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A Dose of Social Science: Support for the Use of Summary Jury Trials as a Form of Alternative Dispute Resolution

John S. Connolly

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A DOSE OF SOCIAL SCIENCE: SUPPORT FOR THE USE OF SUMMARY JURY TRIALS AS A FORM OF ALTERNATIVE DISPUTE RESOLUTION

Honorable John S. Connolly†

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This article was adapted in part from a thesis submitted in partial fulfillment of the requirement for the degree of Master of Judicial Studies at the University of Nevada at Reno.
I. INTRODUCTION

State and federal courts of this country face an increasing caseload, due in large part to the increase of criminal cases, both in the adult system and in the juvenile system. In addition to the increase in juvenile crime, there is an increased desire to certify juveniles to stand trial as adults for violent crimes. This takes a toll on the civil cases pending on various state and federal dockets.

To meet this increase in caseloads, the judicial system must have more judges and judicial officers, or, in the alternative, must find a more effective way to dispose of the cases on hand, particularly the civil cases. Due to budgetary concerns in state legislatures, it is the more likely scenario that the judicial system will have to continue to address the increased number of case filings under the “status quo” number of judges. Some form of alternative dispute resolution (“ADR”) may provide the answer, or at least some relief, to the overburdened court system. Alternative dispute resolution includes a variety of settlement procedures designed to resolve disputes. The primary purpose is to reduce court dockets by increasing the likelihood of settlement. ADR procedures may be provided by a court or a private ADR provider. The principal goals are to relieve court congestion, lessen costs, facilitate access to justice, and, in some instances, provide a measure of justice superior to that obtainable at a full-scale trial.

One ADR procedure in particular shows great promise in resolving the cases currently pending before overburdened courts. The summary jury trial (“SJT”), a relatively recent ADR development, is very different from the more standard arbitration and

2. See Newman, supra note 1, at 177.
3. See Harges, supra note 1, at 799.
4. See id.
5. See Lambros, supra note 1, at 622. Judge Lambros notes that passage of the Speedy Trial Act in 1980 led to priority being given to criminal cases. See id. This led to a backlog of civil cases. See id. As a result, Judge Lambros developed
mediation methods. Summary jury trial is "simply a jury trial without the presentation of live evidence." SJTs involve attorney presentations of the evidence in front of a jury, as well as opening and closing arguments. In some cases, live witnesses may be heard as well. The jury then "deliberates" and provides a "verdict" to the parties. After hearing the jury verdict, the judge and the attorneys—and in some cases the parties themselves—may ask the jury questions about why they found the way they did, or why they believed certain facts and evidence over others. While most often SJTs are nonbinding, the use of a panel of peers has proved helpful to change the minds of litigants opposed to settlement and thus resolve cases in a more efficient and expeditious manner.

However, before judges employ SJTs, they ought to have an answer to the question "Is this an efficient use of either my time or the time of magistrates, referees, or court-appointed neutrals?" Federal Judge Richard Posner of the Seventh Circuit, a renowned scholar in the field of law and economics, suggested in 1986 that we needed a "dose of social science" to answer that question. In this article, I attempt to supply a "dose" of statistical social science to find an answer to this important question.

First, in Part II, this article briefly reviews the various types of ADR, focusing in particular on the format and use of the SJT. In Part III, I discuss a study conducted in 1992 by the Research and Planning Office of the State Court Administrator through the Minnesota Supreme Court, research on the use of SJTs in Ramsey County in 1996, and several cases that settled in whole or in part after SJTs over which I presided. These studies and evidence support the premise that SJTs are an effective use of judicial time. In Part IV, this article addresses some of the concerns raised about SJTs by lawyers, judges, and legal scholars. In conclusion, this article will show that SJTs waste neither judges’, neutrals’, nor litigants’ time, but instead effectively reduce the number of cases that must be tried and provide a satisfactory experience for litigants seeking justice through the court system.

See id.


II. BACKGROUND

A. Alternative Dispute Resolution

Some of the more conventional types of ADR are arbitration, mediation, neutral fact-finding, mini-trial, consensual special magistrate, early neutral evaluation ("ENE"), media-

8. See Minn. Gen. R. Prac. Dist. Ct. 114.02(a)(1) (1998). The Minnesota Rules define arbitration as a "forum in which each party and its counsel present its position before a neutral third party, who renders a specific award." Id. The arbitrator conducts the hearing and considers evidence. See Jack M. Sabatino, ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution, 47 Emory L.J. 1289, 1296 (1998). Arbitration may or may not be binding, depending on such factors as whether the litigants agree to make it binding, or a contractual agreement requires binding arbitration to settle disputes. See Minn. Gen. R. Prac. Dist. Ct. 114.02(a)(1) (1998); Sabatino, supra, at 1296. "If the parties do not stipulate that the award is binding, the award is not binding and a request for trial de novo may be made." Minn. Gen. R. Prac. Dist. Ct. 114.02(a)(1) (1998).

9. See Minn. Gen. R. Prac. Dist. Ct. 114.02(a)(7) (1998); Sabatino, supra note 8, at 1297. In mediation, a "neutral person meets with disputants and attempts to assist them in reaching an agreement that either resolves their differences or satisfactorily accommodates their respective interests in spite of those differences." Sabatino, supra note 8, at 1297. The mediator can not impose his or her own judgment on the parties. See Minn. Gen. R. Prac. Dist. Ct. 114.02(a)(7) (1998).

10. See Minn. Gen. R. Prac. Dist. Ct. 114.02(a)(6) (1998) ("A forum in which a dispute, frequently one involving complex or technical issues, is investigated and analyzed by an agreed-upon neutral who issues findings and a non-binding report or recommendation.")


A forum in which each party and their counsel present their opinion, either before a selected representative for each party, before a neutral third party, or both to define the issues and develop a basis for realistic settlement negotiations. A neutral third party may issue an advisory opinion regarding the merits of the case. The advisory opinion is not binding unless the parties agree that it is binding and enter into a written settlement agreement.

Id.

12. See Minn. Gen. R. Prac. Dist. Ct. 114.02(a)(2) (1998) ("A forum in which a dispute is presented to a neutral third party in the same manner as a civil lawsuit is presented to a judge. This process is binding and includes the right of appeal.")

13. See Minn. Gen. R. Prac. Dist. Ct. 114.02(a)(5) (1998); Sabatino, supra note 8, at 1298. In ENE, a neutral party "meets with litigants and their counsel shortly after a case has been brought[,] . . . considers a summary of the major issues of liability and damages from all parties, and then gives them an advisory assessment of what he or she thinks of their positions." Sabatino, supra note 8, at
tion/arbitration, \(^{14}\) "rent-a-judge," \(^{15}\) and the lesser known summary jury trials (SJTs). \(^{16}\) Some forms of ADR are more commonly known than others. For example, mediation and arbitration are better known to the average judge or attorney than neutral fact finding or early neutral evaluation. In addition, some forms of ADR overlap. For example, arbitration and mini-trial are very similar. In arbitration, the arbitrator is usually one person who makes either a non-binding or binding decision. \(^{17}\) A mini-trial also usually has a one-person fact finder, and that person makes either a non-binding or binding decision. \(^{18}\) The main difference between arbitration and mini-trial is that a mini-trial is more formal and has more of the indicia of a regular trial, \(^{19}\) whereas an arbitration is more similar to a hearing. \(^{20}\)

Likewise, mediation and early independent neutral evaluations have some similarities. The parties in mediation look to a mediator to lead them to a settlement with which they all can live. \(^{21}\) In an ENE, the parties seek out a neutral evaluator to help them come to

---

1298; see also MINN. GEN. R. PRAC. DIST. CT. 114.02(a)(5) (1998) ("A forum in which attorneys present the core of the dispute to a neutral evaluator in the presence of the parties. This occurs after the case is filed but before discovery is conducted. The neutral then gives a candid assessment of the strengths and weaknesses of the case. If settlement does not result, the neutral helps narrow the dispute and suggests guidelines for managing discovery.")

14. See MINN. GEN. R. PRAC. DIST. CT. 114.02(a)(9) (1998) ("A hybrid of mediation and arbitration in which the parties initially mediate their disputes; but if they reach impasse, they arbitrate the deadlocked issues."); see also Sabatino, supra note 8, at 1299 (defining "med-arb" as where "a neutral starts the process as a mediator but then converts into an arbitrator if he or she cannot mediate a solution").


16. See MINN. GEN. R. PRAC. DIST. CT. 114.02(a)(4) (1998) ("A forum in which each party and their counsel present a summary of their position before a panel of jurors. The number of jurors on the panel is six unless the parties agree otherwise. The panel may issue a non-binding advisory opinion regarding liability, damages, or both."); see also Sabatino, supra note 8, at 1298-99 (describing SJTs as "shortened 'dry run' versions of trials, which are conducted before a jury empanelled under normal court procedures").

