lost earnings premised upon lost opportunity, promotion, career advancement, or similar theory shall only be proven by expert testimony or the report of any expert previously exchanged pursuant to these rules.

d. In the event a party intends to call a live expert witness, medical, or otherwise, that party shall provide written notice to all parties of such witness and provide an opportunity for the expert to be deposed.

e. Pretrial evidentiary issues such as motions in limine and redaction of documentary evidence shall be determined in conformance with the applicable rules of evidence or the agreement of the parties by the Special Hearing Officer at the pretrial conference.

f. The parties shall have the right to issue subpoenas to secure the attendance of witnesses or the production of documents as may be requested by any party.

12. Case Presentation:

a. The Special Hearing Officer shall identify himself or herself to the Fast Track jury as a Special Hearing Officer appointed by the court for the purpose of presiding over the Fast Track jury trial.

b. Upon agreement, counsel may present summaries, and may use photographs, diagrams, PowerPoint presentations, overhead projectors, individual notebooks of exhibits for submission to the jurors, or any other innovative method of presentation. Anything that is to be submitted to the jury as part of the presentation of the case must be exchanged at the pretrial conference unless the parties consent. Counsel is encouraged to stipulate to factual and evidentiary matters to the greatest extent possible.

c. The parties are encouraged not to call more than three (3) witnesses for each side. On application of a party and good cause shown, the Special Hearing Officer may allow an increase in the number of witnesses. Unless otherwise stipulated, the parties shall follow a classic order of presentation.

d. The parties may agree to substitute procedures regarding the presentation of evidence upon approval of the Special Hearing Officer.

13. Jury Verdict: Upon a verdict agreed upon by 5 of the 6 jurors, the verdict is binding, subject to any written high/low stipulation agreed upon by the parties. In the event less than 6 jurors are available for deliberation, a verdict may be returned by all of the remaining jurors, save one.

14. Post-Trial Motions: The verdict may be set aside only upon the Special Hearing Officer finding that it was the product of fraud.

15. Inconsistent Verdicts: In the case of inconsistent verdicts, the Special Hearing Officer shall recharge the jury as appropriate and have it return to deliberation to resolve any inconsistency.

16. Incapacitated Person or Minor: In a Fast Track jury trial involving an incapacitated person or minor, the Chancery Court must approve any high/low parameters prior to trial in the same manner the Court would approve a settlement involving such persons.

17. Qualification of the Special Hearing Officer: The Special Hearing Officer will be selected by the mutual consent of the parties. In all cases, the Special Hearing Officer must be a member in good standing of the Mississippi Bar and should have trial experience. The parties shall determine the compensation, if any, of the attorney appointed to serve as a Special Hearing Officer. A Circuit Court or County Court Judge may also conduct a Fast Track jury trial, depending on the available resources of the Court. Nothing herein shall be construed to give a right to demand a trial by a Circuit Court Judge in a Fast Track jury trial.

18. Mandatory Charge of the Fast Track Jurors: The Circuit or County Court Judge who qualifies jurors selected for participation in a Fast Track jury trial shall charge the jurors about the nature of the Fast Track jury trial and concerning the identity and authority of the Special Hearing Officer. Fast Track jurors shall otherwise be qualified and sworn in the same manner as jurors selected for trial in the regular term of court.

FORM FOR THE FAST TRACK JURY TRIAL PROCESS

Consent Order Granting a Fast Track Jury Trial and Appointing a Special Hearing Officer

2013-03-07-01

The Supreme Court of South Carolina

Re: Fast Track Jury Trials

Appellate Case No.: 2013-000389

ADMINISTRATIVE ORDER

Pursuant to the provisions of Article V, § 4 of the South Carolina Constitution, I find that a Fast Track jury trial process has been used on an *ad hoc* basis in South Carolina and has proven to be successful. Allowing implementation statewide will be beneficial to the public and aid in the efficient use of limited judicial resources.

I adopt the attached procedures and **form** for the voluntary use of the Fast Track jury trial process statewide. The Fast Track jury trial process may be implemented by the Chief Administrative Judge. This order is effective upon the date of my signature.

s/Jean Hoefer Toal
Chief Justice of South Carolina

March 7, 2013
Columbia, South Carolina

RULES AND PROCEDURES FOR THE FAST TRACK JURY TRIAL PROCESS

Nature of the Binding Fast Track Jury Trial: A Fast Track jury trial is a voluntary, binding jury trial, before a reduced jury panel and a mutually selected Special Hearing Officer. The mode and method of presentation of evidence can be traditional or the parties may agree on procedures to streamline the process, often in a manner similar to what is done in arbitrations. In the absence of agreement of counsel, adopted in the Consent Order Granting a Fast Track Jury Trial and Appointing a Special Hearing Officer, the process and rules that follow shall apply:

1. Consent of Parties: The parties to the Consent Order Granting a Fast Track Jury Trial and Appointing a Special Hearing Officer represent that they have the authority of their respective clients and/or insurance carriers to enter into the agreement. This agreement shall be irrevocably binding upon the parties absent fraud.

2. Stipulation: If the parties agree to a Fast Track jury trial, the parties shall file a Consent Order Granting a Fast Track Jury Trial and Appointing a Special Hearing

Officer. Additionally, a written stipulation may be signed by the attorneys reciting any high/low parameters. The high/low parameters of a Fast Track jury trial, if any, shall not be disclosed to the jury.

3. No Right to Appeal and Costs: The parties further agree to waive the right to appeal from the determination of this matter, absent allegations of fraud. Written Findings of Fact and Conclusions of Law shall not be required. Following the jury verdict, the Clerk of Court shall not enter judgment except upon motion to the Circuit Court and a showing that the jury's verdict has not been satisfied. The parties agree to waive costs and disbursements.

4. Mediation and Arbitration: Where the parties consent to a Fast Track jury trial, the case is exempt from mandatory mediation and/or arbitration.

5. Scheduling: Fast Track jury trials are scheduled with the Clerk of Court in the county where the case is filed. The parties shall provide the Clerk of Court with a filed copy of the Consent Order Granting a Fast Track Jury Trial and Appointing a Special Hearing Officer. The case shall be removed from the docket and a mutually convenient trial date shall be set. Fast Track jury trials shall not have any priority over any regularly scheduled courtroom proceeding or courtroom staff. The Clerk of Court shall allocate such space or staff as may be available and suitable only after all of the needs of regularly scheduled courtroom business are met.

6. Pretrial Submissions:

a. **Documentary Evidence.** Any party intending to offer documentary evidence at trial, including, but not limited to medical bills, medical records, and lost income records, shall serve copies of such documentary evidence upon all parties not less than thirty (30) days before the scheduled trial, unless that period is modified by the order setting the case for a Fast Track jury trial.

b. **Pretrial Conference.** No later than ten (10) days before trial, unless that period is modified by the order setting the case for a Fast Track jury trial, the Special Hearing Officer assigned to the case shall conduct a pretrial conference, at which time objections to any documentary evidence previously submitted shall be determined and witness lists shall be exchanged. If there are no objections at the time of the hearing, counsel shall so stipulate in writing. Documentary evidence that is not served at the pretrial hearing is not admissible absent the consent of all parties.

7. Record: A Fast Track jury trial will not be recorded by an Official Judicial Department court reporter. If either party desires to have a transcript of the proceeding, it shall be at that party's expense.

8. Existing Offer and Demand: The parties may stipulate in writing that the pre-trial offer and demand remain unaltered through the Fast Track jury trial. If the parties enter into this stipulation, either party may elect to accept the last settlement proposal of the opponent at any time before the verdict is announced by the jury.

9. Jury Selection: Fast Track juries shall consist of no more than six (6) jurors, selected from a venire called for a regular term of court. The jurors shall serve only

during regular court hours during the term of court for which the Fast Track jury trial is called. The Court shall allow each side two (2) peremptory challenges. Jurors may be selected for a Fast Track jury trial only to the extent that the presiding Circuit Court Judge finds that such selection will not impede jury trials for either the Court of Common Pleas or Court of General Sessions. The Circuit Court Judge may select the jury or direct that the Special Hearing Officer select the jury.

10. Time Limits: The parties are encouraged to expedite the trial process by limiting the number of live witnesses. Generally, a Fast Track jury trial should not last longer than one (1) day.

11. Rules of Evidence: The parties may offer such evidence as is relevant and material to the dispute. The parties may, in the Consent Order Granting a Fast Track Jury Trial and Appointing a Special Hearing Officer, agree to modify the rules of evidence. The parties are encouraged to stipulate to modes and methods of presentation that will expedite the process, such as the following:

a. The parties may agree to the admissibility of video or written depositions, affidavits, and if appropriate, ex parte depositions.

b. The parties can agree to the admissibility, without the usual requirements of authentication and other technical requirements, of medical records, including but not limited to hospital records, ambulance records, medical records and/or reports from plaintiff's health care providers, diagnostic test results including but not limited to X-rays, MRI, CT scan, and EMT reports, or any other graphic, numerical, symbolic, or pictorial representation of medical or diagnostic procedures or tests.

c. Past lost income may be proven by the submission of documentary evidence from the plaintiff's employer, including, but not limited to, pay stubs, tax returns, W-2 and/or 1099 forms, or lost wage statements. Any claim for future lost earnings premised upon lost opportunity, promotion, career advancement, or similar theory shall only be proven by expert testimony or the report of any expert previously exchanged pursuant to these rules.

d. In the event a party intends to call a live expert witness, medical, or otherwise, that party shall provide written notice to all parties of such witness and provide an opportunity for the expert to be deposed.

e. Pretrial evidentiary issues such as motions in limine and redaction of documentary evidence shall be determined in conformance with the applicable rules of evidence or the agreement of the parties by the Special Hearing Officer at the pretrial conference.

f. The parties shall have the right to issue subpoenas to secure the attendance of witnesses or the production of documents as may be requested by any party.

12. Case Presentation:

a. The Special Hearing Officer shall identify himself or herself to the Fast Track jury as a Special Hearing Officer appointed by the court for the

purpose of presiding over the Fast Track jury trial.

b. Upon agreement, counsel may present summaries, and may use photographs, diagrams, PowerPoint presentations, overhead projectors, individual notebooks of exhibits for submission to the jurors, or any other innovative method of presentation. Anything that is to be submitted to the jury as part of the presentation of the case must be exchanged ten (10) days in advance of trial, unless the parties consent. Counsel are encouraged to stipulate to factual and evidentiary matters to the greatest extent possible.

c. The parties are encouraged not to call more than three (3) witnesses for each side. On application of a party and good cause shown, the Special Hearing Officer may allow an increase in the number of witnesses. Unless otherwise stipulated, the parties shall follow a classic order of presentation.

d. The parties may agree to substitute procedures regarding the presentation of evidence upon approval of the Special Hearing Officer.

13. Jury Verdict: The verdict is binding, subject to any written high/low stipulation agreed upon by the parties.

14. Post-Trial Motions: The parties may agree to waive any motions for directed verdict, motions to set aside the verdict, motion for additur or remittitur, or any judgment rendered by said jury. If the parties so agree, the Special Hearing Officer shall not set aside any verdict or any judgment entered thereon, nor shall he or she direct that judgment be entered in favor of a party entitled to judgment as a matter of law, nor shall he or she order a new trial as to any issues where the verdict is alleged to be contrary to the weight of the evidence.

15. Inconsistent Verdicts: In the case of inconsistent verdicts, the Special Hearing Officer shall recharge the jury as appropriate and have it return to deliberation to resolve any inconsistency.

16. Incapacitated Person or Minor: In a Fast Track jury trial involving an incapacitated person or minor, the Circuit Court Judge who assigns the case to the Fast Track jury trial process must approve any high/low parameters prior to trial in the same manner the Court would approve a settlement involving such persons.

17. Qualification of the Special Hearing Officer: The Special Hearing Officer will be selected by the mutual consent of the parties. In all cases, the Special Hearing Officer must be a member in good standing of the South Carolina Bar and must have completed the trial experience required by Rule 403, SCACR. The parties shall determine the compensation, if any, of the attorney appointed to serve as a Special Hearing Officer. A Circuit Court Judge may also conduct a Fast Track jury trial, depending on the available resources of the Court. Nothing herein shall be construed to give a right to demand a trial by a Circuit Court Judge in a Fast Track jury trial.

18. Mandatory Charge of the Fast Track Jurors: The Circuit Court Judge who qualifies jurors selected for participation in a Fast Track jury trial shall charge the jurors about the nature of the Fast Track jury trial and concerning the identity and

authority of the Special Hearing Officer. 'Fast Track jurors shall otherwise be qualified and sworn in the same manner as jurors selected for trial in the regular term of court.

FORM FOR THE FAST TRACK JURY TRIAL PROCESS

Consent Order Granting a Fast Track Jury Trial and Appointing a Special Hearing Officer

STATE OF SOUTH CAROLINA)
)
COUNTY OF _____)
)
_____)
Plaintiff,)
vs.)
_____)
Defendant.)

IN THE COURT OF COMMON PLEAS
_____JUDICIAL CIRCUIT

CONSENT ORDER: FAST TRACK JURY TRIAL AND APPOINTMENT OF SPECIAL HEARING OFFICER

Docket No. _____

The parties consent to the following:

1. Refer the above-captioned case to the Fast Track jury trial process.
2. Abide by the "Rules and Procedures for the Fast Track Jury Trial Process," outlined in the Chief Justice's Administrative Order, Case. No. 2013-000389 (March 7, 2013), subject to any additional written stipulations attached to this Order.
3. Select _____to serve as the Special Hearing Officer in this Fast Track jury trial proceeding. He/She is a member in good standing of the South Carolina Bar and has completed the trial requirements of Rule 403, SCACR governing the practice of law.
4. Other:

_____

_____

_____

Attach a copy of any additional stipulations.

IT IS THEREFORE ORDERED:

1. _____ County Clerk of Court shall make available a courtroom facility and not more than ten (10) jurors from the jury venire for that week so that the parties may select a jury of six (6) to hear the above-captioned case.
2. The "Rules and Procedures for the Fast Track Jury Trial Process," outlined in the Chief Justice's Administrative Order, Case. No. 2013-000389 (March 7, 2013), shall be used at the Fast Track jury trial, subject to any additional written stipulations attached to this Order.
3. The parties are entitled to use the subpoena power authorized by the South Carolina Rules of Civil Procedure to compel attendance of witnesses, if necessary, at the Fast Track jury trial.
4. _____ is to serve as a Special Hearing Officer for the purpose of the binding Fast Track jury trial, and he/she shall have the authority to rule on all matters with regard to procedures and evidence as if he/she were sitting as a Circuit Court Judge, subject to any written stipulations attached to this Order.
5. The Special Hearing Officer does not have direct contempt power. If the Special Hearing Officer reports to the Circuit Court Chief Administrative Judge a finding of contemptuous conduct, then the parties are subject to the contempt power of a Circuit Court Judge and may have to attend a contempt hearing.

Date: _____, 20____
_____, S.C.

_____
Circuit Court Chief Administrative Judge

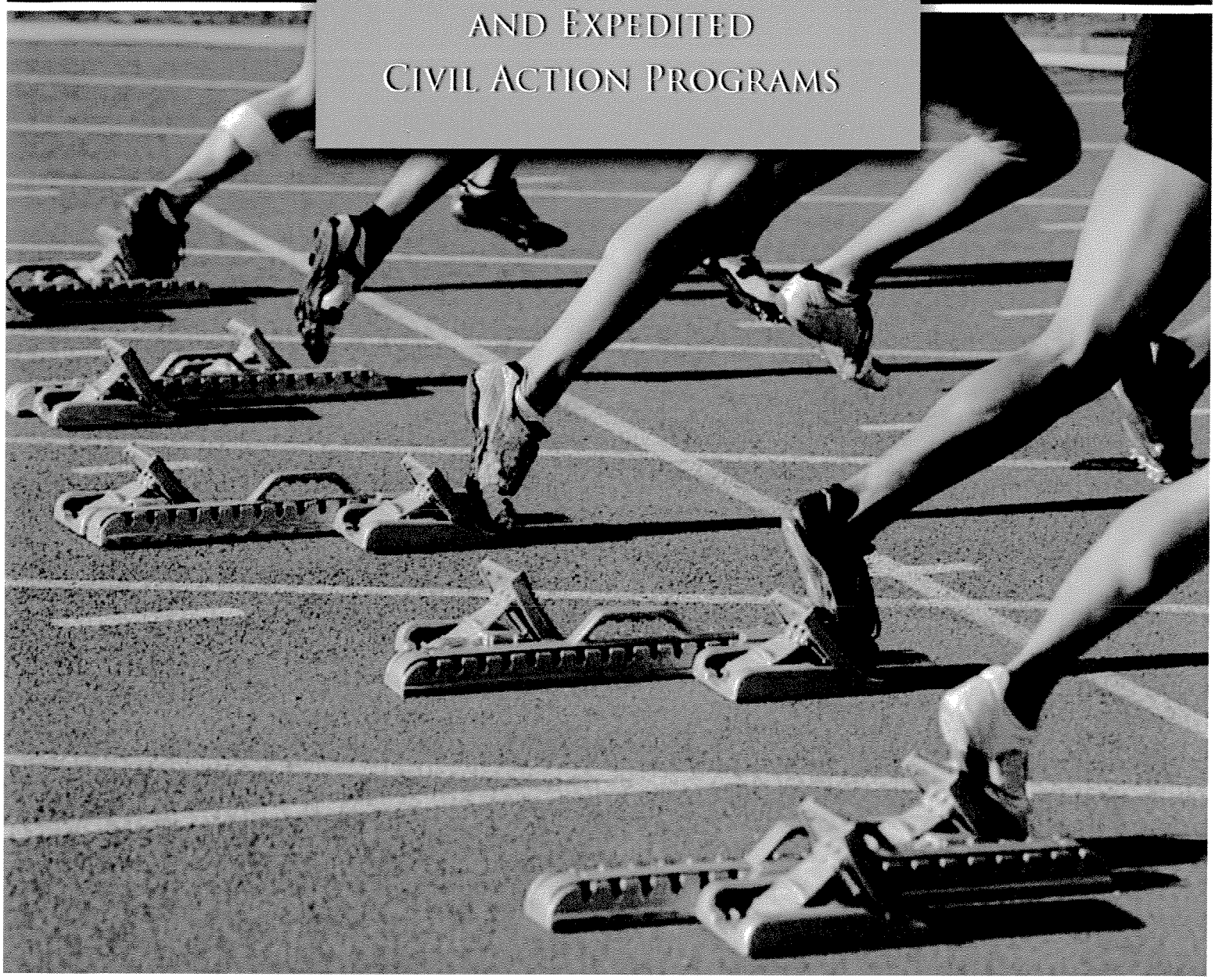
WE CONSENT:

_____ _____
_____ _____

_____ _____
_____ _____

A Return to Trials:

Implementing Effective Short, Summary, and Expedited Civil Action Programs



RULE ONE INITIATIVE

IAALS
EMPOWERING IMPROVEMENT. ADVANCING EXCELLENCE.
INSTITUTE for the ADVANCEMENT of the AMERICAN LEGAL SYSTEM
UNIVERSITY of DENVER

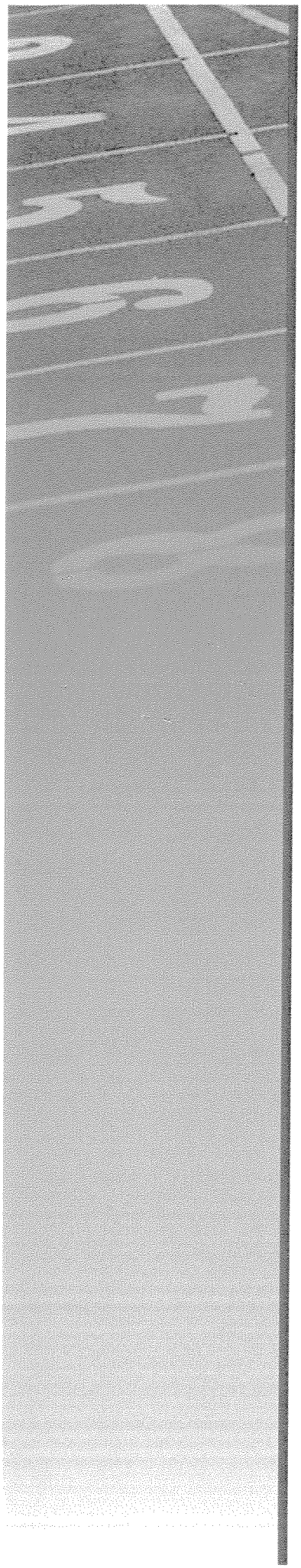
AMERICAN BOARD OF TRIAL ADVOCATES

NCSC
National Center for State Courts

A Return to Trials:

Implementing Effective Short, Summary, and Expedited Civil Action Programs

October 2012



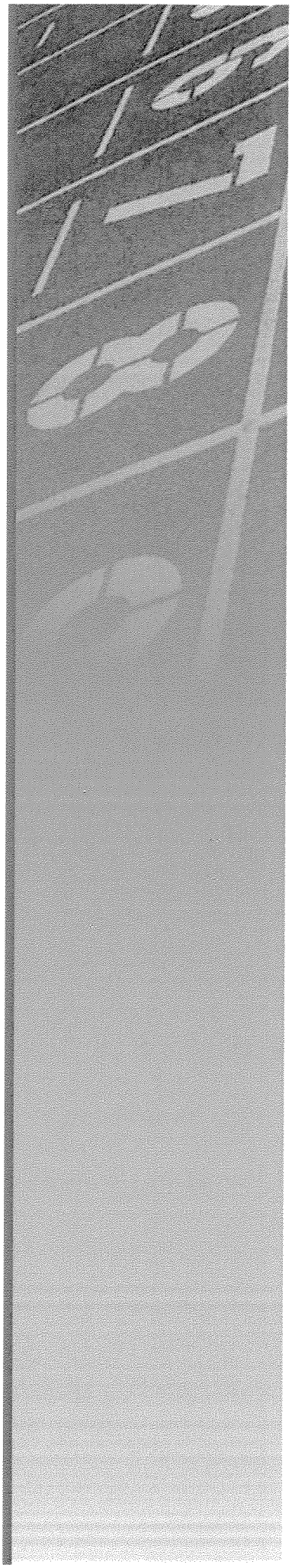
IAALS—Institute for the Advancement of the American Legal System
John Moye Hall, 2060 South Gaylord Way, Denver, CO 80208
Phone: 303-871-6600
http://iaals.du.edu

IAALS, the Institute for the Advancement of the American Legal System, is a national independent research center at the University of Denver dedicated to continuous improvement of the process and culture of the civil justice system. By leveraging a unique blend of empirical and legal research, innovative solutions, broad-based collaboration, communications, and ongoing measurement in strategically selected, high-impact areas, IAALS is empowering others with the knowledge, models, and will to advance a more accessible, efficient, and accountable civil justice system.

Rebecca Love Kourlis — Executive Director
Brittany K.T. Kauffman — Manager, *Rule One Initiative*

RULE ONE INITIATIVE

Rule One is an initiative of IAALS dedicated to advancing empirically informed models to promote greater accessibility, efficiency, and accountability in the civil justice system. Through comprehensive analysis of existing practices and the collaborative development of recommended models, *Rule One Initiative* empowers, encourages, and enables continuous improvement in the civil justice process.



AMERICAN BOARD OF TRIAL ADVOCATES

About ABOTA

The American Board of Trial Advocates, founded in 1958, is an organization dedicated to defending the American civil justice system. With a membership of 6,800 experienced attorneys representing both plaintiffs and defendants in civil cases, ABOTA is uniquely qualified to speak for the value of the constitutionally mandated jury system as the protector of the rights of persons and property. ABOTA publishes *Voir Dire* magazine, which features in-depth articles on current and historical issues related to constitutional rights, in particular the Seventh Amendment right to trial by jury.

ABOTA's National Board of Directors has taken a stand regarding expedited jury trials and unanimously passed the following resolution:

Expedited Jury Trials

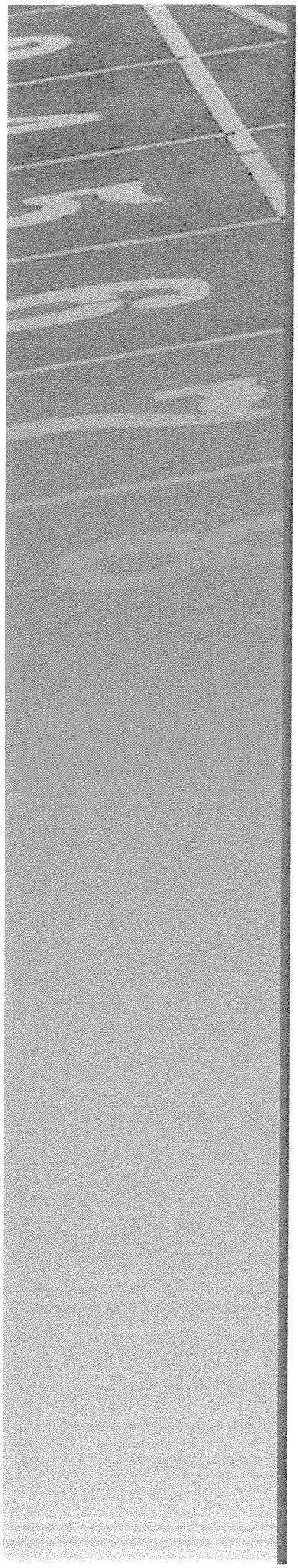
Whereas, ABOTA recognizes that the number of civil cases in the United States actually tried to a jury is rapidly decreasing and that litigation costs and delays are a major contributor to the reduction in the number of civil juries trials, and

Whereas, ABOTA recognizes that several states have adopted expedited jury trial programs which provide for streamlined pretrial procedures and abbreviated jury trials in many civil cases in an effort to thereby reduce the cost and time involved, yet preserving the civil jury system in this Country,

It is therefore, RESOLVED, that ABOTA supports the concept of streamlined pretrial procedures and expedited jury trials and that ABOTA, through its leaders and members, should support existing expedited jury trial programs and encourage the adoption of similar programs throughout all jurisdictions.

— Jan. 14, 2012

American Board of Trial Advocates
2001 Bryan St., Suite 3000, Dallas, TX 75201
(800) 93-ABOTA (932-2682) | www.abota.org



National Center for State Courts
300 Newport Avenue
Williamsburg, Virginia 23185
Phone: 800-616-6164
www.ncsc.org

The National Center for State Courts (NCSC) is a nonprofit organization dedicated to improving the administration of justice by providing leadership and service to the state courts and courts around the world. Founded in 1971, the NCSC provides education, training, technology, management, and research services to the nation's state courts. The NCSC Center for Jury Studies engages in cutting-edge research to identify practices that promote broad community participation in the justice system, that enhances juror confidence and satisfaction with jury service, that provides jurors with decision-making tools necessary to make informed and fair judgments in the cases submitted to them, and that respects jurors contributions to the justice system by using their time effectively and making reasonable accommodations for their comfort and privacy. The NCSC is headquartered in Williamsburg, Virginia and has offices in Denver, Colorado, Arlington, Virginia, and Washington, DC.

Mary C. McQueen President

Richard Schauffler Director of Research Services

Paula Hannaford-Agor Director, NCSC Center for Jury Studies

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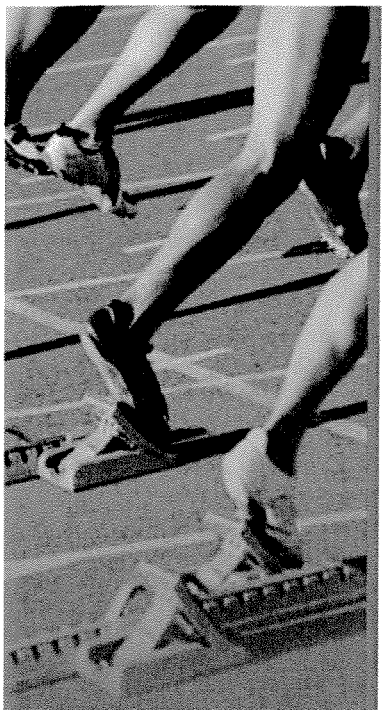

INTRODUCTION

There is a widespread perception—among lawyers and litigants—that the civil justice system is too complex, costs too much, and takes too long. There is also data documenting that civil jury trials have decreased precipitously over the last decade.[1] The decline in jury trials has meant fewer cases that have the benefit of citizen input, fewer case precedents, fewer jurors who understand the system, fewer judges and lawyers who can try jury cases—and overall, a smudge on the Constitutional promise of access to civil, as well as criminal, jury trials.

As one response to these realities, various jurisdictions—both state and federal—have implemented an alternative process that is designed to provide litigants with speedy and less expensive access to civil trials. The programs involve not only a simplified pretrial process, but also a shortened trial on an expedited basis. While some programs focus on jury trials, the overall goal of such programs is to provide access to a shorter pretrial and trial procedure, both for jury and bench trials. For purposes of this report, we are calling these programs Short, Summary, and Expedited Civil Action programs (SSE programs).

The National Center for State Courts (NCSC) has just completed a report detailing the elements of various examples of these programs.[2] In the wake of that report, the NCSC, IAALS (the Institute for the Advancement of the American Legal System at the University of Denver), and the American Board of Trial Advocates (ABOTA) have taken on the task of collating information about what seems to be working in these programs, how to use the process well, and how a jurisdiction might choose to put a program in place if it does not now have one.

For all three organizations, this work represents an ongoing commitment to processes that provide less expensive access to the civil justice system and a commitment to the preservation of the civil jury trial.

In preparation for the drafting of this report, the three organizations formed a Committee (members listed on Appendix A), agreed upon a charge to the Committee (Appendix B), and reviewed all available information regarding existing programs around the country. The Committee then met in person and thereafter worked collaboratively on the report. The Committee was chosen on the basis of balance, knowledge about different programs, and experience.

The recommendations that follow are designed to assist those around the country who are considering implementing an SSE program. Because of the variability

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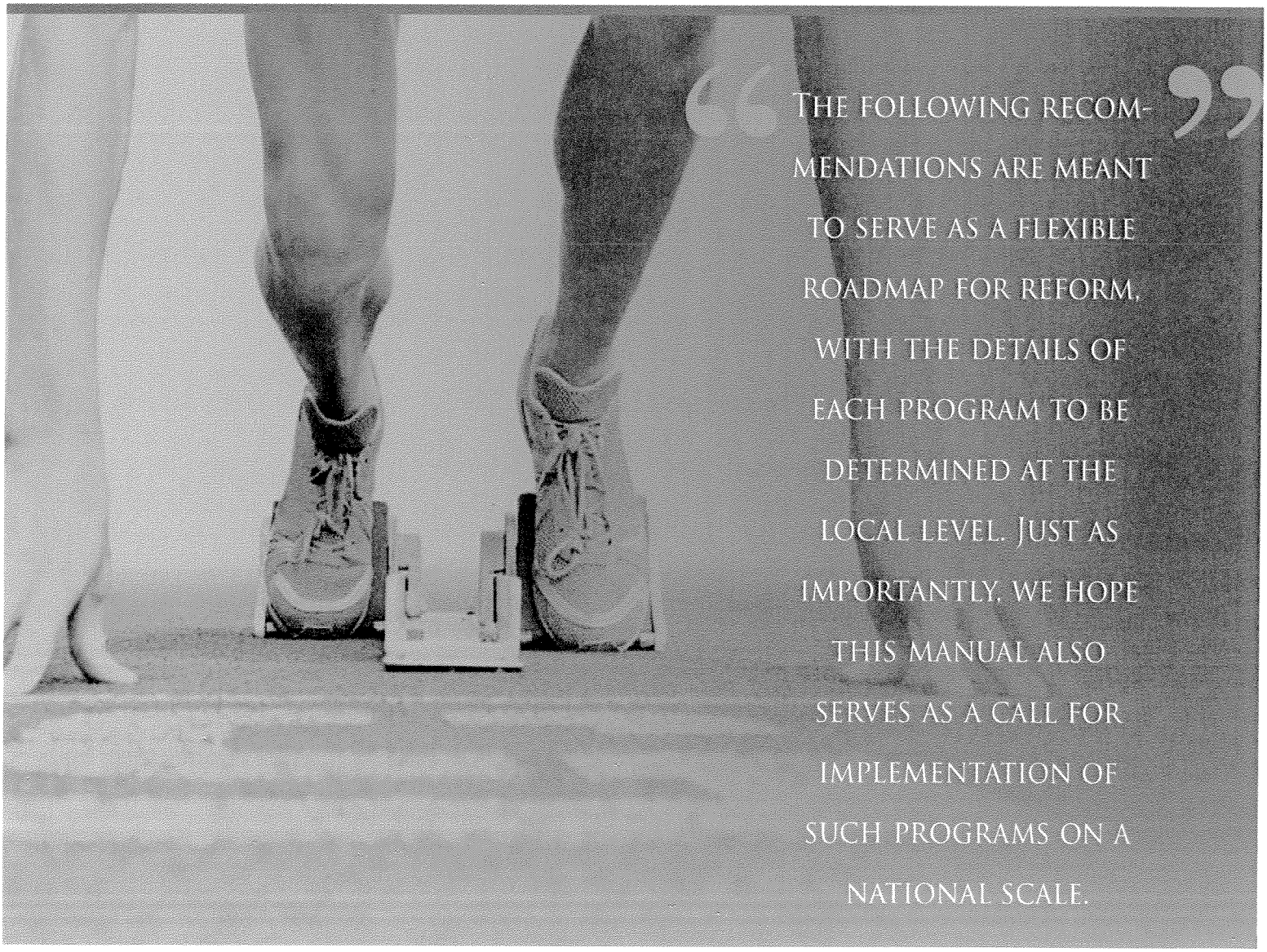
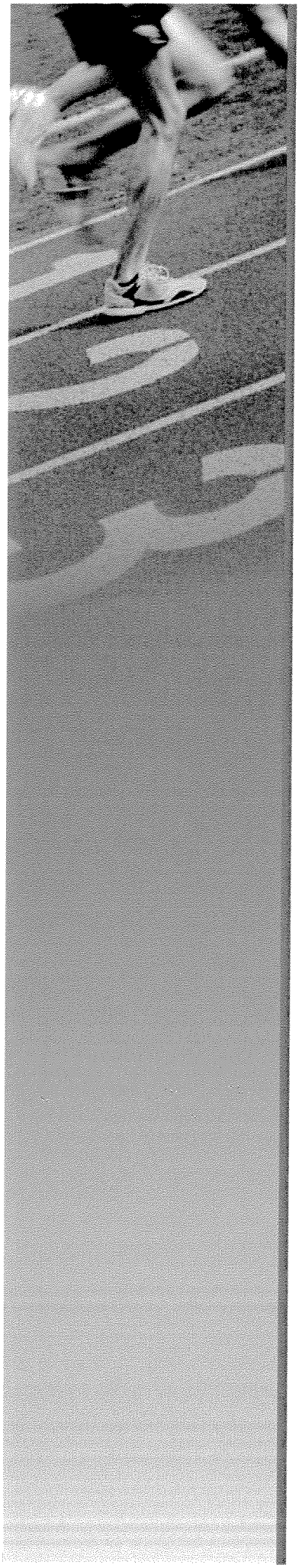
1 According to state court disposition data collected by NCSC from 2000 to 2009, the percentage of civil jury trials dropped 47.5% across the period to a low 0.5% in 2009. Data on federal civil cases shows a decline in cases resolved by trial from 11.5 percent in 1962 to 1.8 percent in 2002, illustrating the historic trend away from trials. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 461, 464 (2004) (noting that in 1938, "the year that the Federal Rules of Civil Procedure took effect, 18.9 percent of terminations were by trial").

2 NATIONAL CENTER FOR STATE COURTS, SHORT, SUMMARY & EXPEDITED: THE EVOLUTION OF CIVIL JURY TRIALS (2012), *available at* http://www.ncsc.org/SJT/.

of existing programs, and the different needs that each of these programs meet in their respective jurisdictions, the Committee has chosen not to recommend a specific set of parameters to be implemented in every program and for every case. Instead, the following recommendations are meant to serve as a flexible roadmap for reform, with the details of each program to be determined at the local level.

Just as importantly, we hope this manual also serves as a call for implementation of such programs on a national scale. The organizations and individual members who make up this Committee believe in the importance of Rule One of the Federal Rule of Civil Procedure's goals of a "just, speedy, and inexpensive determination" of every civil action. Yet today, pressures on client and court resources have only increased, making access even more problematic. While these pressures make attainment of this goal more difficult, they also create space for innovation. Our organizations hope that what follows is a resource for creating and implementing these innovative programs in your jurisdiction.





What is a Short, Summary, and Expedited (SSE) Civil Action Program?

Before trying to identify what works and what does not, it is important to define the characteristics of an SSE program for purposes of this Report. The programs vary greatly across the country, and none are identical.

However, there are five constants that the Committee suggests are present in almost all of the programs and are critical for success:

First, the trial itself is short.

Most jurisdictions limit the trial to one or two days. The Committee believes that the length is not necessarily dispositive, but there must be an expectation that the trial will be short and to the point. By necessity, the evidence also must be limited. Length of trial is a critical component, both for purposes of the trial itself and for purposes of structuring the pretrial process, which is then necessarily focused and abbreviated.

Second, the trial date must be certain and fixed.

The trial date must not be susceptible to continuance, at the behest of the court or counsel, except in extraordinary circumstances. One of the key features of the programs is the fact that litigants know they must be prepared for the trial on the date on which it is set. Such certainty drives the pretrial process and many of the benefits of the programs. In some of the more successful programs, the litigants also know who their judge will be if they choose the SSE program: either they have access to a judge pro tempore, whom they jointly choose, or they know who the judge assigned to the case will be. Hence, the program achieves a level of certainty and predictability that may not otherwise be available.

Third, the program extends to the whole litigation process—not just the trial.

The pretrial process is also expedited and focused.

Fourth, the program encourages issue agreements and evidentiary stipulations.

Rules promoting evidentiary agreements, encouraging stipulations, and allowing relaxed evidentiary foundational standards save time and narrow the focus to the key issue(s) to be addressed at trial.[3]

3 For examples of pretrial and trial agreements, *see* Stephen D. Susman, Trial by Agreement, http://trialbyagreement.com (last visited Sept. 24, 2012).

FIFTH, ALMOST ALL OF THE PROGRAMS ARE EITHER PARTIALLY OR WHOLLY VOLUNTARY.
The litigants have the option of choosing this particular track for their case, and they are not forced to do so. Although voluntary processes are often slow to catch on, because people in general—and attorneys in particular—do not embrace change, voluntary programs nonetheless preserve the right of the litigants and counsel to decide whether the case at issue is appropriate for an abbreviated process and the program.

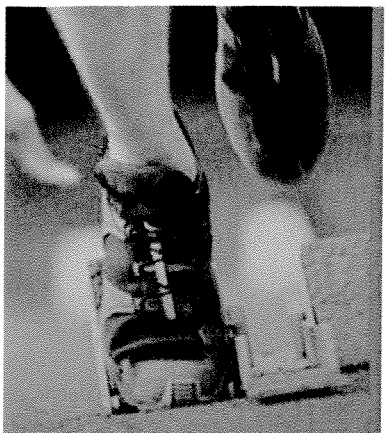
While one or a few of these characteristics may be instrumental in achieving greater access and quicker resolution, such as establishing a firm trial date and utilizing agreements and stipulations to achieve a more streamlined trial, the SSE programs discussed here generally include most, if not all five, of these characteristics. While generally applicable rules and case management techniques that mandate streamlined pretrial process and expedited trial settings do not in and of themselves satisfy the defining characteristics of an SSE program (such as voluntariness), the Commitee does not mean to infer that such procedures may not also be an effective means of assuring access and efficiency.

