When Mediation Fails: The Summary Jury Trial Alternative

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with Leslie C. Smith, United States Magistrate Judge[2]

Consider this common settlement scenario: At the conclusion of your mediation in a Title VII case, you have reached a stalemate with opposing counsel and her client. One of you bottomed out at $300,000, the other refused to go higher than $60,000. The mediator suggested that the case should settle around $150,000, but neither side was interested. You know you've got a great case, but it's obvious opposing counsel feels the same way. Is trial your only option? Not necessarily.

A. When Should Parties Consider a Summary Jury Trial?

When a mediation fails after a wide disparity in settlement offers, it is often a sign that one or both parties have mis-evaluated the case. Often an attorney's next step is to spend a significant sum on a mock jury panel or focus group in order to prepare for trial. Mock jury panels may be useful to assess the strengths and weaknesses of a case and to evaluate how real people will react to the basic facts and arguments. The summary jury trial process, however, is far more effective. Aside from the fact that the court will empanel a jury from the same jury pool that would be used for trial, the real advantage is that the summary jury trial turns "the biggest unknown – a juror's reaction to [opposing counsel's theory of the case] – into a highly effective case valuation and settlement tool."[3]

In federal court, judges and parties may decide to hold a summary jury trial "when

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[3] Keith R. McCurdy & Keith J. Rosenblatt Grott, *The Summary Jury Trial: An Alternative to the Traditional Alternative Dispute Resolution Process*, THE METROPOLITAN CORP. COUNSEL 16 (May 2005), *available at* http://www.metrocorpcounsel.com/pdf/2005/May/16.pdf (last visited August 21, 2007).

witness credibility is an issue, when settlement talks have stalled over differing perceptions of the amount a jury is likely to award, and when the procedure" will result in a cost savings to the court.[4] Essentially, a summary jury trial is a mini-trial. The court calls a jury panel, and the parties follow a traditional – albeit shortened – trial format. And while the parties may choose whether to make summary jury trials binding or advisory, these alternative mediation procedures are likely to result in settlement regardless, because the parties get to have their day in court.

B. Preparing for and Structure of a Summary Jury Trial

Before a summary jury trial, the attorneys and the referral judge draw up a stipulated order setting guidelines and time limits.[5] These guidelines may include provisions that specify: (1) what evidence the parties may offer (usually any evidence that would be admissible at trial); (2) the number of witnesses who may be called to testify for each side; and (3) whether the jury's decision is binding or advisory. The order also allows the parties to set time limits on opening statements, witness testimony, and closing statements. Rarely will the Court permit the summary jury trial to extend beyond one day, including time for deliberations.

One to two weeks before the proceedings, the parties submit proposed jury instructions and verdict forms. The instructions should be abbreviated and case specific; there is no need to include stock or general instructions. The parties should also submit exhibits, specifying which exhibits are stipulated to and which are contested. Parties may choose to prepare exhibit notebooks for each juror in order to save the time spent passing exhibits between jurors. If the

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[4] Excerpt from ELIZABETH PLAPINGER & DONNA STIENSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS (1996), *available at* http://www.fjc.gov/public/home.nsf/autoframe?openform&url_l=/public/home.nsf/inavgeneral?openpage&url_r=/public/home.nsf/pages/765 (last visited August 16, 2007).

[5] An example of such an order follows this article.

parties choose to read from depositions, statements, or reports, the relevant excerpts should be submitted to the court. In our experience, attorneys have spared no expense on exhibits; they have used power point presentations, professionally printed posters and diagrams, and high quality video presentations. While the evidentiary rules will likely be more relaxed at the summary jury trial, parties may make the same objections they can make at a normal trial.

