ONE DAY IN COURT: SUGGESTIONS FOR IMPLEMENTING SUMMARY JURY TRIALS IN IOWA

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I. INTRODUCTION

As trial courts attempt to manage heavier caseloads with more limited resources and no additional judges, pretrial efforts are being made to narrow and resolve issues, thereby reducing the number of days in trial.[1] Additionally, courts are making greater efforts to expedite the settlement process and increase the percentage of civil cases which settle prior to trial.[2] One such device is the summary jury trial. This procedure provides a mechanism for

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The statements and points of view expressed by this article are those of the authors and do not represent the policies of the United States District Court.

1. FED. R. CIV. P. 16; IOWA R. CIV. P. 136.

2. *See* THE ROLE OF COURTS IN AMERICAN SOCIETY, 94-97 (1984) (Lieberman, ed.) [hereinafter Lieberman, ed.]; Alabama Inaugurates Court Expert Plan, *Alternatives to the High Cost of Litigation*, August 1982; Note, *Rule 68: A 'New' Tool for Litigation*, 1978 DUKE L.J. 889.

the parties to use the court to structure the presentation of their case, usually in one day, and to receive an advisory opinion from a jury.[3] This article will review court-oriented settlement methods and offer suggestions for the implementation of summary jury trials in Iowa in the Federal and State district courts.

II. The Problem

Currently, there are not enough judicial work hours to accommodate the trial of every case which is filed.[4] Fortunately, the vast number of civil cases settle prior to trial without significant intervention by the court in the settlement process.[5] For the remaining cases, however, especially those which are scheduled for trials of over five days, economy of judicial time requires that some attempt be made by the court to explore the possibility of settlement with counsel and their clients.[6] By providing the court's structure to support settlement discussions, and encouraging the parties to devise a solution to the dispute, the court will relieve docket congestion and reduce undue delay, facilitate access to justice, and provide more effective dispute resolution.

Additionally, trial costs, including attorneys' fees and expenses, the court payment of jurors, courtroom attendants, court reporters, and other support staff can be saved through early settlement. If lengthy cases can be resolved prior to trial rather than in the midst of trial, the court would then be able to reach other unsettled cases, in a more timely fashion.[7]

The goal of delivering quality justice without delay, as stated by Iowa Chief Justice Reynoldson in his 1985 State of the Judiciary Report,[8] is seriously impinged not only by the crush of new civil cases filed, but by the inability to dispose of more cases.[9] To assist in the formulation of a plan to address delay in processing civil cases in Iowa, a "Study of Civil Litigation in the Iowa District Court" was made by the Supreme Court Advisory Com-

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3. Jacoubovitch & Moore, Summary Jury Trials in the Northern District of Ohio, Federal Judicial Center (1982).

4. *See* Reynoldson, "The State of the Iowa Judiciary," at 5 (delivered before a joint convention of the Seventy-First General Assembly, Jan. 16, 1986) [hereinafter Reynoldson]; D. Walker, Study of Civil Litigation in the Iowa District Court (1986) [hereinafter D. Walker]; Eighth Circuit Annual Report, July 1985.

5. S. Goldberg, E. Green & F. Sander, Dispute Resolution 6 (1985) [hereinafter Goldberg].

6. Lieberman & Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. Chi. L. Rev. 424, 426 (1986).

7. Administrative Office of the United States Courts, Federal Court Management Statistics 1985 [hereinafter Federal Management Statistics]; D. Walker, *supra* note 4.

8. Reynoldson, *supra* note 4.

9. Burger, 1984 Year-End Report on the Judiciary [hereinafter Burger]; Cannon, *Contentious and Burdensome Litigation: A Need for Alternatives*, 63 Nat'l Forum (1983).

mittee on Rules of Civil Procedure.[10]

In Iowa district courts, there are currently ninety-nine district court judges and fourteen senior status judges to service 53,878 civil and 41,429 criminal cases filed in one year.[11] The average length of time from filing to judgment, as reported by the Walker study for cases in 1982-84, was 19.3 months.[12] The average number of case (civil and criminal) dispositions per judge for 1985 was 687.[13]

Similarly, in the federal courts situated in Iowa, there is a regular increase in civil and criminal case filings.[14] Even with an increase in the number of cases that the courts can resolve judicially, there are hundreds of civil lawsuits which cannot be tried each year.[15] In the Northern and Southern Districts of Iowa there are three full-time judges and three on senior status.[16] They serviced 2,297 civil and criminal cases filed between June 30, 1984, and June 30, 1985,[17] up 6.6 percent from the previous reporting year.[18] The Iowa federal district courts disposed of an average of 565 cases per judge during this period.[19] Federal civil cases had a median of fifteen months from filing to trial.[20]