Beyond these fundamental characteristics, however, there are a host of variations. All of these variations are components that the local bench and bar can review and build upon. The program characteristics chosen by a particular jurisdiction should be responsive to its needs and is likely to be quite individualized.

BENEFITS OF SSE PROGRAMS

There are a variety of benefits that SSE programs can provide. First, the BENEFITS TO THE COURT SYSTEM itself include the dedication of fewer judicial officers and court staff to the process. In one jurisdiction, the whole process happens without any involvement from the court, except for the assignment of a courtroom and the summoning of jurors. In other jurisdictions, sitting judges oversee the process, but it takes far less time than civil cases handled under the traditional rules of civil procedure. Once judges become familiar with the SSE program, they tend to like the process because it allows them to clear their docket, achieve better closed case numbers, and preside over jury trials, without investing weeks of court time. The system also benefits from the increased numbers of jury trials, which involve more people in the system and inform them about the process. More broadly, by making good on the promise of access to a civil jury trial, it is possible that such a program can revive confidence in the jury system to some extent, particularly if jury trials increase in frequency and the quality of the verdicts is well-regarded. The court system benefits equally from SSE bench trials. Judges are able to resolve matters more quickly and efficiently, with streamlined procedures and a short trial that resolves the case in a day or two.

"BY MAKING GOOD ON THE PROMISE OF ACCESS TO A CIVIL JURY TRIAL, IT IS POSSIBLE THAT SUCH A PROGRAM CAN REVIVE CONFIDENCE IN THE JURY SYSTEM TO SOME EXTENT, PARTICULARLY IF JURY TRIALS INCREASE IN FREQUENCY AND THE QUALITY OF THE VERDICTS IS WELL-REGARDED.



"SSE PROGRAMS SEEK TO ADDRESS INEFFICIENCIES THAT CURRENTLY EXIST IN OUR CIVIL JUSTICE SYSTEM BY STREAMLINING BOTH PRETRIAL AND TRIAL PROCEEDINGS IN SELECT CASES.

The BENEFITS FOR THE LITIGANTS are, first and foremost, that their case will take less time and cost less money than if they had proceeded along a regular case track. In short, the process increases access to the system and decreases expense and time. But there are additional benefits as well. The process may provide more certainty. This can include certainty of trial date and perhaps of judge assignment. In some programs, this can include certainty of outcome, with limited appeal rights, and possible risk containment, if damages are limited or agreed to on a high-low basis.[4]

BENEFITS FOR JURORS include more opportunity to participate and a shorter, more focused process when they do participate. Jurors benefit from serving for both a shorter and more defined period of time.[5] Because of the streamlined process, and resulting streamlined issues, SSE programs also create less confusion and greater clarity for jurors about what is being asked of them. For these reasons, SSE programs may actually result in a better process for the jurors.

BENEFITS FOR ATTORNEYS are both immediate and long-term. First, these trials may provide an opportunity for younger attorneys to handle jury trials. Second, being able to take smaller or less complex cases for less investment on a per-case basis may actually serve to increase an attorney's client base and build good will. Lastly, an expedited process forces attorneys to focus very acutely on what is important in a case—and to shape both the discovery and the trial presentation around those key issues. It improves case management skills, attention to what is important, and clarity and brevity of trial presentations. It can also encourage cooperation in the discovery process in order for the attorneys to get the discovery they need in a short period of time. In jurisdictions where the whole process is the result of attorney negotiation, there is additional incentive to cooperate. Appendix C identifies a set of criteria that counsel can use to identify appropriate cases for an SSE program, as well as recommendations for maximizing effective preparation for and presentation at an SSE trial.

The development of all of those skills has possible pervasive implications. The current litigation process encourages attorneys to develop an all-inclusive, litigious approach to cases, whereas the SSE program prioritizes and hones the skill of highlighting only what is important. SSE programs seek to address inefficiencies that currently exist in our civil justice system by streamlining both pretrial and trial proceedings in select cases. It is also possible to make the pretrial and trial process more efficient in non-SSE program cases by incorporating some of these same principles. Moreover, the more attorneys try cases in front of juries, the more comfortable they become both with the process and the potential outcome. Thus, it is possible that use of SSE programs could actually change the litigation culture as a whole over time.

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4 Some parties that agree to a short, summary, and expedited procedure also enter into a high-low agreement, where both parties agree that the outcome of the case will be no less than the low amount, nor in excess of the high amount.

5 Employers also benefit significantly from reduced employee absence and, as a result, employers may be more willing to pay employee wages even when not required by law.

Implementing an SSE Program

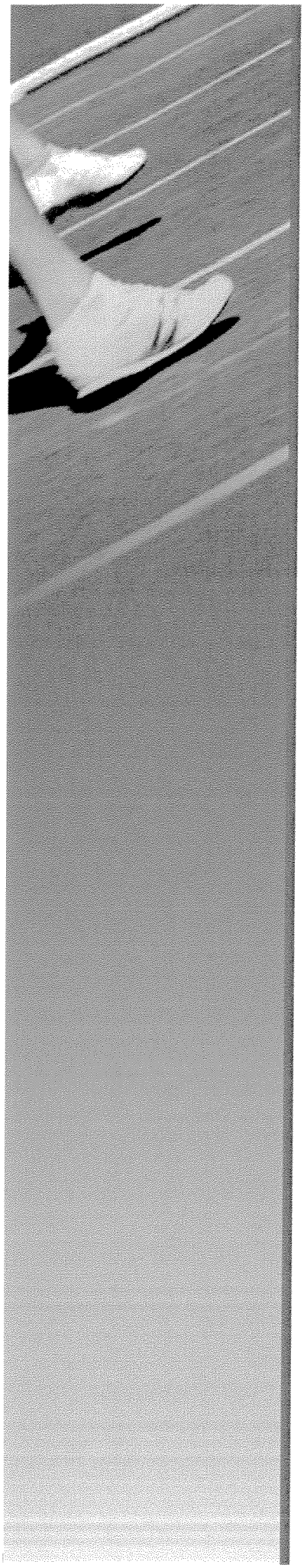
The Design

The Committee has pooled both anecdotal and empirical data about SSE programs around the country and has drawn from the individual expertise of the Committee members. Out of that pool of information, the Committee has distilled the elements that characterize the more successful programs and has also created a check-list of decisions that a jurisdiction should review when designing a program.

The SSE program should be designed to address existing obstacles that impede efficient case processing and resolution in that jurisdiction, but without introducing procedures or requirements that affect otherwise well-functioning processes. The table below identifies some common obstacles described in the NCSC study and the solutions that the SSE programs implemented to address those obstacles. At the same time, changes in procedures should be made only as needed to craft an effective SSE program. For example, jury procedures should be the same in the SSE programs as in regular civil litigation wherever possible.

The obstacles posed, and the corresponding SSE program benefits that may be achieved, may also shift during the course of an individual case. For this reason, programs should be sufficiently flexible to permit early entry, for those who seek a streamlined pretrial procedure, and late entry, for those who just want an abbreviated trial, perhaps because only one issue remains after summary judgment. Other components of successful programs appear to be presenting the option to counsel and the parties on an individualized basis (through case management orders or at status conferences) and creating certainty regarding who the judge will be for the case.

Common Obstacles	Potential SSE Program Solutions
Civil case backlogs create scheduling delays for civil trials with regularly assigned civil trial judges	Permit SSE program trials to be tried to non-judicial personnel (e.g., special referees, judges pro tempore) or magistrate judges
Calendaring preferences for non-civil trials undermine trial date certainty	Permit SSE program trials to be tried to non-judicial personnel (e.g., special referees, judges pro tempore) or magistrate judges
Pretrial case management does not permit early identification of trial judge	Assign SSE program cases to one or more highly qualified and SSE designated trial judges
Length of civil trials makes it difficult to calendar cases for trial	Restrict trial length; restrict amount or form of trial evidence
Length of voir dire makes civil jury trials too lengthy	Designate smaller jury panel size; provide fewer peremptory challenges; shorter voir dire time
Expert witness fees make it too expensive to take cases to trial	Restrict expert evidence (number and/or form)
Discovery process is disproportionately excessive for lower value or less complex cases	Restrict the scope and/or time limit for discovery
Discovery disputes take too long to resolve, increasing expenses and delaying trial readiness	Create a process to expedite resolution of discovery disputes, including more immediate access to trial judge or discovery master and preference for informal telephonic conferences rather than formal motions, briefs, and hearings
Mandatory ADR creates needless procedural hurdles without significantly improving case resolution rates	Permit SSE program cases to opt out of mandatory ADR



When implementing a program, the local jurisdiction should review the following checklist of possible components:

- Rigid versus tailor-made procedures:
  - Some programs allow counsel great latitude in deciding upon the particular rules that will govern both the trial and the pretrial process.
  - Other jurisdictions have fairly rigid procedures that apply to every case submitted to the program.
- The questions to be addressed—either by counsel in a stipulation, or by rules or case management orders—are:
  - Time limits: How much time is allotted for discovery, as well as the length of the trial itself?
  - Rules of evidence: Do they apply, and to what extent?
  - Discovery: Requests for production, depositions, and interrogatories—what will be allowed?
  - Experts: Are expert witnesses allowed? If so, do they provide a report, can they be deposed, and do they testify at trial?
  - Motions: Will motions be allowed? If so, what kinds of motions? Does the court provide an expedited process for the resolution of those motions?
  - Client consent: Is a client's signature documenting informed consent required?
- Selection of judge: Will the judge be assigned or chosen by the parties (e.g., a senior judge, judge pro tempore, magistrate judge, or sitting judge)?
- When opt-in may occur: Is there a limited window of time at the beginning of the case when the parties may opt in, or is it available throughout the litigation process?
- Number of jurors (almost all specify a smaller panel than other civil jury trials).
- Unanimous jury verdict? If non-unanimous verdicts are permitted, what decision rule applies?
- Binding decision or not?
- On the record or not?
- Appealable decision or not?
- Is the program perceived as a form of alternative dispute resolution (this relates directly to whether it is binding)?
- Is the program statutory, supported by statewide rules, or put in place by a particular judge in his or her courtroom?
- Extent of informal versus formal procedures recognized.
- Restrictions on the amount of trial time and division of that time between the parties.
- Calendaring variations (some programs mandate a trial within four months, others within six months).
- Limits on damage awards coming out of the process: Many jurisdictions specifically limit the process to smaller cases and cap damage awards; other jurisdictions make the process available more broadly, but attorneys often agree to high-low parameters for the verdict.

This list illustrates the variation in program elements across the country. As a jurisdiction is designing an SSE program, it should balance the tailoring of the above variations to meet its specific needs with the benefits of uniformity and consistency. There is value in uniformity where program elements have continually been successful, and we encourage anyone implementing a program to look both at what works within their own jurisdictions already and the successful elements of existing SSE programs around the country.

The New York model provides a useful example. What began as a local Summary Jury Trial (SJT) program on a pilot basis has since expanded to all thirteen judicial districts in the state. The New York program was not expanded wholesale, but rather has been implemented with flexibility to allow the program to meet local needs. Nevertheless, there are rules and procedures that are consistent across the program, including

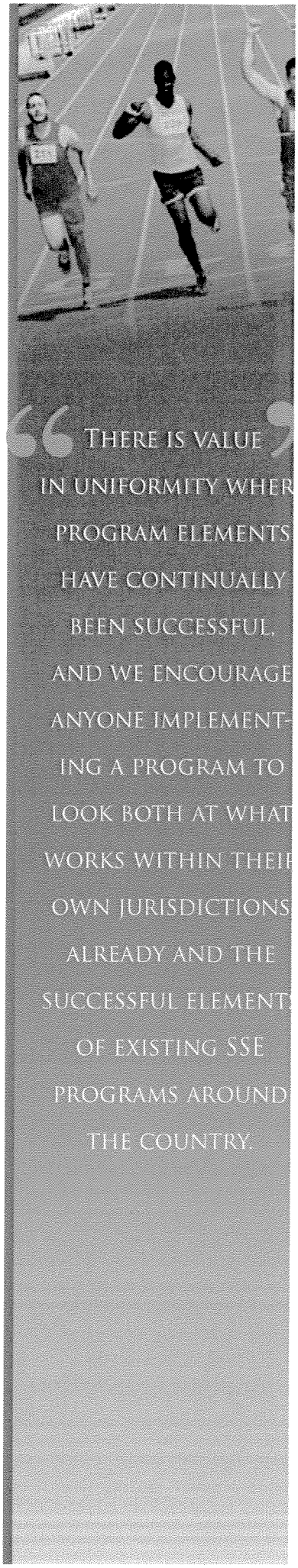
> (1) an evidentiary hearing before trial; (2) a statement determining whether the SJT is binding or nonbinding: (3) expedited jury selection with limited time for attorney voir dire; (4) opening statements limited to ten minutes; (5) case presentation limited to one hour; (6) modified rules of evidence, such as acceptance of affidavits and reports in lieu of expert testimony; and (7) presentation of trial notebooks provided to the jury, and closing statements limited to ten minutes.[6]

Judicial support of the program has been a hallmark since its inception, first under Justice Joseph Gerace's guidance, and today with the efforts of the program's statewide coordinator Justice Lucindo Suarez.[7]

In contrast, the South Carolina's Summary Jury Trial program is an attorney-controlled program that takes advantage of relatively abundant court resources such as courtrooms and jurors, while addressing the need for additional judicial resources by utilizing temporary judges.[8] Because jury trials are assigned to a rolling docket in South Carolina's circuit court such that the cases are on call for trial, everyone involved also benefits from a firm trial date. The South Carolina program has evolved to meet the needs of the legal community and stands as a testament to the importance of considering what resources a jurisdiction brings to the table, as well as those that may be in scarce supply, when designing a program.

The Implementation Process

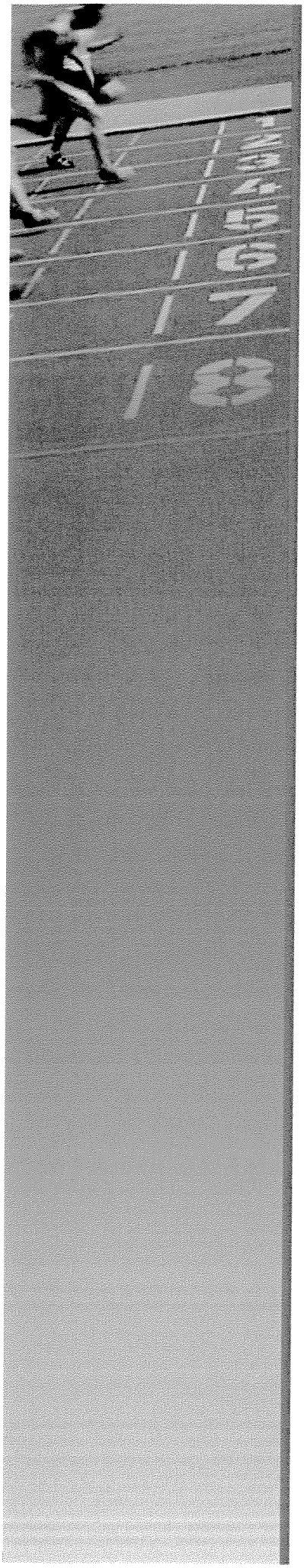
First and foremost, the program should be developed by the bench and bar—and perhaps community—in an individual jurisdiction, and it should be responsive



6 National Center for State Courts, *supra* note 2, at 35.

7 *See generally* Lucindo Suarez, *Summary Jury Trials: Coming Soon to a Courthouse Near You*, NYSBA Trial Law. Sec. Dig., Fall 2007.

8 See National Center for State Courts, *supra* note 2, at 12-25.



to the needs of that jurisdiction. There is no one-size-fits-all formula. Further, when the program is the result of local investment, it is much more likely to succeed. The first step, therefore, should be to identify the problems that the program is intended to address. The bench and the bar in a jurisdiction interested in building out an SSE program should identify a small group of individuals who can assess the problems of the jurisdiction and build the specifics of a program designed to address those problems. The group should then distribute their proposal broadly and invite input.

There must be broad judicial and administrative support for the program. It cannot just be one judge who champions it, but rather a full bench or court system. If one judge takes the lead, as is true with many other programs, when that judge rotates or leaves, the program falters. Similarly, there must be broad-based administrative support. Court staff must view the program as good for the system, and cooperate in making it work. The program should NOT be viewed as a second-class program designed for less important matters. Rather, it should be viewed as an expedited process, available to all litigants for any appropriate case.

Communications and training are essential. When the program is launched, there should be widespread communication. The program should be touted in terms of benefits that the system, the attorneys, jurors and—most importantly—litigants stand to gain. Judges, court staff, and attorneys all need training on the benefits and application of the program. Because of their length, SSE trials can also more easily be taped and used for education and promotion, for practicing attorneys and law students. In the Eighth Judicial District Court of Nevada, instruction has been an important tool in selling the program, in addition to educating participating attorneys about the process. Several short trials have been conducted at the William S. Boyd School of Law at the University of Nevada, Las Vegas, and observed by attorneys, law students, and faculty. If there is a failure in either communication or training, the program will remain dormant—few will use it. Investing in a central coordinator can be valuable in ensuring that the communication and training component has adequate planning and support.

Judges should make counsel and litigants aware of the program on a case-by-case basis, not just as an existing rule. The challenges that any jurisdiction will face are in building trust in the bench and the bar. Attorneys will inherently distrust the process because of concerns that it will limit their ability to discover and present information, and could limit their possible damages. The South Carolina model, where attorneys design every aspect of the process on a case-by-case basis, seems to enjoy greater attorney acceptance. On the other hand, it may also create an advantage for experienced, knowledgeable attorneys and a disadvantage for younger, inexperienced attorneys, which undermines one of the potential goals of the program.

As a related matter, attorneys may have malpractice concerns. For example, if they lose their case in an SSE process, will their client assert malpractice against them?

There are multiple ways to address this issue, such as in California where the client's signature is required to document informed consent. Addressing those concerns in advance would go a long way toward alleviating attorney reticence.

The most effective way to defuse distrust is through data and education. In the New York model, using data from other jurisdictions with such programs to convince attorneys of its utility is very powerful. Attorneys from those other jurisdictions are also generally very willing to share their experiences with other program users and offer advice.

Each jurisdiction should develop a system for keeping data about the program from the beginning, and should share that information with other jurisdictions around the country experimenting with similar programs. The jurisdiction should make a commitment to reexamine the program—perhaps every year for the first two or three years—to tailor and adapt it based upon the data. After at least two years of annual review, reexamination can be moved to every other or every third year.

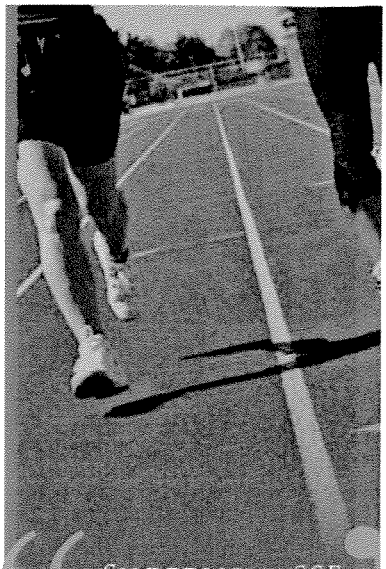
The Importance of Data

Historically, SSE programs were developed as a creative reframing of how to reach a resolution in a civil dispute, capitalizing on the inherent strengths of a jury as the fact-finder. Successful SSE programs today both enhance access to justice for litigants and remove numerous local or state-level barriers to trials. However, for these programs to be effective, they must document not only program operations, but also measure the program's performance through sound performance management.

Brian Ostrom and Roger Hanson of the NCSC have proposed a High Performance Framework as best practices for performance measurement and performance management. Within this Framework lies the concept of perspectives, which are "how the interest and positions of different individuals and groups involved in the legal process are affected by administrative practices."[9] The four perspectives include: 1) the customer perspective; 2) the internal operating perspective; 3) the innovation perspective; and 4) the social value perspective.

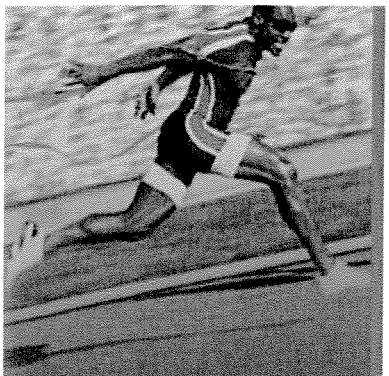
Applying these principles, SSE programs are encouraged to:

- Collect data to monitor performance on an ongoing basis so as to be responsive to fluctuations in performance over time;
- Conduct analyses of the program's performance to ensure compliance with program requirements;
- Supplement performance data for use in education and training programs for participants; and
- Communicate the program's results to its partners, policy makers, and the public to promote support and buy-in.



"Successful SSE programs today both enhance access to justice for litigants and remove numerous local or state-level barriers to trials.

9 Brian Ostrom & Roger Hanson, National Center for State Courts, Achieving High Performance: A Framework for Courts v-vi (April 2010).



"WHILE PROGRAMS ARE MOST SUCCESSFUL WHEN THEY ARE DESIGNED TO MEET THE PARTICULAR NEEDS OF JURISDICTIONS, SIMILARLY, THE MOST SUSTAINABLE PROGRAMS ARE THOSE THAT EVOLVE TO MEET CHANGING NEEDS."

Unfortunately, data collection and performance management, a key component of program development, are often left to the last minute or even overlooked completely. Of the six SSE programs examined in the NCSC monograph, for example, only the New York State and the Eighth Judicial District Court of Nevada programs have implemented rigorous data collection and reporting strategies.[10] Our Committee cannot overemphasize the importance of collecting data and assessing the program regularly. Only through the use of empirical data will any jurisdiction truly be able to determine what is working to correct the problems of cost, delay, and access to jury trials. Likewise, only through empirical data will jurisdictions be able to determine what efforts have failed to achieve their goals and to understand why. Innovation is extremely important—but not blind innovation.

Appendix D contains a detailed set of recommendations about how to design and execute an effective data collection program. Any committee charged with creating an SSE program should become familiar with the data collection requirements; and any court charged with implementing an SSE program should put the data collection process in place from the beginning.

Sustaining an SSE Program

Experience from existing programs around the country proves that sustaining an SSE program is just as important, and often just as challenging, as implementing one. The same requirements for creating a solid program—including leadership by the bench and bar, training, and publicizing the benefits and data—are essential for sustaining a program long term.

While programs are most successful when they are designed to meet the particular needs of jurisdictions, similarly, the most sustainable programs are those that evolve to meet changing needs. Where the needs and circumstances change, and the program does not keep pace, the program falters. For this reason, it is essential that these programs be revisited regularly to determine whether changes need to be made. Data collection plays a key role in monitoring the success of the program and providing support for needed changes.

Finally, it is also critical to create a broad base of judicial and administrative support. Where programs have been championed by a single judge or administrator who subsequently retires, the program has waned. While such a champion can be the key to a program's success in the first instance, jurisdictions must strive for underlying support and ensure that there is someone or some group to continue the charge.

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10 *See* National Center for State Courts, *supra* note 2, at 33-57.

Conclusion

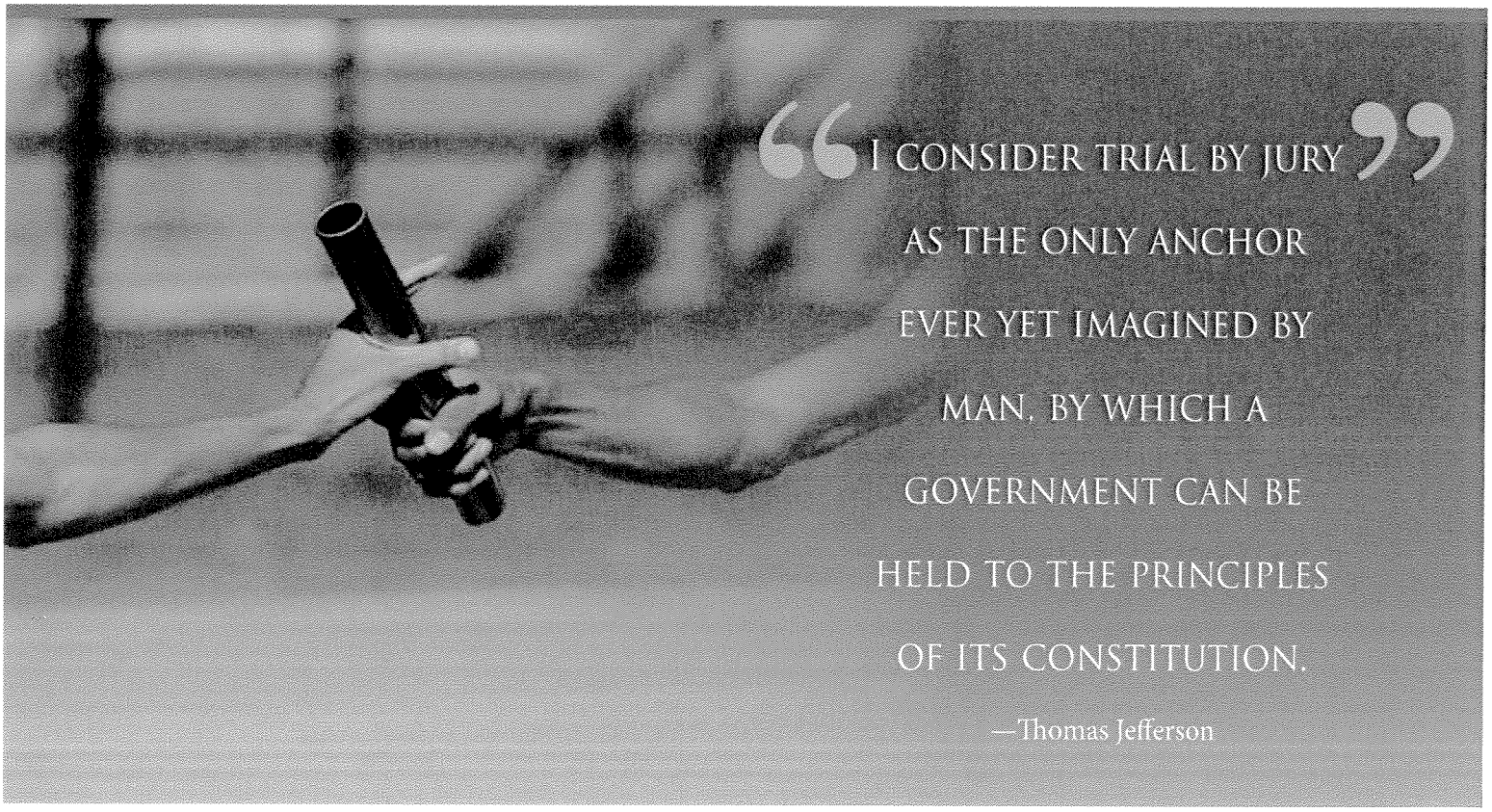
The general themes of this report have broad application across a variety of court reform efforts.

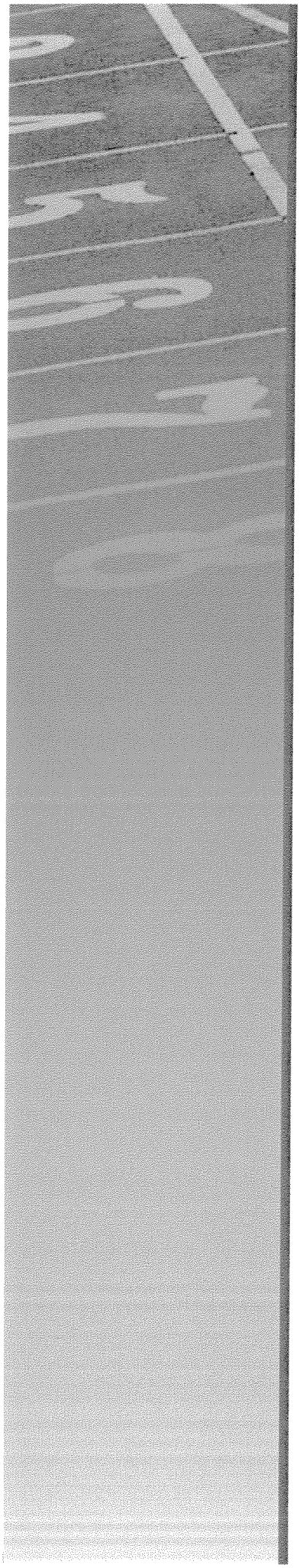
To succeed, court reform must have the following components:

- Initial and continuing judicial and court leadership;
- Buy-in from the bar;
- Responsiveness to real needs of the jurisdiction;
- Training available in advance and on an ongoing basis; and
- Data collection and assessment to ensure continuous improvement.

More specifically, jurisdictions interested in building or improving upon an SSE program can benefit from the experience of other jurisdictions as set out in this report.

Indeed, a just, speedy, and inexpensive resolution of every action is the goal, and SSE programs are one of the vehicles that may achieve that goal—both for an individual case, and perhaps, over time, in changing the culture of the legal system. The mere process of pulling together a group of judicial, bar and administrative leaders, identifying problems within a jurisdiction, coming up with proposed solutions for those problems, and experimenting with different procedures is, in and of itself, a step in the right direction.





APPENDIX A

SSE COMMITTEE MEMBERSHIP

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Statewide Coordinating Judge for Summary Jury Trials
Bronx County Supreme Court

Nicole L. Waters, Ph.D.
Principal Court Research Consultant
National Center for State Courts

Magistrate Judge Bernard Zimmerman
Northern District of California

APPENDIX B

SSE COMMITTEE CHARGE

The American Board of Trial Advocates, IAALS—the Institute for the Advancement of the American Legal System, and the National Center for State Courts wish to undertake a joint project. This Charge outlines the reasons for the project, the allocation of responsibilities, the goals, and the time line.

ABOTA, IAALS, and NCSC are all organizations that have, as part of their missions, a focus on access to the civil justice system in general and to jury trials in particular.

Certain jurisdictions have developed what have come to be called "Expedited" or "Summary" Jury Trial procedures that are designed to provide an alternative for certain types or sizes of cases. Some of the procedures have pretrial components; others relate exclusively to the shortened trial itself. In each instance, the intent is to increase access to the process.

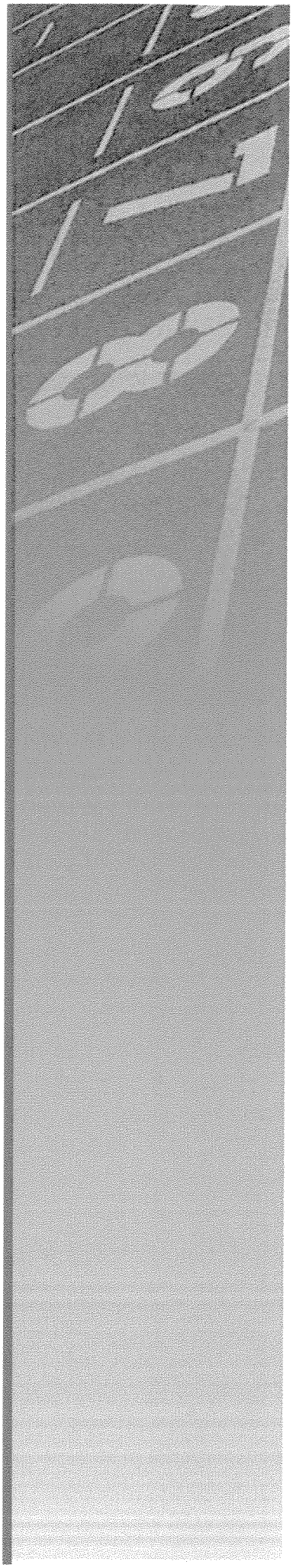
ABOTA, IAALS, and NCSC wish to compile information about the procedures and from that information develop a manual that can be distributed nationally to identify what emerge as best practices, both in developing and implementing a Short, Summary, and Expedited (SSE) procedure and in maximizing the effectiveness of such a procedure once implemented.

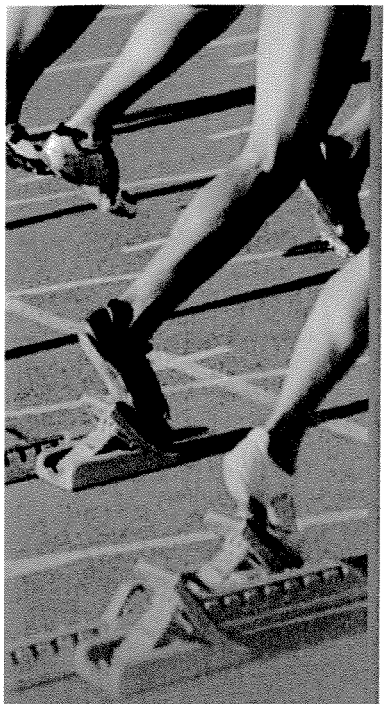
The joint project SSE Committee shall consist of two representatives from ABOTA, IAALS, and NCSC each and up to five additional members from around the country—judges, lawyers, researchers and academics who have experience with EJT procedures. The additional members shall be chosen by the six ABOTA, IAALS, and NCSC members.

The Committee shall convene at IAALS in Denver as soon as schedules permit. Each member of ABOTA, IAALS, or NCSC shall pay their own (or their organization shall pay) associated expenses.

IAALS shall staff the Committee, by compiling and distributing information in advance and taking the lead in drafting a manual/template/report (to be determined) that shall then be distributed among all members for comment. NCSC has already done the research about SSE procedures around the country. That information will be the starting place for the project.

The Committee shall make every possible effort to produce a product by the end of September of 2012. The product will bear the logos of all three organizations (unless one organization wishes to withdraw from the project at any time) and shall be available on all three websites.





APPENDIX C

BEST PRACTICES FOR CASE IDENTIFICATION, PREPARATION, AND PRESENTATION

Assuming that the process is completely optional, the choice falls to counsel to decide which cases might be amenable for resolution through an SSE process. It may well be true that once the attorneys and litigants are familiar with the process, the list of appropriate cases can begin to expand. In reality, it is not just the small case, the low-dollar case, or the simple case that can benefit from an expedited and streamlined process. Many cases can benefit from a process that costs less and that forces litigants, their attorneys, and the fact-finders to focus on the most important issues in the case.

But, in the first instance, the cases that are most likely to be appropriate for this process are:

- Cases with single or limited issues to be resolved;
- Cases where many facts can either be stipulated or determined by the uncontested admission of reports or documents;
- Cases where the likely value doesn't warrant the expense of live expert testimony or exhaustive trial;
- Cases where it is desirable to limit exposure or guarantee recovery (high-low agreements);
- Cases that can be resolved in one or two days of testimony and deliberations;
- Cases involving limited witness testimony;
- Time sensitive cases where the usual docket wait will be prejudicial to a party's ability to present its case;
- Cases where the parties desire a certain (or almost certain) trial commencement date;
- Cases in which the parties fully understand the benefits and risks of participating in the SSE program and have consented to those risks;
- Cases with insurance coverage limit concerns where a high-low agreement is desirable;
- Cases involving insurance coverage where the carrier has consented to be bound by the proceeding.

GUIDELINES FOR PREPARATION AND PRESENTATION

These guidelines have been developed for participants engaged in SSE programs. If properly organized and presented, the trier of fact, be it the court or a jury, will be able to understand complex case issues and evidence in a shortened trial setting. By participating in this program, the participants agree that they have chosen to be bound by statutory or contractual obligations in presenting their cases. This guide is intended to help participants better prepare, organize, and present their cases to accommodate this shortened trial format so that the judge or jury will be able to clearly understand the case in order to make their most informed decision.

Known Limitations:
Participants should thoroughly review the statutory or contractual language to understand the time limitations and evidentiary restrictions in presenting the case. As SSE trials are conducted in such a limited fashion, each moment is precious, including that of the judge and the jury. Participants should endeavor to be timely and respectful of all the time limits.

Cooperation:
SSE trials necessitate greater agreement and cooperation between the parties. This usually means revealing more information to opposing parties prior to trial than in a traditional trial. This in no way diminishes the ability of counsel to be a zealous advocate for their client. In fact, the ability to have greater knowledge about the scope of evidence and testimony that will be presented in these trials allows the attorneys to better plan their presentations and to concentrate on the meritorious issues in the case. By necessity, attorneys for both sides in an SSE trial must exchange exhibits, including any highlighting or additional emphasis, in advance of the trial. These trial formats are not conducive to gamesmanship. And while this does not demand that counsel reveal all of their strategies regarding the way they conduct the case, they must reveal the substantive nature of their evidence. Agreed-upon evidentiary booklets also facilitate cooperation, remove surprises, and help keep the trial short, summary, and efficient.

Pretrial Hearings:
An effective pretrial hearing is essential for achieving a short, summary, and expedited trial. Many jurisdictions with SSE programs include specific requirements for the pretrial hearings, as this hearing is essential for a streamlined and efficient trial. The court and the parties should utilize this hearing to address any questions and concerns regarding all aspects of the trial, and review parameters and expectations of the trial from voir dire to verdict. The court can make rulings on previously exchanged evidentiary submissions, proposed Pattern Jury Instruction charges, and proposed verdict sheet questions. Some of these matters may involve the increase and or redistribution of peremptory challenges where more than two attorneys appear on a case, the need for an interpreter, and physical disability issues with parties.

New Information:
In preparing the case presentations, SSE participants should remember that the jury is hearing evidence for the first time. They do not have the background or familiarity with the subject matter that the attorneys, experts, and parties have. In preparing the evidence, it is important for participants to constantly evaluate the information that must be conveyed so that the jury will understand the testimony or exhibit. A commonly asked question to discern needed information for the jury would be, "If you were listening to this for the first time, what would you need to know?" If there are issues of some complexity in the case that may require time to explain in order for the jury to have context or background for the evidence, the attorneys should consider whether they would wish to draft an agreed upon tutorial to be read by the judge in the case or a glossary of terms to familiarize jurors with acronyms or terminology. This should not only address potential confusion but also potential misconceptions the jury may have about the issues in the case.

Theme:
Jurors respond best to a narrative framework or story of the case. This story helps them to organize and understand the evidence. Every case has a central theme or organizing principle. This is usually a single phrase or sentence. One of the easiest ways to develop a theme is to fill in the phrase, "This case is about . . . ." While development of a theme is important in every case, it is even more so in SSE programs, where jurors need to quickly understand the case and render a verdict.

Three to Five Points:

Once counsel has developed the theme, it is best to identify the three to five main evidentiary points that support this central principle. While this does not preclude counsel from having a different number of points, three to five main points have been shown to provide a better organizing structure to ease the comprehension level of the jury. Moreover, this will assist attorneys in narrowing the focus of their presentation so as to fit within the constraints of an SSE trial. If possible, each of these main points should be stated in a single sentence, like a headline for a news article. These single sentence headlines help jurors to retain and organize the main issues in the case. These main points should be selected because counsel believes these issues will lead the jury to an appropriate verdict in the case. This is not to exclude other important points or evidentiary issues.