17. See Sabatino, supra note 8, at 1296-97; Webber, supra note 15, at 1499.

18. See Webber, supra note 15, at 1499.

19. See id.

20. See supra note 8.

21. See supra note 9 (discussing mediation).
a reasonable settlement in the hope that the case can be settled in the early stages, with the idea that by saving the costs of litigation a just settlement might be found.\(^2\) While all of these ADR methods provide a way for litigants to resolve their differences outside of the courtroom, they are not always a satisfactory solution to those who want their "day in court."\(^3\)

Summary jury trials, however, involve a very different approach to ADR. A SJT is usually an abbreviated half-day trial where each side calls only one live witness.\(^4\) The judge picks the jury in about fifteen minutes. Any expert witness testimony consists only of written reports. Excerpts from witnesses’ depositions may be used. Often times, opening statements and final arguments are merged; particularly when one side does not call any witnesses. An example of this might be where the defendant admits liability in a personal injury case and is only contesting the amount of the plaintiff’s damages. In an SJT, the defense might choose to spend its whole time

\(^2\) See supra note 13.

\(^3\) As Judge Spiegel so aptly stated: "[n]one of these methods provides the parties with their day in court where they can air their grievances. In the eyes of some, these techniques run counter to the American justice system's concept of ventilation, confrontation, and vindication of rights in a structured adversarial system." Spiegel, supra note 6, at 833. Others have also commented about the importance of litigants, especially plaintiffs, needing to tell their story to a judge or jury. See, e.g., Alexander B. Denson, The Summary Jury Trial: A Proposal from the Bench, 1995 J. Disp. Resol. 303, 303 (1995).

\(^4\) The following is a summary of the procedures I observe for SJTs held in my court room. For additional information about procedures used in summary jury trials, see Ann E. Woodley, Saving the Summary Jury Trial: A Proposal to Halt the Flow of Litigation and End the Uncertainties, 1995 J. Disp. Resol. 213, 221-23 (1995). See also Newman, supra note 1, at 183-86; Harges, supra note 1, at 802-05; Webber, supra note 15, at 1496-97; Marla Moore, Mandatory Summary Jury Trials: Too Hasty a Solution to the Growing Problem of Judicial Inefficiency, 14 Rev. Litig. 495, 496 (1995). A key difference between my SJT procedures and those described by most commentators is that I allow limited live witness testimony.

In addition, after conducting approximately fifty SJTs, I have made the following observations. The presiding judicial officer ought to apply the rules of evidence the same as one would in a full-blown trial, with the exception that a hearsay affidavit may be admitted if the party vouches that the witness will be called at the trial. In addition, depositions ought to be admitted, particularly where the opposing party had the opportunity to cross examine the witness at the deposition. In Ramsey County, I follow the rules of evidence with the above-mentioned caveat and so do the other presiding judicial officers over summary jury trials. The purpose of a summary jury trial is to allow the parties to present a capsule (or condensed) version of the trial and get the input from six summary jurors as to how they would rule if this were a full-blown trial. Therefore, it would not be logical to have different evidentiary rulings at the summary jury trial, as compared to the full-blown trial.
in arguments and submit only medical reports rather than use live witnesses.

The court instructs the jury at the end of the SJT, usually with abbreviated instructions. The verdict form is usually the same as in a full trial, but may be shortened. The court limits jury deliberations to about three hours. The parties and the attorneys must be in court when the verdict is read. After hearing the verdict, the court asks the jury a set of questions, such as: (1) What did you think of the plaintiff's claim?; (2) How did you like the plaintiff as a witness?; and (3) Was the plaintiff credible? Following this, the attorneys, and sometimes even the parties, may ask questions. This is the most important part of the proceeding.

B. Why Study SJTs?

Recently, the court system has looked to mandatory, non-binding ADR in hopes that the civil cases can move more rapidly and more cases can be settled rather than tried. In order to have the most efficient judicial system possible, we should not make a determination as to which type of ADR process, if any, ought to be used based on anecdotal evidence. Judge Richard Posner of the Seventh Circuit Court of Appeals wrote in 1986:

The success or failure of the procedure must be verified by accepted methods of (social) scientific hypothesis testing. I am unconvinced by anecdotes, glowing testimonies.


26. See Woodley, supra note 24, at 217. In Minnesota, the legislature has provided for an experiment in two judicial districts (Hennepin County and Ramsey County) where judges can order nonbinding ADR. See Minn. Stat. § 484.74 (1998). This statute provides:

In litigation involving an amount in excess of $7,500 in controversy, the presiding judge may, by order, direct the parties to enter nonbinding alternative dispute resolution. Alternatives may include private trials, neutral expert fact-finding, mediation, minitrials, and other forms of alternative dispute resolution. The guidelines for the various alternatives must be established by the presiding judge and must emphasize early and inexpensive exchange of information and case evaluation in order to facilitate settlement.

Id. § 484.74, subd. 1. The statute also provides for binding ADR procedures using special magistrates where the amount in controversy exceeds $50,000 and all parties consent to ADR. See id. § 484.74, subd. 2a.
als, confident assertions, appeals to intuition. 27

The gist of Judge Posner's article was that we need a "dose of social science" to determine whether summary juries are effective. 28 Judge Posner noted that each year there are approximately 14,000 civil trials in the federal courts, and suggested that for one or two years, one percent of the cases ready for trial be assigned randomly for summary jury trials. 29 He indicated this should provide an adequate statistical sampling to evaluate this procedure. 30 In particular, Judge Posner suggested selecting 1,000 federal cases at random, dividing them randomly into two groups of 500 cases each, using a SJT in each case in one group but in no case in the other group, and then comparing the settlement rates. 31 Such a comprehensive study would permit a determination of whether SJTs played a significant role in the settlement of cases.

Judge Posner presented a legitimate concern about whether or not SJTs waste judicial resources because they are too "lavish" with the judges' time. 32 Judge Posner conducted his own "admittedly crude" studies to evaluate SJTs. 33 He found that there was no support for the conclusion that SJTs increased judicial efficiency. 34 In addition, he believed that no credible techniques are being used that would enable the outcome of the experiment to be evaluated objectively. 35

27. Posner, supra note 7, at 367.
28. Id.
29. See id.
30. See id.
31. See id. at 376.
32. See id. at 382.
33. See id. at 377. Judge Posner evaluated SJTs in the Northern District of Ohio using published statistics to compare "various indicia of judicial performance" in that district with the other Ohio district and the other districts of the Sixth Circuit. Id. Judge Posner compared data from before and after Judge Lamброс introduced SJTs in his district to attempt to evaluate how the SJT affected the number of trials, the median disposition time for trials, the number of cases terminated, and the number of cases pending. See id. at 378-79. Judge Posner could not find any trend the suggested SJTs decreased the number of trials or pending cases, or increased case terminations. See id. However, he repeatedly emphasized the "crudeness" of the study. See id. at 382.
34. See Posner, supra note 7, at 382. He stated instead that "[t]he judicial time taken up in summary jury trials might be spent equally well or even better on some other method of encouraging settlements, especially when one considers how lavish the summary jury trial is with the judge's time: he spends a whole day trying to settle one case." Id.
35. See id.
A small dose of social science was also recommended by Federal District Judge William O. Bertelsman, from the United States District Court for the Eastern District of Kentucky. In *McKay v. Ashland Oil, Inc.*, Judge Bertelsman observed:

It is certainly true, as Judge Posner points out in his insightful article, that the effectiveness of summary jury trials has not been scientifically verified. I for one would welcome a controlled experiment along the lines he suggests to see if it can be verified and in what type of cases summary jury trials are most useful. Also, it would be profitable to try to discern the most effective techniques for employing them. It is interesting to note, however, that a controlled scientific experiment such as that suggested by Judge Posner cannot be effectively conducted unless summary jury trials are mandatory.

Judge Bertelsman suggested even "unscientific" data may be useful to evaluate SJTs. And he added that in his own experience SJTs had saved him sixty trial days because, in his limited use of the procedure (five times), two cases set for thirty day trials had settled.

No doubt there exists a need to have some definitive evidence of whether or not SJTs are worth the time, effort, and expense involved. There are few studies, to date, of which this author is aware that evaluate SJTs. The father of the SJT, Federal Judge Thomas Lambros, claimed a ninety percent settlement rate using SJTs in

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36. 120 F.R.D. 43 (E.D. Ky. 1988).
37. *Id.* at 49. *But see In re NLO, Inc.*, 5 F.3d 154, 158 (6th Cir 1993) (disagreeing with Judge Bertelsman's finding in *McKay* that "mandatory summary jury trials would seem to be within the inherent power of the court" and holding that "it is error" to compel "an unwilling litigant to undergo this process [because it] improperly interposes the tribunal into the normal adversarial course of litigation").
38. *See McKay*, 120 F.R.D. at 49.
39. *See id.* He further noted:

It is true that I cannot prove scientifically that the cases would not have settled anyway but my experience tells me they would not. I do know that but for my making summary jury trials mandatory in these cases, they would not have occurred. I know also that the attorney who objected to the first summary jury trial he was required to participate in is now the biggest local fan of the procedure.