On the day of the summary jury trial, the attorneys will participate in the jury selection process. The jury pool will be smaller than normal, so attorneys may only get one or two peremptory challenges. A six to eight member jury is ideal. To ensure that the verdict is authentic, the jury is not told that the decision is non-binding until after they have reached a verdict. After the jury is sworn in, each side will have the opportunity to present a brief (usually ten to fifteen minutes) opening statement. Time limits should be strictly enforced to keep the proceedings moving. The remainder of the trial will unfold as agreed to in the stipulated order.

After the judge gives the jury the streamlined instructions, the jury should be given at least an hour to deliberate. If the jury has not reached a verdict within the time set aside, the parties and judge may decide to ask the jury where they are in their deliberations. To maintain the cost savings and convenience of the proceedings, it is important that the deliberations not spill over to another day. If the stipulated order requires a unanimous verdict, it may be prudent to agree to a consensus verdict instead. Once the jury has reached a verdict, the court may explain the nature of the proceedings and encourage the jurors to talk to the attorneys about the case presentation and the deliberations.

C. Benefits of Summary Jury Trials

The greatest advantage to conducting a summary jury trial is the opportunity to present your case to a real jury. After the jury has reached a verdict, it is also helpful to get the jurors'

insight on the credibility of the witnesses and the effectiveness of your strategy. Because parties go into a summary jury trial with widely differing settlement values, the verdict should make at least one side reconsider its bargaining position. Consequently, the best time to attempt to settle a case is while the jury is still out. If the case does not settle while the jury is out, settlement is still a possibility. For the party on the wrong side of the verdict, "[t]he possibility of losing becomes real[, and a] client's perceived invincibility may be rapidly replaced with the reality of trial."[6] If the parties do not settle before or immediately after the verdict is announced, it may be beneficial to request a continuation settlement conference with the Magistrate Judge. To ensure that the proceedings and verdict are still fresh in the minds of the parties, any continuation settlement conference should be held no more than thirty days after the summary jury trial.

The parties may also decide, either in the stipulated order or while the jury is out, to make the verdict dispositive. To make this option more attractive, the parties can agree to set a cap and floor on damages. The advantages to making the verdict dispositive are: (1) a cost savings to the parties; (2) a private settlement with no judgment; (3) elimination of the unknown factors inherent in dispositive pre-trial motions; and (4) elimination of all appeals. Further, an end to the case will decrease the stress and emotional turmoil parties often associate with litigation.

D. When Summary Jury Trials Are Not Appropriate

For a summary jury trial to be effective, it is important that no one pull a punch by withholding relevant evidence – everyone must agree to give it her best shot. In other words, the

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[6] *Summary Jury Trials*, *available at* http://www.rcreo.com/pg84.cfm (quotation marks and reference omitted) (last visited August 21, 2007). On the other hand, "[o]ne drawback to a summary jury trial is that it may have a polarizing effect, entrenching a party further in his or her position." *Id.* (quotation marks and reference omitted).

parties must honestly use the proceedings as a settlement tool, or they will be a waste of time and resources. A summary jury trial is not appropriate where one of the parties has an ace up his sleeve. With our expansive discovery rules, however, this possibility is unlikely. The proceedings may also be inappropriate when one party sees delay as an advantage. Both parties must want to work toward a resolution of the case.

Finally, this method of alternative dispute resolution must be cost effective for the court. Because the court is putting resources into the settlement efforts, and because it is fairly expensive to bring a jury panel in, the court will not agree to this process for a case that would normally have a short trial. If the case can be tried in two days, it makes no sense to hold a summary jury trial in one. Normally, the court will not agree to a summary jury trial unless the real trial is scheduled for four or more days.

E. Conclusion

When traditional mediation has failed, a summary jury trial may be an appropriate detour on the road to trial. Summary jury trials represent a cost savings to both the parties and the court, allow parties to present their cases to a real jury panel, and encourage parties to reevaluate their settlement positions based on the jury's verdict. Additionally, the flexibility of summary jury trials allows the court to adapt the process to the needs of each case. Rather than gear up for trial after you reach an impasse in your next mediation, consider the summary jury trial as an alternative settlement tool.