Other salient issues should be examined to see if they could fit into the categories of the main points. In determining these main points, the attorneys can ask themselves several questions:

1) Why is this one of the most important points in the case?
2) What do you want the jury to conclude from this point?
3) How does this point connect to the verdict you want the jury to render in the case?

Distinguish between what the jury needs to know about the case from what the attorneys want them to know. Remember to connect all of the dots in the narrative story of the case in order to avoid leaving the jury with unanswered questions. Although pretrial rulings or time constraints may not allow the attorneys to answer all of the jury's questions in the case, they should endeavor to answer the main questions the jury will have:

Who are the parties?
What happened?
What is the dispute?
What am I supposed to decide?

While it may not be essential to script out the entire presentation of the case, it is advisable to create a detailed outline in order to ensure that each side is able to present the optimal amount of essential evidence the attorneys feel is necessary to meaningfully represent their client's case. While there is a tendency in a standard trial to repeat information in the belief that this repetition will influence the jury, one of the most common complaints of jurors is their belief in the needless redundancy of testimony or issues.

Outline for the Case:

These three to five main points can become an outline for presenting the case and they help the attorney to organize the testimony and exhibits. And while it is understandable that attorneys would want to include as much as they can about what they have learned about the case, given the time constraints of an SSE trial, it is advantageous to keep the presentation focused on these main points.

Sequence:

Because of the shortened time in these trials, it is also advisable to put these main points in a prioritized, sequential order that makes the best sense for the case. In other words, one point should lead to the next point, which would lead to the next point. This sequence can be organized in chronological order of the events in the case that counsel wants to describe, but can also be organized by legal issues, main conclusions of expert witnesses, or other sequential ordering.

Scheduling:

Many attorneys are not used to the rigorous scheduling of an SSE trial. It is advisable, once the attorneys have agreed upon the schedule for voir dire, opening statements, and case presentations, that they consciously plan out and allocate the amount of time they need for each of their witnesses according to the priority of issues in their case. They should then confirm that the witnesses are available on the date and time of their scheduled testimony.

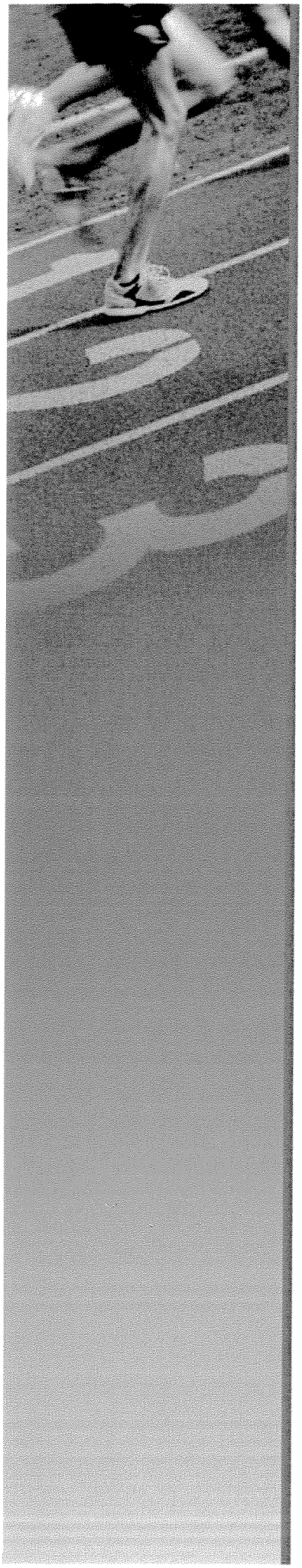
Witnesses:

SSE trials generally allow attorneys to present most of their case directly to the judge or jury. However, if the attorney is able or wishes to present witnesses, include only those witnesses that are most essential to the case. For this, attorneys can ask themselves which witnesses will reasonably illustrate the three to five main points outlined above. As the rules for laying foundation or qualifying experts may be relaxed in these trials, attorneys should try and focus the testimony on the most needed areas to illustrate the main issues in his or her case. In most cases, these witnesses will have prescribed or agreed upon time for their testimony.

To ensure conformance with the agreed upon testimony, in preparing both lay and expert witnesses, it is advisable to go over these few needed questions in advance. If there is agreement to have the witness testify by videoconferencing, make sure that the internet, phone or videoconferencing equipment is tested and working at the time of testimony. If there is an agreement to include recorded witness testimony, either from deposition or by mutual consent on direct and cross examination, attorneys should conform the testimony to the time limits and the agreed upon scope of the testimony, as well as the form of the testimony (recorded testimony only, recorded testimony with subtitles, recorded testimony with deposition transcript). The attorneys should decide whether the recorded testimony will be available for later review by the jury. To help focus the testimony of each witness, the attorney may ask himself or herself what they would ask the witness if they only had five questions. That way, they can prioritize the testimony of the witness into the most germane areas. Additionally, if attorneys will be presenting a witness' testimony (such as an expert's) themselves, either by reading deposition transcripts, or presenting the report of that witness, it is advisable to present the written testimony or exhibit on a document projector or electronically through an LCD projector as well as giving the jurors individual copies.

Exhibits:

Similarly, in preparing exhibits for the trial, the attorney should only include exhibits that illustrate the key points the attorneys are trying to make in their presentations or illuminate the witnesses' testimony. If there is agreement to include these in an exhibit notebook, it is important that these be clearly tabbed, marked, and limited to the information related to specific testimony. If additional exhibits are included in the document notebooks that have not been approved or have no relation to the testimony the jurors are hearing, it is counter-productive and can be misleading, causing more confusion for the jury. If the exhibit includes attorney highlighting, make sure these are pre-approved by opposing counsel before including these in the jurors' books. Pre-approval is important to ensure that there are not later disputes about the inclusion or argumentative nature of the exhibits.



Trial Presentation:
If any of the presentations and exhibits will be shown in a PowerPoint, Trial Director, or other trial presentation system, ensure that these presentations are approved by the judge and opposing counsel before trial. Additionally, it is essential that these presentation systems be tested before the trial day to ensure they are in working order. If the attorneys would like to use blowups, a flip chart, a white board, or a Smart Board for their presentations, it is advisable that they obtain agreement on their use and practice with this media prior to the actual trial. Attorneys should also strive to be consistent in how they highlight information on a document or a demonstrative exhibit to avoid juror confusion.

Juror Note-Taking and Questions:
Whenever possible, jurors should be encouraged to take notes to aid their case organization and comprehension. Although the time frame is extremely tight, if agreed, attorneys and their clients should consider allowing juror questions. This will hopefully highlight for counsel the information jurors need to better understand and make decisions in the case.

Practice:
After months or more of working on a case, there is a natural tendency when one is working from an outline to add in details from the extensive knowledge that the attorney has of the case. When this happens in an SSE trial, with the strict time constraints, attorneys may simply run out of time to present their case, perhaps even leaving essential evidence or important issues out of their presentation. One of the ways for attorneys to avoid this unfortunate situation is to practice in order to time their presentations precisely. Additionally, with practice sessions, the attorneys may hear arguments or issues that simply seem less important when they say them out loud. This also allows counsel to avoid unwanted confusion or argumentation.

Jury Instructions and Verdict Forms:
In a short, summary, and expedited trial, the jury instructions and verdict questions are decided in advance of the beginning of the trial. This should help counsel to focus their presentations, both in their openings statements and in their presentation of evidence. In submitting instructions to the court, it is advisable to focus on only the special instructions or key definitions that are the most salient to the case. If allowed, these relevant instructions and verdict questions should be introduced to jurors at the beginning of the case to allow them to become more familiar with these legal guidelines and the questions they will need to answer. Many of the pattern jury instructions do not need to be submitted to the judge. The parties and the judge should evaluate the necessary scope of the instructions, given the limited length of the trial and deliberations. In prioritizing the evidence, counsel can ask themselves which testimony and demonstrative evidence will best address the verdict questions the jury has to answer and the instructions they will have to follow. The particular wording of a pattern jury instruction charge should be stipulated to before the evidentiary hearing. If opposing counsel does not agree, the attorney should be prepared with a draft of the charge with possible case or statutory support, and the reasons for inclusion of the charge. If attorneys are allowed closing arguments, it is advisable to use the stipulated juror instructions and verdict form in the closing argument, while showing jurors the instructions and walking them through the form, illustrating how counsel feels the evidence supports particular conclusions.

Simplify:
After the attorneys have fully planned their trial presentations, it is prudent for them to re-examine them prior to the actual trial to test the presentations for comprehension. For this, they should examine whether they can state any of the evidence or issues in a simpler and more direct manner in order for the jurors to fully understand the case. It is important that they not only analyze this simplicity themselves but also discuss the case with laypeople to assure that the comprehension levels are appropriate for the jury.

Voir Dire:
The attorneys will have extremely limited voir dire in a short, summary, and expedited trial, if allowed at all. Thus, it is important to identify the central issues that may create a bias for potential jurors in the case. After these issues have been identified, counsel should write the three main questions that identify a bias, negative predisposition, or side preference that they would not want on the jury. In asking these questions of the panel, it is important to ask open-ended questions that require the jurors to speak about the experiences or attitudes that may affect their ability to be fair and impartial in the case. It is not a good use of the limited voir dire time to ask indoctrination or leading agreement or promise questions. If there are additional concerns, the attorneys may also submit these questions for the judge to ask the jurors with support as to why the particular questions address a bias. Counsel are advised to review the voir dire and jury selection rules in an SSE trial in order to better understand whether there is attorney-conducted voir dire, the length of time allotted for questioning, how cause and peremptory challenges are conducted, and how many jurors and alternates are seated, as well their seating order.

Avoid Excessive Argument:
In an SSE trial, jurors assimilate a large amount of information in a short period of time. Thus, they will respond better to a clear presentation of evidence than to a great deal of argument. If jurors hear too much argument before closing statements in the case when they have no context, they may minimize or discredit the evidence they do hear.

APPENDIX D

BEST PRACTICES FOR DATA COLLECTION

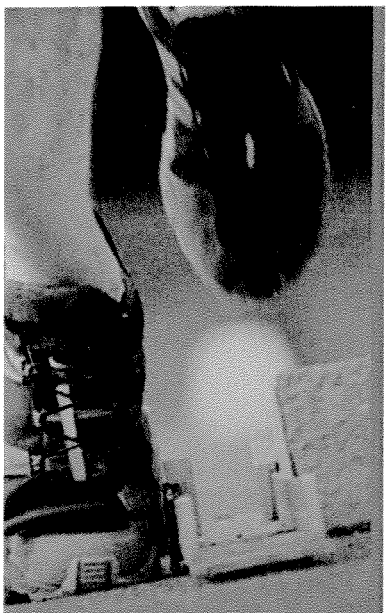
This section describes best practices for developing and implementing a data collection plan for your SSE program.

TYPES OF DATA COLLECTION

Court-based programs typically collect two different types of information about program performance: case-level data and participant feedback. Case-level data documents objective information about the trials that take place through the program, such as the number of trials, the types of cases, trial length, and trial outcomes. Ideally, information of this type should be collected by a single person with direct knowledge or involvement in the trial, such as the trial judge or courtroom staff. Participant feedback typically focuses on the individuals who participated in the trial or have a direct investment in the trial outcome—lawyers, litigants, and jurors—to document their perceptions about program effectiveness and fairness and to solicit recommendations for program improvement. Most participant feedback methods consist of questionnaires or focus groups.

FOCUS OF DATA COLLECTION

Some basic information should be collected about all SSE trials such as the case number, the case name, the type of case (e.g., automobile tort, premises liability, breach of contract, etc.), the trial start and end date(s), and the trial outcome. This type of basic information accomplishes three things: (1) it documents the actual volume of program activity; (2) it facilitates comparison of the SSE cases with non-SSE cases and with jury trials under similar SSE programs in other jurisdictions; and (3) provides empirical evidence of fairness by documenting plaintiff versus defendant win rates.



In addition to basic information, the program should document other aspects of the SSE program. In developing the data collection methods, the overriding philosophy should be to tailor the data collection efforts to program objectives. This approach will ensure that program developers and participants can point to solid, empirical information about program accomplishments. Table D-1 below illustrates some common objectives of SSE programs and applicable data elements to measure to assess performance.

Table D-1

IF THE PURPOSE OF THE PROGRAM IS TO ...	DATA COLLECTION SHOULD FOCUS ON ...
Bring cases to trial faster	Case filing date (or date case entered program)
Reduce trial costs	Trial length Amount and form of evidence introduced at trial: • Number of witnesses • Live witness/expert testimony vs. written reports
Provide a venue for younger, less experienced lawyers to gain trial experience	Attorney characteristics: • Number of years in practice • Law firm size Assessments of the program as an educational opportunity
Continue to attract participants (growth)	Names of the participating insurance carrier Insurance policy limits Existence and range of high-low agreements Identify other repeat players

The SSE programs in New York and the Eighth Judicial District Court of Nevada offer useful illustrations of how the program managers developed their respective data collection strategies to further program objectives. See State of New York Summary Jury Trial Data Collection Form (attached as Exhibit B) and Eight Judicial District Court of Nevada Sample Data Collection Form (attached as Exhibit C). Both programs identify the case name, case number, trial date, jury verdict, and the amount of damages awarded. Because the New York State program is statewide, the NY Data Collection Form also identifies the specific type and the location of the court in which the trial took place.

The Short Trial Program in the Eighth Judicial District Court of Nevada operates under the auspices of the ADR Office. Thus, much of the detail captured on the Short Trial Information Sheet was designed to provide the ADR Commissioner with a view of Short Trial performance compared to other ADR options, including the total number of cases proceeding on the arbitration and Short Trial tracks, the number of cases scheduled for Short Trial or arbitration, and the number of completed Short Trials or arbitration decisions entered. Because many of the Short Trial cases are appeals from mandatory arbitration, the Short Trial Information Sheet also collects detailed information about the amount of damages claimed by the plaintiff and the actual damages awarded by the jury for medical expense reimbursement, pain and suffering, and lost wages, which permits a detailed comparison between jury and arbitrator decision-making in the same case. Because the decision to include previous arbitration decisions in the materials provided to the jury was somewhat contentious, the Short Trial Juror Exit

Survey largely focused on the impact that knowledge about the arbitration decision had on the jury verdict. Both the Juror Exit Survey results and the comparison of arbitration decisions with jury verdicts demonstrated that the impact was negligible, putting to rest concerns that the practice interfered with the jury's independent judgment.

The NY Data Collection Form continues to evolve over time. In addition to basic identifying information, the current version was designed to measure the efficiencies introduced by Summary Jury Trials compared to non-Summary Jury Trial cases. For example, information about the anticipated trial length for a non-Summary Jury Trial (Question 8) provides a concrete measure for the number of trial days saved using the SSE procedures. Similarly, details about the amount of time allotted for the various segments of the summary jury trial provide benchmarks for the "normal" timeframe for conducting these trials. (The forthcoming version of the data collection form will eliminate many of these questions because they revealed almost no variation in these measures across case types or among judicial districts.) A unique feature of the NY Data Collection Form is the identification of the insurance carrier representing the defendant. This information serves as a barometer to both plaintiff and defendant's bars, as do the insurance policy limits and high-low agreement parameters, of the breadth of acceptance of Summary Jury Trials as a method of case resolution. Over time, this information has documented significant growth of participating carriers, with policy limits and high-low parameters trending higher.

Exhibit A provides a template of data elements that SSE program developers may consider when designing their own data collection instruments. Ideally, comparable information about non-SSE program trials should be routinely available or easily compiled from existing sources to provide baseline information.[11]

In developing case-level data collection forms or SSE participant surveys, it is often tempting to collect extremely detailed information about the cases and trials adjudicated. Program developers should keep in mind that, as the data collection process becomes lengthier and more detailed, it also becomes more time and labor-intensive and requires more resources to support. A useful technique to keep data collection objectives from eclipsing the broader objectives of the SSE program is to review each proposed data element or survey question with the following criteria in mind.

Is/Does the data element or survey question . . .
Essential documentation of basic program operations?
Clearly measure the performance of key program objectives?
Readily available from the case management system, case files, or trial participants?
Duplicate other data elements or survey questions?

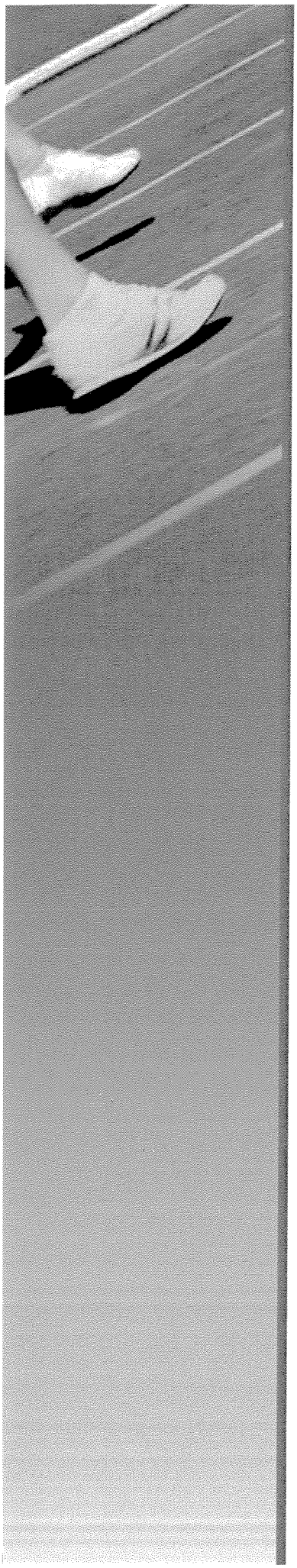
Process of Data Collection

An important part of the data collection strategy is ensuring that this task is undertaken by individuals with the appropriate skills, resources, and authority to do so.

Questions that SSE program developers should address are:

- Who is responsible for collecting the data, reviewing the data to ensure its completeness, and compiling the data for analysis?
- What authority does that individual or agency have to enforce compliance with data collection efforts?
- Is any of the information collected confidential? If so, who should have access to that information? What procedures should be implemented to ensure confidentiality?

11 For more information about effective program evaluation, see IAALS, A Roadmap for Reform: Measuring Innovation (2010).



- How frequently are the data compiled and analyzed? To whom and in what format are findings reported?
- Where are program reports and data archived?

Data collection should not be undertaken for its own sake, but rather to support program maintenance and sustainability. As such, it is important that program participants from whom or about whom information is collected understand the purpose of data collection and how the information will be used. Program developers should also consider the form of data collection. Electronic forms such as online surveys or fill-in PDF forms require more technological expertise to develop, but offer greater accuracy and legibility and are less labor-intensive to compile. In addition to streamlining the data collection process, involving individuals with technology expertise in the design process can facilitate the process of generating both routine and ad hoc reports.

Program developers should also have a plan to disseminate the findings from data collection efforts. In the Eighth Judicial District Court of Nevada, the ADR Commissioner provides reports detailing the number of cases that entered the Short Trial Program, were scheduled for trial, and were completed to the local court administration and to the Nevada Administrative Office the Courts. Because the Eighth Judicial District Court is largely funded by local taxpayers, the Short Trial Program reports are routinely shared with the local Board of Commissioners to show how the Short Trial Program helps the court use those resources more effectively. The statewide ADR reports, including Short Trial statistics, are provided to the Nevada Legislature as mandated by statute. Under the mandatory arbitration program, arbitrators are supposed to make decisions according to how a jury would decide the case. Thus, the arbitration versus Short Trial verdict comparisons provide valuable training for and feedback to the arbitrators assigned to those cases. In addition, those comparisons are also excellent tools for dispelling common myths circulating in the legal community about how juries evaluate and assign monetary values to different categories of damage awards.

In New York State, Justice Lucindo Suarez provides quarterly reports detailing the number of Summary Jury Trials held for each of the 13 judicial districts to the Chief Administrative Judge of the New York Judicial Branch and to each of the district administrative judges. He also sends copies of the reports to each of the judges who presided in a Summary Jury Trial during the preceding quarter and their judicial clerks who submitted the data collection forms. This approach provides further encouragement for the judges and clerks to submit their data and ensures that the reports accurately reflect the actual volume of Summary Jury Trials conducted in those courts. "The judges and clerks will always let me know if they think I've made a mistake by omitting any of their trials from the total counts," he explained. "I then make the corrections and resend the corrected reports with the subsequent quarterly reports." Justice Suarez also uses the data during training workshops with judges and lawyers across the state to illustrate details about these trials such as the amount of time typically allocated for various segments of the trial or the proportion of trials undertaken with high-low agreements.

EXHIBIT A

SAMPLE DATA COLLECTION FORM

Case name: _____ Case number: _____

Case type (check one):

☐ auto tort ☐ premises liability ☐ contract ☐ other (please specify) _____

Filing date: _____/_____/_____

Trial date(s): _____/_____/_____to _____/_____/_____

Insurance carrier: _____ ☐ Not applicable

Policy limits: _____ ☐ Not applicable

High/low agreement range: _____ to _____

Arbitration decision: _____ ☐ Not applicable

Damages claimed:

Medical expenses: $_____

Pain & suffering: $ _____

Lost wages: $ _____

Other damages: $ _____

Jury size (if variable): _____

Length of … (in minutes)

Voir dire: _____

Opening statements: _____

Plaintiff evidence: _____

Defendant evidence: _____

Closing arguments: _____

Jury deliberations: _____

Plaintiff evidence:

Number of fact witnesses: _____ Number testifying in person: _____

Number of expert witnesses: _____ Number testifying in person: _____

Defendant evidence:

Number of fact witnesses: _____ Number testifying in person: _____

Number of expert witnesses: _____ Number testifying in person: _____

Verdict:

☐ Plaintiff ☐ Defendant

Unanimous verdict:

☐ Yes ☐ No

Damages Awarded:

Medical expenses: $_____

Pain & suffering: $ _____

Lost wages: $ _____

Other damages: $ _____

EXHIBIT B

STATE OF NEW YORK
UNIFIED COURT SYSTEM

SUMMARY JURY TRIAL DATA COLLECTION FORM

UCS-413 (08/11)

Please mail, fax or scan this Data Collection Form for every Summary Jury Trial. Submit to Hon. Lucindo Suarez, Supreme Court - Bronx County, 851 Grand Concourse, Bronx, NY 10451; Fax: 718-537-5076. Attention Hon. Lucindo Suarez; Scan: lsuarez@courts.state.ny.us

1. **INDEX NUMBER:** _____ 2. **CASE NAME:** _____

3. **COUNTY:** _____ 4. **COURT:** ○ Supreme ○ NYC Civil Court ○ County ○ City/District

5. **CASE TYPE:** ○ Commercial ○ Tort ○ Motor Vehicle ○ Other: _____

6. **NUMBER OF ATTORNEYS:** Plaintiff(s) ☐ Defendant(s) ☐ 7. **INSURANCE CARRIER:** _____

8. **EXPECTED NUMBER OF JUDICIALLY DETERMINED TRIAL DAYS IF NO SJT:** ☐☐

9. **DATE OF SUMMARY JURY TRIAL:** ☐☐ / ☐☐ / ☐☐☐☐ **(month / day / year)**

10. **ISSUES:** ○ Liability only ○ Damages only ○ Liability and damages 11. **WAS SJT:** ○ Binding ○ Non-binding

12. **IF THERE WAS A HIGH/LOW AGREEMENT, PLEASE INDICATE:** $_____ High $_____ Low ○ None
12a. Carrier(s): _____ **12b. Policy Limit(s)** $_____

13. **DID THE CASE SETTLE?** ○ No ○ Yes **13a. When?** ○ Before SJT ○ During SJT ○ After SJT
13b. What was the settlement amount? ○ $_____ ○ Don't know ○ Not applicable

THE PROCEEDINGS

14. **WAS THE SUMMARY JURY TRIAL PRESIDED OVER BY A:** ○ Judge ○ JHO

15. **HOW MANY JURORS WERE ON THE PANEL CALLED FOR THE SUMMARY JURY TRIAL?** ☐☐ ○ Don't know

16. **HOW MUCH TIME (IN MINUTES) WAS ALLOTTED FOR VOIR DIRE?**

	Judge	○ 20	○ 30	○ 40	○ more than 40
	Plaintiff(s)	○ 5	○ 10	○ 15	○ more than 15
	Defendant(s)	○ 5	○ 10	○ 15	○ more than 15

17. **HOW MUCH TIME (IN MINUTES) WAS ALLOTTED FOR...**

... opening statements?	**Judge**	○ 20	○ 30	○ 40	○ more than 40
	Plaintiff(s)	○ 5	○ 10	○ 15	○ more than 15
	Defendant(s)	○ 5	○ 10	○ 15	○ more than 15
... case presentation?	**Plaintiff(s)**	○ 30 or less	○ 40	○ 50	○ 60 or more
	Defendant(s)	○ 30 or less	○ 40	○ 50	○ 60 or more
... closing statements?	**Judge**	○ 20	○ 30	○ 40	○ more than 40
	Plaintiff(s)	○ 5	○ 10	○ 15	○ more than 15
	Defendant(s)	○ 5	○ 10	○ 15	○ more than 15

18. **HOW MANY WITNESSES TESTIFIED (LIVE OR BY VIDEO) FOR THE...**

Plaintiff(s)	○ 0	○ 1	○ 2	○ more than 2
Defendant(s)	○ 0	○ 1	○ 2	○ more than 2

19. **HOW MANY EXPERT REPORTS WERE SUBMITTED FOR THE...**

Plaintiff(s)	○ 0	○ 1	○ 2	○ more than 2
Defendant(s)	○ 0	○ 1	○ 2	○ more than 2

20. **WAS ANY DOCUMENTARY OR DEMONSTRATIVE EVIDENCE GIVEN TO THE JURY?** ○ Yes ○ No

THE VERDICT

21. **FOR HOW LONG (IN MINUTES) DID THE JURY DELIBERATE?** ○ 30 or less ○ 40 ○ 50 ○ 60 or more

22. **VERDICT:** ○ Plaintiff ○ Defendant ○ Split ○ Hung

23. **DAMAGES AWARDED:** $_____ ○ Settled before deliberations

WHO COMPLETED THIS FORM?

NAME: _____

PHONE NUMBER: _____ **DATE:** _____

EXHIBIT C

QUESTIONS TO THE JURY ABOUT THE SHORT TRIAL PROGRAM

EIGHTH JUDICIAL DISTRICT COURT

PLEASE MAIL WITHIN 10 DAYS OF THE COMPLETION OF THE TRIAL TO:

ADR Commissioner
c/o ADR OFFICE
330 S. Third St.
Las Vegas, NV 89155
Fax...(702) 671-4484
ATTN: STP Jury Survey

1. How did you feel this morning when you were advised that you would be participating in the Short Trial Program ("STP")?

2. How did you feel when you learned that you would be a juror for just one day?

3. How do you feel about the fact that only four jurors were chosen?

4. [If applicable] Did the jury instruction regarding the fact that an arbitrator had previously heard this case and rendered an award have any impact on your verdict today?

5. [If applicable] If so, how (i.e., did it help or hinder you reaching a verdict)?

6. [If applicable] How do you feel about being given this information?

7. What did you think about the evidentiary booklet?

8. How did you feel when you were able to reach a (unanimous?) verdict?

9. What did you like most about the STP?

10. What did you like least about the STP?

11. If summoned, would you sit as a juror in the STP again?

12. If you could recommend any change(s) be made to the program, what would it/they be?

EXHIBIT C

SHORT TRIAL INFORMATION SHEET

1. Case Name: _____.

2. Case No.: _____ 3. Trial Date: _____.

4. **NAME of COUNSEL (@ TRIAL) for:** Plaintiff: _____.

   Defendant: _____.

   Other Party: _____.

5. **Nature** of Damages: (e.g., soft tissue, broken bones, contractual, etc.): _____

   _____.

6. Damage **Amounts** Claimed (e.g., medical expenses incurred, property damage amount, amount of lost wages, etc.):

   _____.

7. Testimony from **[please use NAMES of ALL witnesses]** Oral Written

   Plaintiff(s): _____ ☐ ☐

   Plaintiff's expert(s): _____ ☐ ☐

   Defendant(s): _____ ☐ ☐

   Defendant's expert(s): _____ ☐ ☐

   Other(s): _____ ☐ ☐

   Other's expert(s): _____ ☐ ☐

8. Verdict: Party Verdict Amounts (e.g., meds, P & S, LW)

   _____ _____

   _____ _____

9. Verdict Unanimous: Y / N. 10. Liability Admitted: Y / N.

11. Length of: Trial (EXCL. lunch): _____; Jury deliberation: _____.

12. Interesting Notes: _____

    _____.

PLEASE RETURN WITH FILE-STAMPED VERDICT FORM TO ADR OFFICE

IAALS INSTITUTE *for the* ADVANCEMENT *of the* AMERICAN LEGAL SYSTEM

UNIVERSITY of DENVER

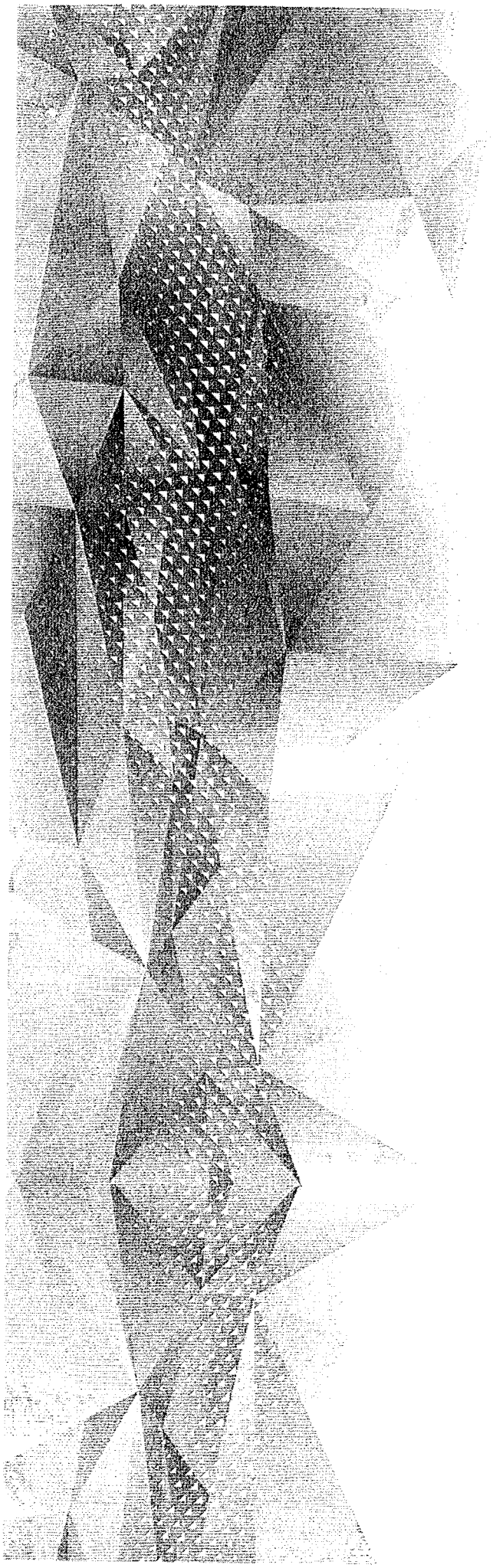
Institute for the Advancement of the American Legal System

University of Denver

John Moye Hall, 2060 South Gaylord Way

Denver, CO 80208

Phone: 303.871.6600 http://iaals.du.edu



SHORT, SUMMARY & EXPEDITED

THE EVOLUTION OF CIVIL JURY TRIALS

SHORT, SUMMARY & EXPEDITED

THE EVOLUTION OF CIVIL JURY TRIALS

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Table of Contents

Introduction

Since the early 20th century, American courts have struggled to design procedures to provide litigants with speedy, inexpensive, and fair resolutions to civil cases. Many of the court reform efforts of the 20th century focused on the inherent uncertainty that civil litigants face in personal and business affairs due to court delay, excessive litigation expenses, and procedural complexity. Simultaneously, courts struggled to manage rapidly expanding criminal, family, and juvenile caseloads. In 1934, the federal judiciary adopted rules of civil procedure to provide uniformity across the federal courts. Rule 1 defined the rules as intended "to secure the just, speedy, and inexpensive determination of every action and proceeding."[1] The vast majority of states followed suit by enacting state rules of civil procedure that often mirrored the federal rules verbatim. In subsequent decades, courts experimented with a variety of procedural and administrative reforms including simplified evidentiary requirements for small-claims cases, expanded discovery (including automatic disclosure of witnesses), differentiated caseload management, increased judicial case management, and alternative dispute resolution (ADR) programs.

One such reform—the summary jury trial—was developed in the early 1980s as a way for litigants to obtain an indication of how a jury would likely decide a case, providing a basis for subsequent settlement negotiations. Federal District Court Judge Thomas Lambros, sitting in the Northern District of Ohio, is credited with the original idea for the summary jury trial. In a 1984 article published in *Federal Rules Decisions*, he described his efforts in 1980 to resolve two personal injury cases using alternative dispute resolution techniques.[2] In spite of numerous attempts, the parties had refused to settle, believing that each could obtain a better outcome from a jury trial. It struck Judge Lambros that if the parties could preview what a jury would do, they would be more likely to settle.

The procedure that Judge Lambros developed was essentially an abbreviated, nonbinding jury trial before a six-person jury selected from a ten-person jury panel.[3] The parties were given up to one hour to present an oral summary of

[1] Fed. R. Civ. Proc. Rule 1.
[2] 103 F.R.D. 461 (1984).
[3] The voir dire process was similarly abbreviated. Jurors completed a brief written questionnaire, which eliminated the need to question jurors individually. The attorneys were each allocated two peremptory challenges.

their respective cases. Although the attorneys did not formally present evidence during the proceeding, all representations about the evidence had to be supported by discovery materials, such as depositions, stipulations, documents, and formal admissions that would otherwise be admissible at trial. Accordingly, Judge Lambros employed this technique only in cases for which discovery was complete and no dispositive motions were pending. The summary jury trial itself was private, and no formal record kept of the proceedings. In spite of this relative informality, Judge Lambros did require that all parties with settlement authority attend the proceeding. The parties were not required to accept the jury's verdict as a valid, binding decision, and could later opt for a full jury trial if desired. But some attorneys would stipulate that a consensus verdict would be deemed a final determination, permitting the court to enter a judgment on the merits.

Over the four-year period from 1980 to 1984, 88 cases were selected for summary jury trial in the Northern District of Ohio. More than half ultimately settled before the summary jury trial was held, and 92% of the remaining cases settled after the summary jury trial. Judge Lambros estimated that the procedure saved the court more than $73,000 in jury fees alone. The savings to litigants in reduced attorney fees and trial expenses would be considerably more.

In Judge Lambros's eyes, the summary jury trial was a form of ADR that explicitly incorporated the concept of trial by jury, but eliminated the risk of a binding decision and the expense associated with a lengthy jury trial. He justified the use of the summary jury trial under the authority of Rule 16 of the Rules of Civil Procedure, which states that "the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conference before trial for such purposes as (1) expediting the disposition of the action. . . and (5) facilitating the settlement of the case." But the success of the summary jury trial, according to Judge Lambros, depended on its procedural flexibility. He warned that the rules adopted by the Northern District of Ohio were not absolute rules to be followed in every case, much less in every court. He encouraged other state and federal courts to adapt the summary jury trial format to comport with local circumstances.

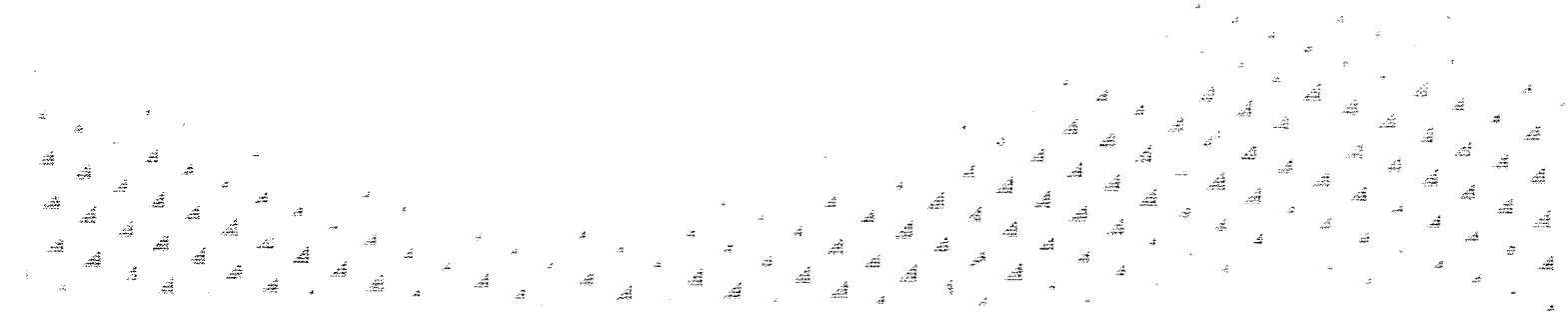
Over the next three decades, a number of courts across the country learned of Lambros's summary jury trial procedure or one of its procedural offspring and implemented some variation in their own jurisdictions in an effort to improve civil case management. Most of these programs share a few basic characteristics. For example, they are designed specifically for factually and legally straightforward cases involving lower-value damage awards. Because the facts and law are

relatively simple, these cases require less discovery and are trial-ready in a much shorter period of time compared to other civil cases. Moreover, the lack of factual complexity means that live expert testimony is usually not required to explain the nuances of the evidence to the jury. Assuming no serious disputes about evidentiary authenticity or foundation, the parties can stipulate to the admission of documentary evidence to support their respective positions at trial. The procedures developed to manage summary jury trial programs generally offer an earlier trial date, a truncated pretrial process, simplified trial procedures, or some combination thereof.