*Id.*
the Northern District of Ohio, where he sits.\textsuperscript{40} The trouble with this figure is that most studies show that, in fact, over ninety percent of all cases settle before trial.\textsuperscript{41} Thus, in some sense, Judge Lambros’ statement, which extols SJTs, almost waves a red flag in the face of the opponents of SJTs.

A better data set on SJTs was created by Senior Judge S. Arthur Spiegel, from the Southern District of Ohio. He recently summarized his experiences with SJTs in a case opinion holding that a court can mandate the parties to SJT.\textsuperscript{42} He noted that over a thirteen year period, he had scheduled 131 SJTs.\textsuperscript{43} Of those, 106 settled before the SJT and sixteen settled after the SJT, resulting in a ninety-three percent settlement rate before actual trial.\textsuperscript{44} Of the remaining cases, six settled during the actual trial, and three were tried to completion.\textsuperscript{45} Of particular interest in Judge Spiegel’s summary of his experiences is that at least two of the three cases that were tried to completion had the same verdict as in the SJT.\textsuperscript{46}

Judge Spiegel also attempted to summarize the efficiency of the SJTs in terms of time and cost. He stated that the sixteen SJTs took a total of forty-nine days to try (about 1\frac{1}{2} months); the parties estimated later that if those sixteen cases had been tried on the merits they would have taken a total of 450 days (or about 1\frac{1}{4} years, about nine times longer in the court system).\textsuperscript{47} Judge Spiegel was then able to provide estimates on the costs of this difference. He indicated that in 1995, 224 trial days cost the court system $211,449.62, resulting in an average cost per jury trial day of $943.97.\textsuperscript{48} Thus, by saving the trial court over 400 jury trial days, even just sixteen SJT-prompted settlements provided “significant” savings in jury costs alone.\textsuperscript{49} Judge Spiegel concluded that “in addi-


\textsuperscript{41} See William W. Schwarzer, \textit{The Federal Rules, the Adversary Process, and Discovery Reform}, 50 U. Pitt. L. Rev. 703, 707-08 (1989) (finding that 95\% of all civil cases filed in federal courts are terminated before trial).


\textsuperscript{43} See id.

\textsuperscript{44} See id.

\textsuperscript{45} See id.

\textsuperscript{46} See id. Judge Spiegel apparently tried only two of the three cases, and did not state the result of the third case, if known. See id.

\textsuperscript{47} See id.

\textsuperscript{48} See id. at 394 n.2.

\textsuperscript{49} See id.
tion to the savings recognized by the individual litigants, the use of the summary jury trial has significantly reduced administrative, jury and other related costs."

The few other available studies also suggest success and satisfaction with SJTs. For example, during a six year period the Western District of Oklahoma held 187 SJTs, of which seventy settled prior to the SJT and seventy-nine settled after the SJT (about an eighty percent settlement rate before actual trial). In addition, another study found that sixty-four percent of state lawyers and fifty-three percent of federal lawyers believed that SJT verdicts were reflective of true trial results.

Although these few studies provide some idea as to the effectiveness of SJTs, more information is needed to evaluate their usefulness in the court system. For this reason, I embarked on a study back in 1992 that has provided some additional information about litigant and attorney opinions of the effectiveness of SJTs, as well as data showing settlement percentages.

III. DO SJTS INCREASE JUDICIAL EFFICIENCY? TWO STUDIES AND THEIR RESULTS, AND RELATED CASE EXAMPLES

In the summer of 1992, the Honorable Kenneth Fitzpatrick, Chief Judge of the Ramsey County District Court, named me Chair of the Ramsey County Court Calendar Committee. That same summer, I took a class in Law and Social Science from Professor

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50. Id. at 394. Judge Spiegel previously estimated the effectiveness of SJTs in 1985, and shared the results in a speech to the Federal Bar Association. See Spiegel, supra note 6, at 829. At that time Judge Spiegel was able to summarize the results from eight SJTs. See id. at 834. He indicated that a total of seventeen days, which included the jury deliberation time, were necessary to conduct the eight SJTs. See id. By comparison, it had been estimated through pretrial conferences that the eight cases would take 135 days to dispose of through regular trials. See id. Three of the eight cases settled following the SJT, and two during the first week of the trial on the merits after a total of nine days of trial. See id. One case was tried to completion over a seven day period with a verdict identical to that given by the SJT jury. See id. This resulted in a total of 33 court days between the SJTs and cases proceeding to trial; so even with two trials on the merits remaining, the total trial time was likely to be substantially less than the predicted 135 trial days. See id.


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James Richardson at the University of Nevada-Reno in pursuit of a degree in Masters of Judicial Studies. After taking this course, I suggested to Chief Judge Fitzpatrick that Ramsey County commission a study to compare different methods of ADR, focusing in particular on SJTs.

The idea of conducting a study arose from Judge Posner's 1986 article. Agreeing wholeheartedly with the need for data on the use of ADR methods and SJTs in particular, we conducted a study in 1993 in Ramsey County and another analysis in 1996. The 1993 study assigned cases to various ADR procedures, evaluated the trial rate of those cases following ADR, and then queried the attorney participants afterwards as to their views of those procedures. By comparison, the 1996 study simply evaluated whether and when cases assigned to the various ADR proceedings settled before, during, or after the proceeding, if at all. These two studies are summarized below. In addition, I have had the opportunity to preside over a number of SJTs; I summarize five of these cases and their results below to show the beneficial effects of SJTs on litigants and encouraging settlements.

A. Ramsey County Statistical Study

Based on the social science course from Professor Richardson, as well as the suggestions for studies by Judges Posner and Bertelsman, a study was developed in 1992 in Ramsey County. Civil cases filed in 1993 were randomly assigned to either a control group, an experiment group of cases eligible for mediation/arbitration, or a second experiment group of cases eligible for summary jury trial. Selections were made from the major civil cases that were filed and placed on a "standard" case track. Case

53. See supra notes 27-35 and accompanying text.
54. See supra notes 27-39 and accompanying text.
55. The study is summarized in detail in a report to the Minnesota Supreme Court. See Research and Planning Office State Court Administration, Minnesota Supreme Court, Report on the Use of Alternative Dispute Resolution in Ramsey County (1995) [hereinafter Ramsey County Report]. I was assisted in this study by Chief Judge Kenneth Fitzpatrick; Lynae Olson, the Ramsey County District Court Civil Coordinator; and the Research and Planning Office of the State Court Administration, Minnesota Supreme Court. Permission to incorporate the Ramsey County Report into this article was granted by the Office of Research and Planning.
56. See Ramsey County Report, supra note 55, at 1
57. See id. at 2 & n.2. Ramsey County uses a "differentiated case management system" where cases are placed on either an expedited case track (expected to set-
assignment continued until roughly 100 cases were assigned to each group—control, mediation/arbitration, or summary jury trial. Cases were not allowed out of the control group to which they were assigned.

Data on case processing were obtained from the State Judicial Information System for each of the cases in the three groups. In addition, questionnaires were sent by mail to those litigants and their attorneys who were involved in the SJTs. The questionnaires were mailed in October of 1994 to attorneys, and to the litigants in December of 1994.

To evaluate varying ADR processes, the Ramsey County SJT assessment was compared to a study conducted in Hennepin County several years earlier on the use of mediation.

1. Summary of Numerical Results

The results of the 1993 Ramsey County survey are summarized in Table 1. These numbers indicate that the trial rate for the control group cases, those not eligible for any form of ADR, was 6.4% higher than the SJT experimental group. Regarding the SJT cases, only 3.6% went to full trial. The survey also indicated that the trial rate for the control group was 5.9% higher than the mediation/arbitration group. Regarding the mediation/arbitration group, 4.1% went to trial. Interestingly, however, the control group cases were disposed of in the same or less number of days.
Table 1. Processing of Ramsey County ADR Evaluation Cases

<table>
<thead>
<tr>
<th>Group</th>
<th>No. of Cases</th>
<th>Percent of Cases Disposed as of 12/94</th>
<th>Days to Disposition</th>
<th>Trial Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Mean</td>
<td>Median</td>
</tr>
<tr>
<td>1. Control</td>
<td>80</td>
<td>94%</td>
<td>211</td>
<td>216</td>
</tr>
<tr>
<td>2. Summary Jury Trial</td>
<td>83</td>
<td>95%</td>
<td>221</td>
<td>252</td>
</tr>
<tr>
<td>3. Mediation/Arbitration</td>
<td>97</td>
<td>98%</td>
<td>213</td>
<td>219</td>
</tr>
<tr>
<td>a. ADR</td>
<td>35</td>
<td>100%</td>
<td>311</td>
<td>301</td>
</tr>
<tr>
<td>b. No ADR</td>
<td>62</td>
<td>97%</td>
<td>156</td>
<td>160</td>
</tr>
</tbody>
</table>

In Hennepin County, the median time to disposition for the control group was 252 days, while the time to disposition for the experimental group (ADR cases) was 232 days. Interestingly, trial rates for the experimental group were actually higher in Hennepin County than for the control group, a result which was not found in the Ramsey County data.