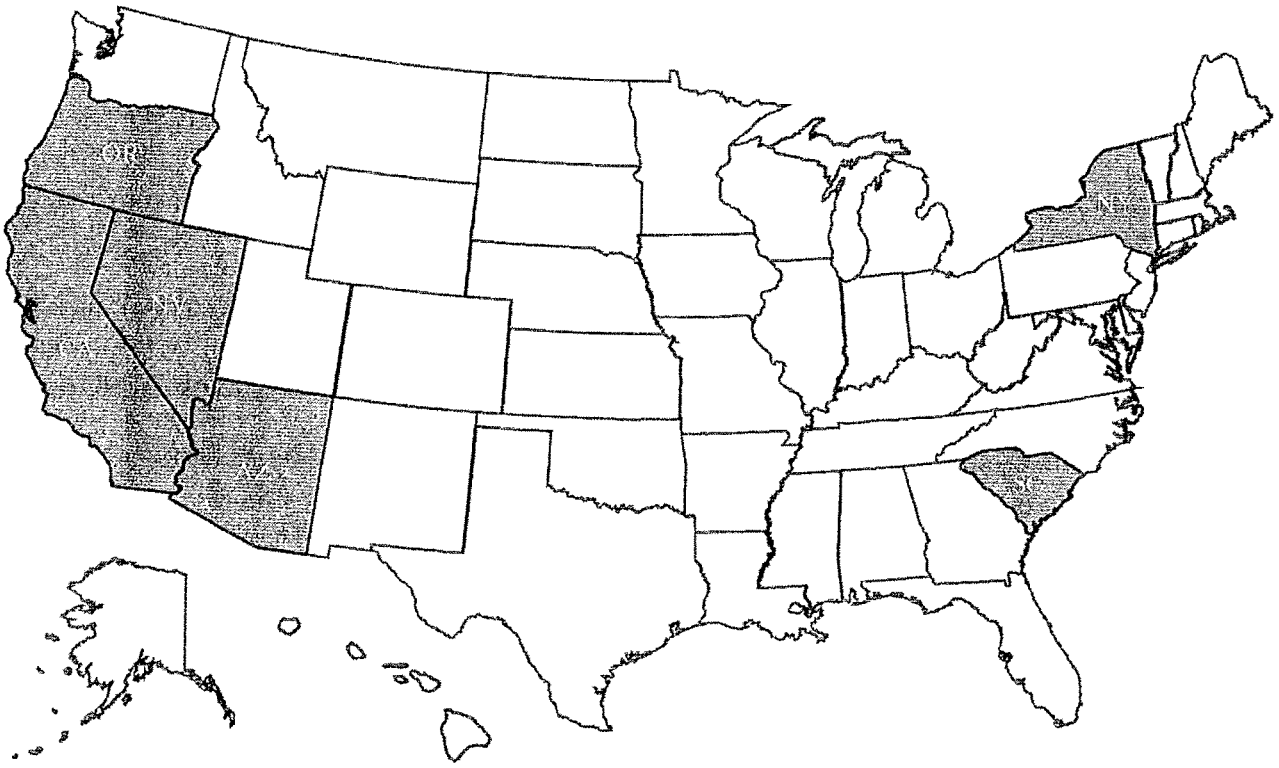
A close look at these courts, however, reveals that although the details of these programs may be superficially similar to Lambros's procedure, in many instances they were designed to address very different problems than the unreasonable litigant expectations identified by Judge Lambros. Some courts found that a modified summary jury trial procedure provided solutions to such myriad problems as trial-calendaring obstacles, disproportionately high litigation costs associated with jury trials (especially expert witness fees), dissatisfaction with mandatory ADR programs, and inconsistent pretrial management associated with the use of master calendars for civil cases.

These courts also introduced a variety of modifications to Lambros's basic procedure. For example, some courts view their program as one of several ADR tracks, while others view it as a legitimate jury trial. In some courts, a regularly appointed or elected trial judge presides over the summary jury trial; other rules authorize a magistrate, judge pro tempore, or even an experienced member of the local bar to supervise the proceeding. The size of the jury ranges from as few as four to as many as eight jurors. Some court rules expedite the trial date for cases assigned to the program, but the trial procedures themselves are identical to those employed for a regular civil jury trial. Other rules mandate an abbreviated trial, placing restrictions on the number of live witnesses or the form of expert evidence. Some programs result in a binding, enforceable verdict as compared to the advisory verdict rendered in Lambros's procedure. Finally, some programs permit the litigants to appeal an adverse verdict while others severely restrict the right to appeal. Even the name of the program differs from court to court: summary jury trial, short trial, expedited jury trial, etc.

This monograph examines the development, evolution, and operation of summary jury trial programs in six jurisdictions. In four of these jurisdictions—Charleston County, South Carolina; New York; Maricopa County, Arizona; and Clark County, Nevada—the programs have



States with Summary Jury Trial Programs Described in NCSC Case Studies

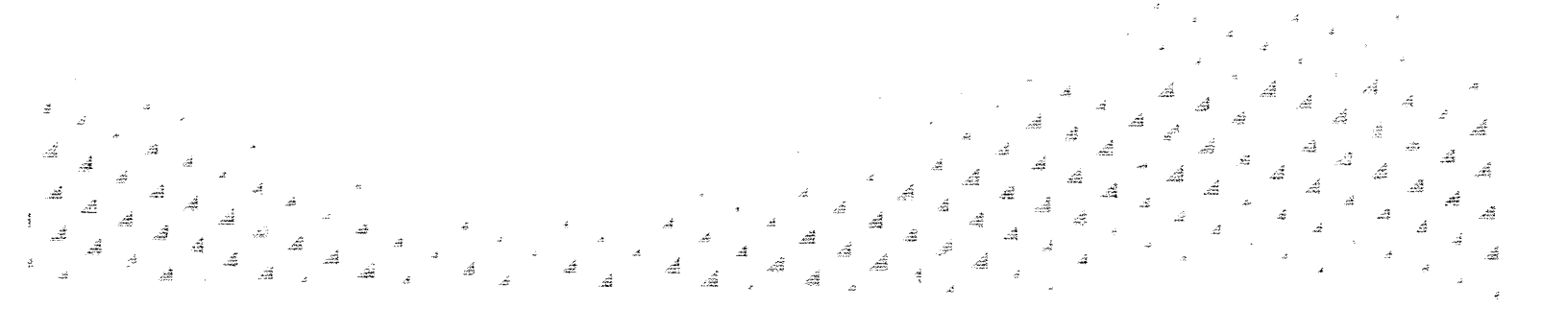


been in operation for a decade or more. These were chosen largely due to their longevity, which provides a solid track record for assessing their respective advantages and disadvantages. The programs in the remaining two jurisdictions (Multnomah County, Oregon, and California) have been implemented more recently. In addition to addressing perennial concerns about uncertainty, delay, and expense, these programs also focus on emerging concerns in civil case processing, such as ensuring access to the courts for lower-value cases and countering rapidly deteriorating attorney trial skills due to underuse in the contemporary civil justice system.

The respective programs are described as case studies based on interviews that NCSC project staff conducted with trial judges, attorneys, and court staff during a series of site visits in 2011. Where possible, the NCSC staff also observed one or more summary jury trials in those courts. Each case study describes the institutional and

procedural structure of the program and, if available, objective information about the number of cases assigned to these programs and their respective outcomes. Because these programs developed in response to different problems and with different institutional constraints, the case studies also include descriptions of those factors and the impact they have had on program operations. At the end of each case study is a brief section with references and resources that includes contact information for the program supervisors or liaisons; citations to authorizing statutes and court rules; and model motions, orders, and forms employed in those programs. The concluding chapter of the monograph discusses lessons to be learned from these six programs for courts that may be interested in developing similar programs.

Some explanation about the terminology employed in this monograph is in order. State courts often use different terms to describe the same thing. For example, all of the case studies in this monograph describe programs implemented in the trial courts of general jurisdiction in their respective states. Because they are general jurisdiction courts, they manage a variety of case types—criminal, civil, family, and sometimes probate and traffic. But the names of those courts differ from state to state. New York State refers to its general jurisdiction trial court as the "supreme court." Arizona and California call them "superior courts." Oregon and South Carolina call them "circuit courts," while Nevada has the "district court." Out of respect for the local culture in each of these sites, this monograph employs the local terminology in the case studies. Readers who superimpose their own institutional terminology may mistakenly understand these programs to be housed within limited jurisdiction courts, or perhaps even appellate courts. The use of local terminology applies as well to other potentially confusing references, including those for trial judges, court dockets and calendars, and court staff, including clerks of court, commissioners, and court administrators. To the extent that a site employs local terminology in a way that might be easily confused, the case studies include clarifying footnotes or parenthetical descriptions.



	South Carolina 9th Judicial Circuit Summary Jury Trial Program	Maricopa County (Arizona) Superior Court Short Trial Program	New York State Summary Jury Trial Program: Bronx County
PROGRAM HISTORY	Originated in Charleston County in the 1980s. First modeled on the federal summary jury trial procedure and designed to adjudicate uninsured motorist and small claims cases. Highest summary jury trial volume is in Charleston County, with limited use in Berkeley and Dorchester counties. Statewide expansion is currently under consideration.	Implemented in 1997 by Judge Stanley Kaufman in consultation with Civil Bench/ Bar Committee to address dissatisfaction with mandatory arbitration program for cases valued at less than $50,000.	Originated in Chautauqua County by Judge Gerace in 1998. The program spread to surrounding areas, then to Bronx and other New York City burroughs, and is now nearly statewide. The New York State Office of Court Administration appointed a statewide coordinator in 2006.
JURY	6-person jury is selected from a 10-person panel. Verdicts must be unanimous. Parties have 2 peremptory challenges each.	4-person jury is selected from a 10-person panel. Verdict requires 3/4 agreement. Parties have 3 peremptory challenges each.	6-to 8-person jury is selected from a 16-to-18-person jury panel. Verdict requires 5/6 agreement. Parties have 2 peremptories each.
JUDGE	Experienced trial lawyers, often with mediation training, serve as "special referees."	Judge pro tempore oversees trial only; cases remain on superior court judges' docket for all pretrial management including appointment of arbitrator and/or judge pro tempore.	2.5 dedicated judges assigned to summary jury trial docket. Judges facilitate and rule during trial, court attorney supervises pretrial and voir dire.
TRIAL PROCEDURES	No formal rules on procedures. Binding decision. Special referee meets with parties 7-10 days before trial to rule on evidence and arguments. Trial is not recorded, no appeal.	Parties have 2 hours each to present case; only 1 live witness testifies; all other evidence admitted as deposition summaries, documentary evidence in trial notebook. No appeal except for fraud.	Parties have 30 minutes for voir dire (court attorney oversees), judge 15-minute opening, charges on law 20 minutes, 10-minute openings, presentation in 1 hour (includes cross), 10 minute rebuttal; no more than 2 live/video witnesses, medical witnesses limited to reports; 10-to-15-minute closings. Primarily binding decisions (not in upstate), no appeal. Judgment not recorded.

Nevada 8th Judicial District (Clark County) Short Trial Program	Multnomah County, Oregon Expedited Civil Jury Trial Program	California Expedited Jury Trial Program
Implemented statewide in 2000 to address cost of litigation in lower-value cases, the length of time to bring cases to trial. Procedure established an alternative to mandatory arbitration or as trial de novo following appeal from arbitration. Non-arbitration cases can stipulate to short trial procedures.	Implemented statewide May 2010. Originated as a parallel effort by the Oregon ACTL and a Special Committee of the Multnomah County Circuit Court to address the implications of vanishing trials for legal practice. The Multnomah County Circuit Court was also concerned about problems associated with master calendar for civil cases. Multnomah County was first to implement the ECJT. The first trial was held in August 2010.	The Expedited Jury Trials Act, California Rules of Court and *Expedited Jury Trial Information Sheet* became effective January 2011. The procedure was developed by the Small Claims Working Group composed of members of the Judicial Council's Civil and Small Claims Advisory Committee.
4-person jury is selected from a 12-person panel. Verdict requires 3/4 agreement. Parties have 2 peremptory challenges each.	6-person jury. Verdict requires 5/6 agreement.	8-person jury, no alternates. Verdict requires 3/4 agreement. Parties have 3 peremptory challenges each.
Judge pro tempore oversees all pretrial management and trial activities.	ECJT trials are assigned to a circuit court judge for all pretrial management and trial proceedings.	Judicial officers assigned by presiding judge; may be temporary judge appointed by court, but not someone requested by the parties.
Parties have 15 minutes of voir dire; 3 hours each to present case; jury verdict is binding, enforceable judgment, but can be appealed to Nevada Supreme Court; short trial rules strongly encourage expert evidence by written report. Jurors given trial notebook with key documentary evidence.	All trial procedures same as for regular jury trials, although shorter voir dire due to reduced panel size. Parties are encouraged, but not required, to minimize live witness testimony. No time limits. No limits on appeal.	Parties and judge have 15 minutes voir dire; 3 hours each side for presentation of case (witnesses, evidence, arguments). Parties can agree to many modifications, e.g., evidentiary issues, timing of filing documents, fewer jurors needed for verdict, time for voir dire, allocation of time per side. Verdict is binding; very limited appeals or post-trial motions.

Charleston County's Summary Jury Trial Program: A Flexible Alternative to Resolve Disputes

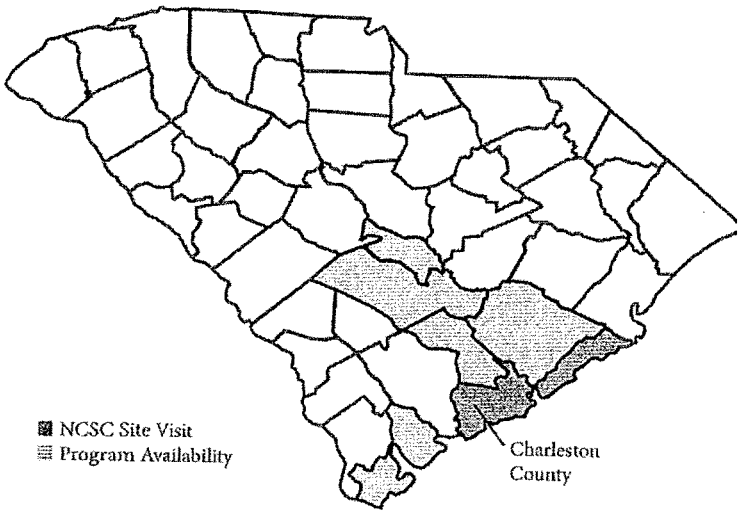
The summary jury trial (SJT)[4] is a creative compromise among the local civil bar, the judges of the Ninth Circuit, and the Clerk of Court to augment the supply of a scarce judicial resource (time) with knowledgeable local attorneys to serve as temporary judges in civil trials in exchange for the use of relatively abundant court resources (courtrooms and jurors) with which to try cases. Thus far, the SJT program has been remarkably successful in Charleston County, so much so that there are proposals to expand the SJT model statewide to more effectively use judicial resources and reduce existing backlogs. The challenge of expanding the program statewide depends on either replicating the same conditions seen in Charleston County in other jurisdictions or providing sufficient flexibility in the program's procedures to address each jurisdiction's unique conditions. This case study is based on interviews with judges, lawyers, the clerk of court, and South Carolina's Chief Justice Jean Hoefer Toal, along with observations of an SJT[5] conducted in August 2011 during a visit to Charleston County in the Ninth Judicial Circuit.[6] It describes the program's history and current operational procedures. It then discusses the proposal by the chief justice to expand the program statewide.

[4] There is some dispute about how best to refer to the program. Traditionally, the program was modeled after the federal "summary jury trial," and as such, the name has transferred. Proponents of the term "summary jury trial" argue that if the alternative term, "fast track jury trial" were used, litigants who opted for this program may believe that the case is set on a separate or *faster* track to reach a trial date, thereby conferring special treatment, which is not necessarily true. On the other hand, proponents of the term "fast track jury trial" are concerned that using the term "summary jury trial" may be confused with the limited jurisdiction magistrates court, referred to as "summary court." For the purposes of this publication, we will refer hereinafter to the program as the summary jury trial (SJT).

[5] The NCSC team observed a SJT that was recreated from a previously held SJT. The attorneys presented the actual case facts; stand-in actors presented the testimony of the actual witnesses. The attorneys and SJT judge reenacted the procedures as used in the original SJT.

[6] The description of the SJT is based on the experiences of Charleston County. Variations in local practice are noted where applicable, but the NCSC did not observe or interview anyone outside of Charleston County during its site visit.

South Carolina



Program History

The circuit court in Charleston County, South Carolina hears both criminal and civil cases. Civil disputes are heard by the civil branch of the Circuit Court, the Court of Common Pleas. Although there is no jurisdictional minimum for the court of common pleas, the limited jurisdiction court, the magistrates court, has a maximum limit of $7,500. The SJT is voluntary for civil litigants who file claims in the court of common pleas. While the SJT has been used for a wide range of cases, nearly half of those utilizing the SJT option are parties in motor vehicle disputes. Motor vehicle trials comprise nearly half of the court's civil jury trials; in the last five years the percentage of automobile jury trials in the Court of Common Pleas ranged from a low of 43% in 2009 to a high of 63% in 2008.

The SJT was first used in Charleston County by attorneys and judges who had exposure to this practice in the federal courts. SJTs have been held primarily in the Ninth Circuit (Charleston and Berkeley counties), with some limited use in the First Circuit (Dorchester, Orangeburg, and Calhoun counties). It is undocumented as to when the first trial was held (~mid-1980s), but the trials were originally nonbinding, as modeled after the federal court program.

The federal model, used as a basis for the summary jury trial in Charleston County, was defined by four key features: (1) trials are short, (2) relaxed rules of evidence apply, (3) litigants avoid costly expert witness fees with fewer live witnesses testifying, and (4) the verdict is nonbinding. The federal model was largely an adaptation used by federal courts in South Carolina based on Judge Lambros's program. It was used as a mandatory case management technique, requiring parties to submit to compulsory SJTs before trying a case to a jury.[7] The current program, as used in the Court of Common Pleas in Charleston County, diverges from the federal model in two ways: (1) it is an attorney-controlled program in which entry into the program is by mutual consent, and (2) the verdict is now binding rather than an advisory opinion on which to base subsequent settlement negotiations.

[7] Lucille M. Ponte, *Putting Mandatory Summary Jury Trial Back on the Docket: Recommendations on the Exercise of Judicial Authority*, 63 Fordham L. Rev. at 1085 (1995).

The original adaptation of the federal model into the Ninth Circuit Court occurred in a very informal manner. Several mock jury trials were held in which attorneys paid the jurors directly for their time. Verdicts were originally treated as an advisory decision. However, as the use of this technique evolved and gathered traction among the local bar, the clerk of court and Judge Vick Rawl advocated for and secured the use of *binding* summary jury verdicts, particularly if the trials used court facilities, but also as a way to clear the court's calendar, allowing circuit court judges to hear other cases. As Chief Justice Toal puts it, "it is a big safety valve for backlog issues." Moreover, it is a compelling argument to convince attorneys who saw the federal model as an ineffective use of resources only to arrive at an advisory decision that this was a viable option for resolving disputes.

Judge Rawl and Judge Daniel Pieper, along with the clerk of court, Julie Armstrong, and members of the bar, such as Sam Clawson, Paul Gibson, and Matt Story, all had a hand in shaping the procedures for the Ninth Circuit's program. Judge Pieper was the primary judicial force behind the SJT and facilitated its development. The clerk of court and Judge Pieper held a bench and bar meeting to acquaint the bar with the SJT, present it as a viable and inexpensive option to resolve cases, and actively solicit any concerns or questions they may have.

SJT Procedures

In Charleston, the SJT is primarily an attorney-controlled program that encourages the resolution of legal issues. The SJT program operates about midway along a continuum from mediation and arbitration on one end to the traditional jury trial on the other. While some other programs described in this monograph underwent development formally by a stakeholder-planning group, this program developed more organically; it was not specifically designed to address any one problem. Instead, the SJT has evolved, primarily by members of the local bar, as a means to work around unsatisfactory options along the dispute resolution continuum.

Traditional arbitration has a reputation among some lawyers as enforcing too much rigidity and resulting in unsatisfactory awards. As support for that opinion, court data indicate that approximately 90 percent of all cases diverted to ADR return to the court docket. According to members of the bar, arbitrators will often try to please both parties, rendering a decision that is unfavorable to both.

On the other hand, jury trials in South Carolina's circuit court are assigned to a rolling docket. Rule 40 of the South Carolina Rules of Civil Procedure dictate that when a case is placed on the jury trial roster, it can be called for

trial after 30 days. Depending on the number of judges sitting during the term of court (~20 cases assigned per judge per court term), the case is subject to be called at anytime during the assigned term (typically a one-week period). However, all other cases that appear on the jury trial roster, not necessarily restricted to those assigned that week, are also subject to be called with only a 24-hour notice. The certainty of knowing the trial date is, therefore, subject to whether other cases scheduled for that week's term of court settle or file for a continuance. This presents a challenge to attorneys who must, on short notice, manage client and witness schedules. The SJT affords attorneys a clear benefit—a date certain for trial.

All SJTs are held before a special referee, who is jointly selected and hired by the attorneys in the case; the parties usually split the fee of approximately $1,000 equally. Pursuant to §14-11-60 and South Carolina Rules of Civil Procedure 39 (see Contacts and References: Charleston County Summary Jury Trial), the parties agree to try the case through an SJT before a special referee, hereinafter referred to as the "SJT judge." The presiding circuit court judge, upon agreement by the parties, may in any case appoint an SJT judge who has all the powers of a master-in-equity and thereby has authority to rule in the case as if he or she were a sitting circuit court judge. Typically, the SJT judges are practicing attorneys, well-respected among the members of the local bar, certified in mediation, and have an active legal practice in the community. To communicate their role to the jurors at trial, some SJT judges ceremoniously put on the judge's robe in the presence of the jurors as they explain their responsibilities in presiding over the trial before them.

The SJT affords the parties a much-welcomed method of pretrial management that is largely absent in non-SJT cases. Seven to ten days before the trial date, the attorneys meet with the SJT judge to agree on the expectations for the trial. At this planning session, the parties also discuss any evidentiary rulings that are at issue and agree to the charges that will be given to the jurors, minimizing surprises at trial. The South Carolina civil trial docket management otherwise rarely affords this opportunity.

One substantial benefit of hosting SJTs in Charleston is the availability of courtrooms, primarily as a result of a new courthouse constructed following Hurricane Hugo, which hit South Carolina in 1989. SJTs are held in a regular courtroom of the circuit court. The attorneys in the case coordinate with the SJT judge to select a date, contact the court, and request the use of a courtroom. Once this occurs, the case is officially removed from the court's jury trial docket.

Jurors who serve on an SJT are selected by a circuit court judge from the same pool as all civil juries. On Mondays, six jurors are selected from a ten-member panel, with two peremptory

challenges allowed per party. In South Carolina, the procedure for all jury trials is to use a bifurcated jury selection process. A circuit court judge conducts voir dire for all trials scheduled for the week. The case is then assigned to another circuit court judge who presides over the trial. This process, as applied to the SJT, allows attorneys in the case to propose voir dire questions to the circuit court judge assigned to oversee jury selection. The circuit court judge usually completes jury selection in approximately ten minutes per case. Once jurors are selected, they are briefed on their responsibilities and directed to report to the assigned courtroom for the SJT.

Jury service is for one week or the length of a trial. As such, jurors who serve on an SJT are afforded a comparatively short length of service. After completing jury service, jurors receive an exemption from further jury service for three years. Jurors are compensated at $10 a day, along with reimbursement for mileage.

Trials are held in courtrooms, and are open to the public.[8] Typically, trials last no more than one day, occasionally continuing on to a second day. The day begins at 9:00 AM with a break for lunch around 12:30. The case is usually submitted to the jury by 2:30 or 3:00 PM. On average, jury deliberations last two hours. Trials are not scheduled for Fridays to avoid the potential for a weekend interruption.

SJTs offer attorneys greater flexibility in the presentation of evidence, which translates into potential costs savings. There are no specific time limits enforced on the parties, but the attorneys generally agree to a condensed presentation of evidence. Part of the condensed evidence includes the use of video testimony or depositions, when needed, which drastically reduces the cost of experts; expert witnesses for SJTs typically do not testify live in court. The parties routinely agree to exceptions to the South Carolina Rules of Evidence that are specified in a Consent Order that the parties submit to a sitting circuit court judge. With the exception of these agreed-upon changes stated in the Consent Order, the SJT judge will conduct the trial in accordance with the South Carolina Rules of Evidence. However, no clerk or reporter is present as there is no formal record of the proceedings and no appeal.

While the unanimous six-person jury decision is binding on the parties, the court does not have the power to enforce the judgment. During interviews with the participants, however, no circumstances arose in which enforcement was at issue. A copy of the verdict may be placed in the case file, but there is no requirement or formal judgment entered into the case management system.[9] Currently, the clerk's office in Charleston County manually tracks all SJTs.

[8] Steven Croley, *Summary Jury Trials in Charleston County, South Carolina*, Loy. L.A. L. Rev. at 1618-19 (2008). Croley reported observations to the contrary. Interviews and observations by NCSC revealed that this is incorrect or, at minimum, is no longer private as described by Croley.

[9] An exception was noted by interviewees that Berkeley County records the verdict as a judgment that must be satisfied.

Jurors are not afforded the opportunity to take notes during the trial. In fact, jurors are specifically asked *not* to take notes. Despite widespread acceptance of this practice (over two-thirds of both state and federal courts permit notetaking)[10] the need in a shortened, summary trial may be less consequential as compared to the need in a lengthier jury trial. Moreover, the summarized materials are provided to the jurors for purposes of deliberation, and jurors are permitted to ask questions, in writing, through the bailiff during deliberations.

As stated previously, most SJTs are simple automobile torts. Although the program is designed for a wide range of disputes, some Charleston attorneys believe SJTs are best suited for motor vehicle claims or cases in which liability is not at issue. Yet others advocate that the SJT has been successfully used in more complex cases; in one case, the reported damage award was $600,000.

Program Benefits

The consensus opinion in Charleston among its users is that the SJT benefits all; as one attorney said, "Both sides win in this process—quicker, cheaper, and with certainty." The benefits extend to the litigants, the attorneys, the court, and even the jurors. The SJT judges and attorneys interviewed in Charleston agreed that the only one who loses with a SJT is possibly the expert, who is not afforded a witness fee to appear in court.

From the litigant's perspective, the parties are given their "day in court" without the costs associated with a full trial. This method affords the parties a chance to tell their story to a jury that decides the case. Another benefit to litigants is the possibility of receiving payment more expeditiously. Virtually all parties enter into a high/low agreement when opting for an SJT. While the low can vary depending on the negotiated agreement between the parties, the high is typically the insurance policy limit. As an incentive for the plaintiff to agree to the high/low, the plaintiff may be able to secure a disbursement of the agreed low figure upon entering into the agreement.

By far the most compelling benefit of the SJT from the attorneys' perspective is the trial date certainty. Charleston attorneys, considering the unpredictability inherent in the rolling docket system, applaud the benefits enjoyed by having a trial date scheduled with certainty. Logistically, this facilitates the attorneys' ability to predictably schedule witnesses and clients. Attorneys also suggest that having the option of a SJT, similar to the litigant's benefit of having their day in court, allows efforts during discovery to be meaningful, as attorneys are able to make use of what was gathered in deposition. Additionally, attorneys praise the SJT as an opportunity for younger

[10] Hon. Gregory E. Mize, Paula Hannaford-Agor, and Nicole L. Waters, The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report 32 (2007).

attorneys to gain trial experience. The decline in trial rates nationwide has contributed to a lack of trial experience by new attorneys. Overall, the SJT provides attorneys with yet another mechanism to move difficult cases (or difficult clients, who may have reached an impasse in settlement negotiations) along.

Similarly, the court is encouraged by the program's ability to procure progression toward resolution in difficult cases. When parties opt for an SJT, this frees circuit court judges to try other cases and maximizes the use of judicial resources. Ultimately, the court is able to redistribute resources where there is the greatest need. It maximizes judicial resources and reduces backlog. For example, jurors and courtrooms are an available resource, judge time is more limited. When civil cases are diverted to a SJT, judges can shift their time and attention to other issues, such as the criminal case backlog. This bolsters the court's capacity to resolve disputes and serve the public.

Jurors also share in the program's benefits. Juror exit interviews suggest that SJT jurors feel the process is smoother and attorneys are better prepared. A common complaint of jurors nationwide is that their time is not respected. As anecdotal testament to improved juror satisfaction with SJTs, one juror approached an SJT judge at a local establishment and shared his unique perspective after having served on both a regular jury trial and an SJT. This juror interpreted the lack of objections, interruptions in the presentation of evidence, and the minimal sidebars in the SJT as admirable preparation by the attorneys and enhanced organizational skills by the SJT judge.

Challenges of Statewide Expansion

Undoubtedly as a result of the previously described benefits, the SJT has caught the attention of Chief Justice Toal, who plans to promote the program as a feasible dispute resolution alternative statewide. She is currently reviewing requests submitted to the South Carolina Supreme Court to expand the program to Horry and Beaufort counties.

The SJT, while it serves a clear benefit to those who choose it as well as to the court and the jurors, has several challenges to be a viable statewide option for resolving civil disputes in South Carolina. The court will need to consider attorney comfort with use of relaxed rules of evidence, the level of attorney preparation necessary to accommodate summary presentation of evidence, the availability of additional resources in the case of program expansion, and necessary efforts to market the program, all with an earnest consideration of the local culture, including specific jurisdictional needs.

SJT attorneys admit that while the day of trial is relatively smooth and efficient, an SJT can require as much, if not more, preparation than a traditional jury trial. A key benefit of the program is its flexibility. However, that advantage may also work to its detriment, in the perspective of some attorneys, as it requires experience to understand how best to negotiate relaxed use of the evidentiary rules. In effect, there is less predictability for newer, less experienced attorneys.

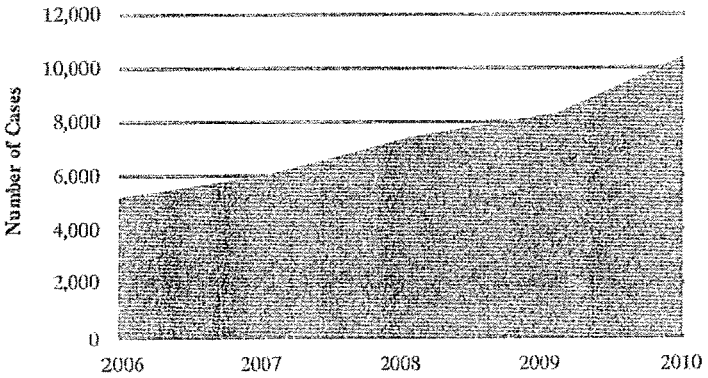
While South Carolina boasts of very short voir dire times, the timing as to when the jury is selected varies by preference of the judge assigned for that term. Some judges will select the SJT panel first; others will exhaust the selection of all of the common pleas panels before the SJT panel is selected, which requires the SJT attorneys to be present and prepared to begin the SJT, though generally no later than midday, depending on the selection judge's practices. Either way, other courts will have to consider how best to implement jury selection practices for SJTs.

While Charleston is blessed with available courtrooms, other courthouses around the state will have to consider the availability of courtrooms or other suitable facilities in which to conduct the trial. The availability of human resources, both jurors and court personnel, is another consideration. For example, in Charleston County, the courtrooms access secure areas for circuit court judges that require a deputy marshal to be present when courtrooms are in use. As a result, use of courthouse facilities may also require staffing of specific court personnel.

In considering statewide expansion, Chief Justice Toal, and the South Carolina Supreme Court, may adopt a rule for mandatory arbitration and provide the SJT as an opt-out alternative. The Chief described it as "a carrot and stick approach." Without adding additional judgeships, attorneys from across the state must be trained in the necessary procedures to facilitate the program's expansion. In October of 2011, the Supreme Court passed a rule that requires all attorneys to be listed in a statewide database. This database will enable statewide coordination, through the administrative office of the courts, to maintain a roster of potential SJT judges.

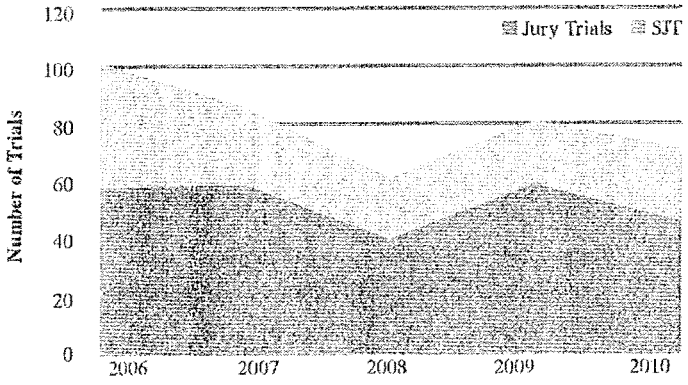
The case management system does not currently provide a disposition code for tracking SJTs. Thus, statewide coordination would necessitate a data collection system using this code so that the clerks of court can manage and predict trends in the use of SJTs. Staff from the Charleston County Clerk of Court's office agreed data tracking was needed; they graciously shared data collected manually that tracks the number of civil trials (both SJTs and circuit court jury trials) held in Charleston County in the past five years. These data reveal a slight downward trend in the number of SJTs, despite an upward trend in civil filings generally (see Figures 1 and 2).

Figure 1. New Civil Cases Filed in Charleston County



It is noteworthy, however, that SJTs amount to nearly half of the total number of civil jury trials in 2006 and approximately one-quarter in 2007 through 2010. These data demonstrate that the SJT is a significant tool in resolving disputes.

Figure 2. Civil Jury Trials Held in Charleston County



An expansion of the program to other courts across South Carolina will require a concerted marketing effort. For one, Chief Justice Toal indicated the need for someone to serve as a statewide coordinator, overseeing the program. Moreover, a marketing effort requires that the plaintiff and defense bars both embrace the SJT. Repeat defendants, such as insurance carriers, as well as the plaintiff's bar, will need to believe that the program offers a fair process – one that is not perceived as advantageous to one side or the other. In the recent past, Charleston attorneys traveled out of state to speak about the Charleston SJT. Their presentation to a mixed group of attorneys was initially met with resistance. Yet, when the audience heard about the program from an attorney who has tried cases before a summary jury (i.e., a plaintiff's attorney speaking to the plaintiff's bar and a defense attorney speaking directly to the defense bar) the message was more readily received and the SJT was seen as a legitimate method of resolving a case.

Attorneys who actively use the program in Charleston County suggest that replicating Charleston's SJT model elsewhere without institutional credibility will not be fully embraced by members of the bar in other communities. Certainly, garnering the support of state leadership, such as the chief justice, the administrative office of the courts, and the clerks of court, is not only advisable, but necessary. Yet even with support of state-level leadership, the implementation in each circuit must be thoughtful with respect to the *local* legal culture and case-processing needs of the jurisdiction.

It is incumbent upon a jurisdiction adopting the SJT to plan for flexibility with which to tailor the program to address the needs and challenges of that particular jurisdiction. Wholesale adoption of the procedures without strategic planning runs the risk of *introducing* pitfalls and challenges where previously none existed.

Contacts and References: Charleston County Summary Jury Trial Program

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Relevant Statutes/Rules

S.C. Code Ann. §14-11-60 (La. Co-op. 1976): In case of a vacancy in the office of master-in-equity from interest or any other reason for which cause can be shown the presiding circuit court judge, upon agreement of the parties, may appoint a special referee in any case who as to the case has all of the powers of a master-in-equity. The special referee must be compensated by the parties involved in the action.

Per consent order appointing special summary jury trial judge per S.C. Code Ann. §14-11-60 and by South Carolina Rule of Civil Procedure 39 gives permission to the parties to try a case in a jury trial before a special referee.

STATE OF SOUTH CAROLINA)) COUNTY OF CHARLESTON)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT C/A:
Plaintiff, vs Defendant.	**CONSENT ORDER APPOINTING A SPECIAL SUMMARY JURY TRIAL JUDGE**

WHEREAS, counsel has agreed to allow _____ to serve as a special master in the Summary Jury Trial proceedings; and

ORDERED, ADJUDGED AND DECREED that_____ is to serve as a special master for the purpose of the binding Summary Jury Trial and he shall have the authority to rule on all matters with regard to procedures and evidence as if he/she was a sitting Circuit Court Judge, subject to the Order Granting a Summary Jury Trial.

AND IT IS SO ORDERED this _____ day of _____, 2012, at _____, South Carolina.

Chief Administrative Judge

I SO MOVE:	WE CONSENT:
By:_____	By:_____
Attorney for Defendant	Attorney for Plaintiff

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT C/A:
Plaintiff, vs Defendant.	)	**CONSENT ORDER GRANTING SUMMARY JURY TRIAL**

WHEREAS, the parties have a dispute with regard to the value of this case; and

WHEREAS, the parties wish to seek a Summary Jury Trial in order to assist in establishing a binding settlement value in this case[1]; and

WHEREAS, the parties have agreed to bear their own cost, regardless of the jury verdict; and

WHEREAS, the parties agree that the Defendant admits to simple negligence, and that the only issues to be decided by the Summary Trial Jury are proximate cause and actual damages, and

WHEREAS, the parties wish to simulate, as close as possible, a jury trial as to the issues of proximate cause and actual damages only; and

WHEREAS, the parties have agreed to allow the admission of medical records, reports, bills, Affidavits, depositions and video depositions in lieu of live testimony, telephonic or video depositions, and

WHEREAS, each party agrees to provide the other party with copies of all such

---

[1] The parties have agreed that the jury verdict will be binding, subject to the terms and conditions of a letter of agreement, signed by counsel, to be disclosed only after a verdict has been rendered.

medical records, reports, bills, Affidavits, depositions, video depositions, telephonic or video depositions and any other documents upon which either party intends to rely and/or introduce into evidence at least fourteen (14) days prior to the scheduled Summary Jury Trial; and

WHEREAS, the parties agree that any reply Affidavits or documents to be introduced in reply to the other party's case shall be presented to the other party at least three (3) days prior to the date scheduled for the Summary Jury Trial. It is therefore,

ORDERED, ADJUDGED AND DECREED that Charleston County may make available a courtroom facility and not more than ten (10) jurors from the jury venire for that week so that the parties may select a jury of six (6) to hear the case. It is furthermore,

ORDERED, ADJUDGED AND DECREED that a special master is to be appointed by the Chief Administrative Judge with consent of both parties for the purpose of the binding Summary Jury Trial and he/she shall have the authority to rule on all matters with regard to procedures and evidence as if he/she was a sitting Circuit Court Judge, subject to this Order. It is, furthermore,

ORDERED, ADJUDGED AND DECREED that the procedures outlined hereinabove concerning the use of medical records, reports, bills, Affidavits, depositions, video depositions, or video depositions and other documentary evidence shall be utilized at the Summary Jury Trial and the procedures for providing those documents to opposing parties are hereby adopted as a part of this order. It is, furthermore,

ORDERED, ADJUDGED AND DECREED that the parties shall be entitled to utilize the subpoena power authorized by the South Carolina Rules of Civil Procedure to compel attendance of witnesses, if necessary, at the Summary Jury Trial.

AND IT IS SO ORDERED this _____ day of _____, 2012, at _____, South Carolina.

Chief Administrative Judge

I SO MOVE:

By:_____

Attorney for Defendant

WE CONSENT:

By:_____

Attorney for Plaintiff

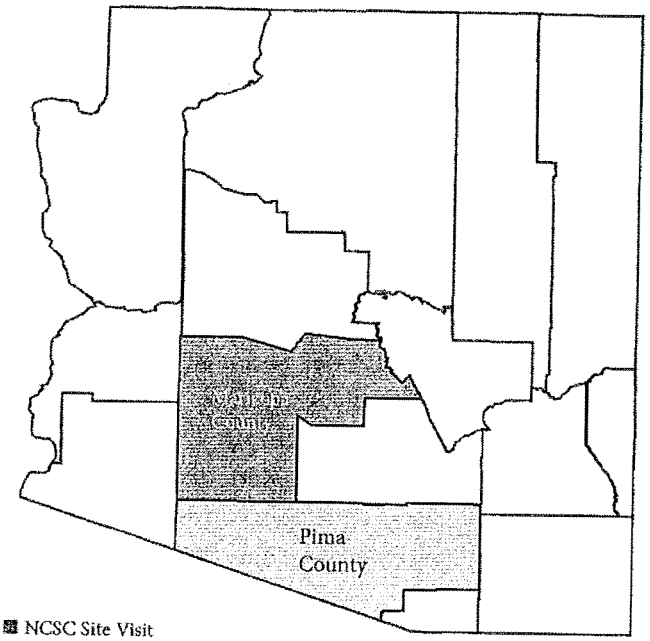
The Short Trial Program in the Maricopa County Superior Court: Has It Outlived Its Usefulness?

The short trial program in the Maricopa County Superior Court originated in discussions by the court's Civil Study Committee, a bench-bar committee composed of experienced civil trial attorneys who meet periodically with the presiding civil judge and other judges assigned to the Civil Division to discuss problems and concerns. A frequent topic during the mid-1990s was dissatisfaction by both the plaintiff and defense bars with the court's mandatory arbitration program for cases valued at $50,000 or less. Under local court rules governing the mandatory arbitration program, all attorneys licensed by the state of Arizona with four or more years in practice and a professional mailing address in Maricopa County were required to serve as arbitration hearing officers for cases assigned to mandatory arbitration. It did not matter that the attorney may have had little or no experience in arbitration proceedings or interest in civil litigation generally. The court did not provide training for arbitrators, and compensation for this service was a negligible $75 per hearing day, so most lawyers had little financial incentive to spend time preparing for and conducting the arbitration hearing or drafting a decision. As a result, plaintiffs' attorneys complained of unwarranted arbitration decisions for defendants while defense attorneys complained of unreasonably high arbitration awards for plaintiffs. For both sides of the civil bar, the only upside to the mandatory arbitration program was the fact that arbitration decisions were nonbinding and litigants could appeal an adverse decision and request a trial de novo in the superior court.

Under the leadership of Judge Stanley Kaufman (ret.), who was presiding judge of the Civil Division at the time, the committee implemented the short trial program in 1997 as an alternative for civil litigants who wanted

to appeal an unsatisfactory arbitration decision or bypass mandatory arbitration altogether. The program grew consistently from a few dozen trials per year in the late 1990s to more than one hundred in 2002, but then the local civil bar seemed to lose interest. The numbers of short trials dwindled to 50 or fewer per year in 2003 and 2004, and averaged only 18 per year from 2005 through 2009. Only 9 short trials were conducted each year in 2010 and 2011. This case study examines the rise and fall of the short trial program and the factors that have contributed to its demise in the Maricopa County Superior Court.

Arizona



NCSC Site Visit
Program Availability

General Description of the Short Trial Program

The short trial program in the Maricopa County Superior Court allows civil litigants to opt for a streamlined jury trial as an alternative to mandatory arbitration or as an appeal from an unfavorable arbitration decision. Short trial procedures are also available to litigants in cases that are not subject to mandatory arbitration. Both parties in a civil case must stipulate to participation in the program by filing a notice in the superior court. Upon receipt of the motion for short trial, the judge presiding over the case refers it to the ADR Coordinator to schedule a trial date and select a judge pro tempore to preside over the short trial. Short trials are generally scheduled within 90 days of the referral.[11] Judges pro tempore serve pro bono. Qualifications for judges pro tempore are the same as those for superior court judges—namely, that they be attorneys licensed to practice in Arizona, in good standing, and with a minimum of five years of practice experience.[12] Currently 40 judges pro tempore have volunteered to preside over short trials.

[11] There has been a gradual change in case management practices in the Civil Division in recent years. Rather than setting the trial date at a preliminary case management conference, many judges assigned to the Civil Division now defer setting cases for trial until all discovery and dispositive motions are complete. Only one or two trials are scheduled each week. As a result, jury trials are now being set two to three years into the future.

[12] Judges pro tempore work in all areas of the court; those judges assigned to the Civil Division regularly conduct settlement conferences as part of routine pretrial case management.

Under the short trial rules, the parties select a four-person jury from a panel of ten prospective jurors (civil jury trials in the Superior Court usually have 8 jurors). The parties are allocated three peremptory challenges each. If one or more jurors are excused for cause, the number of peremptory challenges is reduced accordingly, and the first four qualified jurors are impaneled. The trial procedures permit the parties up to two hours each to present their case; however, they are restricted to only one live witness. All other evidence is admitted as documentary evidence in a trial notebook given to jurors as soon as the jury is sworn and the trial begins. The time and live-witness restrictions are intended to minimize litigation costs. During the trial, jurors are allowed all of the decision-making aids available to jurors in civil cases in the superior court: they are permitted to take notes, to submit written questions to witnesses, and to discuss the evidence among themselves before final deliberations. In addition to the evidence presented at trial, the trial notebooks contain the final jury instructions.

After the evidentiary portion of the trial is complete and the trial attorneys have made their closing arguments, the jury retires to deliberate. Three of the four jurors must agree to render a valid verdict. Once they have done so, the verdict is binding on the parties. If the trial was an appeal from an unsatisfactory arbitration decision, the verdict for the prevailing party at trial must better the arbitration decision by at least 23%, or the losing party at trial can collect reasonable attorneys' fees and expert witness fees.[13] No appeal from the verdict is permitted except for fraud. To date, no appeal from a short trial has been documented.

Most short trial cases are lower-value personal-injury cases, especially automobile torts involving soft-tissue injuries. In the past two years, only two trials involved claims other than personal-injury automobile torts; both were breach-of-contract cases. In many short trial cases, liability is conceded and the damage award is subject to a high-low agreement. The plaintiff win rate has averaged 88% over the past two years, but the vast majority of awards were less than $8,000. Only three of the short trials were appeals from an arbitration decision; in the remaining cases, the litigants had opted out of mandatory arbitration altogether. The trials themselves are conducted in any available courtroom in the superior court building.

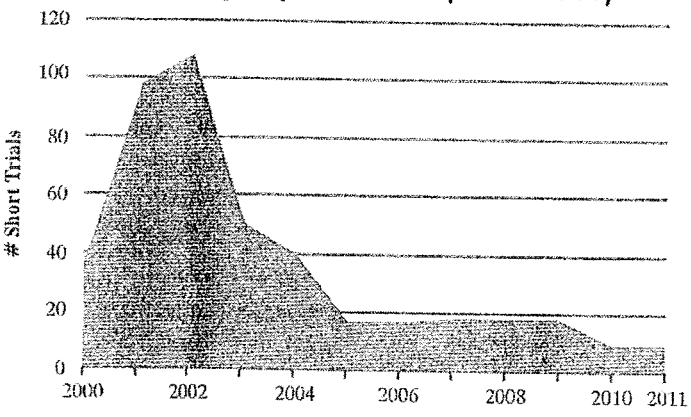
Evolution of the Short Trial Program

The short trial program began on a fairly optimistic note. Originally designed as a mechanism for litigants to avoid the unpredictability of mandatory arbitration or appeal from an unfavorable arbitration decision, it offered a solution for longstanding complaints

[13] Rule 77(f).

about that program. For those who opted out of mandatory arbitration altogether, it also avoided the possibility of incurring expenses for reasonable attorneys' fees and expert witness fees if the short trial verdict did not improve the arbitrator's decision by at least 10%.[14] Although trial delay was not perceived as a serious problem at that time, litigants also believed that they could get a trial date faster under the short trial program than in the superior court. Anecdotal reports suggest that local insurance carriers, who were generally skeptical about whether arbitration awards reflected the same amount of damages that juries would award, were largely enthusiastic about the opportunity to develop a representative sample of jury awards on which to base settlement negotiations. Once the program was in place, it received a great deal of publicity and support from Judge Kaufman and judges assigned to the civil bench. As a result, the short trial program enjoyed a great deal of popularity during its early years, reaching a peak of 108 short trials in 2002 (see Figure 3).

Figure 3. Short Trials Held in the Maricopa County Superior Court (2000-2011)



Beginning in 2003, however, the number of short trials dropped off precipitously due to a variety of factors. Anecdotal reports suggest that arbitration awards gradually became more aligned with civil jury awards. This significantly diminished incentives for both plaintiff and defense counsel to appeal from arbitration judgments, especially given the risk of paying attorneys' fees and expert witness fees to the opposing party if the appellant failed to improve the award by at least 10%. In 2007 the arbitration appeal penalty was increased to 23%, further reducing incentives to appeal from mandatory arbitration.

In addition to the strong likelihood that a jury verdict would not differ enough from an arbitrator's decision to make it economically worthwhile to appeal, increasing numbers of civil trial attorneys began to question whether it made sense to seek a jury trial given the increased time and effort involved in preparing for and conducting a jury trial. Preparation for an arbitration hearing generally required only an hour or two, and the hearing itself rarely took more than a couple of hours, at most. Jury trials, on the other hand, required a great deal of preparation—intellectually, emotionally, and logistically—and would likely consume an entire day. In essence, the perceived benefits of a jury trial were considerably less than the combination of increased costs and increased risk of an adverse outcome, even if a litigant were simply considering the choice of opting out of mandatory arbitration in favor of a short trial.

[14] In 2007 the arbitration appeal penalty was increased to 23%.

Procedural restrictions on short trials were widely viewed as additional barriers. Some attorneys expressed concern that the limits on the number of live witnesses and time constraints interfered with their ability to present a compelling argument for their clients. They believed that live testimony by witnesses, especially expert witnesses, was critical to witness credibility. Moreover, two hours was insufficient time in which to present all of the supporting documentation in the trial notebook; attorneys were doubtful that jurors took the time during deliberations to review documents that were not specifically referenced during trial. Litigants with meritorious cases could always choose a regular jury trial before an eight-person jury with no time or witness restrictions.

The inability to appeal an adverse verdict for any reason other than fraud also made the short trial option much less palatable than waiting for a full jury trial in the superior court. As one judge pro tempore noted, the only advantage of the short trial program for many plaintiff lawyers is that it offers a convenient forum in which to get rid of "dog cases" or appease an unreasonable client without appearing to abandon the client entirely.

Finally, in 2003, Judge Kaufman retired and the short trial program lost its most enthusiastic champion on the trial bench. Although many of the trial judges viewed the short trial program in a positive light, none stepped in to take Judge Kaufman's place to continue marketing the short trial benefits to the trial bar. Because the program lacked strong judicial support, the short trial program lost its institutional stature and became "just another" optional ADR track.

Current Pros and Cons of the Short Trial Program

In spite of its relative lack of popularity, some trial attorneys continue to support the short trial program. One frequent participant in the Short Trial program prefers the short trial format to regular jury trials because she believes she can present evidence more clearly and persuasively than most witnesses can, especially expert witnesses. She also noted that, compared to superior court judges, judges pro tempore are less likely to interfere with stipulations by trial counsel concerning the contents of the trial notebooks, jury instructions, and other matters. "A good judge pro tem," she noted, "understands that this is the attorneys' trial and gets out of the way."

Trial lawyers did have some positive comments about the current short trial program, particularly the opportunity to gain jury trial experience in relatively low-value cases. One attorney noted that a whole generation of younger lawyers has largely missed out on this experience, and there is a growing need to replace the generation of experienced trial

lawyers as they retire. Some experienced lawyers will occasionally do short trials to keep their skills sharp. Others pursue short trials solely for professional development, especially to secure a certified specialist designation or other professional imprimatur. As one attorney noted, jury trial experience can be an extremely valuable commodity for advertising purposes.

Judges pro tempore are also extremely positive about the short trial program. They view short trials as a great learning experience, an impressive addition to their professional credentials, and an opportunity to perform judicial tasks that are different from and much more exciting than conducting settlement conferences and other routine case management activities regularly assigned to judges pro tempore in the Civil Division. As a result, the number of judges pro tempore who are willing to preside in short trials greatly exceeds the number of trials held each year.

Most of the superior court judges view the short trial program as a useful, but underutilized, tool. Several expressed puzzlement as to why the program was not more popular and noted that they often suggest that attorneys in less-complex cases consider a short trial, or at least some variation on the short trial rules. They note that opting for a short trial will generally allow the case to go to trial faster, especially since most of the judges assigned to the Civil Division now set only one to two cases for trial each week and only after discovery and dispositive motions are complete.

Conclusions

The alleged problems associated with mandatory arbitration in the mid-1990s that led to the creation of the short trial program appear to have resolved themselves. The Lodestar Dispute Resolution Program at the Arizona State University College of Law evaluated court-connected arbitration programs in 2005 and found that most Arizona attorneys held favorable opinions of mandatory arbitration.[15] Although Maricopa County attorneys had somewhat lower opinions than their counterparts in Pima County (Tucson), the researchers attributed this to differences in the composition of survey respondents in the respective counties, rather than differences in the arbitration programs themselves. One particularly telling finding from the evaluation was that appeals from arbitration awards in Maricopa County comprised 22% of cases in which an arbitration decision was filed, which was the same or considerably less than appeal rates in most other counties throughout Arizona.[16]

In the meantime, appeals from arbitration decisions resulted in only two short trials in the past two years compared to 35 bench trials and 27 non-short trial jury trials.[17] Short trials are

[15] Roselle L. Wissler & Bob Dauber, A Study of Court-Connected Arbitration in the Superior Courts of Arizona (July 13, 2005).

[16] *Id.* at III.C.7. Gila County had the lowest appeal rate at 17% of arbitration decisions filed; other counties in Arizona had appeal rates ranging from 22% (Pima County) to 46% (Yavapai County).

[17] Judicial Branch of Arizona in Maricopa County, Annual Report: Fiscal Year 2011; Judicial Branch of Arizona in Maricopa County, Annual Report: Fiscal Year 2010.

obviously not the preferred option to appeal an adverse arbitration decision. The requirement that the outcome of an appeal from mandatory arbitration must be at least 23% more favorable than the arbitration decision likely plays a role in the relatively low appeal arbitration rates overall.

Additional restrictions on trial presentation time, number of live witnesses, and subsequent appeals are also plausible explanations for the short trial's lack of popularity both as an arbitration appeal option and as an opt-out of arbitration. There was no evidence that a short trial provided litigants with a significantly earlier trial date. Combined with the loss of strong judicial support for the program since Judge Kaufman's retirement, short trials are viewed, at best, as just another ADR option and, by some, as a second-tier level of justice for civil litigants. Unless some future change to civil case management practices, or to the short trial program itself, improves the relative attractiveness of the short trial to other litigation strategies, it is likely to become an interesting footnote in the history of the superior court, but will not have a transformative or long-lasting effect on civil litigation there.

References and Resources: Maricopa County Superior Court Short Trial Program

Contact

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Description of ADR Programs

Short Trial FAQs

Short Trial Program Bench Book (March 21, 2011)

Bronx County's Summary Jury Trial Program: Attending to Local Needs

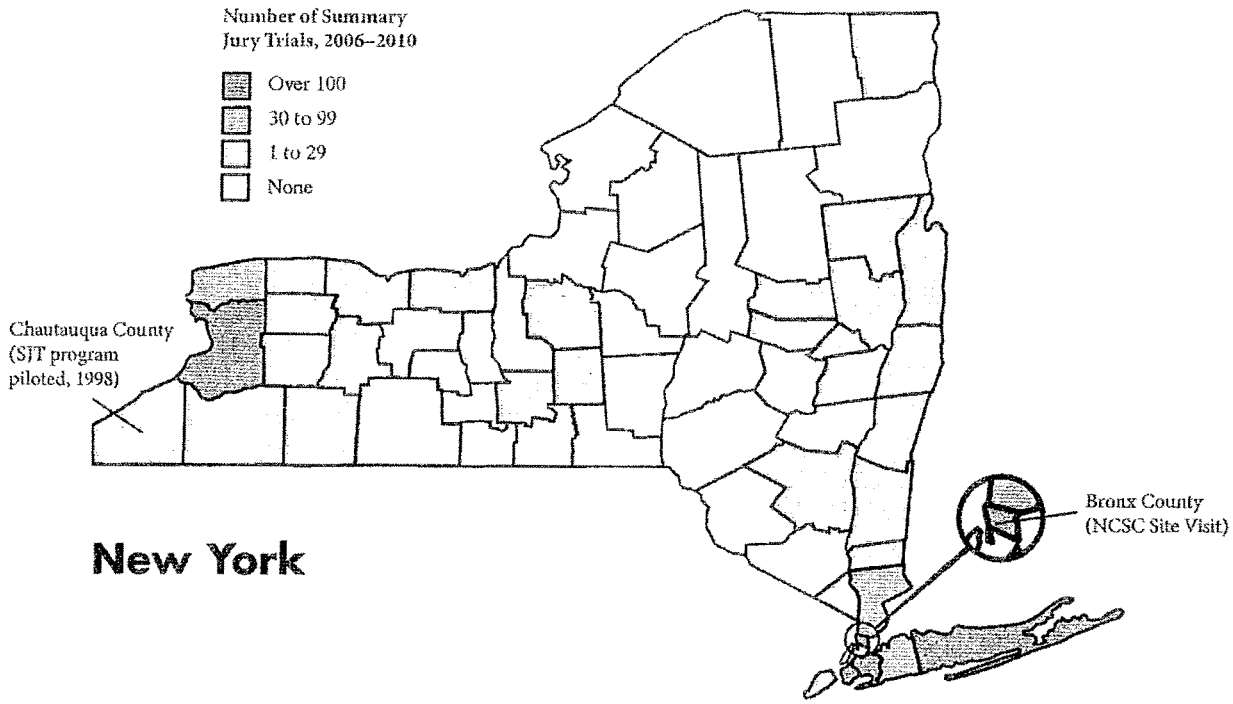
The Bronx County summary jury trial (SJT) program began as a local pilot program in Chautauqua County, New York in 1998 under the guidance of Justice Joseph Gerace. Justice Gerace published extensively about his experience with the SJT and its advantages and was influential in the spread of the program to other counties in the Eighth Judicial District. Justice Gerace's public relations efforts brought the program to the attention of the New York Office of Court Administration (OCA), which ultimately directed expansion of the program to each of the state's twelve judicial districts in 2006.

Recognizing that the Chautauqua SJT model would not necessarily be embraced in different jurisdictions, each with their own unique mix of needs, the OCA permitted a great deal of local flexibility in implementation of the SJT program. Local courts could modify the Chautauqua model to address local aspects of civil jury trial practice, such as length of time to trial, presentation of evidence, and resolution of case backlog. This approach also provided an opportunity to create a program that takes into account local legal culture and facilitates buy-in from the local bar.

A key feature of the expansion of the SJT across New York is the addition of a statewide coordinator. Justice Lucindo Suarez, who has experience overseeing SJTs, holds this position and is responsible for education and outreach efforts to increase awareness of the program and to support local implementation efforts. Another responsibility of the statewide coordinator is collecting case-level data and statewide information and statistics about the aggregate use of the program.

The NCSC visited the Bronx County Supreme Court, Twelfth Judicial District, to learn more about the SJT program.[18] NCSC staff met with the statewide coordinator, observed an SJT, and met court representatives and attorneys who have experience with the Bronx County program. It is clear that the SJT is recognized as a dispute resolution method that provides

[18] The following description of the SJT program is based upon the experience of Bronx County, New York. During NCSC's visit to the Bronx, variations in local practices of other districts were described, but the NCSC did not observe any trials or interview participants outside of the Bronx.



valuable benefits: courts can reduce caseloads and maximize judicial resources; attorneys can resolve cases that suffer from impasse; clients have their day in court; and jurors can fulfill their jury service in as little as one day. The case study that follows offers an implementation model for states that seek to expand an SJT program into local jurisdictions with diverse needs.

Program History

The SJT program began in Chautauqua County as a pilot under Justice Joseph Gerace in 1998. In Gerace's initial pilot program, SJTs offered a nonbinding option to resolve legal disputes. Under this program, the Eighth Judicial District has resolved more than 475 cases since 2000. Justice Gerace authored materials citing the use of SJTs based on the commentary of attorneys and judges,[19] and the program spread to other localities in upstate New York, first to Erie and Niagara counties in the same judicial district as Chautauqua, and then to Albany in the Third and Putnam in the Ninth Judicial District, among others.[20]

Believing that the program permitted sufficient flexibility to have value in other judicial districts, and bolstered by the program's successes in the Third, Eighth and Ninth districts, the OCA directed the expansion of the program to all of the state's 12 judicial districts. As its appointed Statewide Coordinator, Justice Suarez notes, the OCA implemented statewide rules with an awareness "that the particular characteristics of the populace, and of the Bench and Bar in each judicial district, may warrant variations

[19] Joseph Gerace & Kathleen Krause, New York State Supreme Court Eighth Judicial District, Summary Jury Trial Program: Program Manual (2004).
[20] Central New York Women's Bar Association, Summary Jury Trials: Becoming Part of the Civil Practice Fabric (April 2011).

of the rules."[21] It was with this acknowledgment that the first major down-state metropolitan judicial district, Bronx County in the Twelfth District, implemented a pilot program in 2006. The Twelfth District provided OCA with an opportunity to test its belief that the SJT program was amenable to the needs of large metropolitan courts.

There are seven common SJT rules and procedures in the statewide program: (1) an evidentiary hearing before trial; (2) a statement determining whether the SJT is binding or nonbinding; (3) expedited jury selection with limited time for attorney voir dire; (4) opening statements limited to ten minutes; (5) case presentation limited to one hour; (6) modified rules of evidence, such as acceptance of affidavits and reports in lieu of expert testimony; and (7) presentation of trial notebooks provided to the jury,[22] and closing statements limited to ten minutes.[23] Although these are the most common features of the program, each jurisdiction may amend these rules to address their own court's needs.

Then Bronx County Administrative Judge Barry Salman, working together with the Bronx Bar Association and armed with the practical guidance of Justice Gerace, endeavored to implement the SJT in the Twelfth Judicial District. Before the expansion of the SJT program, the Bronx offered a shortened, non-jury trial option where the only contested issue was liability;[24] since the issues in an SJT are similarly limited, familiarity with one of the primary elements of an SJT program already existed. Despite this familiarity, the bar initially resisted the idea of an SJT because the non-jury trial program was presented as mandatory, the decision was nonbinding, and attorneys would lose one of the perceived advantages of jury trials, specifically, the ability to develop extensive rapport with the jury.

To address the bar's concerns, a committee of eight members from the local bar was formed to establish the structure of the program as it would apply to the Bronx. Efforts were undertaken to convince the bar of the program's merits; to assure repeat clients, such as insurance companies, that the program could be of benefit to their cases; to establish procedural rules; and to prepare a logistical plan to accommodate program needs, such as courtroom facilities. Open dialogue about the proposed rules was created, and when issues arose, they were addressed either through rule revisions or education efforts, such as continuing legal education (CLE) programs. The resulting program was one that achieved buy-in from the local bar and was perceived as sufficiently

[21] Lucindo Suarez, *Summary Jury Trials: Coming Soon to a Courthouse Near You*, TRIAL LAW. SEC. DIG., Fall 2007, at 3.

[22] Modifications to the standard rules of evidence are made upon agreement by the attorneys. As a result, attorneys have great flexibility in determining how evidence is presented to the jury.

[23] Central New York Women's Bar Association, *supra* n. 17.

[24] This is still an ADR program available to Bronx County litigants.

flexible to fit the needs of the local legal culture. The primary difference between the Chautauqua model and the Bronx model is that the Bronx elected to make all SJTs binding. To begin the metropolitan pilot in the summer of 2006, Justice Gerace tried ten cases within a ten-day period to demonstrate how SJTs are conducted. From September 2006 to June 2007, the Bronx SJT program boasted of 69 verdicts in 73 court days. Since the statewide debut of the program in 2006, over 1,200 SJTs have been conducted.

Program Summary

The Bronx County program provides a one-day jury trial that streamlines the trial process by reducing the number of jurors and live witnesses. Trials are overseen by trial judges assigned exclusively to the SJT docket. Restrictions are placed on the total amount of time allotted for trial, including jury selection, opening and closing arguments, and presentation of evidence. There is no record of the proceedings, and no appeal from the verdict. All verdicts are binding. The SJT is best suited to cases involving relatively straightforward evidentiary matters. Before jury selection, the SJT process is explained to the jury panel. There is an incentive for jurors to serve on an SJT, as their service is completed in one day and is credited for six years. However, because there are no appeals, and no record is created, it is incumbent upon the jurors to focus carefully on the task at hand. Attorneys report that jurors remain engaged during the process and, overall, report positive experiences serving as a juror.

To promote program legitimacy and obtain local buy-in, the Bronx County administrative judge consulted the bar to identify potential judges to preside over SJTs. Participating attorneys suggest they are most comfortable with dedicated SJT judges because these individuals have an opportunity to become familiar with the rules and to enforce them consistently from case to case. Heeding this guidance, several judges were selected as dedicated SJT judges; as of the summer of 2011, the Bronx assigned 2.5 full-time equivalent judges to the SJT docket. SJT calendars are scheduled on an alternating-day rotation (e.g., Monday and Wednesday, or Tuesday and Thursday) to permit one day for carryover in the unusual circumstance that additional time is necessary to conclude a case or for the jury to reach a verdict.

In the Bronx, SJT verdicts are heard before a jury of not fewer than six and not more than eight jurors. Jury panels of approximately 18 are sent to the courtroom for voir dire. Depending on the presiding judge, jury selection is typically attorney controlled and lasts approximately 30 minutes for each side. As a result, attorneys may question jurors under the supervision of the court attorney, a role that is similar to that of a law clerk in most jurisdictions. Jurors who are challenged for cause are dismissed immediately; peremptory challenges, two per side, are overseen by the judge, court attorney, and court clerk in judicial chambers by agreement of the parties. If a case has multiple defendants, peremptory challenges are shared or split among them. The SJT results in a dramatic reduction in the amount of time it takes to seat the jury because the time allotted for voir dire

is strictly enforced. Additionally, as a result of the shortened time for trial, hardship excuses are virtually nonexistent. Rather than the typical one-half to one full day of jury selection, juries are seated in less than an hour.

The court is committed to streamlining external constraints to ensure that a one-day time frame is possible. As such, when Justice Salman first implemented the program, he made arrangements to ensure that the panel was delivered to the courtroom by 9:30 AM, rather than late morning or early afternoon, which is common for a traditional jury trial. He also made arrangements with the OCA to provide lunches for jurors to reduce the time required for lunch breaks.[25]

A key component of the SJT procedures is strict adherence to time limits. The clerk monitors the time, divided as 30 minutes for each party to conduct jury selection; 10 minutes of opening statements; one hour for presentation of evidence, including cross-examination; and 10 minutes of closing, with rebuttal available to the plaintiff, if reserved. Evidence packets are prepared and exchanged between the parties two weeks in advance. Attorneys report that due to the strict time limits, it is necessary to prepare carefully for a fairly intense day—this means that there is no time savings in attorney pretrial preparation. However, because evidence packets are exchanged between the parties in advance, there are also no surprises at trial, and attorneys are able to fully prepare for their cases ahead of time.

[25] Due to economic cuts, lunches for SJT jurors were discontinued during the summer of 2011. The court is considering several options to reinstate lunches for these jurors.

Based on input from the local bar, SJTs also exploit the benefits of simplified procedures. Because the standard rules of procedure are relaxed, judges primarily serve as facilitators to keep trials moving. Attorneys work out many of the issues beforehand by exchanging evidentiary packets at the pretrial conference, which is overseen by the court attorney. The parties may request that the SJT judge oversee the pretrial conference. However, due to the cooperative spirit among the local bar that is reflected in the nature of the SJT program, such requests are rare. The court attorney, therefore, plays a very prominent role in processing and managing the case. Damages caps are often worked out between the parties and high/low agreements are commonly used, although jurors are unaware of their existence. The high dollar amount is virtually always set as the insurance policy limit. These high/low agreements are very important because they assist attorneys with managing client expectations.

One of the significant benefits afforded the litigants is cost savings based on the summary presentation of evidence. The SJT rules limit the use of live witnesses, typically to two per side.[26] As a result, it is routine for attorneys to stipulate to the introduction of police reports and other documentary evidence, such as depositions or medical records, for publication in lieu of witness testimony. Only basic objections, such as relevance, leading, and hearsay, are permitted in open court; non-routine objections are handled

[26] The time limits imposed through the Bronx County Summary Jury Trial Rules and Procedures make it impractical to call more than two live witnesses to provide testimony.

as a sidebar as, with no appeal, there is no reason to preserve them on the record. For these reasons, defense litigants, most often insurance companies, favor the program; it provides an opportunity to resolve low-value cases without significant litigation expense.

Perhaps the most significant change to the Bronx program from the Chautauqua pilot is that all SJTs are binding in the Bronx. This change occurred as a result of input from the local bar. As a result, the clerk records the SJT verdict and submits a data collection form that records basic information about the case. The court does not enforce payment of the judgment; rather, the verdict is treated as a stipulation between the parties. This process is similar to an out-of-court settlement agreement. Attorneys report that because of these procedures, it is necessary to carefully prepare their clients and to achieve full buy-in for the process, as no appeals are allowed, and the court does not enforce the verdict.

Repeat players in SJTs, typically representing insurance companies, report that a variety of case types are appropriate for the program, including cases with litigants who have been unwilling to settle. Other suitable cases include low-dollar-value cases and those that include soft-tissue injuries, involve automobile torts, or rely upon an insurance policy with a damages cap. Participants suggest that the process is best used for claims of premises liability, intentional torts, certain types of malpractice, general liability, and commercial liability including slip-and-fall cases. In complex cases, the process is encouraged for damages-only claims. Cases in which the parties wish to distill the trial to the core issues, or that turn on a question of fact or credibility, were also suggested as good potential candidates. On the other hand, cases that involve complex injuries or multiple plaintiffs or defendants were not recommended for the program. This is primarily due to the complexity of issues involved and length of time necessary to accommodate adequate presentation of evidence by the parties.

Program Observations

The SJT program is viewed as a benefit to all involved. A key advantage for attorneys is the opportunity to be creative and to gain greater control over the conduct of the proceeding via agreements reached during the pretrial conference. SJTs provide attorneys with another valuable tool for case resolution and negotiation. From the judge's perspective, SJTs provide an opportunity to demonstrate to jurors that their service and time is valued, further enhancing public trust and confidence in the courts. From the court's perspective, SJTs reduce caseload backlog. Based on statewide statistics collected by Justice Suarez, the use of SJTs has ebbed and flowed over the last several years (see Figure 4). The highest volume of SJTs has been in the Twelfth (Bronx), Eleventh (Queens), Second (Brooklyn), and Tenth (Nassau and Suffolk) Judicial Districts, and where it originated, the Eighth Judicial District. The Second and Eleventh Districts have seen a steady rise in the number of SJTs over the last several years. For some

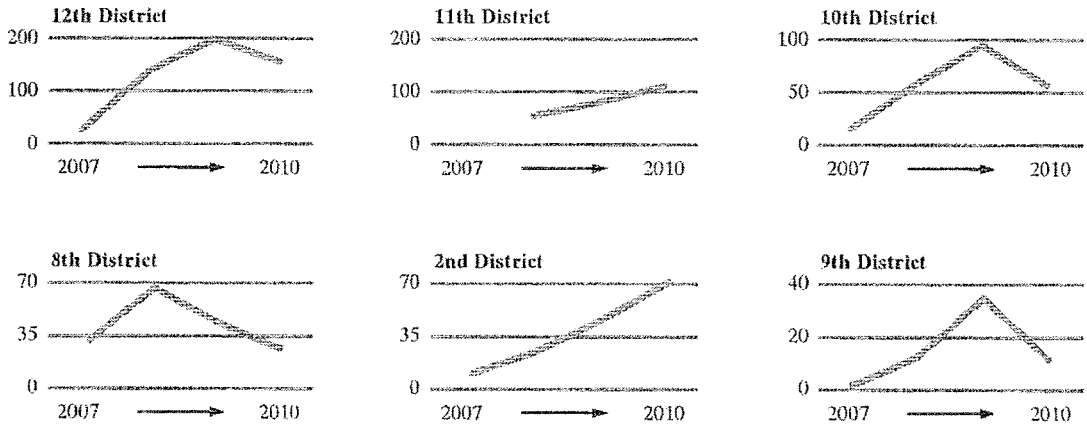
districts, the low volume of SJTs is explained by lower caseloads in rural areas; in others, the SJT program has only recently been implemented.

Justice Salman reviewed the statistics collected on this program and was surprised to realize the trials were resulting in a nearly 50/50 split rate for plaintiff/defense wins. In his view, this provides credibility that the SJT is not just a defense tactic. As this example illustrates, the statewide data collected on this program provides justification for why it is important to document these outcomes. Moreover, monitoring the types of cases that contribute to backlog and seeking opportunities to engage and resolve these cases through an SJT will maximize its utility.

The data that Justice Suarez, the statewide coordinator, has collected are extensive. See Summary Jury Trial Data Collection Form in References and Resources: Bronx County Summary Jury Trial. After each SJT, the court clerk is asked to complete a data collection form. The data form tracks the case type, issues at trial (liability and/or damages only), award limits of any high/low agreement, timing of any settlement, time spent on voir dire and key trial segments (opening, presentation, closing), the number of witnesses, time spent in deliberation, the jury's verdict, and the award amount. Although these data are routinely collected statewide, there has not been adequate funding or manpower to analyze and disseminate the results.

In addition to data collection, Justice Suarez is responsible for educating judges and lawyers in other counties about the program and serving as a resource for courts across New York who are implementing the SJT. Justice Suarez has conducted SJTs in the Bronx and is thus familiar with the many facets of the program. The statewide coordinator's responsibilities include

Figure 4. Number of Summary Jury Trials, by District and Year



Note: The First, Third, Fourth, Fifth, Sixth, Seventh and Thirteenth Judicial Districts were excluded from the figure as they reported less than 30 SJTs cumulatively over the four-year period.

preparing marketing materials; presenting educational presentations at CLE sessions; networking with other courts, judges, and bar associations interested in the program; responding to questions and concerns of both attorneys and judges; and generally serving as a program advocate. Marketing involves a significant amount of travel, including presenting the SJT program to other interested states. Justice Suarez sums up the position as follows: "I am not an administrator; I am not a supervisor; I am a coordinator—*I suggest.*" Justice Suarez notes the importance of having an advocate for the program who is willing to meet with individuals personally; he says it is "important to press the flesh" to understand the issues and concerns a trial court is experiencing that make the SJT an appealing option. Although there are a variety of benefits derived from having a statewide coordinator to oversee the use of SJTs, Justice Suarez also suggests that he "should be the first and last coordinator;" his perception is that the program will ultimately become an accepted part of civil practice and procedure within New York.

The SJT is often compared to the traditional jury trial and alternative dispute resolution (ADR). Overall, it has been embraced as another valuable method for resolving disputes. The participants note that even in a large metropolitan area, there is an increased emphasis on cooperation between the parties that does not exist in the other methods of case resolution. This appears partly to be a characteristic of the types of cases that are tried in the SJT program; many of these cases would be settled before trial if the parties could agree upon the value of the case. The SJT provides the parties an opportunity to resolve cases where they have come to an impasse in negotiations. Comparatively, the SJT program is more flexible, due to relaxed rules of evidence, and results in a significant costs savings to the parties. It is described by those who use it as an effective tool for negotiation, yet it still provides the parties with an opportunity to tell their story—a significant benefit from the litigant's perspective.

Challenges and Conclusions

Despite the accolades and previously described benefits, the SJT program is not without challenges. For one, management of staff overtime and budget cuts due to the tight economic times has significantly affected the program. For example, the court no longer provides lunch to the jurors. Therefore, jurors need time to leave the courthouse to obtain lunch and undergo security screening upon reentering the building. Given the shortened time frame of the SJT, this change in procedure costs valuable trial time and could result in a second day of trial. Compounding this issue is that court officers need sufficient time to clock out of the building before the end of their shift. This means that court facilities must be secured by a certain time during the day, limiting the length of time jurors can deliberate.

A further challenge arose in one case, which reflects the necessity for attorneys to actively manage client expectations during an SJT. In this instance,

the party did not accept the jury's verdict. Since the program is voluntary and the parties are responsible for enforcement of any judgment, party satisfaction is key to the successful continuance of the program. Attorneys have recognized this risk and now routinely ask clients to sign a consent form before entering the program. Related to party satisfaction, if a party wishes to leave the program, there is currently no authority for the judge to remove the case from the program and to return it to the trial docket. Finally, participants report that the rules and procedures for SJTs are not uniform among the jurisdictions, requiring attorneys who practice in multiple jurisdictions to become familiar with multiple sets of SJT procedures. This is a necessary trade-off for a program that maximizes flexibility in implementation to match local jurisdiction needs.

Overall, participants indicate satisfaction with the SJT. There are, however, some minor changes that program participants have recommended to improve the SJT experience. Some suggestions include making the pretrial conference forms more concise; broadening the scope of the program so that it continues to grow; and providing additional resources to the program. Assigning dedicated judges and courtrooms, providing jurors with lunches rather than risking the cost incurred from a two-day trial, and supporting statewide data-collection efforts were among those listed by participants as a priority for the success of the program. Such a commitment bodes well for the long-term sustainability of the Bronx County SJT, but also favors the efforts necessary to expand the program to other courts in New York.

References and Resources: Bronx County Summary Jury Trial Program

Contact

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Bronx County Summary Jury Trial Rules

Bronx County Summary Jury Trial Rules

STATE OF NEW YORK
UNIFIED COURT SYSTEM

SUMMARY JURY TRIAL
DATA COLLECTION FORM

UCS-413 (04/07)

Please mail, fax or scan this Data Collection Form for every Summary Jury Trial. Submit to Office of Court Research, Rm. 975, 25 Beaver St., New York, NY 10004; Fax: 212-428-2987, phone: 212-428-2990. Attention: Antoinette Coleman, acoleman@courts.state.ny.us

1. INDEX NUMBER: _____ 2. CASE NAME: _____

3. COUNTY: _____ 4. COURT: ○ Supreme ○ NYC Civil Court ○ County ○ City/District

5. CASE TYPE: ○ Commercial ○ Tort ○ Motor Vehicle ○ Other: _____

6. NUMBER OF ATTORNEYS: Plaintiff(s) ☐ Defendant(s) ☐

7. JUDICIALLY DETERMINED TRIAL DAYS IF NO SJT: ☐☐ 8. SJT DATE: ☐☐ / ☐☐ / ☐☐☐☐

9. ISSUES: ○ Liability only ○ Damages only ○ Liability and damages 10. WAS SJT: ○ Binding ○ Non-binding

11. INSURANCE CARRIER(S): _____ 11a. Policy Limit(s) $ _____

12. IF THERE WAS A HIGH/LOW AGREEMENT, PLEASE INDICATE: $_____ High $_____ Low ○ None

13. DID THE CASE SETTLE? ○ No ○ Yes 13a. When? ○ Before SJT ○ During SJT ○ After SJT
13b. What was the settlement amount? ○ $_____ ○ Don't know ○ Not applicable

THE PROCEEDINGS

14. WHO PRESIDED OVER THE SUMMARY JURY TRIAL? ○ Judge ○ JHO

15. HOW MANY JURORS WERE ON THE PANEL CALLED FOR THE SUMMARY JURY TRIAL? ☐☐ ○ Don't know

16. HOW MUCH TIME (IN MINUTES) WAS ALLOTTED FOR VOIR DIRE?

	Judge	○ 20	○ 30	○ 40	○ more than 40
	Plaintiff(s)	○ 5	○ 10	○ 15	○ more than 15
	Defendant(s)	○ 5	○ 10	○ 15	○ more than 15

17. HOW MUCH TIME (IN MINUTES) WAS ALLOTTED FOR...

... opening statements?	Judge	○ 20	○ 30	○ 40	○ more than 40
	Plaintiff(s)	○ 5	○ 10	○ 15	○ more than 15
	Defendant(s)	○ 5	○ 10	○ 15	○ more than 15
... case presentation?	Plaintiff(s)	○ 30 or less	○ 40	○ 50	○ 60 or more
	Defendant(s)	○ 30 or less	○ 40	○ 50	○ 60 or more
... closing statements?	Judge	○ 20	○ 30	○ 40	○ more than 40
	Plaintiff(s)	○ 5	○ 10	○ 15	○ more than 15
	Defendant(s)	○ 5	○ 10	○ 15	○ more than 15

18. HOW MANY WITNESSES TESTIFIED (LIVE OR BY VIDEO) FOR THE...

	Plaintiff(s)	○ 0	○ 1	○ 2	○ more than 2
	Defendant(s)	○ 0	○ 1	○ 2	○ more than 2

19. HOW MANY EXPERT REPORTS WERE SUBMITTED FOR THE...

	Plaintiff(s)	○ 0	○ 1	○ 2	○ more than 2
	Defendant(s)	○ 0	○ 1	○ 2	○ more than 2

20. WAS ANY DOCUMENTARY OR DEMONSTRATIVE EVIDENCE GIVEN TO THE JURY? ○ Yes ○ No

THE VERDICT

21. FOR HOW LONG (IN MINUTES) DID THE JURY DELIBERATE? ○ 30 or less ○ 40 ○ 50 ○ 60 or more

22. VERDICT: ○ Plaintiff ○ Defendant ○ Split ○ Hung

23. DAMAGES AWARDED: $_____ ○ Settled before deliberations

WHO COMPLETED THIS FORM?