One measure of success for an ADR program is how well it conserves judicial resources for use in cases that truly require judicial intervention. The Hennepin County study found that the use of mediation saved some judge time. In Ramsey County, as shown in Table 2, the control group required an average of approximately one hearing per case (0.99). However, only about half (52.5%) of these cases were disposed with some court activity. For the SJT group, the numbers are very similar. Thus, the SJT program did not significantly reduce the frequency of judicial intervention in cases. For the mediation/arbitration group, however, fewer hearings per case were held (.54) and fewer cases required court activity for disposition (36.5%).

63. See id.
64. See id. at 5.
65. See id.
66. See id.
Table 2. Court Appearances for Each Sample Group

<table>
<thead>
<tr>
<th>Group</th>
<th>Average Number of Hearings per Case</th>
<th>Percent of Cases Disposed With Some Court Activity</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Control</td>
<td>.99</td>
<td>52.5%</td>
</tr>
<tr>
<td>2. Summary Jury Trial</td>
<td>.94</td>
<td>52.0%</td>
</tr>
<tr>
<td>3. Mediation/Arbitration</td>
<td>.54</td>
<td>36.5%</td>
</tr>
<tr>
<td>a. ADR</td>
<td>.82</td>
<td>47.0%</td>
</tr>
<tr>
<td>b. No ADR</td>
<td>.39</td>
<td>31.0%</td>
</tr>
</tbody>
</table>

2. Summary of Effects on Attorneys and Litigants

Both the Ramsey County and Hennepin County studies queried attorneys and litigants as to their opinions about various aspects of either mediation (Hennepin County only) or SJT (Ramsey County only). The data from these two studies is summarized below in Figures 1 through 8, with the percentage of responses listed for attorneys and litigants, for either mediation or SJT.

As shown in Figure 1, slightly more attorneys (96%) and litigants (84%) participating in mediation felt they had an adequate opportunity to present their case than those attorneys (79%) and litigants (75%) participating in SJTs. Even so, over three-fourths of the attorneys and litigants found both ADR processes sufficient to allow them to present their case.

67. See id. at 5.
68. Calculated by dividing the total number of hearings held in the group, by the total number of cases in the group.
69. Calculated by dividing the number of cases which had some sort of court activity before a judge (e.g. a hearing, a pre-trial conference, etc.), by the total number of cases in the group.
Figure 1. Were you given an adequate opportunity to present your case?

Attorneys were slightly more likely than litigants to believe the other side or jury heard their case in both mediation (75% of attorneys compared to 63% of litigants) and SJT (76% of attorneys compared to 58% of litigants) processes, as shown in Figure 2. Even so, as shown in Figure 3, approximately three-fourths of attorneys and litigants from both the mediation and SJT groups felt their cases were handled “very fairly” or “fairly.”

Figure 2. Do you believe the other side/jury heard your case?
Interestingly, as shown in Figure 4, 81% attorneys found the SJT process to be either “very efficient” or “efficient” as compared to only 56% of those participating in mediation. Litigants viewed the two processes similarly. The Ramsey County Report hypothesized that “[b]ecause of the timing of summary jury trials, attorneys may be comparing them to full jury trials, however.”⁷⁰ Along these same lines, 68% of attorneys were either “very satisfied” or “satisfied” with the SJT process, while only 42% felt the same way about mediation, as shown in Figure 5. Again, litigants rated the two processes similarly. The Ramsey County Report suggested that the disparity in attorney responses could be a result of attitude changes toward ADR processes in general over time; by comparison, it would make sense that litigants, who are not regularly exposed to various trial and ADR methods, would view the two ADR methods similarly even during the different time periods involved in the Hennepin and Ramsey County studies (late 1980s versus early 1990s, respectively).⁷¹

⁷⁰. RAMSEY COUNTY REPORT, supra note 55, at 8.
⁷¹. See RAMSEY COUNTY REPORT, supra note 55, at 9.
Figure 4. What is your opinion of the ability of the process to handle your case efficiently?

Figure 5. In general, how satisfied are you with the process?
Litigants were also asked whether they felt they saved money through mediation or SJT over a regular trial process and the results are shown in Figure 6. While 43% of the litigants felt they saved money through mediation, only 25% felt SJT saved them money.\footnote{The Ramsey County Report suggested this difference might be explained by "the relatively late invocation of the summary jury trial process." \textit{Id}. at 9.} By comparison, 17% of litigants felt they spent more money in both mediation and SJT.

\begin{figure}[h]
\centering
\includegraphics[width=0.5\textwidth]{chart.png}
\caption{Will you (or your firm) have saved money or spent additional money on this case participating in the process?}
\end{figure}

The studies also asked attorneys to report whether they felt they spent more or less time on the ADR procedure than they would have for a regular trial process. As shown in Figure 7, while about one-third of attorneys felt that they spent less time in the ADR process (either mediation or SJT), 30% felt they spent more time because of mediation, and 57% felt that SJT required them to spend more time on the case. Interestingly enough, as shown in Figure 8, when litigants were asked whether they thought billable hours increased or decreased as a result of the ADR process, they generally (56% in mediation and 58% in SJT) replied that billable hours decreased. Only a small percentage (16% in mediation and 17% in SJT) thought the hours billed increased. Attorney responses for SJT (no data available for mediation) reflected an op-
posing view, with 49% believing the ADR process increased the time billed and 31% believing it decreased the time billed.

**Figure 7.** Has this process had any effect on the amount of time you (attorneys) spent on this case?

![Figure 7](chart1.png)

**Figure 8.** Generally, do you (litigants) think this process reduced or increased time billed to clients compared to the normal adjudicative process?

![Figure 8](chart2.png)
The Ramsey County study concluded by stating:

This study should provide some guidelines to judges and administrators as they make decisions about what type of ADR technique to invoke for a particular case. If the interest is in settling more quickly, then mediation/arbitration should be used. If a case has advanced without settling and looks like it might need to be tried, a summary jury trial might be useful in encouraging settlement. Using either method can reduce the number of trials and conserve precious judicial resources to apply to cases which require them.\(^73\)

B. Recent Evidence After the Ramsey County Report

As a follow up to the Ramsey County Report, from January 1996 to December 1996, the Ramsey County District Courts tracked cases where the litigants opted for various forms of ADR, including SJTs, rather than proceeding to a full court trial. Table 3 below summarizes the results of this study.

As noted in Table 3, a total of 1,074 cases opted to try ADR in 1996. Of these, 671 were still pending or removed from the court calendar by the end of the year due to settlements. The other 403 were dismissed or withdrawn, or found not to be suitable for ADR, such as medical malpractice cases, appeals of city official assessments, and smaller civil cases. As shown in Table 3, of the 671 cases that were pending or removed by the end of the year, 530 opted for mediation, 112 for arbitration, 1 for mediation-arbitration, 2 for moderated-settlement conference, 2 for early neutral evaluation, and 24 for SJT.

Of the 24 cases opting for non-binding SJTs, all 24 cases settled. A third of these cases did not settle until after the SJT. Of the 530 cases opting for mediation, 521 cases settled, although only 93 actually proceeded with mediation because the rest had settled prior to that step. Of the 112 cases choosing non-binding arbitration, 109 settled before trial, with 38 still pending at the time of the arbitration. The results show that, when used, SJTs serve as an effective settlement tool available along with the more traditional methods of mediation and arbitration.