NAME: _____

PHONE NUMBER: _____ DATE: _____

SUMMARY JURY TRIAL PROGRAM

An Introduction to the Summary Jury Trial

A summary jury trial (SJT) is a one-day jury trial that combines the flexibility and cost-effectiveness of arbitration with the structure of a conventional trial. Participation in an SJT is voluntary.

In binding summary jury trials, damages can be floored and capped on a high/low basis and the right to appeal or move against the verdict can be limited or waived. Parties have successfully used the verdict in non-binding SJT's as a settlement guide to predict how an actual jury would determine damages or resolve a contested issue.

The arbitration-like format allows parties to try the case or resolve particular issues without investing time and money to summon myriad experts, doctors and other witnesses.

Conducting the Summary Jury Trial

Most SJT's are structured like a traditional trial, though attorneys and judges may fashion the process to fit the needs of a given case.

The typical summary jury trial begins with jury selection and is followed by an introduction from the court that explains what will occur and how it differs from a conventional trial. Each side's attorney then has 10 minutes to deliver an opening statement. Then, the plaintiff presents his or her evidence, after which the defendant presents its evidence.

Absent an agreement to the contrary, courts require parties to introduce their evidence within one hour, and each side is permitted to call at most two witnesses, who are subject to cross-examination.

The rules of evidence are relaxed but not abrogated. Affidavits, medical and hospital reports, depositions, police reports, and other experts' reports may be read into evidence. Portions of video depositions may be played for the jury in lieu of actual appearances. Attorneys may display reports, contracts, photos or diagrams, and witnesses can appear via videoconference.

After all of the evidence has been introduced, each attorney gives a 10- to 15-minute closing argument, and the SJT judge then charges the jury and sends jurors off to deliberate. The majority of juries deliberate less than 90 minutes before rendering their verdicts.

In non-binding SJT's, the judge and attorneys may question the jurors on their impressions and rationales, which often leads to settlement.

Cases Suitable for Summary Jury Trial

In general, any case that can be presented to and understood by a jury in a day is suitable for a binding SJT. **Slip-and-fall** and **no-fault** cases are appropriate for a summary jury trial, as are **property damage claims**.

A binding summary jury trial can often provide finality in less time and with less cost than a motion for summary judgment, especially in cases where the primary issue in dispute is whether the plaintiff's injury is a "serious injury" as that term is defined in Insurance Law § 5102(d). **Cases where the damages sought are less than $200,000** are particularly amenable because the costs of pursuing litigation likely outweigh the potential benefits to the plaintiff and his or her attorney. The SJT is also well suited in liability- or damages-only cases as well as **cases where there is limited insurance coverage** or when the parties are firm on demands and offers and willingly submit the case on a high/low basis.

All large-damage and small-damage **cases in which a jury's advisory verdict has the potential of helping the parties reach settlement**—even complex cases with potentially large damages—are suitable. In complex cases, parties may submit one or more key factual issues to the jury for resolution, which often leads the parties to settlement.

Benefits of the Summary Jury Trial

Attorneys benefit because:

- Attorneys need not invest the time required to conduct a full trial.
- In non-binding summary jury trials, the panel's advisory verdict can serve as a "reality check" to a client who is reluctant to settle.

Clients benefit because:

- Summary jury trials give clients their day in court.
- Binding summary jury trials are not appealable and thus afford clients finality.

Courts benefit because:

- Summary jury trials reduce court calendars resulting in shorter periods for other cases to be scheduled for trial.
- The benefits of summary jury trials allow better use of limited judicial resources.

Jurors benefit because:

- Participating as panelists in a summary jury trial allows citizens to fulfill their jury service in one day.
- Unlike in conventional trials, jurors in an SJT can provide attorneys with immediate, specific feedback.

SUMMARY JURY TRIAL PROGRAM

Courts' Experience with the Summary Jury Trial

Since 2000, New York's Eighth Judicial District has resolved over 475 cases through binding and non-binding summary jury trials without the necessity of a traditional trial. The lawsuits involved automobile collisions, slip-and-fall injuries, medical malpractice claims, contract disputes, wrongful timber cutting allegations, and injuries from dog bites.

Since 2006, the SJT Program's statewide debut, over 1200 SJTs have been conducted. The distribution between plaintiff and defendant verdicts reflect the distribution of conventional trials of the judicial district.

Summary jury trials have been used in federal district courts and by at least 17 states' courts. They have resolved a variety of commercial disputes, negligence and medical malpractice actions, products liability suits, and anti-trust and fraud cases.

The Summary Jury Trial is Flexible

Scope of Discovery: If the parties consider submitting their case to an SJT when the case is filed, then they are free to determine—by agreement—the scope of discovery and the timing of the trial. They can set the SJT to be held on a date certain and, in turn, try the case within weeks or months of the filing of a Note of Issue.

Finality: If local court rule permits them to do so, parties may negotiate whether the jury's determination will be binding or non-binding.

Introduction of Evidence: Parties can stipulate to affidavits in lieu of appearances of expert witnesses and other witnesses. They can also agree to submit medical reports instead of live testimony. Attorneys can negotiate whether they will introduce ex parte deposition videos or transcripts.

Hi/Low Ranges: The parties can also agree to a range of possible damages. If the verdict is below the minimum amount in the range, then the plaintiff is awarded that minimum amount; likewise, if the verdict exceeds the maximum amount in that range, then the plaintiff is awarded that maximum amount.

Confidentiality: In cases where the parties submit their dispute to a non-binding summary jury trial, the parties can decide whether the results of the proceeding will be publicized or remain confidential. This can be an important consideration for cases where the outcome is likely to impact the broader community.

For more information about
SUMMARY JURY TRIALS
please contact:

(Affix Local Contact Information Here)

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or
Lsuarez@nycourts.gov

[July, 2010]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
----------X

INDEX NO.

Plaintiff(s),

- against -

TO TRANSFER ACTION TO SUMMARY JURY TRIAL (SJT) PROGRAM

Defendant(s).
----------X

IT IS HEREBY STIPULATED AND AGREED that the parties to this action, by their respective attorneys, voluntarily agree to the transfer of this matter for final disposition to the **Summary Jury Trial Program (SJT)**, subject to the Rules of the SJT Program. The signatories to this Agreement represent that they have the authority of their respective clients and/or insurance carriers to enter into this agreement.

Attorney for Plaintiff(s)
Print Name:_____
Phone Number:_____
E-Mail:_____
Signature:_____

Attorney for Defendant(s)
Print Name:_____
Phone Number:_____
E-Mail:_____
Signature:_____

Attorney for Plaintiff(s):
Print Name:_____
Phone Number:_____
E-Mail:_____
Signature:_____

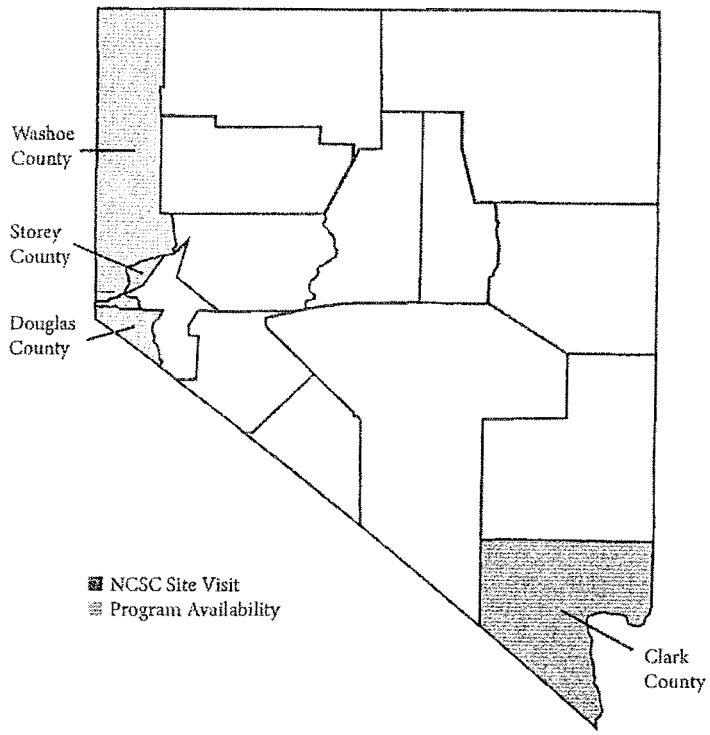
Attorney for Defendants(s)
Print Name:_____
Phone Number:_____
E-Mail:_____
Signature:_____

Dated:

The Short Trial Program in the Eighth Judicial District of Nevada: A Continuing Evolution

In 2000 the Board of Governors of the Nevada State Bar created a statewide commission to investigate ways to address chronic complaints about the length of time needed for civil cases to come to trial in the Nevada District Courts, as well as disproportionately high costs associated with litigating lower-value cases. The Short Trial Commission was chaired by attorney William Turner and comprised 14 highly experienced civil trial lawyers representing both the plaintiff and defense bar, insurance carriers, and the Nevada trial and appellate bench. The commission focused on the concept of the summary jury trial as a supplement or alternative to the existing mandatory arbitration procedures as a potential solution. The commission's recommendations were submitted to the Supreme Court of Nevada and subsequently adopted statewide in 2000.

Nevada



The short trial program became a mandatory component of the ADR programs in Nevada's Eighth and Second judicial district courts, which serve the state's two most populous communities in Clark County (Las Vegas) and Washoe County (Reno). The program was permitted throughout the rest of the state, but only the district courts in the First and Ninth judicial districts (Carson/Storey and Douglas counties) ultimately implemented the program. This case study focuses primarily on how the program developed, evolved over time, and currently operates in the Eighth Judicial District of Nevada, which has the highest volume of both civil case filings and short trials in the state.[27]

Program Background

The impetus for the development of the short trial program in Nevada was grounded in two ongoing concerns by the Nevada civil bar. The first concern was the length of time involved in bringing a case to trial. According to several members of the commission, civil cases in the mid- and late 1990s typically took up to four years to come to trial in the Eighth Judicial District Court due to high caseloads. Civil caseloads were lower in other areas of the state, so the amount of time to bring a case to trial was generally shorter, typically only a year or so. Because civil case filings in the Eighth Judicial District comprised more than three-quarters of the statewide civil filings, the corresponding trial delays made the need for effective remedies that much more imperative.

The civil bar also perceived the rising costs of litigation as a growing barrier to access to justice, especially in lower-value cases. For example, expenses associated with hiring an expert witness to testify in a typical personal-injury trial typically ranged from $2,500 to $5,000 per expert. Combined with attorneys' fees and court costs, litigation expenses often dwarfed the potential damages that a jury might award, forcing some litigants to settle regardless of the merits of their case or possibly even forgo filing a claim at all.

Under the Nevada Arbitration Rules at that time, cases in the Eighth Judicial District in which the probable damages were $40,000 or less were subject to nonbinding arbitration. The Office of the ADR Commissioner administered the mandatory arbitration program, identifying cases that were eligible for the program, ensuring that prospective arbitrators were qualified, appointing arbitrators by random assignment if the parties had not stipulated to the appointment of a specific arbitrator, and ensuring that the arbitration decisions were properly recorded in the case files. The program itself was remarkably successful insofar that an average of 71% of the cases that entered the program were settled or dismissed.[28] Litigants who were dissatisfied with

[27] According to the 2010 Annual Report of the Nevada Supreme Court, civil filings from the Eighth Judicial District Court comprised 77% of the state's civil filings and requests for a trial de novo following mandatory arbitration comprised 90% of the statewide requests for a trial de novo.

[28] Annual Reports of the Nevada Judiciary (2000-2011).

the arbitrator's decision could request a trial de novo in the district court. In the 29% of cases that did so, however, the mandatory arbitration requirement amounted to yet another procedural delay in scheduling a trial date and added additional litigation expenses.

Ultimately, the commission submitted its report and recommendations in the form of an ADKT[29] to the Nevada Supreme Court to establish a "Short Trial Program" in which parties in cases assigned to mandatory arbitration could either opt out of the mandatory arbitration and have their case resolved in an abbreviated and streamlined jury or bench trial or request a trial de novo following mandatory arbitration in a short trial proceeding. The short trial program was authorized by the Nevada legislature, and rules governing its operation were enacted by the Nevada Supreme Court as a pilot program in 2000. The administrative costs of the program were included in the operational budget for the mandatory arbitration program and funded through a $5 fee included in the filing fee for both the plaintiff's complaint and the defendant's answer. The first short trial was held in the Eighth Judicial District Court on June 7, 2002. Between 2002 and 2004, the Eighth Judicial District held a total of 97 short trials.

[29] ADKT refers to matters submitted to the "Administrative Docket" of the Nevada Supreme Court.

General Procedures Governing Short Trials in Nevada

Under the Nevada Short Trial Rules, parties electing this option have their cases scheduled for trial within 240 days of their stipulation into the program.[30] The ADR commissioner assigns the case to a judge pro tempore, who is responsible for all pretrial management decisions including additional discovery and pretrial motions, as well as for presiding over the trial itself.[31] The trial may be by jury or to the bench.

If the parties elect a short jury trial, a four-person jury is selected from a panel of 12 prospective jurors.[32] The parties have 15 minutes each to conduct voir dire, after which time they may remove two prospective jurors by peremptory strike in addition to any jurors struck for cause.[33] After all challenges for cause and peremptory challenges have been exercised, the first four jurors remaining on the randomized jury list are impaneled as jurors.[34] The parties are then allocated three hours each to present their case, including opening statements, direct and cross-examination of witnesses, introduction of documentary evidence, and closing statements.[35] The judge pro tempore advises the jurors of

[30] N.S.T.R. 12.
[31] N.S.T.R. 3.
[32] By stipulation, the parties can have a six-person or eight-person jury, in which case the respective jury panels are comprised of 14 or 16 prospective jurors.
[33] With permission of the presiding judge, the parties may conduct voir dire for up to 20 minutes each. N.S.T.R. 23.
[34] N.S.T.R. 23.

the applicable law governing the case using instructions from the Nevada Pattern Civil Jury Instruction Booklet, and then sends the jurors to deliberate.[36] A minimum of three of the four jurors are required to agree to render a valid verdict.[37] There is no time limit on deliberations, but thus far all trials have concluded within one day. The verdict rendered by a jury in the short trial program results in a binding, enforceable judgment.[38] As originally implemented, the Short Trial Rules provided extremely limited grounds for appeal, but those restrictions have since been lifted, and parties may now appeal a short trial verdict to the Nevada Supreme Court according to the procedures governing appeals of all civil cases.[39]

To aid juror comprehension of trial evidence, the parties are required to prepare a trial notebook for jurors containing all reports and documentary evidence, including photographs, medical records, billing records, and a copy of any previous arbitration awards.[40] Unless a party specifically objects before trial, all documentary evidence in the trial notebook is deemed admitted without requiring live witness testimony concerning its authenticity or foundation.[41] The short trial rules strongly encourage parties to present expert evidence through a written expert report rather than by live expert testimony.[42] Jurors are permitted to take notes and to submit written questions to witnesses, as is the case for jurors serving in all civil jury trials in Nevada.

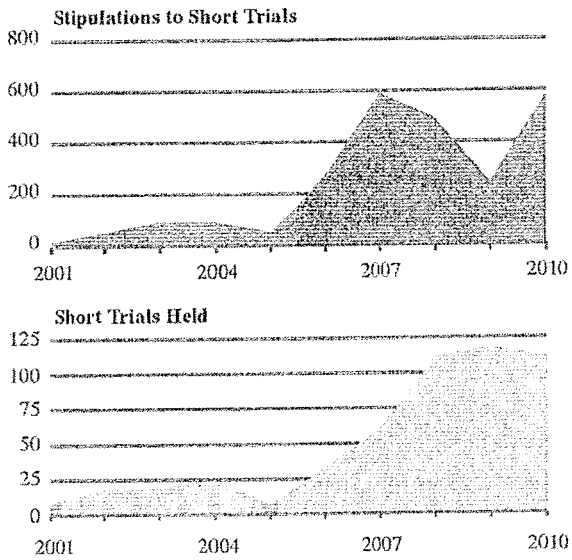
The time limits imposed on the parties under the short trial rules are designed to minimize litigation costs. In addition, one provision of the short trial rules places a cap of $3,000 on the amount of attorney fees and a cap of $500 per expert on the amount of expert witness fees that can be recovered by a party.[43] Unless ordered otherwise by the judge pro tempore, the parties are jointly responsible for the $1,500 fee for the judge pro tempore and up to $250 in reimbursable expenses.[44] Jury fees of $160 are paid by the party demanding the jury.[45]

A striking characteristic of the Nevada short trial program has been the willingness of the Nevada Supreme Court to review the short trial rules and seek statutory or rule amendments in response to problems or concerns as they arose. January 2005 saw the most significant changes to the program since its inception. These included an increase to the amount-in-controversy requirement for cases eligible for mandatory arbitration from $40,000 to $50,000, reflecting the effect of inflation on the value of these cases. The Nevada Supreme Court also made the short trial program mandatory for parties requesting a trial de novo following mandatory arbitration;[46] until that time, the short trial program had been a voluntary program that parties could choose to pursue rather than wait for a trial before a

[35] N.S.T.R. 21.
[36] N.S.T.R. 25.
[37] N.S.T.R. 26.
[38] N.S.T.R. 26 ("A judgment arising out of the short trial program may not exceed $50,000 per plaintiff exclusive of attorney's fees, costs and prejudgment interest, unless otherwise stipulated to by the parties. Jurors shall not be notified of this limitation.").
[39] N.S.T.R. 33.
[40] N.S.T.R. 18.
[41] N.S.T.R. 16.
[42] N.S.T.R. 19(a).
[43] N.S.T.R. 27(b).
[44] N.S.T.R. 28 and 29(a).
[45] N.S.T.R. 31(b).
[46] N.S.T.R. 4.

district court judge. After the 2005 amendments, parties could remove their case back to the district court docket only by paying a $1,000 "opt out" fee.[47] As a result, the number of short trials scheduled in the Eighth Judicial District jumped dramatically from less than 20% of the requested trials de novo in 2005 to more than 80% in 2006 through 2010, with similar increases in the number of short trials actually held (see Figure 5). Finally, the restrictions on appeals from short trials were lifted so that parties could appeal an adverse judgment to the Nevada Supreme Court according to the same rules as regular civil cases.[48] In 2008, the Nevada Supreme Court amended the short trial rules to require approval of a district court judge before a short trial judgment becomes final.[49]

Figure 5: Stipulations to Short Trial Program and Trials Held, 2001-2010



[47] N.S.T.R. 5.
[48] N.S.T.R. 33.
[49] N.S.T.R. 3(d)(4).

Current Short Trial Operations in the Eighth Judicial District Court

The short trial program in the Eighth Judicial District is administered by the Office of the ADR Commissioner, which maintains a list of qualified judges pro tempore, oversees training for those judges, assigns judges for cases that opt into the short trial program, schedules the trial date and courtroom location, and ensures that the final judgment is properly recorded in the case files. All of the ADR programs, including the short trial program, are funded through a $15 civil case filing fee on complaints and an additional $15 civil case filing fee on answers. In 2005 the Clark County Board of Commissioners increased the filing fee from $5 each for complaints and answers, which made the ADR Office financially self-sustaining. District court operations are entirely funded through local tax revenues. Consequently, the programs administered by the ADR commissioner receive strong support from the local Board of Commissioners insofar that they reduce the number of jury trials that would otherwise be conducted by district court judges at local taxpayer expense.[50]

Under the rules governing the short trial program, judges pro tempore must be active members of the State Bar of Nevada, have a

[50] The Eighth Judicial District Court estimates that the cost of a jury trial in the district court is approximately $2,500 per day for an average of 2 to 3 days.

minimum of ten years of civil trial experience or its equivalent, and fulfill at least three hours of accredited continuing legal education on short trial procedures each year.[51] Topics covered in the training sessions can vary from year to year, but typically focus on recent rule changes, case law, and policies concerning the short trial program, and evidentiary and ethical issues that are unique to short trials. The current judge pro tempore list includes approximately 100 names of local civil trial attorneys. Judges pro tempore are generally assigned six to seven short trial cases each per year, but approximately 80% of these cases ultimately settle before trial, ostensibly due to the relative speed and certainty of the trial date.

For the past several years, the Eighth Judicial District Court has conducted more than 100 short trials per year, the overwhelming majority (98%) of which are appeals from mandatory arbitration decisions.[52] Typically, only 20% of litigants opt for a bench trial rather than a jury trial. In addition to trials de novo following mandatory arbitration, a small handful of non-mandatory arbitration cases stipulate to participation in the short trial program rather than wait for a regular jury trial before a district court judge.[53] Most short trial cases involve personal injury and property damage claims, usually resulting from automobile accidents in which liability has been admitted and a high/low agreement is in place. It is unusual for cases involving contracts or more serious tort claims to opt into the short trial program, but a small handful have been tried over the past ten years that the program has been in operation.

Once the parties have stipulated to participate in the short trial program, the ADR commissioner schedules a trial date within 240 days, reviews the availability of judges pro tempore for that date, and sends the parties the names of three prospective judges with instructions to either stipulate to the assignment of a specific judge from the complete list of judges pro tempore or to strike no more than one name from the three that were randomly selected.[54] At the program's inception, most parties stipulated to the assignment of a specific judge pro tempore, but since the short trial program became mandatory in 2005, it is more common for the judge to be selected from among the judges remaining on the proposed list submitted to the parties.

Once assigned to a short trial case, judges pro tempore enjoy all the powers and authority of district court judges except with respect to the final judgment, which must be submitted to a district court judge for approval.[55] Under the existing Short Trial Rules, the parties must submit a pretrial memorandum to the judge pro tempore that includes a brief statement of the claims and defenses; a complete list of witnesses,

[51] N.S.T.R. 3(c).

[52] The number of short trials exceeds the number of civil jury trials conducted in the district courts.

[53] The ADR commissioner predicts that the number of cases not eligible for mandatory arbitration may be because many of the newly elected district court judges had experience in the STP as litigators and as pro tem judges. They understand the program and are highly supportive of it.

[54] N.S.T.R. 3.

including rebuttal and impeachment witnesses; and a description of their expected testimony, a list of exhibits, and any other matters to be resolved at the pretrial conference.[56] The pretrial conference must take place at least ten days before the scheduled trial, during which the judge pro tempore may rule on any motions, including motions in limine.[57] According to several of the more experienced judges pro tempore, it is imperative that all disputes and questions related to the short trial proceedings be settled during the pretrial conferences as there is too little time and insufficient access to technology resources such as copiers or printers on the day of trial. Most judges pro tempore use a detailed short trial checklist to ensure that all possible questions and contingencies have been addressed. The short trial rules have an extraordinarily strict continuance policy and settlements must be reported to the court no later than two days before the scheduled trial date.[58] It is extremely unusual for a short trial to be cancelled or continued on the trial date.[59]

Short trials are scheduled on Thursdays and Fridays, subject to district courtroom availability. Currently, 32 district court judges share 23 courtrooms in the Regional Justice Center in downtown Las Vegas, so courtroom availability has become increasingly limited. Thus far in 2011, two short trials had to be continued to a future date because no courtroom was available on the scheduled trial date.[60] In a typical short trial, the judge, lawyers, parties, and live witnesses, report to the designated courtroom no later than 8:00 am to set up the courtroom and resolve any last-minute problems. The jury panel is available to be picked up from the jury assembly room by 8:30 am, and voir dire is generally concluded and the jurors impaneled and sworn by 9:30 am. As in non-STP civil jury trials, jurors may take notes and submit written questions to witnesses.[61] Jurors are also provided a notebook containing all of the documentary evidence to be provided at trial, including expert witness reports and copies of medical invoices and any previous arbitration decision.[62] Most trials conclude by mid-afternoon, and jury deliberations typically take 20 to 30 minutes, although some have lasted as long as two hours. By all accounts, the jurors are quite happy to learn that the expected length of their jury service will be one day and that serving as a trial juror on a short trial will complete their jury service requirement.[63] One of the former judges pro tempore noted the importance of emphasizing to jurors that in spite of the lower values, these are serious cases and the outcomes are very important to the litigants. No one interviewed during the site visit suggested that jurors take their task any less seriously in short trials compared to other jury trials in the district court.

[55] N.S.T.R. 3(d).
[56] N.S.T.R. 9.
[57] N.S.T.R. 10.
[58] N.S.T.R. 11.
[59] According to records kept by the ADR commissioner, this has happened only 17 times since the inception of the program through October 2011.
[60] Bench trials may be conducted off-premises at the convenience of the parties, which avoids the problem of courtroom availability.
[61] A number of judges pro tempore who were interviewed during the site visit reported that jurors do submit a lot of questions in these cases. They noted that it was unclear if this trend reflects younger, more inquisitive jurors, or attorneys' trial presentation skills.
[62] According to several experienced trial attorneys and pro tempore judges, a common approach in opening statements involves describing the contents of the trial notebook to the jurors in detail.
[63] The Eighth Judicial District Court employs a one-day/one-trial term of service.

After the short trial has concluded, the judge pro tempore issues a recommended final judgment, which typically is a recitation of the jury's verdict.[64] Although the parties may object to the recommendation, the final judgment is almost universally approved by the district court judge. In fact, there is only one known instance in which a district court judge rejected a recommended final judgment submitted by a judge pro tempore following a short trial. Ironically, that trial was a bench trial, rather than a jury trial.

The ADR commissioner keeps detailed records of both arbitration awards and short trial verdicts, including comparisons between the two. Arbitrators and juries agree on liability nearly two-thirds of the time, which is not surprising given that the defendants often concede liability. For cases in which the jury ultimately disagrees with the arbitrator's decision, jury verdicts for the defendant outnumber those for the plaintiff by a ratio of almost 2 to 1. With respect to damage awards, short trial juries also appear to be less plaintiff oriented than arbitrators. A review of 111 short trial jury awards in 2010 found that jury awards were less than the arbitrator's award in 54% of the cases, more than the arbitrator's award in 18% of the cases, and were the same as the arbitrator's award in 5% of the cases. In the remaining cases, 2% stipulated to participation in the short trial program without going through mandatory arbitration, and 21% were non-arbitration cases from the district court that elected a short trial proceeding.

Since the short trial program has been in place, there have been relatively few appeals from short trial judgments.[65] Only one involved a challenge to the Nevada Short Trial Rules rather than to the validity of the underlying verdict. In *Zamora v. Price*, the plaintiff argued that requiring that the trial notebooks include a copy of any previous arbitration decision violated his right under the Nevada Constitution to a jury trial.[66] Because the jury instructions specifically advised jurors that they were not obligated to follow the arbitrator's decision, or even to give it any weight whatsoever, the Nevada Supreme Court determined that the inclusion of the arbitration decision in the trial notebook did not infringe on the jury's fact-finding duty in such a way that it would significantly burden the right to a jury trial.[67] Given that juries concur with the arbitrators' decisions in only 5% of the cases, it seems that jurors regularly exercise their discretion to ignore the arbitration decision.

[64] There is no formal reporting of the trial proceedings unless a party or both parties request and agree to pay for the court reporter's services. N.S.T.R. 20.

[65] A search of the LEXIS database found only two cases involving appeals from short trials.

[66] Zamora v. Price, 213 P.3d 490 (Nev. 2009).

[67] *Id.* at 494. Zamora's appeal also included an equal-protection claim that cases exceeding $50,000 amount in controversy were not subject to the evidentiary requirement that previous arbitration awards be disclosed to the jury. The Nevada Supreme Court held that "having cases with an amount in controversy below a threshold amount subject to mandatory nonbinding arbitration, and having the arbitration award introduced at a subsequent new trial, is rationally related to a legitimate governmental interest, and therefore, no equal protection clause violation exists." *Id.* at 496.

Reported Advantages and Disadvantages of the Short Trial Program

Overall, the consensus among all of the key stakeholders in the short trial program is that it meets its intended objectives very effectively. It delivers a much faster trial date—typically within six months of the short trial program stipulation compared to up to four years for a regular civil jury trial in the district court. The shorter time frame and the restrictions on attorneys' fees and expert witness fees limit the amount of financial exposure for litigants. The use of judges pro tempore to preside over short trials and the tighter restrictions on continuances ensure greater certainty that the trial will actually go forward on the date scheduled. Unlike an arbitration award that parties may either accept or reject, the short trial results in a valid jury verdict and an enforceable final judgment. The short trial experience may also satisfy litigants' desire for "their day in court" in ways that an arbitration hearing would be unlikely to do.

Finally, the administration of the short trial program by the ADR commissioner relieves the district court judges of routine case management for a sizable portion of their civil dockets, permitting them to concentrate on more complex cases requiring more individual attention. Short trial jurors receive the same compensation as jurors serving in other district court trials, and by all accounts are treated as or more respectfully in terms of effective use of their time and respect for their diligence.[68] In exit questionnaires, the jurors themselves report that they were quite satisfied with their service.

In addition to effective and efficient case disposition, several experienced trial attorneys and judges pro tempore described the educational benefit of the short trial program, especially for younger lawyers who may lack opportunities to try comparatively low-risk cases to a jury. One judge pro tempore explained that the time constraints on presenting a case make short trials even more rigorous than regular jury trials. Trial lawyers must be more prepared and more focused on essential trial issues. Another district court judge, who was a frequent judge pro tempore and experienced trial lawyer before being elected to the district court bench, claimed that he liked to do short trials both to keep his trial skills sharp for higher-value cases and to experiment with new trial techniques in lower-risk cases.[69]

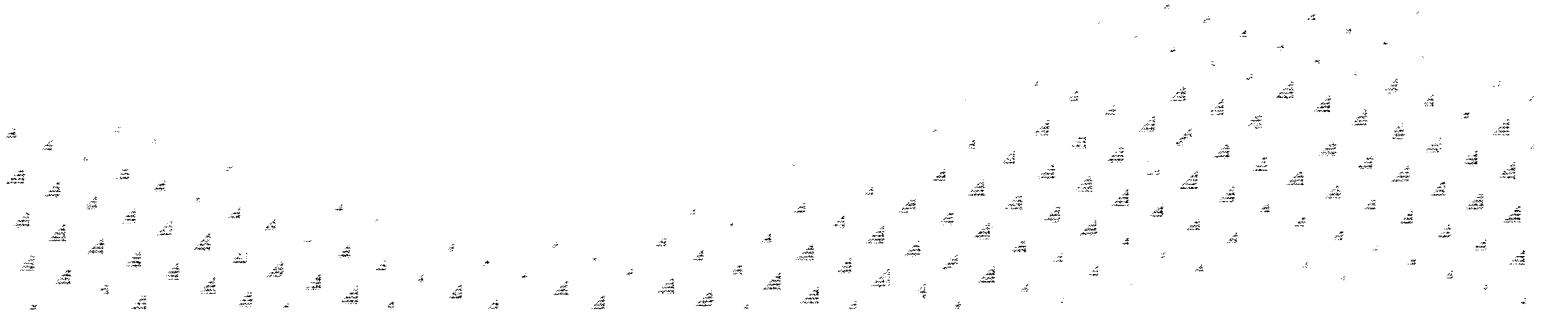
[68] During an assessment of jury operations in the Eighth Judicial District Court in 2008, the NCSC found that only 64% of jury panels that were scheduled for trial actually began jury selection that day. The majority of the cancelled panels were called off due to day-of-trial settlement or plea agreements and nearly one-fourth of the trials were continued to a future date. As a result, more than one-third of the jurors who reported for service never left the jury assembly room. Paula L. Hannaford-Agor, Assessment of Jury Operations and Procedures for High Profile and Lengthy Trials in the Eighth Judicial District Court of Nevada: Final Report 9 (Sept. 11, 2008). During the site visit for the Short Trial Program, informal discussions with the Jury Manager for the Eighth Judicial District Court confirmed that poor juror utilization due to day-of-trial cancellations has not improved significantly in the past three years.

[69] The use of short trials as an appropriate venue to experiment with different trial techniques may also be spilling over to the district court bench. According to anecdotal reports, some district court judges have begun advocating the use of trial notebooks in non-short trial civil jury trials, citing improvements in juror comprehension and satisfaction.

The short trial program has received significant public acclaim as well. In 2004 it won the National Achievement Award from the National Association of Counties, which recognizes innovative programs that contribute to and enhance county government in the United States. In 2006 it won first place in the 15th Annual Better Government Competition sponsored by the Shamie Center for Restructuring Government at the Pioneer Institute for Public Policy Research.

In terms of disadvantages, the most significant seemed to be the ongoing issue of courtroom availability. The ADR commissioner reported that the demand for short trials greatly exceeds available space in which to conduct the trials, and he has lobbied hard for dedicated courtrooms for short trials to prevent the risk and uncertainty of continuances. He did not, however, foresee a remedy for courtroom shortages in the near future. Related complaints were expressed by several judges pro tempore about the lack of logistical support, especially access to printers, copiers, and other routine administrative resources, during short trials. One judge pro tempore noted that even the best pretrial management cannot anticipate every possible contingency that may arise during trial, and it is unreasonable to force unnecessary delays during trial for the judge pro tempore or parties to make changes in written jury instructions or to make copies of an exhibit that was unintentionally omitted from the trial notebook. Although some district court judges are fairly generous with judges pro tempore about access to these types of resources in chambers, there is some ongoing tension about the use of their courtrooms during district court dark periods. With the exception of the limited amount of time allocated for voir dire, no specific complaints were expressed concerning the trial procedures themselves.

It was not clear from the interviews with key stakeholders in the short trial program that short trials offer a distinct advantage for either plaintiffs or defendants. Recent statistics suggest that short trial juries are less generous to plaintiffs, awarding lower damage awards than those received in arbitration or even rendering verdicts for defendants on liability when the arbitrator had decided in favor of the plaintiff, which would suggest that short trials are a pro-defendant venue. On the other hand, anecdotal reports from stakeholders who have been involved in short trials since their inception suggest that the direction and differential between arbitration awards and jury verdicts have shifted periodically over the past decade, indicating that perhaps the current statistics reflect only temporary characteristics of the jury pool or even the pool of arbitrators. Regardless of plaintiff concerns about the comparative miserliness of short trial juries, there were also complaints on the defense side that scheduling the short trial date within six months is too fast, especially for defendants who view a relative delay in trial as a strategic advantage in settlement negotiations.



Because the limitations on attorneys' fees and expert witness fees are unique to the Nevada short trial program, interviews with key stakeholders focused on the impact of this feature on litigant and attorney satisfaction. Because most cases adjudicated by short trial involve contingency-fee arrangements for the plaintiffs, the general consensus among stakeholders was that this feature had little detrimental impact on attorneys and a fairly significant upside for the plaintiffs.

Under a contingency-fee arrangement, plaintiff attorneys typically only recover costs from plaintiffs if the jury returns a defense verdict in a short trial. The costs associated with unsuccessful cases are thus already accounted for in the general operating costs of the attorney's law firm. In the event of a successful suit, on the other hand, the fee agreement takes precedence over the short trial rules, permitting the attorney to recover the agreed-upon percentage of the award as the fee from the plaintiff, although the $3,000 attorneys' fee limit could be recovered from the defendant to offset the amount owed by the plaintiff.

It was generally agreed that the restrictions on the amount of attorneys' fees are likely to be more detrimental to the defense, particular in cases that require greater expenditures for retained counsel and expert witnesses to contest liability. Defense attorneys for many of these trials, however, are salaried attorneys for the insurance carriers, which would reduce the potential expenses incurred for attorneys' fees. There have been sporadic proposals to increase the cap on attorneys' fees, and at least one challenge that the $3,000 cap should be applied per party, rather than per side, but thus far concerns that litigation costs be minimized to the greatest degree possible have kept those proposals at bay.

Looking Forward

To date, the amendments adopted by the Nevada Supreme Court have tended to make the short trial program stronger and more legitimate over time, garnering significant support by key stakeholders. The Nevada Supreme Court recently adopted two additional changes to the short trial program.

The first provided a mechanism for the local district courts to eliminate the $1,000 "opt-out" fee, allowing parties that appeal a mandatory arbitration decision to bypass the short trial option and have their cases sent back to the district court for a trial de novo. While the proposal was pending before the Nevada Supreme Court, proponents argued that it was unfair to impose an additional $1,000 expense on parties who want a full jury trial before a district court judge and without the procedural restrictions set forth in the Short Trial Rules. That they would have to wait three to four years for that trial, rather than six months for a short trial, should be a factor for parties to take into consideration in deciding which option to elect, rather than being coerced into a short trial in lieu of a $1,000 fee. Opponents of the change,

on the other hand, argued that eliminating the opt-out fee would undermine the legitimacy of the short trial program by making it appear to be a second-class, albeit faster, alternative to a trial de novo before a district court judge. It would also provide a means for parties seeking delay for strategic reasons to achieve that objective while further overloading district court calendars at taxpayer expense. Siding strongly with the opponents of the change, the Eighth Judicial District Court has not availed itself of the opportunity to eliminate the "opt out" fee.

The second proposal was much less controversial. Those changes simply provided additional clarification about what constitutes a "final judgment" under the Nevada Short Trial Rules, provided rules governing objections to the judge pro tempore's recommended judgment, and amended the rules concerning the payment of juror fees and costs to align with those applicable for civil cases in district court.[70]

[70] Those revisions were adopted on February 8, 2012. N.S.T.R. 5(a) provides an exception to the opt-out provision if local court rules have been adopted requiring the opt-out fee. To date, the Eight Judicial District Court has retained its opt-out fee.