\(^{73}\) RAMSEY COUNTY REPORT, supra note 55, at 11-12.
Table 3. 1996 Ramsey County Case Disposition

<table>
<thead>
<tr>
<th></th>
<th>MED</th>
<th>ARB</th>
<th>MAR</th>
<th>MSC</th>
<th>ENE</th>
<th>SJT</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cases Initially to ADR</td>
<td>830</td>
<td>202</td>
<td>4</td>
<td>6</td>
<td>5</td>
<td>27</td>
<td>1074</td>
</tr>
<tr>
<td>Cases Dismissed, Withdrawn, or Found to Not Be Suitable for ADR</td>
<td>300</td>
<td>90</td>
<td>3</td>
<td>4</td>
<td>3</td>
<td>3</td>
<td>403</td>
</tr>
<tr>
<td>Cases Pending and Suitable for ADR Processes</td>
<td>530</td>
<td>112</td>
<td>1</td>
<td>2</td>
<td>2</td>
<td>24</td>
<td>671</td>
</tr>
<tr>
<td>Cases Settled Before ADR</td>
<td>217</td>
<td>55</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>16</td>
<td>290</td>
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<tr>
<td>Cases Settled at ADR (usually during the process)</td>
<td>211</td>
<td>16</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>228</td>
</tr>
<tr>
<td>Total Cases Settled at or Prior to ADR</td>
<td>428</td>
<td>71</td>
<td>0</td>
<td>1</td>
<td>2</td>
<td>16</td>
<td>518</td>
</tr>
<tr>
<td>Percent of Cases Settled at or Prior to ADR</td>
<td>81%</td>
<td>63%</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>67%</td>
<td>77%</td>
</tr>
<tr>
<td>Cases Settled After ADR and Before Trial</td>
<td>93</td>
<td>38</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>8</td>
<td>141</td>
</tr>
<tr>
<td>Remaining Cases (not settled)</td>
<td>9</td>
<td>3</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>12</td>
</tr>
<tr>
<td>Total Case Settlements</td>
<td>521</td>
<td>109</td>
<td>1</td>
<td>2</td>
<td>2</td>
<td>24</td>
<td>659</td>
</tr>
<tr>
<td>Percent of Total Settlements, Before, At, or After ADR</td>
<td>98%</td>
<td>97%</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>100%</td>
<td>98%</td>
</tr>
</tbody>
</table>

Key:
- **MED** = Mediation
- **ARB** = Arbitration
- **MAR** = Mediation-Arbitration (started with mediation and ended in arbitration)
- **MSC** = Moderated Settlement Conference
- **ENE** = Early Neutral Evaluation
- **SJT** = Summary Jury Trial
C. Case Examples

Existing settlement theory predicts that both parties will calculate an expected value based upon their estimates of winning, factoring in the cost of litigation. Summary jury trials save transaction costs—attorney's fees, expert witness's fees, and other client costs. They also save costs to the courts in judicial time, jury fees, and support staff time (also a form of transaction costs).

I will take my experiences in five different cases prior to 1996, four of which opted for nonbinding SJT and one which involved a binding SJT, and show how they were more economically efficient than a full-blown trial with higher transaction costs.

1. The Offer Was Kept Open

The first case I would like to discuss is the case I call "The Offer Was Kept Open." This case was the first SJT heard in Ramsey County, and the first over which I presided. I suggested this form of dispute resolution to the attorneys after attending a course on ADR offered by the National Judicial College in Boston in October 1990. The SJT was held in November 1990 after a pre-trial conference where the attorneys agreed to participate in an SJT.

The plaintiff in this case was rear-ended in a car accident and sued the defendant for a soft tissue injury to her back. The defendant admitted liability, but denied that the plaintiff had any permanent injuries. The defendant's insurance company offered $7,500 to settle, but the plaintiff demanded $15,000. Counsel for both sides urged the court to add a non-traditional step to the SJT process and allow at least one live witness for each side to be questioned at the SJT. Both sides wanted the plaintiff to testify so she would receive a better evaluation of her case and input from the summary jurors through their verdict and subsequent questioning by the court and counsel. It is my opinion that the live testimony assisted in the settlement of the case.

Interestingly, although the defendant had admitted liability, the summary jury awarded the plaintiff nothing, finding no perma-

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75. Editor's Note: These anecdotal observations are based on the author's recollections and portions of tape recorded transcripts. Readers desiring additional public information about these cases are encouraged to contact the author directly.
nent injury. The fact that the plaintiff had the opportunity to tell the jury about her symptoms, but still received no damages, helped convince her that she ought to reconsider the defendant insurance company’s settlement offer. After the plaintiff heard what the summary jurors said about her case, she accepted the $7,500 that the defendant’s insurance company still kept on the table. This was an economic and efficient result. The plaintiff heard from six people what her real-life probability of winning in a real trial would be. As a result she had the opportunity to reevaluate her position. Although she “lost,” she received a “Mulligan” and was able to settle for $7,500. Both parties saved transaction costs regarding the testimony of their respective doctors who probably would have charged each party $3,000.

2. The Questionable Insurance Agent

In this SJT, a sub-agent claimed that he was owed a commission of $5,000 by his employer, an insurance agent. The defendant claimed he did not owe the plaintiff anything because the plaintiff was on a training program and not entitled to any commissions. Also, he claimed that the plaintiff was either incompetent or a crook, alleging that the plaintiff nearly got himself arrested by fraudulently attempting to sell an 89 year-old widow a disability policy. Before the SJT, the defendant offered the plaintiff $1,500 to settle the case.

The summary jury heard the case and found for the defendant. Afterwards, the court and parties discussed the decision with the six jurors. Here, in a nutshell, are some of thoughts of the summary jury.

JUDGE: Why didn’t you feel the contract was breached?

. . . .

JUROR 5: It appears to me that [the defendant] had brought him [the plaintiff] on board as sort of a training period and he was still under that training period; therefore, that was one of the arguments that I gave consideration in determining whether or not there was an actual breach of contract. I also had some other thoughts on that.

76. Here, plaintiff became more pessimistic about winning. P - S is negative. See Posner, supra note 25, § 21.5, at 556. Posner notes “litigation will occur only if both parties are optimistic about the outcome of the litigation.” Id. Thus, a case, “a fortiori . . . will be settled if one party is more pessimistic than the other . . . .” Id.
breach of contract. Some of the other arguments have already been presented by these two (indicating).

JUDGE: Was there anybody that felt that the plaintiff should get any money at anytime?

JUROR: Well, early on, I think we were discussing $300 that was not paid there, alleged to be not paid out of the $1,500 that was thrown around a bit. It kind of was waived off . . . .

JUDGE: Let me just throw this out to you. There have been some settlement discussions, and if the plaintiff could get $1,500, would you recommend that he take it before the trial that's due to come up in a couple weeks?

JUROR: I'd certainly think he definitely should take it.

JUROR 2: We had sympathy for the plaintiff. It wasn't enough to persuade us.

JUROR 3: We didn't like to see him end up short, but we got to do yea or nay on this.

JUROR 3: Certainly didn't figure $10,000 was anywhere near worth this. Too many of them weren't even—too many were no commissions taken . . . .

JUROR 4: To me, there's a sort of vindictive nature to this court trial. Somebody feeling that they were wronged and seeking revenge. To me, there is no compensation for that; zero dollars amount for that, no $1,500.

JUDGE: Beg your pardon?

JUROR 4: I said zero dollar amount, no $1,500, is how I feel. That's my opinion.

JUDGE: But on the other hand, if the plaintiff could receive that in a settlement, would you recommend that he take it?

VARIOUS JURORS: Definitely. Certainly. I certainly think he should go for it.

Ten minutes after this discussion, the plaintiff settled for $1,500 after some discussions in chambers. The case would have taken much longer to resolve but for the summary jurors, and in particular Juror 4, who said not to give the plaintiff anything. This juror's frankness when he talked about the vindictive nature of the lawsuit opened the door to the settlement room. The other five ju-
rors took the position that the plaintiff should not get anything, although they had toyed with the idea to maybe give him some nominal amount. However, Juror 4 shook the plaintiff. The plaintiff probably felt he should take the offered settlement rather than risk a Juror 4 on the real trial.

A trial on this case would have taken three days, especially if it was as the one summary juror characterized it, "a vindictive lawsuit." Thus, this case had the potential for high transaction costs for both parties and the court system.

3. The Classic Car Case

The plaintiff owned a 1954 classic Chevy. The plaintiff brought his car to the defendant, a classic car restorer and rebuilder, to have it restored. The defendant asked for $10,000 down for parts, which the plaintiff paid to him. Several months later, the defendant still had not completed repairs to the car and claimed he needed more money for parts. The plaintiff refused, and instead sued the defendant for breach of contract, consumer fraud, and replevin (i.e., return of the car). The defendant counter-sued for breach of the contract.

The defendant was in poor financial straits at the time of the SJT, claiming to be contemplating bankruptcy. The summary jury awarded the plaintiff $18,000 for breach of contract, but found that the defendant did not commit consumer fraud. This was important because the plaintiff could have been awarded attorney’s fees if he had prevailed on this issue and would have been entitled to receive punitive damages.

The plaintiff hoped to capitalize on the fraud and punitive damages in the main trial, but the court's discussion with the summary jurors after their decision diffused him:

COURT: Maybe I could ask this question. Was there anybody on the jury that felt there was fraud and misrepresentation?
JUROR: No.
COURT: Or anybody that felt that the plaintiff should get punitive damages?
JUROR: No.

The jurors discussed damages further, with one juror summing
up the punitive damages question, the lack of fraud, and the way they arrived at damages:

COURT: Yeah, what were your thoughts on damages?
JUROR: Well, because of the way of wording as far as punitive damages, I can’t say that there was intent to commit a fraud. It just happened that there was problems with it. I had gone through a similar thing when my house was hit by a tornado with the builder. And the same thing happened so I understand how they feel, and all the anguish and, if anything, I would lean towards giving them more money, but I think the $17,500 is fair because I’ve been in their shoes.
COURT: Did anyone want to give less than $14,000 . . .
JUROR: That was about the point, was about $14,500.
JUROR 2: $14,500 to $17,500.