References and Resources: Nevada Short Trial Program

Contact

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Relevant Statutes/Rules

Description of Short Trial Program

General Information

Nevada Short Trial Rules, List of Judges Pro Tempore, and Forms

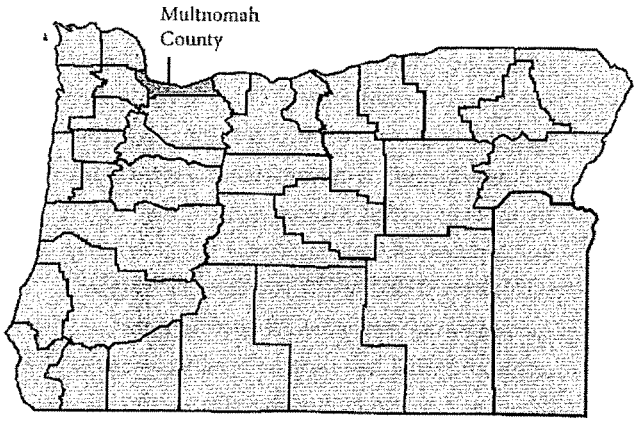
The Oregon Expedited Civil Jury Trial: Killing Many Birds with One Stone

In May 2010, the Oregon Supreme Court enacted Uniform Trial Court Rule (UTCR) 5.150, which authorized the Oregon Circuit Courts to permit civil litigants to resolve their cases with an expedited civil jury trial (ECJT) before a six-person jury. The rule specified that litigants who chose this procedure were exempt from mandatory arbitration, but it also imposed additional requirements that are not applicable to litigants seeking a jury trial under the standard civil process in Oregon. Two key conditions for ECJTs are holding the trial within four months of the parties' stipulation to participate and pretrial disclosure of expert witness reports.

Five judges assigned to the Civil Case Management Committee of the Multnomah County Circuit Court had worked for adoption of the new rule and immediately seized the opportunity to implement the ECJT program. They viewed the ECJT as a suitable vehicle not only to provide litigants with speedier trials, but also to implement a number of related reforms to civil case processing including closer and more consistent pretrial management. Another major objective of the Multnomah County ECJT program was to provide younger, less-experienced lawyers the opportunity to try cases before juries in a relatively low-risk environment.

The first ECJT was held in May 2011 and by the end of 2011 a total of 8 cases had been scheduled for trial. For this case study, the NCSC interviewed the trial judges who developed and oversee the ECJT program in the Multnomah County Circuit Court and a number of the attorneys who participated in ECJT trials during its first year of operation. While it is too soon to make definitive judgments about the program's success, it is clear that the way Rule 5.150 was implemented in the Multnomah County Circuit Court addresses a number of civil-case-processing concerns identified by the local civil bar. It is not clear, however, that the program is ideally suited as a training opportunity for young lawyers given the local legal culture and prevailing expectations about how civil cases should be litigated.

Oregon



Development of the ECJT Program

Effective May 2010, Chief Justice Paul J. De Muniz of the Oregon Supreme Court implemented Rule 5.150 of the Oregon Uniform Trial Court Rules (UTCR). The initial impetus for the rule was based on the chief justice's concerns about the fairness of arbitration decisions and the costs imposed on litigants by extended civil litigation. The new rule authorized the Oregon judicial districts to designate a civil case as "expedited" provided that the parties to the case submitted a joint motion to seek the designation and the judicial district had adequate staff, judges, and courtrooms to manage expedited cases. Under UTCR 5.150, if the presiding judge of the judicial district grants the motion, the case becomes exempt from mandatory arbitration or other forms of alternative dispute resolution, and a date for a trial before a six-person jury is scheduled within four months of the order. Rule 5.150 also provides a default order for the schedule and scope of discovery if the parties fail to include a discovery agreement. Six counties in Oregon initially indicated their intent to implement ECJTs.

At about the same time that the Oregon Supreme Court was developing Rule 5.150, trial judges and attorneys in the Multnomah County Circuit Court were investigating the "vanishing civil trials" phenomenon. In late 2009, the presiding judge's ADR/Vanishing Civil Jury Trial Committee issued a report, *The Vanishing Civil Jury Trial in Multnomah County*, which found a 30% decline in the number of jury trials since 2001. The report described findings of a survey of 450 trial lawyers and a series of focus groups with experienced trial attorneys and arbitrators about court- and litigation-related factors that discourage jury trials. The survey and focus group participants complained that the court's master calendar system for civil cases resulted in delayed and inconsistent rulings on pretrial motions because trial judges were unfamiliar with the cases or less experienced with civil litigation generally. There was also a widespread perception that trials rarely began on the scheduled trial date due to the local practice of scheduling trial dates in the "regular course" before a case was given a "date certain" to commence trial.[71] Mandatory arbitration was another focus of criticism because it increased

[71] The Vanishing Civil Jury Trial in Multnomah County: Report of the Presiding Judge's ADR/Vanishing Civil Jury Trial Committee 8-9 (Nov. 6, 2009).

the costs and the procedural complexity of civil litigation. Because mandatory arbitration was nonbinding, many lawyers viewed the process as simply "another bump in the road" after which one side or the other would appeal after "discovering" the opponent's experts during the hearing. Some lawyers avoided the entire process by intentionally inflating the amount of damages sought in the complaint to make cases ineligible for mandatory arbitration. Other litigation-related factors discouraging jury trials included expert witness expenses, the "all or nothing" risk associated with jury verdicts, the inherent uncertainty of jury trials for risk-averse clients, and the stress involved in preparing for and trying cases to juries. The report specifically recommended that the Multnomah County Circuit Court implement the ECJT rule that was under consideration by the Oregon Supreme Court at that time.

Two additional factors contributed to the decline of civil jury trials: the unification of the Oregon district and circuit courts in 1998, and the increasing refusal of clients to agree to underwrite the ongoing legal education of junior-level attorneys. The former district courts, which had jurisdiction over civil cases up to $10,000 in value, permitted lawyers to bring lower-value cases to trial before a six-person jury. Litigants could appeal an unsatisfactory verdict to the Court of Appeals. Many experienced trial lawyers and judges in Oregon explained that they first obtained experience with jury trials in the former district courts. Since the late 1990s, civil litigants have increasingly refused to pay the cost of having junior lawyers sit as second chair in jury trials in the circuit court. As a result, younger lawyers lost access to two traditional training grounds for jury trial experience. According to one senior trial attorney who worked on the development of Rule 5.150, the intent of using six-person juries for ECJT trials was to restore the functional option of the district court experience that had served the experienced trial bench and bar so well in the past.

The ECJT Program in Multnomah County Circuit Court

Rule 5.150 provides a basic procedural structure for expedited civil cases.[72] The rule requires the parties to file a joint motion to designate the case as an expedited case. The presiding judge of the judicial district (or designee) has sole authority to decide the motion.[73] If the presiding judge grants the motion, the case is exempt from mandatory arbitration or other court ADR programs.[74] The trial date must be set within four months of the order granting the expedited designation.[75] All expedited civil jury trials must employ a six-person jury.[76] The parties may design their own discovery plan, which is filed with the court.[77] If they decline to do so, Rule 5.150 provides a default discovery plan, including mandatory discovery of the names, addresses,

[72] UTCR Rule 5.150(1).
[73] UTCR Rule 5.150(2).
[74] UTCR Rule 5.150(2)(a).
[75] UTCR Rule 5.150(2)(b).
[76] UTCR Rule 5.150(7).
[77] UTCR Rule 5.150(3).

and telephone numbers of all lay witnesses other than those to be used for impeachment purposes; all copies of unprivileged documents and access to tangible things that will be used to support the parties' claims or defenses; and copies of all discoverable insurance agreements and policies.[78] After the parties have requested an ECJT designation, the default discovery plan also provides that the parties can take no more than two depositions; serve no more than one set of requests for production and one set of requests for admission; serve all discovery requests no later than 60 days before the trial date; and complete all discovery no later than 21 days before trial.[79] Parties are also prohibited from filing pretrial motions without prior leave of court.[80]

In spite of the detail provided in the default discovery plan, Rule 5.150 leaves a great deal of the operational implementation to the discretion of the local judicial districts. The Civil Case Management Committee used this flexibility in Rule 5.150 to simultaneously address some of the concerns raised in the *Vanishing Trials* report. Cases designated as expedited under Rule 5.150, for example, are removed from the court's master calendar and assigned to one of the five judges on the committee for all pretrial management purposes.[81] During the initial case management conference with the parties, which is held within ten days of the expedited designation order, the trial judge sets the trial date no later than four months from the date of the designation order.[82]

Although Rule 5.150 provides that parties may not file pretrial motions without leave of court, the Multnomah County judges agreed to make themselves available to the lawyers to answer questions, clarify orders, and help resolve pretrial disputes as necessary.

Other than establishing the jury as a six-person panel, ECJT trials are typically conducted much like any other civil jury trial. There are no explicit restrictions on the length of the trial, the number of witnesses, or the form of evidence presented (e.g., live witness testimony versus trial exhibits). The parties can stipulate to various restrictions (and the rules implicitly encourage the parties to discuss them), but these agreements must be filed with the court at least 14 days before trial. The parties may also stipulate to try the case in a non-traditional manner (e.g., with or without voir dire by court and counsel, presenting statements of stipulated facts to be interpreted by live expert testimony, etc.). At least five of the six jurors must agree on the verdict to render it valid (compared to 9 of 12 jurors in a 12-person jury). Following the trial, both parties have the right to appeal an adverse verdict to the Oregon Court of Appeals.

[78] UTCR Rule 5.150(4)(a).
[79] UTCR Rule 5.150(4)(b)-(f).
[80] UTCR Rule 5.150(5).
[81] "Expedited Civil Jury Trials In Multnomah County."
[82] *Id.*

Trials under the ECJT Program

The first ECJT was held in August 2010. As of November 2011, the Multnomah County ECJT program had scheduled eight cases, most of which were personal-injury cases. This was a considerably slower start than anticipated by the Multnomah County trial bench, which had dedicated considerable time and effort to publicizing the availability of the program. Another surprise was that most of the requests for ECJT designation were filed by fairly experienced trial attorneys, rather than the more junior attorneys that the program was designed to attract. All but one of the attorneys interviewed during the NCSC site visit reported that they would participate in the program again if an appropriate case presented itself.

Both plaintiff and defense attorneys expressed similar views about the types of cases they believed appropriate for the ECJT program: simple (ideally single-issue, either liability or damages) cases involving lower monetary value (less than $50,000) in which any medical treatment that the plaintiff received had been completed.[83] They explained that scheduling the trial date within four months of the designation order was unreasonable for more complex cases because such cases normally involve more time for discovery and more time for settlement negotiations. Cases subject to Oregon Revised Statute 20.080 also were identified as offering particularly strong incentives for both the plaintiff and defense to participate in the ECJT. Under ORS 20.080, the plaintiff's attorney can recover reasonable attorney's fees for cases valued $7,500 or less if the plaintiff prevails at trial provided that the defendant received a written demand for payment of the claim before the case was filed in court. The defendant in ORS 20.080 cases has every incentive to opt for a speedy trial and restricted discovery to limit the potential exposure to a large award of attorneys' fees. The plaintiff, on the other hand, has an incentive to obtain a speedy resolution with minimal investment in discovery costs that might otherwise eclipse the plaintiff's eventual damage award.[84]

The opportunity to avoid mandatory arbitration was another key selling point for the attorneys that participated in the early ECJT trials. As the *Vanishing Trials* study found, most civil trial attorneys in Multnomah County simply plead damages in excess of $50,000 if they wish to avoid mandatory arbitration, but for plaintiffs this procedural sleight-of-hand also removes the availability of ORS 20.080 attorney's fees for very low-value cases. The exemption from mandatory arbitration allows the plaintiff to bypass the "split the baby" approach that characterizes many of the arbitration awards as well as the additional costs involved in preparing for, participating in, and then appealing the arbitration hearing.

[83] In contrast, Multnomah County's ECJT judges panel views the program as open to cases of any value. At least one trial involved a prayer for damages in excess of $100,000. Cases are subject to mandatory arbitration if damages are pled in the amount of $50,000 or less.

[84] One the other hand, some plaintiff attorneys may be less inclined to seek prompt resolution of ORS 20.080 cases because delay may provide for increased attorneys' fees.

Several attorneys noted their appreciation about having immediate access to the trial judge, if necessary to resolve pretrial disputes, which is considerably sooner than the estimated six weeks to obtain a decision on a pretrial motion for cases assigned to the court's regular civil docket. One attorney did point out an inherent irony concerning judicial accessibility in ECJT cases—namely, that pretrial access to judges is more often necessary in more complex cases, for which an ECJT designation would not normally be filed. All of the attorneys reported great confidence in the expertise of the ECJT judges and believed that a significant part of the program's attraction is that these five judges[85] are overseeing its operation and appeared committed to its success.

The attorneys had mixed opinions about the ECJT trials themselves. Several attorneys noted that jury selection involved less time with a six-person jury compared to a twelve-person jury, but the trial length was not appreciably shorter than would otherwise be expected for a regular civil jury trial. Some attorneys said that using a six-person jury made the trial feel less formal and evoked a more relaxed trial presentation style. But the downside to the smaller jury was a less demographically diverse panel and the potential for a disproportionate impact of any outlier jurors on the verdict. Some attorneys believed that the ECJT trial was considerably less expensive than a regular jury trial, but others said that the costs were about the same. Because the ECJT rules are relatively flexible with respect to trial presentations, lower costs are likely to reflect the efficiencies stipulated to during the final pretrial conference, rather than anything inherent in the ECJT program.

The only major disadvantages expressed by the attorneys dealt with the ECJT's short and relatively inflexible deadlines. One attorney reported that once he had found both an appropriate case and a willing opposing counsel to participate in the ECJT, he had to wait more than two months to file the ECJT designation motion because they had mutually agreed on a trial date that was more than six months into the future. On one hand, this was an advantage because it gave both sides additional time to work up the case. But on the other hand, the trial itself did not take place appreciably earlier than it would have if they had simply decided to pursue the case as a regular jury trial.

Another attorney noted a logistically cumbersome issue related to the difference in disclosure deadlines between procedures for the ECJT procedures and mandatory arbitration. He explained that he routinely tries lower-value personal-injury claims, and his entire office management is set up with automated tickler alerts based on mandatory arbitration deadlines. The ECJT cases had to be manually adjusted and required much closer attention to ensure compliance with the rules.

[85] In early 2012, Judge David Rees joined the Civil Case Management Committee, becoming the sixth judge participating in the ECJT Program.

Another attorney complained about the limited time frame between completing discovery and finalizing the trial stipulations. He recounted his experience in which he had submitted a request for admission to the opposing counsel toward the end of the discovery period. The opposing counsel declined the request for admission, forcing the attorney into a last-minute scramble to secure expert evidence to support his claim that medical treatment for the plaintiff was necessary. He would have been at a great disadvantage at trial had he already finalized the trial witness list.

That attorney's experience reflects a unique aspect of the Oregon legal culture in which expert evidence is not discoverable, which has tended to create a culture of "trial by ambush." The ECJT rules require that the attorneys disclose their live witness and trial exhibit list, including expert witnesses and expert reports, no later than 14 days before the trial date—a dramatic departure from routine practice for most attorneys. The one attorney who said he would not participate in the ECJT program in the future explained that he had fallen into the trap of stipulating to certain facts at the final pretrial conference, leaving him unable to respond with additional evidence when he learned that his opposing counsel intended to introduce unexpected expert evidence.

Both this attorney and several others noted that the 14-day expert witness disclosure rule in the ECJT program elevates the importance of having a well-established working relationship with the opposing counsel so that both sides feel confident that the other will not engage in last-minute tricks. In the alternative, the attorney must have sufficient "street smarts" to anticipate and avoid getting trapped into stipulations that would put him or her at a strategic disadvantage. Ironically, although the ECJT program was designed to make jury trials more accessible to younger, less experienced lawyers, this unique legal culture makes it unlikely that most young lawyers will have either established working relationships with opposing counsel or the requisite "street smarts" to react effectively.

"We Built It. Why Haven't They Come?"

The major disappointment expressed by the Multnomah County trial bench concerning the ECJT program was the unexpectedly slow start for motions for an expedited designation. The ECJT program had been heavily advertised in local legal periodicals, CLE programs, and local civil bar association meetings. The ECJT judges gave presentations about the ECJT program at many of these meetings and CLE programs. The initial expectation was that the court would be trying in excess of 50 ECJT trials each year. That only 8 cases had been scheduled for trial in the first 18 months of the program, one of which ultimately settled before the scheduled trial date, fell far below expectations. The attorneys interviewed during the NCSC site visit offered

the explanation that the ECJT needed to establish more of a track record for fair outcomes and decreased costs before large numbers of civil attorneys would be willing to sign on. Several of the attorneys mentioned that they had asked the opposing counsel in a number of cases about filing an expedited designation motion before they found one willing to go forward.

The "newness" factor may be an inevitable challenge for courts implementing innovative programs, especially those that are essentially voluntary. Moreover, the ECJT program is specifically geared toward increasing the number of civil jury trials. Even under the best of circumstances, only a very small proportion of cases would opt into the program. In Multnomah County as elsewhere across the country, the vast majority of cases will continue to settle or be otherwise disposed by non-trial means. One attorney highlighted this point, stating that he would not want to expend the time and energy to convince first his client and then the opposing counsel to participate in the ECJT if the facts of the case suggested that it would most likely settle in the long run. This dynamic leaves a considerably smaller sample of cases to consider.

The same attorney implicitly raised a second obstacle to widespread use of the ECJT. A substantial number of attorneys in the *Vanishing Trials* study reported that the inherent "winner take all" nature of jury trials and risk-averse clients were significant factors that discourage jury trials. Understandably, clients are unlikely to be convinced to use the ECJT program simply for its educational value to their attorneys. Part of the challenge that attorneys have is convincing their clients that the ECJT offers a better opportunity for a fair outcome at a reasonable price, especially compared to settlement negotiations or an arbitration hearing. More risk-averse clients will require substantially more convincing until the ECJT achieves at least the perception, if not the reality, of a critical mass of successful jury trials. To the extent that all jury trials invariably have at least one loser—and even the winner may not always feel that he or she has won enough to compensate for the time and expense of a jury trial—that critical mass may be slow in accumulating.

Within law firms, a related obstacle for younger lawyers may be the challenge of convincing supervising attorneys to allow them to try the case under the ECJT program. More experienced attorneys are more likely to have the discretion to experiment with innovative programs. Indeed, almost all of the ECJT trials conducted as of November 2011 had been undertaken by fairly seasoned trial attorneys. One, who was in-house counsel for a large institutional client, also observed that he enjoyed considerably more discretion to decide whether to try a case and, if so, the best litigation strategy to employ, than attorneys working in retained defense firms who had more people looking over their shoulders and second-guessing their decisions.

Further complicating the task of securing agreement among all of the key decision makers is the fact that the civil bar now includes a full generation of lawyers that has practiced civil litigation without the implicit assumption that some small, but significant, portion of their cases would ultimately be decided by a jury. Most lawyers in practice today are much more familiar and comfortable with arbitration and other ADR techniques than with trying cases before either a judge or a jury. Many have never developed the necessary skills to do so and may not see an investment in acquiring those skills, either for themselves or for their junior attorneys, as cost-effective in the contemporary legal market. At least one of the more junior attorneys interviewed during the NCSC site visit admitted that his enthusiasm for acquiring effective trial skills is somewhat unusual among his peers; he envisioned his future professional career as part of a fairly elite cadre of lawyers who specialize in effective jury trial practice. A number of other lawyers echoed this viewpoint. They noted that the older, more experienced attorneys in their firms no longer want to dedicate a large amount of effort in trying small cases. Much of the enthusiasm for the ECJT program among the younger cohort of lawyers was the opportunity to acquire the professional skills to replace the older lawyers as they retire. They viewed the ECJT program as providing training to make them a valuable commodity to their law firms and to secure their professional future.

Conclusions

The ECJT reflects a savvy decision on the part of the Multnomah County trial bench to accomplish a number of case management objectives by introducing a fairly straightforward procedure for a speedier trial for lower-value cases. Their implementation of the ECJT program allocated cases for individual case management among a fairly small group of trial judges with extensive experience in civil litigation. All of the judges offered attorneys participating in the ECJT more immediate access to resolve pretrial issues. These steps were designed specifically to address the court management-related problems identified in the *Vanishing Trials* study, especially the inconsistent pretrial decision-making associated with the court's civil master calendar. Their collective efforts to publicize the ECJT program to the local civil bar also sent a strong message that these judges are committed to making the program work effectively. These various efforts appear to have met with approval from most of the attorneys who have participated in ECJT trials.

Ironically, the most significant complaint about the program may be the introduction of a particular reform—namely, required disclosure of expert witnesses and evidence at least 14 days before trial—that was not previously identified as a problem by the practicing bar. In fact, it appears from the comments expressed by the

attorneys that the absence of expert discovery is well accepted in conventional legal practice in Oregon and even viewed as an advantage insofar that it provides the maximum degree of strategic flexibility while minimizing costs. The introduction of a very different cultural norm may take some time for Multnomah County attorneys to appreciate, if they ever do. The ECJT program also provides a catch-22 in terms of the intended participant pool. The program's designers viewed the ECJT as a reintroduction of the district court model in which a large portion of the more experienced trial lawyers in Multnomah County originally cut their teeth. But the change in culture associated with early disclosure of expert evidence provides pitfalls that younger attorneys may be ill-equipped to avoid.

The ECJT has had a slower initiation period than many originally anticipated, but those expectations may have been unrealistic. Although most reviews of the first several ECJT trials have been fairly positive, a long-term concerted effort may be necessary to build sufficient trust in the ECJT program as a fair and cost-effective option for litigants, as well as a valuable training ground for those attorneys interested in obtaining jury trial experience.

References and Resources: Oregon Expedited Civil Jury Trial Program

Contact

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Relevant Statutes/Rules

Oregon Uniform Trial Rules 5.150

Description of Multnomah County ECJT Procedures

The Vanishing Civil Jury Trial in Multnomah County

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR MULTNOMAH COUNTY

_____ Plaintiff	)	Case No. _____
v.	)	**MOTION FOR AN EXPEDITED CIVIL JURY CASE DESIGNATION**
_____ Defendant	)	

(1)The parties move the court for an order designating this case as an expedited civil jury case and exempting or removing it from mandatory arbitration, pursuant to ORS 36.405(2)(a) and (b), and from all court rules requiring mediation, arbitration, and other forms of alternative dispute resolution.

(2) Each party agrees:

(a) To fully comply with any agreements set forth in section (4) of this motion as to the scope, nature, and timing of discovery, or, if there are no such agreements, to fully comply with the requirements of UTCR 5.150(4).

(b) That all discovery will be completed by _____ (which must be no later than 21 days before the trial date).

(3) The parties agree: (Check one)

_____ To conduct discovery in accordance with section (4) of this motion. The terms of section (4) supersede UTCR 5.150(4), **OR**.

_____ To conduct discovery in accordance with the requirements of UTCR 5.150(4).

(4) If the parties agree to the scope, nature, and timing of discovery pursuant to UTCR 5.150(3), those discovery provisions are stated here and supersede UTCR 5.150(4).

(a) Document discovery
____ Set(s) of Requests for Production per party
Serve by _____ (date)
Produce by_____(date)

(b) Depositions
____ Depositions per party
Complete by _____ (date)
(c) Requests for admissions
____ Sets of Requests for Admission per party

Serve by _____
Serve response by _____

(d) Exchange names, and if known, the addresses, and phone numbers of witnesses
Describe categories of witnesses _____ (*e.g.* those described in UTCR 5.150(4)(a)(i), percipient, lay, expert, all)
Exchange by _____ (date)
(e) Exchange existing witness statements
Describe categories of witnesses _____ (*e.g.* those described in UTCR 5.150(4)(a)(i), percipient, lay, expert, all)
Exchange by _____ (date)
(f) Insurance agreements and policies discoverable pursuant to ORCP 36B(2)
Produce by _____ (date)
(g) Other, if any (describe):

_____
_____
Produce by _____ (date)

5. The parties agree that expert testimony will be submitted at trial by:

☐ Report

☐ An alternative to in person testimony (specify): _____

☐ In person testimony

6. To expedite the trial, the parties further agree as follows (describe stipulations such as those concerning marking and admissibility of exhibits, damages, and other evidentiary issues):

_____
_____
_____

Dated this __ day of _____, 20____.

_____
Attorney for _____

_____
Attorney for_____

_____
Attorney for_____

MOTION FOR AN EXPEDITED CIVIL JURY CASE DESIGNATION (Multnomah County) UTCR 5.150

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR MULTNOMAH COUNTY

_____ Plaintiff	) Case No. _____
v.	) **ORDER DESIGNATING AN EXPEDITED CIVIL JURY CASE**
_____ Defendant	)

I HEREBY ORDER that:

1. This case is designated as an expedited civil jury case.

2. Good cause having been shown, pursuant to ORS 36.405(2)(a) and (b), this case is
   ☐ exempt
   ☐ removed
   from mandatory arbitration and from all court rules requiring mediation, arbitration, and other forms of alternative dispute resolution.

3. Trial date will be set at the case management conference and the trial will be held no later than _____.
   (month/year)

4. This case is assigned to Judge _____, and the parties are directed to call the judge immediately and arrange for a case management conference to be held within 10 days if feasible.

5. ☐ The written agreement of the parties
   ☐ The default provisions of UTCR 5.150(4)
   is/are are adopted as the case management order.

6. This order takes effect immediately.

DATED this _____ day of _____, 20_____.

_____
Presiding Judge

WHAT TO EXPECT AT THE FIRST CASE MANAGEMENT CONFERENCE OF AN EXPEDITED CASE

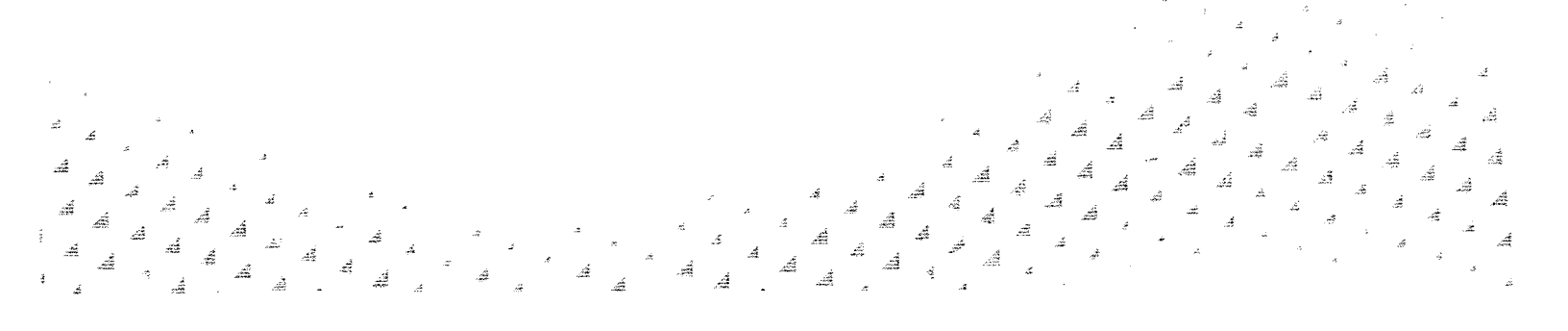
One of the available trial judges (Kantor, Litzenberger, Matarazzo, Nelson, Wilson) will schedule a conference within 10 days of the expedited case designation. All trial counsel and self-represented parties must appear either in person (preferred) or by telephone.

The conference will address the following issues, if not previously agreed upon by the parties:

- The setting of the trial date;
- The parties' discovery agreement, if any;
- Handling of pretrial disputes.
- Time limits on voir dire.
- Scheduling of the trial management conference.

In the absence of a discovery agreement, the additional issues will be addressed:

- The scope, nature, and timing of discovery, including depositions, requests for production and discovery requests for admission and other discovery requests;
- The date discovery will be complete, which must be not later than 21 days before trial;
- Stipulations regarding the conduct of the trial, which may include stipulations for the admissions of exhibits and the manner of submissions of expert testimony.
- Production of the names and, if known, addresses and telephone numbers of all persons, other than expert witnesses, likely to have knowledge that the party may use to support its claims or defenses, unless the use would be solely for impeachment.
- Production of all unprivileged ORCP 43 A(1) documents and tangible things that the party had in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment.
- Production of all insurance agreements and policies discoverable pursuant to ORCP 36 B(2).



California's Expedited Jury Trial Program: Awaiting a Verdict

On January 1, 2011, the Expedited Jury Trials Act[86] and additions to the California Rules of Court[87] took effect, establishing an expedited jury trial program throughout the state of California.[88] The expedited jury trial (EJT) rules and procedures were developed by the Small Claims Working Group (Working Group), which was established in April 2009 at the request of the Chief Justice and the Administrative Director of the Courts. Chaired by Judge Mary Thornton House (Los Angeles Superior Court), the Working Group comprised members of the California Judicial Council's Civil and Small Claims Advisory Committee and representatives of a broad range of stakeholders including the plaintiff and defense bars, the insurance industry, business groups, and consumer organizations.[89]

The charge to the Working Group was to consider various innovations that California might adopt to promote the more economical resolution of cases,[90] increase access to courts for litigants with lower-value cases, and streamline jury trials in light of declining court resources available for civil cases.[91] In the course of research into how other states had addressed these issues, the Working

[86] CAL. CIV. PROC. CODE §§ 630.01-630.12; 2010 CAL. STAT. CH. 674.

[87] CAL. R. CT. 3.1545-3.1552.

[88] The Expedited Jury Trials Act has a five-year sunset provision and is set to expire January 1, 2016. The California Judicial Council is charged with assessing the impact of expedited jury trials in reducing litigant and court costs and maintaining an efficient and expeditious trial court system.

[89] See CIVIL & SMALL CLAIMS ADV. COMM., REPORT TO THE JUDICIAL COUNCIL, JURY TRIALS: EXPEDITED TRIAL PROCEDURES (Oct. 8, 2010).

[90] Within California's unified court system, civil cases have three classifications based on dollar values and for which some variations in rules apply. A civil case in which the amount in controversy is $10,000 or less ($7,500 for automobile accidents in which the defendant driver's insurance policy includes a duty to defend) may be filed as a small claim. Small claims are handled under simplified procedures, and the parties must represent themselves at trial. CAL. CIV. PROC. CODE §§ 116.210-116.880. Other civil cases are divided into two classifications: limited civil (amount in controversy is $25,000 or less) and unlimited civil (amount in controversy exceeds $25,000). CAL. CIV. PROC. CODE §§ 85-89. Some modifications to discovery and evidentiary procedures, along with limitations on certain types of motions, apply in limited civil cases. CAL. CIV. PROC. CODE §§ 90-100.

[91] California courts are primarily state funded. Over the past few years state funding has declined by over 30%, including $350 million in cuts effective July 1, 2011. The consequences of declining budgets include the closure of civil courtrooms and large staff reductions. For example, San Francisco closed 10 civil courtrooms and cut 67 employees in October 2011. Los Angeles County has also closed courtrooms and laid off 1,600 staff since 2010.

Group invited representatives from New York and South Carolina to discuss their experiences with summary jury trials. The reported success of these programs in reducing costs without compromising litigants' rights or systematically favoring either plaintiffs or defendants allayed many of the stakeholders' concerns and encouraged them to explore adapting South Carolina's summary jury trial model for use in California. With broad-based support from its constituents, the Working Group embarked upon an intensive and inclusive process to establish a legal framework for a summary trial format that would balance flexibility for litigants and courts with the economies necessary to meet the program's goals. Over a period of one and a half years, the Working Group negotiated and fine-tuned a set of rules and procedures for EJTs that would become part of the California Code of Civil Procedure and the California Rules of Court.

California's EJT program is now in its early stages of implementation. To date its usage is uneven across the state, and relatively few EJTs have occurred. For example, only 19 cases were disposed as EJTs in Los Angeles County during the first 11 months of the program (January through November 2011).[92] Although EJTs have not yet become routine for courts or the civil bar, judges, attorneys, and jurors who have participated in EJTs are generally very satisfied with the process and outcomes. These initial experiences indicate the potential for the EJT program to gain the momentum needed to accomplish its goals.

[92] This figure is based on data collected by the director of juror services for Los Angeles Superior Court as of November 30, 2011. Other court records indicate up to 25 expedited jury trials were conducted during this time period.

This case study focuses on the EJT rules and their potential benefits, the manner in which the program operates in the Los Angeles and San Francisco Superior Courts, and the experiences of attorneys who have been early participants in the program. This case study is based primarily on interviews with superior court judges and staff, staff of the California Judicial Council and the Administrative Office of the Courts, and attorneys practicing in Los Angeles, Orange, Riverside and San Francisco Counties who have participated in EJTs.[93]

California

[93] Project staff also reviewed case file data from the 19 identified EJTs concluded in Los Angeles County through November 30, 2011.

Expedited Jury Trial Program Structure

California's EJTs are voluntary short trials intended to conclude in a single day. The word "expedited" refers to the trial itself, not to pretrial procedures: expedited trials are intended to be shorter than ordinary trials, but they do not advance through the pretrial phases of litigation more quickly than non-EJT cases and generally do not receive a calendar preference. The Working Group chose the word "expedited" to distinguish California's program from other methods of alternative dispute resolution. The Working Group sought to emphasize that EJTs are "real trials with real judges." To this end, only judicial officers assigned by the presiding judge of a superior court may conduct EJTs. As in a standard jury trial, the verdict of the EJT jury is binding.

The Expedited Jury Trials Act (Chapter 674 of the California Code of Civil Procedure) and the California Rules of Court set out the requirements for EJTs.[94] Thirty days before the scheduled trial date, the parties must file a proposed consent order indicating their agreement to participate in an EJT.[95] EJTs are purely voluntary, and all parties and their attorneys must sign the consent order.[96] Court rules also set timelines for the pretrial exchange of documentary evidence, witness lists, and other trial-related information; advance filings of motions in limine; and a pretrial conference.[97] The EJT pretrial rules are intended to create a default system for narrowing issues and evidence for trial including a pretrial conference designed to resolve any outstanding issues and promote an efficient trial process.

The consent order may include modifications to the standard EJT rules, but four elements are mandatory under the EJT statute: (1) each side is limited to three hours for presenting its case (opening statements, presentation of evidence, direct and cross-examination of witnesses, and closing arguments); (2) the case is heard by a maximum of eight jurors as opposed to twelve, with no alternates; (3) each side is limited to three peremptory challenges; and (4) the parties waive their right to appeal or file post-trial motions, except for fraud or misconduct of the judge or jury.[98]

Examples of modifications that the parties may make within the bounds of the consent order include changes to the timing for pretrial submissions and exchanges; limitations on the number of witnesses per party; stipulations

[94] The standard provisions of the California Code of Civil Procedure apply to any matters not expressly addressed by Chapter 674, the Rules of Court, or the consent order that specifies the parties' agreement on various pretrial, trial and evidentiary issues.

[95] Cal. R. Ct. 3.1547. The rule qualifies this requirement with the statement "unless the court otherwise allows." Most expedited jury trials appear to have proceeded more or less spontaneously and therefore have not followed the EJT pretrial procedures. In Orange County, however, several cases reportedly have proceeded through the full EJT pretrial process.

[96] The court may deny the proposed order for good cause.

[97] Cal. R. Ct. 3.1548.

[98] Cal. Civ. Proc. Code § 630.03(e)(2).

regarding factual matters; stipulations as to what constitutes necessary or relevant evidence for a particular factual determination; and the admissibility of particular evidence without legally required authentication.[99] Many of the allowable modifications are intended to streamline the pretrial process and to reduce the time needed for presenting the case.

An important feature of California's EJTs is the expressed ability of the parties to enter into high/low agreements, which are permitted but uncommon in traditional civil trials in California. Such agreements set a maximum amount of damages that the defendant will be liable to pay and a minimum amount of damages that the plaintiff will recover. Neither the existence of a high/low agreement nor its contents may be revealed to the jury.[100] The ability of each side to limit its exposure was designed to reduce uncertainty about the potential effects of the smaller jury size and to mitigate the risk entailed in waiving the right to appeal the verdict.

[99] CAL. R. CT. 3.1547(b).

[100] CAL. CIV. PROC. CODE § 630.01(b). The agreement may be submitted to the court only under specified circumstances (by agreement of the parties, in a case involving either a self-represented litigant or a minor or other protected person, or to enter or enforce a judgment). CAL. R. CT. 3.1547(a)(2).

Implementation of the California Expedited Jury Trial Program

Although the statutes and rules governing EJTs apply throughout the state of California, the mechanics of implementation have been left largely to individual courts and judges. Ordinarily, the Administrative Office of the Courts would support an initiative such as the EJT program through training, education, and statewide program management. However, budgetary constraints and reductions in personnel have limited the ability of the Administrative Office of the Courts to provide staff support for the EJT program beyond the drafting of forms and informal communication with courts and the bar regarding the use of EJTs across the state.

The state budget crisis has also delayed the drafting and approval process for the EJT forms. One year after the EJT statute went into effect, the Judicial Council had approved only an information sheet describing EJT procedures. Forms for the consent order and a juror questionnaire were still awaiting final approval. Some courts and attorneys have used the draft versions of these documents.

Publicity for the EJT program has been handled primarily by judges, court clerks' offices, and interested law firms and individual attorneys, although there was some early outreach on

the part of AOC staff.[101] Judges in Northern California have spoken about the program at local bench-bar meetings, and some courts include information about EJTs in the packet of documents provided to each plaintiff upon the filing of a complaint. The civil defense bar presented a series of continuing legal education sessions on EJTs, and several judges and attorneys have written articles and granted interviews explaining the EJT program for state and local legal periodicals.[102]

Outreach by individual judges to attorneys and litigants is an important means of raising awareness of the program. However, judicial knowledge of and active support for the EJT program varies widely. Some judges make a point of informing litigants of the EJT option at the final pretrial conference, whereas some are familiar with the program but do not actively promote it. Others have very little knowledge of EJT procedures but are receptive when attorneys propose an EJT.

Although official statistics on the number of EJTs conducted during 2011 have yet to be collected, EJTs appear so far to be uncommon. The Los Angeles Superior Court, which handles nearly 30% of the state's civil caseload, held an estimated 19 to 25 EJTs during the first 11 months of 2011;[103] San Francisco held approximately four.[104] These numbers represent around 3% to 4% of all civil jury trials conducted in each court.[105] One reason for the scarcity of EJTs may be that nearly all EJTs occur in limited civil cases ($25,000 and under), which account for slightly more than one-tenth of civil jury trials held in California.[106] Judges and attorneys generally agree that limited civil cases are best suited to the EJT procedure because the issues tend to be simple and the volume of evidence low.

Other factors contributing to the limited use of EJTs may include attorneys' lack of familiarity with EJT procedures, the finality of the judgment, and strategic considerations on the part of defendants. Judges report that, despite the outreach efforts described above, many attorneys remain unaware of the EJT option until it is mentioned in a pretrial conference. Even attorneys who have heard of the program may be hesitant to participate until they have observed the results of EJTs conducted by other attorneys. Several interview subjects speculated that, especially in personal-injury cases in which plaintiffs' attorneys work on a contingent-fee basis, defendant insurance companies may be reluctant to agree to any procedure that reduces the plaintiff's expenses. On the other hand, attorneys for an insurance company noted the value of EJTs in resolving cases for defendants who seek closure in the matter being litigated.