The plaintiff was particularly interested in punitive damages because an award of punitive damages would not be dischargeable in bankruptcy, and given the classic car repair man’s statements it seemed likely he would declare bankruptcy if the jury awarded the plaintiff $17,500. The plaintiff’s attorney explored the punitive damages issue further, but did not receive much solace from the summary jury:

[PLAINTIFF’S ATTORNEY]: Yes, maybe if I can just ask a couple questions, and I’ll just throw them out and anyone who feels like answering . . . regarding the punitive damages. Was it my understanding that based on testimony, you heard today, you felt—I believe someone mentioned it—you felt there was no willful intent to cause to my clients harm . . . —that you felt the defendant thought he was within his rights to take the engine and the transmission out . . . ?
JUROR: We think that he probably took it out—to himself, he was doing the right thing rather than doing something to harm somebody else. We felt that he had some money into it and just felt that it was his. It meant as much as to the other group—to the other party.
Once the plaintiff’s attorney was convinced that the entire summary jury refused to award punitive damages, he moved on to their reason for their verdict:

[PLAINTIFF’S ATTORNEY]: And so [as to] the breach of contract[,] you all believed that the written estimate constituted . . . ?

JUROR: Well, that’s not the exact price, but we felt that it should be within the first 10-15%. Even if he was an expert, we knew that certain things came up prior to, and all prior experiences that we’ve all had is that if something comes up, you get a phone call and the estimate is gone through saying, which do you want me to do, the rebuilt or go from there, but even so, it’s within about 10-15%.

In additional discussions with the summary jurors after the verdict, all jurors felt the defendant breached the contract by his non-performance.

As the judge on this case, I pointed out to the jurors that the problem with any settlement was that the defendant was broke and contemplating bankruptcy. I asked the summary jurors if any one of them had any solutions as to how the case could be settled. One juror raised his hand and gave this solution: the plaintiff should give “blank” number of dollars to his attorney, who would, in turn, put the money in an escrow account. The attorney would pay the defendant out of the escrow account once the defendant submitted verified invoices for parts. When the job was done, the defendant would get anything left over in the escrow account.

The parties settled on this basis. The plaintiff gave his attorney $6,000 to place in his trust account. His attorney paid the defendant as the work was completed. This saved some very wasteful transaction costs. If the defendant had been hit with an $18,000 judgment, he would have probably been forced into bankruptcy, which would have been a high transaction cost. The plaintiff would have had a piece of paper awarding him $18,000, suitable for framing, but ineffective to serve any other purpose given the defendant’s bankruptcy. The plaintiff would not have any money, and would not have his car back in any better shape—and probably worse shape than when he took it to be repaired. The plaintiff would have experienced high transaction costs such as attorney’s fees and witness’s fees, with very little return. The summary juror’s
solution was by far the most economically efficient.

4. The Reluctant Home Owner

This was a case where a couple hired a builder to construct a home. The husband possessed an engineering degree and had some sort of a background in construction. He decided to become his own general contractor and subcontracted out a great deal of work to build a new house. Although he chose a builder, the husband was really in charge of the building process. The builder, who in a sense became the husband’s subcontractor, failed to meet the husband’s expectations. As a result the couple sued the builder and one of the builder’s subcontractors.

The husband spent a great deal of time preparing for the lawsuit, lining up some expert witnesses and expending a fair sum on attorney’s fees. If the case had gone to trial, he would have spent considerably more. The plaintiffs wanted about $120,000, but the defendants were only willing to pay $105,000. The plaintiffs’ attorney urged them to take the $105,000, pointing out that this was a substantial sum, particularly in light of the fact that the total value of the house was under $300,000. In addition, he noted that a trial on this matter would probably last ten days, resulting in significant litigation costs such as expert witnesses’ fees. Finally, the attorney added that unless there was a higher probability of winning more than $105,000, the attorney’s fees for a ten day trial would make the process unfeasible for the plaintiffs.

The plaintiff-wife was amenable to settlement, but her husband was not. He was frustrated because of what they had experienced with the builder and subcontractor and because of all the preparation he had done for trial. In a sense, it is likely the case had become an obsession for him.

The summary jury returned a verdict of only $90,000 for the plaintiffs. The post verdict discussions were different here. Besides the questions by myself and the attorneys, I also allowed the plaintiff-husband to ask the jurors some questions. The answers the summary jurors gave to the husband convinced him to agree to a settlement of $100,000, the amount the defendants were offering after the summary jury verdict. This was a case where the opinions of the summary jurors had a stronger effect on the plaintiff husband than anything his attorney or the judge could have said.

This was one of the most economically efficient SJTs over which I have presided. There would have been so many wasted
transaction costs expended by both parties and the court for a case with a fairly predictable result.

5. The Incomplete Kitchen

The last case is one that, hopefully, is typical of a trend focusing on SJTs as a binding process. In this case, the plaintiffs were hired by the defendants to remodel a kitchen in the defendant couple's home. The plaintiffs claimed they completed the job and the defendants owed them about $4,500 for the work. The defendants claimed the plaintiffs did such a poor job on the kitchen remodeling project that they would have to get someone else to finish the job, and thus they did not owe the plaintiffs anything. The case was heard on January 25, 1994 by a summary jury, which deliberated on January 26.

The parties had agreed to make the decision of the summary jury binding. This was due in part to the fact that the case did not involve a large amount of money, as the largest verdict would have been about $5,000; the defendants had spent $2,000 on attorney's fees before dismissing their attorney and representing themselves, and they felt added attorney's fees for trial would be a waste of money; and the plaintiffs' attorney felt he could adequately present the plaintiffs' case in a summary fashion.

The summary jury decided that both parties breached the contract. However, it found that the plaintiffs' breach did not cause the defendants any damages. Thus, the summary jury only awarded the plaintiffs $2,000 for the defendants' breach. Even so, both parties received some satisfaction from the result. The defendants, who received nothing, were saved additional attorney's fees by not having an attorney present at the SJT. The plaintiffs were able to present their case faster and at far less expense than at a full court trial.

D. Summary/Analysis of Studies

These case examples, which are summarized in Table 4, show several things. Litigants are more likely to listen to summary jurors than their attorneys or even qualified neutrals as to the monetary value of their cases, as observed in the "Questionable Insurance Agent" and the "Reluctant Homeowner" cases. In addition, often times six lay people can come up with a more workable solution than a qualified mediator as found in the "Classic Car Case."
“Incomplete Kitchen Case” demonstrates that binding SJTs could be the wave of the future. As litigation expenses continue to grow, it is likely the courts will see more pro se litigants frustrated by the high costs of hiring an attorney. In addition, more litigants will be interested in finding ways to cut their litigation expenses. The SJT provides the best of both worlds for these litigants—the transaction costs of the SJT are much lower than at a full trial, and the litigants have the opportunity to be heard by a panel of their “peers” and to receive a binding verdict which will end the litigation.
<table>
<thead>
<tr>
<th>Case</th>
<th>Case Type</th>
<th>Summary Jury Decision</th>
<th>Settlement?</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The Offer Was Kept Open</td>
<td>Personal injury; Defendant admitted liability but denied damages</td>
<td>For Defendant (no money for Plaintiff)</td>
<td>Yes – Plaintiff took offer of $7,500 which was still on the table</td>
</tr>
<tr>
<td>Plaintiff’s Demand: $15,000</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defendant’s Offer: $7,500</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. The Questionable Insurance Agent</td>
<td>Employment contract; suit for payment of commissions</td>
<td>For Defendant (no money for Plaintiff)</td>
<td>Yes – Plaintiff took offer of $1,500 which was still on the table</td>
</tr>
<tr>
<td>Plaintiff’s Demand: $5,000</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defendant’s Offer: $1,500</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3. The Classic Car Case</td>
<td>Car repair work</td>
<td>For Plaintiff for $18,000</td>
<td>Compromise at jury member’s suggestion.</td>
</tr>
<tr>
<td>Plaintiff’s Demand: n/a</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defendant’s Offer: n/a</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4. The Reluctant Home Owner</td>
<td>Home construction</td>
<td>For Plaintiffs for $90,000</td>
<td>Yes – Plaintiffs took new offer of $100,000</td>
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<td>Plaintiffs’ Demand: $120,000</td>
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<td></td>
</tr>
<tr>
<td>Defendants’ Offer: $105,000</td>
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<tr>
<td>5. The Incomplete Kitchen</td>
<td>Kitchen remodeling</td>
<td>For Plaintiffs for $2,000</td>
<td>N/A (binding SJT)</td>
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<tr>
<td>Plaintiffs’ Demand: $4,500</td>
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<td>Defendants’ Offer: n/a</td>
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IV. SOUR NOTES - ARGUMENTS AGAINST THE USE OF SJTs

There exist certain sour notes and negative impressions about SJTs. Summary jury trials initially sailed along smoothly from their inception by Judge Lambros, until the *University of Chicago Law Review* article by Judge Posner in 1986. Sour notes and misconceptions continue through 1999 due to the concerns expressed by Judge Posner and others. Some of the arguments made by Judge Posner in 1986, that were more recently re-examined by author Marla Moore, suggest SJTs are a waste of time and involve involuntary servitude on the part of the jurors, among other things. These arguments tend to stem from a lack of empirical evidence and a concern for the judicial authority to mandate parties into ADR proceedings in general, leaving the question of the SJT process largely untouched in itself. This section will address these concerns.

A. SJTs Are a Waste of Time

Marla Moore argues that SJTs are ultimately a waste of time and expense for all and have serious constitutional problems. In this author’s opinion, Moore’s arguments are just a re-hash of Judge Posner’s position taken back in 1986. Moore offers no empirical evidence whatsoever to support her conclusions. Judge Spiegel addressed this argument as well in a speech in 1985. He said counsel complained that SJTs caused “extra work and expense for their clients.” Judge Spiegel’s response was “if it succeeds, it certainly cuts the time the lawyers would spend in court trying the case on the merits and that alone should reduce the clients’ expenses.” He added, that even where SJT fails to garner a settlement, “the work of counsel and the Court hasn’t been wasted

77. See Posner, *supra* note 7, at 369-73 (noting, among others, doubts about the conscientiousness of mock juries and possible cost increases to the system as problems of SJTs).
78. See Moore, *supra* note 24, at 495.
79. However, it should be noted that many of the concerns raised by Moore, as well as another critic, Charles F. Webber, see *supra* note 15, arise out of a concern for the use of mandatory SJTs.
80. See Moore *supra* note 24, at 497, 516-18.
82. Id.
83. Id.
as trial on the merits will be scheduled shortly thereafter."

The biggest argument to counter Moore's position that summary juries are a waste of time and expense are the various bits of empirical evidence reported in this article, including in particular the surveys conducted by Ramsey County. Most studies show that, in fact, over ninety percent of all cases settle before trial. By comparison, in the Ramsey County study only 4.1% of mediation/arbitration groups went to trial (95.9% settled), and 3.6% of the SJT group went to trial (96.4% settled). These numbers suggest that it may be more than twice as likely there will be a trial for those cases which were not referred to some type of ADR process, such as SJT or mediation/arbitration.

In addition, although it is unclear how statistically significant an increase in the settlement rate from 90% to 96% might be, the possibility that six more cases out of 100 could settle due to SJTs and other ADR processes would help to make the administration of justice more efficient and decrease transaction costs even though some judicial intervention was required. For example, while the average SJT lasts about one-half day, the average standard jury trial requires three to four days. Summary jury trials cut the amount of money used for juries, and they cut the time needed for the presiding judicial officers.

B. Failure to Use Witnesses

Various commentators argue that one of the deficiencies of the SJT is that no witnesses are called. As a result, the jury verdict is based more on the credibility of the attorneys presenting the evidence than on the actual evidence, and there is no opportunity for cross-examination. Thus the attorney who finds the SJT verdict unfavorable might rationalize that the trial jury will find differently after hearing his or her client or expert witness in person. This is not the case in Ramsey County. Some commentators urge the use of video depositions as part of the attorney evidentiary presenta-

84. Id.
85. See supra Part III.
86. See Webber, supra note 15, at 1521.
87. See Denson, supra note 23, at 311; Moore, supra note 24, at 498; Posner, supra note 7, at 374; Webber, supra note 15, at 1515-17.
88. See Moore, supra note 24, at 500.
89. See Denson, supra note 23, at 311.
I, however, have found that the limited use of live witnesses in the SJT (usually one per side) eliminates this concern and ensures a more realistic verdict. One of the real advantages of using limited witness testimony is the fact that the parties and their attorneys can get feedback from the summary jurors regarding the credibility of key witnesses. In addition, attorneys are urged to get right to the chase in the questions to their witness (usually their client) and immediately get to the crux of the case.

C. Skewed Verdicts

Does shortened voir dire add to a skewed verdict, as Moore and Webber argue? Moore suggests that a “more biased jury may serve at the SJT than would serve at an actual trial” due to the limited jury pool, limited number of challenges to jury members during voir dire, and reliance on a “basic information” form about the jury members.

I have found, however, that if the judge asks a few germane questions of the ten prospective jurors and allows the lawyers a few, brief follow-up questions, there is more than adequate voir dire. I conduct voir dire as follows: Ten prospective jurors are put in the jury box. The attorneys and the judge have the answers to the jury questionnaire form. The judge explains the case and fashions questions regarding the case to see if any particular juror has any bias or prejudice. If a bias seems apparent, I let the attorneys ask one or two follow-up questions. This is similar to the voir dire procedure in full-blown trials in most federal district courts, except that in the federal district courts, the attorneys usually are not allowed to ask follow-up questions; rather, the judge asks them. If this procedure is followed, usually the voir dire can be completed in ten to fifteen minutes. It is fair and loosely based on the federal system, where one would be hard put to argue that federal civil jury trials foster skewed verdicts.

90. See id.
91. But see id. ("It would be a mistake to allow the calling of live witnesses because there would be inadequate control over the content of their testimony and because it would be difficult for it to be sufficiently compressed.")
92. See Moore, supra note 24, at 500; Webber, supra note 15, at 1517.
93. Moore, supra note 24, at 500.
D. Law and Economics

Moore also argues that the delay and expense associated with a SJT, along with the fear of sanctions, cause the litigants to forego a full-blown trial. Moore argues:

[L]itigants are forced to endure the expense and delay of preparing for and participating in SJTs with little hope of actually reaching a settlement agreement.

Besides the fact that Moore's argument completely lacks merit and is unsupported by any evidence, it does not gel with the author's experience. In Ramsey County, the SJT usually lasts a half day. Although clearly the parties incur legal expenses, the plaintiff's attorney usually is compensated on a contingent fee. Therefore, rarely does a plaintiff incur more legal expenses due to a SJT proceeding. The defendant usually has the wherewithal to go through with a SJT. More often than not, the savings the parties receive because their case settled short of a full-blown trial outweighs any expense for the SJT.

Judge Lambros also met this argument head on when he stated that although people argue that an extra layer of expense to the litigation process ensues:

[M]y experience has shown that the opposite is true. Rather than adding an extra layer of expense, summary jury trial encourages trial counsel to make a timely analysis of the case and to focus on its strength as well as its frailties. In preparing for a summary jury trial, trial counsel must crystallize and distill their best arguments and evidence for an abbreviated presentation to the jury.

Judge Spiegel has also defended any expense associated with SJTs by stating:

The summary jury trial is an innovative settlement mechanism with a high success rate. The procedure conserves judicial resources, provides an accurate reading of

94. See Moore, supra note 24, at 503.
95. Id. at 517.
96. Lambros, supra note 1, at 626.
what will actually happen at trial.\textsuperscript{97}

Judge Posner stated:

Settlement out of court is cheaper than litigation. Therefore, only if each disputant expects to do better in the litigation than the other disputant expects him to do are the parties likely to fail to agree on settlement terms that make them both consider themselves better off compared with how they anticipate fairing in litigation.\textsuperscript{98}

Therefore, the logical conclusion under the school of law and economics is that attorney's fees, expert witnesses' fees, judicial time, jury fees, and support staff—all of which are a form of transaction costs—will be lowered if judges and lawyers utilize SJTs. The anecdotal illustrations previously set forth in this article show how SJTs have led to settlements which led to low transaction costs. One can readily see that the more SJTs are utilized, the more parties and their attorneys will be willing to go into binding SJTs. This will definitely promote lower transaction costs.

In my courtroom, there is no expense to the litigant if the litigant wants a SJT and cannot afford to have a referee appointed. In that case, the court has heard the case without any cost to the parties. Oftentimes, the court-appointed neutrals have agreed to wait until after the case is over to require payment, so that in the case of the plaintiff, if there is a settlement or an award, the referee can be paid out of that award.

\textbf{E. Constitutional Concerns}

Various arguments about the constitutionality of SJTs have been raised. These tend to be based on concerns about the right to trial by jury under the Seventh Amendment, the right to due process guaranteed by the Fifth and Fourteenth Amendments, the right of equal protection under the law guaranteed by the Fourteenth Amendment, and the judicial powers under Article Three of the Constitution.\textsuperscript{99} The first three constitutional concerns are directed at ADR procedures generally, especially when such proceed-

\textsuperscript{97} CHIC. DAILY L. BULL. No. 145 (July 24, 1996).
\textsuperscript{98} \textit{Posner}, supra note 25, at 541.
\textsuperscript{99} \textit{See Moore}, supra note 24, at 501.
ings are mandated by the courts and can result in sanctions of parties who fail to participate fully. These arguments are outside the scope of this article, as they address concerns with the mandatory nature of ADR processes in general, not arguments against the use of SJTs specifically. Furthermore, although Ramsey County mandates certain ADR procedures, including SJTs, it does not do so for indigent civil defendants. And Ramsey County has yet to sanction a party for not participating in a SJT. So far to my knowledge, none of the mandated parties have sought appellate intervention.