[101] *See*, e.g., Patrick O'Donnell & Anne Ronan, *Expedited Jury Trials: New Law Implemented In San Francisco*, Daily J., Jan. 21, 2011 (written by AOC staff).

[102] *See*, e.g., Steven P. Goldberg, *Practice Tips: Expedited Jury Trials Offer Innovative Procedures to Reduce Costs*, Los Angeles Law., Oct. 2011, at 20; Laurie M. Earl, *Updates From the PJ: Sacramento's First Expedited Jury Trial*, Sacramento Law., Sep./Oct. 2011, at 7; S. David Rosenthal, *Practice Tips: Lessons From an Expedited Trial*, Trial Law., Summer 2011, at 13; Ciaran McEvoy, *Expedited Jury Trial Law Makes Slow Inroads*, Daily J., Feb. 14, 2011.

[103] *See supra* note 92 and *infra* note 109.

[104] A few attorneys practicing in Orange County reported having conducted approximately 10 EJTs.

[105] In 2009-2010, the latest fiscal year for which data are available, the Los Angeles Superior Court held a total of 507 civil jury trials, and the San Francisco Superior Court held 132. Judicial Council of California, 2011 Court Statistics Report 66 (2011).

[106] *See supra* note 90.

Especially in unlimited civil cases (amount in controversy exceeds $25,000), attorneys may hesitate to recommend an EJT to clients who would be unable to challenge an unfavorable trial result. Post-trial motions and appeals are commonly filed in unlimited civil cases: in a sample of 12 California courts, post-trial motions were filed after 40 percent of unlimited civil jury trials held during 2005, and 26 percent of unlimited civil jury trials held in the same year resulted in appeals.[107] Although the absence of post-trial motions and appeals following an EJT has the potential to be a significant source of cost savings, parties and attorneys appear to be unwilling to give up the option of challenging the trial judgment in unlimited civil cases.

Even when the parties have opted for an EJT, many have not followed all the EJT procedures established by statute and rule. In the program's early months, the EJT rules have been used primarily for trials themselves, and courts have frequently waived the required pretrial procedures. To date, the majority of EJT consent orders have been filed on the eve of trial, precluding the deadlines for the pretrial exchanges of documents and information and the filing of motions in limine. In San Francisco, all EJTs held as of December 2011 were elected during the final conference with the judge on the scheduled trial date. In 18 of the 19 Los Angeles EJT cases, the EJT consent order was filed less than a week before trial, although earlier notations regarding EJT appear in the files of two of these cases. In Orange County and Riverside County, however, attorneys have used the full EJT pretrial procedures. These attorneys report that the procedures have helped narrow the issues and evidence for trial, which has streamlined the trial and reduced litigant costs.

The relatively low level of awareness of the EJT option is an obvious explanation for the late election of EJTs in most cases tried to date. Another reason may be courts' use of the master calendar system in which a case is not assigned to a specific judge until just before the trial begins. San Francisco, for example, uses a master calendar for all civil cases; Los Angeles employs a master calendar in limited civil cases, which represent the vast majority of EJTs. Under a master calendar system, lawyers and litigants may be reluctant to give up the right to appeal until they know which judge will preside at trial.

The last-minute election of an EJT reduces the potential cost savings to the court system as well as to litigants. If a trial is not designated in advance as an EJT, a full panel of jurors must be summoned and sent to the courtroom for jury selection. In some courts, 24 hours notice of an EJT is sufficient to avoid sending a full panel to the courtroom, but the court still wastes resources by summoning more jurors than needed. For litigants, attorneys, and witnesses, the late election of an EJT means that the issue-narrowing benefits of the EJT pretrial

[107] These data are taken from the 2005 Civil Justice Survey of State Courts, which included the superior courts in Alameda, Contra Costa, Fresno, Los Angeles, Orange, San Bernardino, San Francisco, Santa Clara, Ventura, Plumas, Marin, and Santa Barbara counties.

procedures, along with any potential savings in the cost of trial preparation, are lost. As a practical matter, however, some attorneys suggest that the cost of preparing for an EJT may not be significantly less than the cost of preparing for a standard limited civil trial because discovery and other pretrial procedures for EJTs and limited civil cases are similar.

In practice, EJTs may not be substantially shorter than ordinary limited civil jury trials. Very few EJTs are actually completed within one day. For example, of the 19 EJTs held in Los Angeles County between January and November of 2011, only 4 were completed within one day, 12 lasted two days, and 3 were three days long. Attorneys and judges report that jury selection in most limited civil cases is already quite streamlined, but jury selection is typically faster in EJT cases due to the smaller size of the jury. Because of the flexibility of the EJT procedures, the time savings largely depend upon the wishes of the parties and the discretion of the judge. For instance, with judicial approval the parties may stipulate to allow additional time for voir dire, which lengthens the trial, or to relax the rules of evidence, which reduces the time needed for presentation of the case. Even the ostensibly mandatory features of EJTs appear to be waived in some cases—for example, alternate jurors were used in at least two EJTs conducted in Los Angeles, and some judges are flexible in granting a party more than three hours to present a case if needed.

Potential Benefits of the California Expedited Jury Trial Program

In individual cases, California's EJT program has the potential to reduce trial costs for litigants and attorneys by encouraging the parties to agree upon a streamlined presentation of evidence. In one case, for example, the parties stipulated to use the plaintiff's medical records without calling the plaintiff's doctor to testify, saving both time and expert witness fees. Although the parties are free to make these types of evidentiary stipulations in any case, the EJT program's exchange requirements and time limits are designed to encourage such agreements. The time limit for presenting the case also forces the attorneys to distill the case to its essential issues, potentially leading to the pretrial settlement of certain issues or even the entire case. The application of the EJT pretrial rules is expected to become more widespread as courts, judges and attorneys become more familiar with the process and with the benefits of the EJT pretrial procedures in reducing the costs of the trial itself.

By reducing the cost of taking a case to trial, the EJT program also is intended to increase access to justice in cases with damages of low to moderate value. If trial costs are reduced, then plaintiffs' attorneys may be more willing

to accept less valuable personal injury cases on a contingent fee basis. For both plaintiffs and defendants, EJTs also may offer a more affordable way to have their day in court, allowing them the emotional satisfaction of having their cases heard by a jury instead of being forced into a settlement by the high cost of going to trial.

Two other factors suggest that EJTs may have beneficial effects on civil justice practice. First, EJTs produce jury verdicts, which provide metrics for assessing the value of particular types of claims. This knowledge should promote more informed negotiations and settlements of claims that do not proceed to any type of trial, whether an EJT or a conventional jury trial. Second, some attorneys have hypothesized that the EJT will provide a low-risk forum where young attorneys can gain trial experience.

The greatest real-world impact of the California expedited jury trial program may fall not upon litigants or the courts but on jurors. Judges and attorneys consistently report that when potential jurors are advised that they have been assigned to an expedited trial, their demeanor instantly becomes more positive. EJT jurors appreciate the certainty that their trial will conclude within a few days, and they experience the satisfaction of participating in the justice system without the alienation that can result from listening to protracted cross-examinations or battles over the admissibility of evidence. The very existence of a program designed to increase efficiency also helps to bolster public trust and confidence in the judicial system.

The First Year of Expedited Jury Trials in Los Angeles County

Judges and court staff conducted an informal study of EJTs that occurred in Los Angeles County during the first 11 months of the program (January through November 2011).[108] At least 25 expedited jury trials were held during this time period.[109] Nineteen of the cases were limited civil matters, and the remaining six essentially fit the profile of a limited civil case. The nineteen limited civil cases accounted for 20 percent of the approximately 101 limited civil trials concluded during the 11-month period.[110] Verdicts split about evenly between plaintiffs (13) and defendants (12).

Judges provided more detailed information about 15 EJT trials. Thirteen of these cases arose from automobile accidents,[111] and all but one of the 15 cases involved claims for minor impact soft tissue injuries. The trial records suggest that the EJT limits on case presentation time and provisions encouraging streamlined evidence production are

[108] See *The First Year of Los Angeles Expedited Jury Trials: An Excellent Start with Promising Future*, The Valley Law. Mag., February 2012.

[109] This figure differs from the data collected by the director of juror services for Los Angeles Superior Court as of November 30, 2011. These data may not have accounted for other expedited jury trials across the several courts in Los Angeles County because the courts have yet to develop a uniform way to identify them.

[110] The six unlimited civil cases represented, of course, a much smaller proportion of the approximately 836 unlimited civil trials concluded during the time period.

[111] The other two cases were a dog bite and a slip-and-fall.

reasonable and achieving their intended effects on trial time and related costs. Both parties used all their allotted case presentation time in only three of the 13 cases for which this information was reported.[112] Plaintiffs presented at least one witness and up to four, with an average of 2.3. The number of witnesses called by defendants ranged from none to two and averaged 1.2. In five of 14 cases the parties presented no experts. The jurors reportedly valued the lawyers focusing on the critical evidence, and their deliberations averaged approximately two hours.

Few of the EJTs achieved the goal of a one-day trial; the vast majority carried over to a second day. However, all of the 15 trials examined originally had been projected to require at least three trial days and as high as seven trial days, with the majority of trial estimates ranging from three to five days. In the end, all 15 trials, and deliberations in most, were completed in two days. Based on these figures, EJTs eliminated at least 50 trial days. The parties also incurred lower expert fees because the experts did not have to be on call to testify for a protracted period of time.

[112] Among the 13 cases, six plaintiffs used all their time and only three defendants used the full amount.

Looking Forward

After one year, California's EJT program remains in an experimental stage. Some jurisdictions and individual judges have moved more quickly and enthusiastically to try out the process, and a growing number of attorneys are gaining experience trying cases under the EJT rules. By and large, judges, attorneys, and jurors who have participated in EJTs view them quite favorably.

The positive experience with EJTs suggests that their use is likely to grow as more attorneys experience the benefits and share their positive perspectives with colleagues through professional publications and associations. Courts also are likely to promote EJTs more vigorously as judges and court clerks gain experience and learn from their colleagues in other courts.[113]

To date, however, EJTs largely have been used in limited civil cases in which the issues are not complex, the number of witnesses is small, and the attorneys are able to work together in a collegial and cooperative manner. Litigants, attorneys, and the courts are more likely to realize the potential cost savings from EJTs if the use of the EJT procedure is expanded beyond limited civil cases and the parties select an expedited trial earlier in the litigation process.

[113] The Administrative Office of the Courts is planning at least three presentations for judges around the state in 2012.

Courts can take a number of steps to encourage the use of expedited jury trials to achieve economies for the justice system and for litigants. First, judicial leadership is needed to promote the benefits of EJTs to attorneys much earlier in the pretrial stages of litigation. Second, the court can provide calendar preferences for EJTs, which will allow attorneys to coordinate witnesses and reduce costs to the parties. One suggestion is to set aside a designated time period for EJTs, such as one day per month or one week per quarter. As attorneys see that cases can get to trial faster under the EJT rules, they will be more likely to elect expedited jury trials, especially if budgetary pressures continue to diminish the availability of standard civil jury trials. Third, courts that employ a master calendar system can designate a specific judge or judges to hear all EJTs, decreasing the perceived risk of electing an EJT before the trial judge has been assigned. Ultimately, the success of California's EJT program will depend on the efforts of its proponents to persuade attorneys and litigants that the advantages of an expedited trial outweigh any perceived risks.

Relevant Statutes/Rules

Statute: Expedited Jury Trials Act (stats 2010 Ch. 674)
Code of Civil Procedure Sections 630.01-630.12)

California Rules of Court Chapter 4.5
Expedited Jury Trials (Rules 3.1545-3.1552)

General Information

California Courts

Los Angeles Superior Court

References and Resources: California Expedited Jury Trial Program

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EJT-010-INFO Expedited Jury Trial Information Sheet

This information sheet is for anyone involved in a civil lawsuit who is considering taking part in an **expedited jury trial**—a trial that is shorter and has a smaller jury than a traditional jury trial. Taking part in this type of trial means you give up your usual rights to appeal. **Please read this information sheet before you agree to have your case tried under the expedited jury trial procedures.**

This information sheet does not cover everything you may need to know about expedited jury trials. It only gives you an overview of the process and how it may affect your rights. **You should discuss all the points covered here and any questions you have about expedited jury trials with your attorney. If you do not have an attorney, you should consult with one before agreeing to an expedited jury trial.**

(1) What is an expedited jury trial?

An expedited jury trial is a short trial, generally lasting only one day. It is intended to be quicker and less expensive than a traditional jury trial.

As in a traditional jury trial, a jury will hear your case and will reach a decision about whether one side has to pay money to the other side. An expedited jury trial differs from a regular jury trial in several important ways:

- **The trial will be shorter.** Each side has 3 hours to put on all its witnesses, show the jury its evidence, and argue its case.
- **The jury will be smaller.** There will be 8 jurors instead of 12.
- **Choosing the jury will be faster.** The parties will exercise fewer challenges.
- **All parties must waive their rights to appeal.** In order to help keep down the costs of litigation, there are no appeals following an expedited jury trial except in very limited circumstances. These are explained more fully in (5).

(2) Will the case be in front of a judge?

The trial will take place at a courthouse and a judge, or, if you agree, a temporary judge (a court commissioner or an experienced attorney whom the court appoints to act as a judge) will handle the trial.

(3) Does the jury have to reach a unanimous decision?

No. Just as in a traditional civil jury trial, only three-quarters of the jury must agree in order to reach a decision in an expedited jury trial. With 8 people on the jury, that means that at least 6 of the jurors must agree on the verdict in an expedited jury trial.

(4) Is the decision of the jury binding on the parties?

Generally, yes, but not always. A verdict from a jury in an expedited jury trial is like a verdict in a traditional jury trial. The court will enter a judgment based on the verdict, the jury's decision that one or more defendants will pay money to the plaintiff or that the plaintiff gets no money at all.

But parties who agree to take part in expedited jury trials are allowed to make an agreement before the trial that guarantees that the defendant will pay a certain amount to the plaintiff even if the jury decides on a lower payment or no payment. That agreement may also put a cap on the highest amount that a defendant has to pay, even if the jury decides on a higher amount. These agreements are known as "high/low agreements." You should discuss with your attorney whether you should enter into such an agreement in your case and how it will affect you.

(5) Why do I give up most of my rights to appeal?

To keep costs down and provide a faster end to the case, all parties who agree to take part in an expedited jury trial must agree to waive the right to appeal the jury verdict or decisions by the judicial officer concerning the trial unless one of the following happens:

- Misconduct of the judicial officer that materially affected substantial rights of a party;
- Misconduct of the jury; or
- Corruption or fraud or some other bad act that prevented a fair trial.

In addition, parties may not ask the judge to set the jury verdict aside, except on those same grounds. Neither you nor the other side will be able to ask for a new trial on the grounds that the jury verdict was too high or too low, that legal mistakes were made before or during the trial, or that new evidence was found later.

→

EJT-010-INFO **Expedited Jury Trial Information Sheet**

(6) How else is an expedited jury trial different?

The goal of the expedited jury trial process is to have shorter and less expensive trials. The expedited jury trial rules set up some special procedures to help this happen. For example, the rules require that several weeks before the trial takes place, the parties show each other all exhibits and tell each other what witnesses will be at the trial. In addition, the judge will meet with the attorneys before the trial to work out some things in advance.

The other big difference is that the parties can make agreements about how the case will be tried so that it can be tried quickly and effectively. These agreements may include what rules will apply to the case, how many witnesses can testify for each side, what kind of evidence may be used, and what facts the parties already agree to and so do not need to take to the jury. The parties can agree to modify many of the rules that apply to trials generally or even to expedited jury trials (except for the four rules described in (1).

(7) Who can have an expedited jury trial?

The process can be used in any civil case that the parties agree may be tried in a single day. To have an expedited jury trial, both sides must want one. Each side must agree that it will use only three hours to put on its case and agree to all the other rules in (1) above. The agreements between the parties must be put into writing in a document called a Proposed Consent Order Granting an Expedited Jury Trial, which will be submitted to the court for approval. The court must issue the consent order as proposed by the parties unless the court finds good cause why the action should not proceed through the expedited jury trial process.

(8) Can I change my mind after agreeing to an expedited jury trial?

No, unless the other side or the court agrees. Once you and the other side have agreed to take part in an expedited jury trial, that agreement is binding on both sides. After you enter into the agreement, it can be changed only if **both** sides want to change it or stop the process or if a court decides there are good reasons the expedited jury trial should not be used in the case. This is why it is important to talk to your attorney **before** agreeing to an expedited jury trial.

You can find the law and rules governing expedited jury trials in Code of Civil Procedure sections 630.01–630.12 and in rules 3.1545–3.1552 of the California Rules of Court. You can find these at any county law library or online. The statutes are online at *www.leginfo.ca.gov/calaw.html*. The rules are at *www.courts.ca.gov/rules*.

Attorney or Party Without Attorney (Name, State Bar Number, and Address)	For Court Use Only
Telephone No: E-Mail Address: Attorney/Party for: ▫ Plaintiff ▫ Defendant ▫ Other _____	

[PROPOSED] CONSENT ORDER TO EXPEDITED JURY TRIAL	CASE NUMBER

This Consent to Expedited Jury Trial Form is be filled out and signed by all parties or their legal representatives and their attorney of record prior to jury selection in an Expedited Jury Trial Proceeding as defined by California Code of Civil Procedure §§630.01 through 630.12 and California Rules of Court 3.1545 through 3.1552. Information about Expedited Jury Trial [EJT] Procedures can be found on Form EJT-010-INFO.

Please check and initial the below boxes in response to the information requested.

I/We_____[insert name] am the ▫ Plaintiff ▫ Plaintiff's Representative ▫ Defendant ▫ Defendant's Representative ▫ Other _____ and have the authority to consent to an Expedited Jury Trial.

[Initial Here (Optional)]

1. ▫ I am represented by an attorney who has advised me about the EJT procedure and provided me with a copy of Judicial Council Form EJT-010-INFO.
▫ I am representing myself and understand the Expedited Jury Trial Procedures as set forth in the California Rules of Court 3.1545 and 3.1552.

_____ [Initial Here (Optional)]

2. I understand and consent to the EJT Procedure which is a shorter trial with a smaller jury than a traditional 12 person jury and I have agreed to _____ persons on this jury.

_____ [Initial Here (Optional)]

3. I understand and consent to the EJT Procedure which requires a **waiver of the appeal rights of ALL parties** except in very limited circumstances.

_____ [Initial Here (Optional)]

4. I understand that I may not ask the judge to set aside the jury verdict except in extremely limited circumstances and in no case can any party ask for a new trial on the grounds that the verdict was too high or too low or that new evidence was found later.

_____ [Initial Here (Optional)]

5. I understand and consent to the EJT Procedure which requires only three-quarters of the jury to agree in order to reach a decision.

_____ [Initial Here (Optional)

6. I understand that the parties may agree to the conditions of the trial in terms of applicable rules, number of witnesses, types of evidence, and that this is done in order to shorten the length of time in which the matter will be tried to the jury. A copy of that agreement is attached hereto as Exhibit _____.

_____ [Initial Here (Optional)]

7. I understand that the decision reached by the jury in the EJT procedure is BINDING on all parties and that the court will enter a judgment based on the verdict which may require one or more defendant to pay money to a party or to pay no money at all, except in the case of attorney fees and costs which will be decided by the court.

[Initial Here (Optional)]

8. I understand and have agreed that a □ commissioner of the court and/or a □ temporary judge may preside over the EJT. A separate stipulation has been prepared and provided to the court by all the parties.

[Initial Here (Optional)]

9. (Other)

10. □Additional pages are attached hereto. Pages ____ through _____ and are incorporated by reference as though set forth fully herein.

11. After reading and initialing the above, I hereby consent to the Expedited Jury Trial Procedures:

□ Plaintiff/Representative □ Defendant/Representative □ Other _____

_____
[Signature]

_____
[Print Name]

_____
[Signature]

_____
[Print Name]

Attorney for □ Plaintiff/Representative □ Defendant/Representative □ Other

_____
[Signature]

_____
[Print Name]

_____
[Signature]

_____
[Print Name]

Date._____ **IT IS SO ORDERED.**

_____

□ Judge □ Commissioner □ TemporaryJudge

Conclusions and Recommendations

The summary jury trial concept has evolved considerably since its debut in Judge Lambros's courtroom in the early 1980s. Perhaps the most significant change is the summary jury trial's transition from a tool to promote settlement of civil cases to a binding decision on the merits. Part of the attraction of an enforceable judgment may lie with the types of cases for which the summary jury trial programs in these courts were designed—namely, relatively simple, lower-value cases with genuine disputes with respect to liability, damages, or both. Providing a preview of how an actual jury might evaluate the evidence may be a useful settlement technique in a complex, high-stakes case filed in federal court, but for the types of cases adjudicated in these state court programs, a speedy, inexpensive, and *final* determination on the merits is the key to justice. A large portion of the institutional credibility enjoyed by the American justice system is due to its capacity to deliver fair and impartial justice to all comers, not just those who can afford to bring a case to trial. A key objective of these programs is to provide a forum in which civil cases can be resolved cost-effectively and still receive individual consideration regardless of the relative value of their claims.

A second consideration, of growing importance in both state and federal courts, is the rapid erosion of jury trial experience in the civil trial bar. If attorneys do not have sufficient opportunities to hone trial skills regularly in relatively low-risk cases, they will be woefully unprepared and unwilling to do so in those high-stakes disputes that warrant the commonsense approach of a jury. The concerns expressed by judges and attorneys during the NCSC site visits revealed all too clearly that mandatory arbitration and other forms of alternative dispute resolution do not adequately substitute for jury trial experience. The American justice system risks losing a valuable component of its institutional credibility unless a significant portion of the practicing bar maintains the trial skills necessary to keep trial by jury a viable option for dispute resolution.

In spite of the very different procedural and operational differences in the programs observed in these case studies, the courts that implemented these programs have implicitly adopted one of two underlying theories about how they reduce costs and increase access to jury trials. The first theory

focuses on streamlining the pretrial process to allow litigants to proceed to trial at lower cost. This approach normally employs incentives for litigants, such as the promise of an early trial date, priority placement on the court's trial calendar, or at least a firm trial date, in exchange for restrictions on the scope and the length of time to complete discovery. The premise is that attorneys are forced to focus their attention only on the key disputed issues, rather than seeking evidence to support every conceivable issue that might be litigated and expending more money than the maximum value of the case. Because discovery is distilled to the most critical factual and legal disagreements, the subsequent trial requires less time, fewer witnesses, and less documentary evidence. Additional benefits of this approach include giving judges the ability to accommodate a greater number of such trials on the court's calendar and ensuring that jurors receive a more coherent trial presentation from the attorneys. The newer program implemented in Oregon explicitly adopts this approach in its rules and procedures. The Charleston County and Clark County programs also do so, albeit to a somewhat lesser extent. The Charleston County program moves the case off the court's rolling docket and offers litigants the incentive of a firm trial date. The Clark County program sets the trial date within six months of the parties' stipulation to participate in the short trial program; otherwise the parties would wait up to four years for a regular jury trial.

The second theory focuses on streamlining the trial itself, which indirectly affects the pretrial process. The premise is that trial attorneys will not expend substantial amounts of time and effort to gather evidence that cannot be used at trial given constraints on time, the number of live witnesses, the form of expert evidence, or, in the case of the Clark County program, the restrictions on allowable attorneys' and expert witness fees. The Clark County and Maricopa County short trials, the New York summary jury trial, and California's EJTs are all examples of this approach. Of course, several of these programs adopt elements of both approaches by placing restrictions on both the pretrial and trial procedures.

In addition to their general underlying premise, these programs have a number of procedural and operational characteristics in common. Many of them explicitly exempt eligible cases from mandatory arbitration programs, for example. In some instances, the exemption responds to complaints about the quality of the arbitration decisions and in others it simply eliminates what many practitioners view as an unnecessary pretrial hurdle that adds expense and delays the final resolution. With one exception, all are voluntary options for civil litigants; in Clark County, Nevada, the short trial is mandatory for litigants seeking to opt out of mandatory arbitration or to appeal a mandatory arbirtration decision.

All of the programs strongly encourage the attorneys to stipulate to the admission of uncontested evidence and to rely heavily on

documentary evidence presented in juror notebooks rather than live witness testimony. The intent of these preferences in evidentiary procedure is to facilitate a speedier trial than would otherwise take place under traditional jury trial procedures. Ironically, this shift in emphasis toward documentary evidence rather than live witness testimony brings the trial closer in appearance to an arbitration hearing in which the arbitrator may be provided a brief written or oral summary of the evidence with supporting documentation to review before rendering a decision. Although jurors were generally praised for taking their role seriously in summary jury trials, some individuals questioned the extent to which jurors closely examined all of the documentary evidence in the trial notebooks.

All of the programs impanel a smaller jury—by as much as half—than would otherwise be used in a regular jury trial, which saves time during jury selection and the expense of juror fees. Most of the participants in these programs reported their belief that the size of the jury does not affect the jury verdicts in any appreciable way, but some expressed concern that smaller juries tended to be less demographically diverse and more susceptible to the opinions of outlier jurors. Empirical research has confirmed the validity of these concerns, but they may be outweighed by advantages of smaller juries in lower-value cases.[114]

Of greater importance than their commonalities, however, is the apparent suitability of the summary jury trial approach for addressing a variety of disparate problems in each jurisdiction. Because the trials themselves are comparatively short and are presided over by local attorneys, the Charleston County court found that the summary jury trial could be used to circumvent longstanding problems related to civil calendar management. The restrictions on attorneys' fees and expert witness fees in the Clark County program explicitly tackled the problem of affordable access to justice. The Oregon court uses its expedited civil jury trial process to introduce and refine individual calendar management and effective judicial supervision of the pretrial process. At least for a time, the Maricopa program offered litigants an escape from a much-criticized mandatory arbitration program. The original program implemented in Chautauqua County, New York, was similar to the federal model insofar that it served as a check on unrealistic litigant expectations, but the statewide rollout has deliberately sought sufficient flexibility to address all local conditions. In practice, if not intent, the statewide implementation effort in California also appears to be informally adapting to local circumstances in each county.

The intent to address local problems and concerns is no guarantee that a summary jury trial program will ultimately succeed, however. Looking across the six programs, several factors stand out as fundamental to their success. The first is strong judicial support for the program. Or, more to the point, weak judicial support can cripple a program. Maricopa County's short trial

[114] Nicole L. Waters, *Does Jury Size Matter? A Review of the Literature* (NCSC, 2004).

program provides the most concrete example as its popularity fizzled following the retirement of Judge Kaufman, its founder and most ardent supporter on the trial bench. Although the judges who are currently assigned to the Civil Division in Maricopa County generally view the Short Trial Program favorably, no one has yet stepped forward to champion the program and raise it from its current status as just another ADR track. Similarly, the slow start for EJTs in California can be partly attributed to the lack of consistent judicial knowledge of, and marketing for, the program in the different counties across the state.

It should be noted, moreover, that strong judicial support for a program need not involve a personal investment on the part of the entire bench. The South Carolina program, which relies on experienced attorneys to serve as judges in summary jury trials, garnered approval from the local trial bench by diverting civil cases from the court's trial calendar, allowing the judges to reallocate their time and attention to reducing a criminal case backlog. The Clark County program, which employs judges pro tempore to oversee the trials, relieves trial judges of responsibility for pretrial management while giving them credit when cases are successfully resolved. The Clark County program also receives tremendous support from the local legislature because it is financially self-sustaining, thereby reducing the burden on local taxpayers.

Another characteristic of program success is the extent to which all segments of the local civil bar are confident that the program offers a fair and unbiased forum for resolving cases. Perceptions of fairness relate not only to the likelihood of an objectively just outcome for the litigants, but also to the impact of procedures on the ability of attorneys on both sides of a dispute to manage the case cost-effectively. The plaintiff and defense lawyers interviewed for the case studies candidly acknowledged their differing strategic approaches to making these types of cases financially profitable. Obviously, a large part of the focus for all segments of the civil bar will depend on their respective perceptions of the fairness of juries and jury verdicts, at least as compared to alternative dispute resolution methods. If summary jury trials are viewed as a dependably pro-defense venue, plaintiff lawyers understandably will be reluctant to participate, and vice versa.

Several of the programs examined in this study were initiated in response to broad dissatisfaction by both the plaintiff and defense bars with the fairness of mandatory arbitration decisions. The comparison of arbitration decisions with short trial verdicts in Clark County revealed that juries rarely decided cases comparably to arbitrators. While the majority of jury verdicts in 2011 favored defendants over plaintiffs, the jury returned a verdict that is more favorable to plaintiffs than the arbitration decision in approximately 20% of short trials. Moreover, the direction of verdicts has reportedly shifted from time to time. Consequently, both the plaintiff and defense bars in Clark County consider short trials a fair option for clients. The Clark County experience differs starkly from that of Maricopa County, where short

trial verdicts are believed to strongly favor the defense. Plaintiff appeals from arbitration decisions are rare, and when they do occur, most plaintiffs opt for a bench trial or a regular jury trial before a superior court judge. On the other hand, plaintiffs and defendants tended to prevail more or less equally in summary jury trials in New York and in Los Angeles.

Procedural requirements can also play a part in perceptions of fairness for the local bar, especially those concerning penalties for participating in the program as well as the right to appeal an adverse verdict. Several of the jurisdictions have arbitration-appeal penalties providing for awards of reasonable attorneys' fees or expert witness fees if the jury verdict failed to improve the appellant's position by a given percent. Maricopa County has the most stringent rule, requiring arbitration appellants to better their outcome by at least 23%, an especially high hurdle that serves as a significant disincentive to seeking a short trial. The arbitration-appeal penalty is less severe in other jurisdictions, reducing the risk to litigants. In addition, the Maricopa County, New York, and California programs greatly restrict the right to appeal. Attorneys in some of those jurisdictions noted that this feature can greatly discourage participation as it necessarily closes off all future options. In contrast, the Clark County and Oregon programs permit litigants to appeal a summary jury verdict as they could from any other jury verdict. It is extremely rare that a litigant actually does so.

Securing support by both the local plaintiff and defense bars was cited as critical to the success of programs examined in this study. Equally important, however, was garnering support across different segments of the defense bar, especially salaried, in-house lawyers representing insurance carriers and institutional clients as well as retained counsel working for more traditional law firms. In-house lawyers representing insurance carriers and institutional clients are repeat players in summary jury trial programs. Many of these individuals noted the importance for their clients of periodically "testing the market"—that is, trying cases before local juries for the specific purpose of establishing the range of reasonable settlements in similar cases. At the same time, the policies of national insurance carriers frequently differed from site to site on the degree of autonomy and discretion granted to in-house lawyers to make judgments about whether to settle a case or bring it to trial. For the most part, lawyers with greater autonomy seemed more supportive and enthusiastic about these programs, if only because they provided more options for resolving cases.

Retained defense attorneys faced a different set of incentives and disincentives concerning these programs. Their clients were more likely to be motivated to keep costs down, so the option of earlier trials that could be completed in a single day generally worked in the programs' favor. Younger, less experienced lawyers may find these programs attractive insofar that they provide an opportunity for professional development

that might be very valuable in the future, but they must also be realistic that preparing for a summary jury trial involves a great deal more time and effort than doing so for an arbitration hearing. Indeed, experienced practitioners in these programs repeatedly noted that summary jury trials typically require more preparation than regular jury trials due to the need for a considerably more focused, and thus more fine tuned, trial presentation. Jurors reportedly appreciate the clarity and conciseness of summary jury trial presentation, but the time savings at trial may be offset by the amount of additional time needed to hone the trial presentation. On the other hand, their clients could also be more risk-averse and less likely to consent to participation in the program unless there was a clear financial or strategic advantage in doing so.

One way that several of these programs developed local bar support was to actively involve representatives of the various plaintiff and defense bar segments in designing the program details. The Charleston County program does so explicitly insofar that it is an attorney-run program. Similarly, attorney involvement has been a critical component of the New York summary jury trial program. The statewide coordinator has adamantly emphasized the importance that local programs reflect the needs and interests of all major stakeholders to secure their institutional legitimacy. Their participation in developing the procedural details for the program will permit them to address multiple issues of concern and avoid introducing requirements that might lead to unintended consequences.

Suggestions for Expanding or Replicating Programs in New Jurisdictions

The factors that led to successful programs or inhibited their success, offer several lessons for states that wish to expand a local program statewide or local courts that wish to replicate a program in their own community. The first step should involve a careful assessment of the specific problems or concerns that the program is intended to address. One of the most notable aspects of the programs examined for this study was how often the programs were implemented as a workaround for one or more preexisting case management problems (e.g., trial date certainty, calendar management, mandatory arbitration, insufficient or inconsistent judicial supervision of the pretrial process). Courts that are considering a summary jury trial program certainly should consider whether existing problems or complaints can be fixed directly rather than introducing a workaround solution. Of course, some problems are more deeply entrenched and have resisted previous remedial attempts. If this is the case, then courts should, at the very least, design the summary jury trial program to address as many of those problems as possible. When doing so, consider which local resources are relatively abundant, and which are relatively scarce, and whether plentitude can be used creatively to offset scarcity.

The likelihood of identifying and accurately assessing the impact of a new program on the court's existing operations will be greatly improved by involving well-respected and highly experienced representatives of the local plaintiff and defense bars. These individuals may be considerably more knowledgeable and more sensitive to the strategic interests of the various segments of the civil bar and should be given the opportunity to help design the operational details of the program to ensure that it will be perceived as a level playing field. Because local legal culture as well as local court conditions can differ markedly from county to county, it is especially imperative that efforts to expand a local program statewide have the flexibility to tailor the program to best meet local needs.

Similarly, credible judicial leadership and commitment are critical to program success. Although it may not be necessary for the entire trial bench to be actively involved in the operation of the program, much less its design, the leadership team should make a concerted effort to inform their judicial colleagues about the potential benefits of the program and alleviate concerns about how it might affect day-to-day operations, especially as it pertains to the allocation of court resources. If the court has an established culture of rotating judicial assignments, the program leadership should also take steps to ensure effective succession planning to maintain an appropriate level of supervision and support for the program.

In launching a new program, the leadership team should plan for an extended marketing campaign to ensure that all potentially affected interests are informed about the program, its objectives and intended benefits, and its procedures. It may be especially useful to have the representatives of the various stakeholder interests participate jointly in marketing efforts to avoid suspicion that the program is more beneficial to some interests than others. Marketing efforts can include op-ed articles in newsletters and local bar publications, CLE presentations, and informational announcements at local bar meetings, including specialty bars. Documentation about how the program operates can help bolster support by providing empirical information about the fairness of case outcomes and the time-and-expense savings. The data collection form employed in New York State may be a useful model.

Depending on local circumstances, the initiation period may be fairly slow until a sufficient number of trials have been conducted through the program to assure the local practicing bar knows about its benefits. The leadership team should not be discouraged, but rather should use that time to assess whether the program is delivering the intended benefits or whether it has introduced unanticipated consequences, and to make interim modifications to the program if necessary. Indeed, the program leadership should continue to monitor the program's success and be prepared to adopt changes to the program procedures at any time, especially if needed to respond to changes in local conditions. As these case studies suggest, summary jury trials are highly adaptable to local circumstances and, with careful planning and supervision, provide a useful tool for meeting the ongoing needs in civil litigation.

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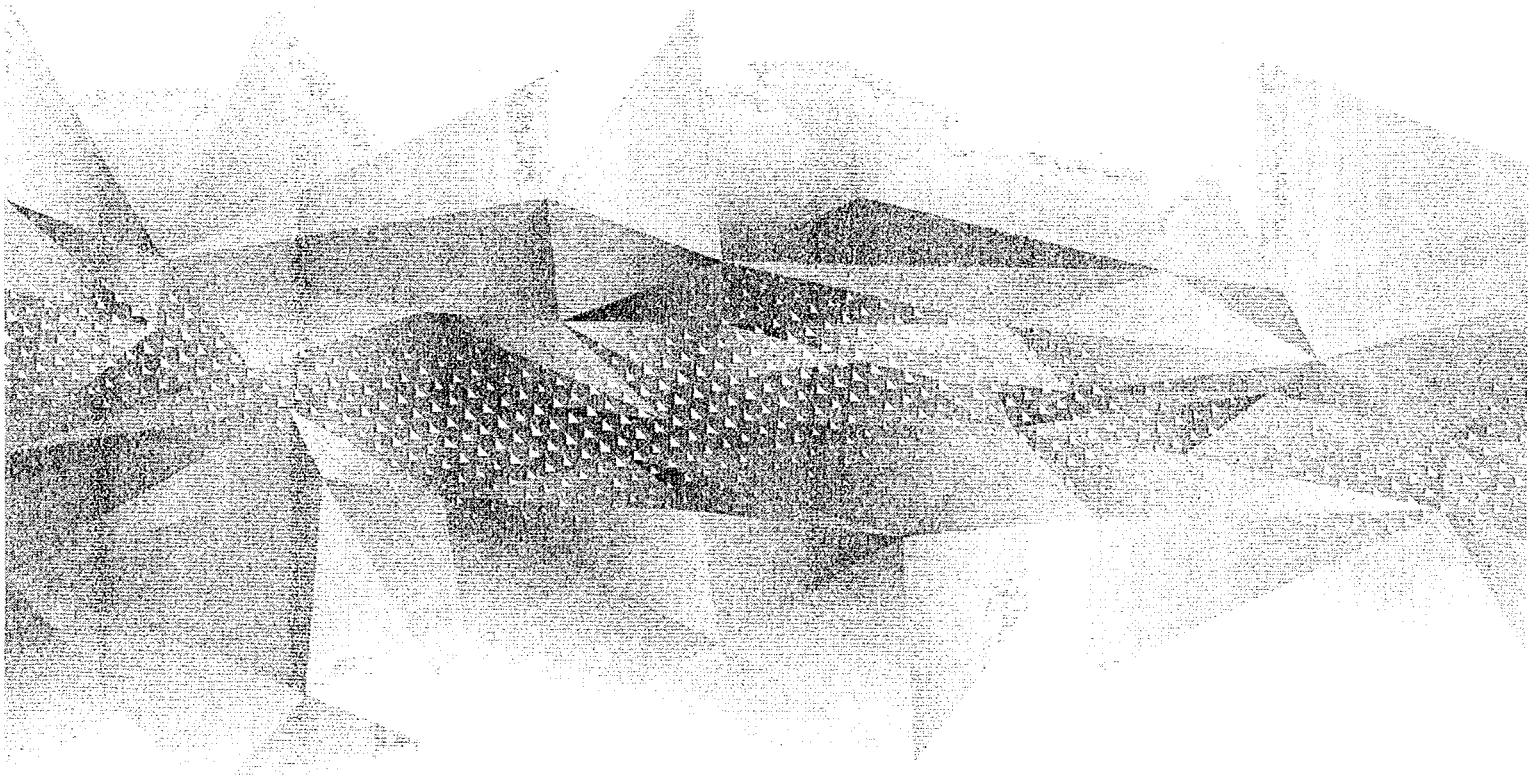

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