100. See id. at 501-11.

101. It is my hope that more SJTs can be heard as binding cases, however. Professor Thomas B. Metzloff agrees, stating:

A binding SJT approach offers the potential for significant cost savings to the litigants. Unlike a court's decision to mandate a traditional SJT on the eve of trial, the parties' decision to employ a binding SJT could be made early in the litigation process (perhaps even before suit is filed). After limited discovery, the case could be tried in an abbreviated fashion in which various procedural shortcuts—many borrowed from the typical SJT format, such as the use of summarized evidence—could be employed. The litigants' goals in formatting the process would be more broadly defined than in the classic SJT context, where the court-initiated process is largely driven by an interest in shortening trial lengths. For example, because the parties have committed the resolution of their dispute to the process, they may often be interested in providing more information to the summary jury than would be the case with the traditional SJT. Serving this interest would usually entail the limited use of live or videotaped testimony on critical issues.

Thomas B. Metzloff, Improving the Summary Jury Trial, 77 JUDICATURE, No. 1, July-Aug. 1993, at 11. He has also stated:

A restructured SJT could perform this new role by offering litigants the opportunity to reduce both the expense of litigation and the risks inherent in the existing jury system. The theory of the binding SJT rejects the common assumption that the SJT process is intended for cases in which conventional negotiations have failed. Instead, it seeks a broader role for the process by providing an ADR option for litigants presently forced to settle, but who would prefer a binding adjudication if the process could be made less expensive and more predictable. A binding SJT approach described here meets what Judge Posner has referred to as the "rational litigant" test.

Thomas B. Metzloff, Reconfiguring the Summary Jury Trial, 41 DUKE L.J. 806, 856-57 (1992) (citing Posner, supra note 7, at 367). Posner stated: "Although emotion and ignorance play a role in litigation, no proposed alternative is likely to work that assumes, implicitly or explicitly, that litigants and their lawyers are irrational." Id. (quoting Posner, supra note 7, at 367). Metzloff continued:
In the event a case would arise before the Minnesota appellate courts, I believe they would follow a Minnesota federal district court case on the subject. In that case, the federal magistrate mandated a SJT but the parties strenuously objected, citing cost concerns and the inaccuracy of any SJT verdict as major evidentiary rulings had yet to be made, and noting that given the party's positions the possibility of settlement would be extremely remote. The district court rejected the view of the Seventh Circuit that a federal judge does not have authority to order a mandatory SJT. The court found instead that the SJT proceeding was a good investment compared to the potential length of a real jury trial lasting four to six weeks, that even if it did not lead to settlement it would benefit the case by clarifying issues for trial for the parties and the court, that the proceeding would be closed to the public so as to avoid premature publicity, and that "it is reasonable to require the parties to engage in settlement efforts with some degree of intensity" in a case such as this. Finally, the court noted that "[r]esort to a totally voluntary system of the use of SJT, where the attorneys are aware of the court's inability to compel their attendance and participation would undercut the potential efficacy of the procedure."

However, one of the constitutional arguments against SJTs has been the question that Judge Posner first posed that it may be unlikely that judges have the authority to convene a jury merely to assist the settlement process. He further warned that "judges should be cautious about instituting new forms of involuntary servi-

The process allows litigants to obtain a binding adjudication of their dispute at a reasonable cost without the risks inherent in the current jury system. A well-designed binding SJT serves three goals: (1) it avoids the possibly expensive and unproductive post-SJT negotiating process (as well as the need to interview jurors after the summary trial to obtain their subjective assessments of case); (2) it removes the distorting impact of an outlying summary jury decision; and (3) it avoids the possibility of an expensive subsequent trial.

Id. at 856-57.
103. See id. at 604.
104. See id. at 606.
105. Id. at 607.
106. Id. at 608.
107. See Posner, supra note 7, at 385-86; see also Moore, supra note 24, at 515-16.
Chief Judge Battisti picked up on this argument in the case of *Hume v. M & C Management*. Sitting in the same district as Judge Lambros, the father of SJTs, Judge Battisti held that nothing in the Jury Selection and Service Act required citizens to serve as juries on SJTs. Given this, he found that federal judges "have no authority to summon citizens to serve as settlement advisors, just as they would have no authority to summon citizens as hand servants for themselves, lawyers, or litigants."

Even so, the concerns raised by this argument of "involuntary servitude" can be easily alleviated. This can be handled, as I have done in a number of cases, by having the clerk of court ask prospective jurors if they would be interested in serving on a condensed case that would probably only last one to two days. In my experience, we have received many volunteers. In the metropolitan area of Minneapolis and St. Paul, to wit Hennepin and Ramsey Counties, where most of the SJTs are held, jurors are generally summoned for a week at a time. If they are selected for a complex case, they will serve for a much longer time. It has been done, and certainly could be done in the future, where certain members of a panel are asked who would be interested in serving on a shorter case.

F. Right of the Litigants to a Fair and Full Trial vs. Judicial Efficiency

It is also opined that litigants' constitutional rights to a full and fair hearing are circumvented by SJTs. Marla Moore argues that this is because the "delay and expense occasioned by participation in the SJT may make proceedings with a full trial impractical for some parties." This runs contrary to the author's experience. First of all, the more SJTs that are ordered, the less calendar delay there will be on a particular judge's docket. Summary jury trials speed up, rather than delay, the opportunity for litigants to have their case heard. Further, if the litigant is not satisfied with the advisory result, the litigant can demand a trial that in this author's

108. Posner, supra note 7, at 386.
111. See *Hume*, 129 F.R.D. at 508-09.
112. Id. at 510.
113. See *Moore*, supra note 24, at 501-10.
114. Id. at 517.
experience has not been delayed.

The rationale behind the SJT does not lie in any effort by the judiciary to put the litigants through so many hoops that they become worn out, impoverished, or both and, therefore, settle. Rather, the rationale for a SJT lies in the fact that there exists empirical evidence of cases where SJTs take place, and there is a substantially greater chance of settling.

G. Giving Up Trial Strategy

Some lawyers express concern that an SJT requires them to show their trial strategy prior to a trial on the merits. However, Judge Spiegel noted that he has not observed a problem with this, and will not allow “any surprises, blindsiding, or trial by ambush” in any proceeding whether it involves “discovery, pretrial proceedings, summary jury trials, [or] . . . trial on the merits” anyway. Accordingly, this argument is meritless.

H. Overstating of Evidence by Counsel

Another concern might be that since evidence does not come in through normal evidentiary procedures which provide for proof, foundation, and objections, and instead is simply presented by counsel during their arguments, such evidence could be “overstated.” This is easily corrected by the exchange of all evidence before SJT. In addition, Judge Spiegel has noted that in his experience, forbidding commentary by counsel during the presentation of evidence to the jury also removes this problem.

V. CONCLUSION

Through the examples and studies summarized here, we have seen that SJTs have the potential to reduce transaction costs noticeably by reducing attorney’s fees, expert witness’s fees, and the time litigants waste in lengthy trials. One of the biggest assets that

115. See id. at 498 (suggesting that lawyers might “strategize” to “withhold critical information during the SJT in order to retain an element of surprise for the real trial” and that this causes uncertainty in evaluating the true effect of SJTs); Spiegel, supra note 6, at 835.
116. Spiegel, supra note 6, at 835.
117. See id.; Moore, supra note 24, at 500.
118. See Spiegel, supra note 6, at 835.
119. See id.
SJTs have had in my district is that they have reduced the civil calendar to such an extent that civil litigants can now get into court within approximately six months of filing.

Summary jury trials also have had an effect on criminal cases in that we now can afford to put more judges on criminal cases. As a result, all the custody felony cases are tried within sixty days, and out-of-custody felony cases are tried within ninety to 120 days. This certainly lowers the transaction costs for the criminal justice system. The accused are either acquitted, convicted, or have their charges dismissed within a relatively short period of time; this is legally and economically efficient.

Chief Justice William Rehnquist, in referring to SJTs and other methods of alternate dispute resolution, said that, "in some areas of the law they will become not the alternate method of resolving disputes, but the usual and customary method."¹²⁰ In addition, former Chief Justice Warren Burger referred to judges experimenting with SJTs "as judicial pioneers who should be commended for their innovative programs. We need more of them in the future."¹²¹ By contributing additional data, attorney and litigant views, and real-life case examples to the legal field, hopefully more judges and practitioners will become aware of SJTs and take advantage of this important and useful method of ADR.