To understand the proportions of the problem, it is necessary to understand the phenomenal growth in litigation in the Iowa courts. In the State district courts there was a 6.3 percent increase in case filings in 1985 over 1984, and over the past ten years a 54.8 percent increase.[21] The federal courts in Iowa have seen a five year increase in filings of 64.6 percent in the Northern District and 54.7 percent in the Southern District.[22] Nationally, in the federal district courts there was an increase from 1984 to 1985 of five percent in civil cases and seven percent in criminal cases.[23] As Chief Justice Burger noted in his 1985 Year-End Report on the Judiciary: "Federal judges are working longer hours and more days than ever before but, like Alice in Wonderland, cannot run fast enough even to stay in the same place."[24]

Even if the combined federal and state civil trial court resources could keep up with the increase in filings through expansion in the number of

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10. The data collection was conducted by Professor David S. Walker of Drake University Law School. The study reviewed disposition times for civil, non-domestic relations cases.
11. Reynoldson, *supra* note 4, Appendix C.
12. D. Walker, *supra* note 4.
13. Reynoldson, *supra* note 4, at 17.
14. Eighth Circuit Annual Report, 16 (1985).
15. *Id.*
16. Federal Management 1985, *supra* note 7, at 113-14.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. Reynoldson, *supra* note 4, at Appendix A.
22. Federal Management Statistics, *supra* note 7.
23. Burger, *supra* note 9.
24. *Id.*

judges, courtrooms, and support personnel, the question still remains: Is litigation the only way to provide the best quality of justice at the least cost in the shortest time?

Even prior to the present situation currently requiring courts to creatively juggle their resources to control their dockets, the development of alternative methods of dispute resolution providing faster and cheaper solutions to conflicts has been widespread in the United States in the past decade.[25] With the budget reductions currently facing the state judiciary[26] and the effects of Gramm-Rudman[27] on the federal court administrative budget[28] coupled with the increasing filings cited above, innovations in court management must take place.[29] Several alternatives have been proposed and studied, including: non-binding court-annexed arbitration,[30] court-annexed mediation,[31] and advisory juries.[32] In addition, courts are encouraged to use summary jury trials and other experimental dispute resolution methods.[33]

Some judges and litigants are concerned, however, that arbitration, court-sponsored settlement procedures or court-annexed mediation is an inappropriate use of judicial authority,[34] resulting in justice which is diluted, or worse, no justice to the case and parties.[35] Professor Owen Fiss leads this argument and suggests that courts should not be dispute resolution institutions, and that adjudication should not be used to "maximize the ends of private parties, nor simply secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes . . . ."[36] Additionally, some argue that the court system gives leverage to already strong parties, allowing them to outlast and outspend the

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25. GOLDBERG, *supra* note 5, at 5.

26. Reynoldson, *supra* note 4, at Appendix K.

27. The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177 (December 12, 1985).

28. Gramm-Rudman will result in the sequestering of 4.3% of the funds appropriated for the judiciary, or $42,115,000. Memorandum from L. Ralph Mecham, Director, Administrative Office of the United States Courts to Federal Court Personnel (January 15, 1986).

29. *See* Lay, *A Blueprint for Judicial Management*, 17 CREIGHTON L. REV. 1047 (1984); Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253 (1985).

30. Court-Annexed Arbitration Act of 1979, 28 U.S.C. § 651 (1985).

31. K. Tegland, *Mediation in the Western District of Washington*, Federal Judicial Center (1984).

32. FED. R. CIV. P. 39(c).

33. Administrative Office of the U.S. Courts, 16 The Third Branch 3 (Nov. 1984).

34. Singer, *Nonjudicial Dispute Resolution Mechanisms: The Effects on Justice for the Poor*, 13 CLEARINGHOUSE REV. 569 (1979) [hereinafter Singer]; Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1984) [hereinafter Fiss]; Rifkin, *Mediation from a Feminist Perspective: Promise and Problems*, 2 LAW & INEQUALITY 21 (1984).

35. *See generally* Fiss, *supra* note 34; Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

36. Fiss, *supra* note 34, at 1075.

weaker or less affluent party and thus come out the "winner."[37] Disparity in bargaining power, however, is in fact best managed through court participation in the dispute resolution, with or without trial, since that provides sufficient procedural safeguards and regulates the conduct of the dispute, thereby maintaining fairness to both parties.[38] Critics also argue that some cases, namely civil rights or other "principle" cases, should be tried and not simply resolved by accommodating the interests of the named parties involved in the immediate action.[39] This concern also is best addressed by judicial participation to set guidelines identifying which cases are amenable to a non-litigation solution and which are not.[40]

The courts are in the best position to tailor alternative dispute resolution methods to fit the types of cases which they confront.[41] In state courts this may include methods to deal with problems such as dissolution of marriage and custody cases, which lend themselves to mediation,[42] while the federal courts may need methods to deal with complex business or mass tort cases which lend themselves to summary jury trials or court-annexed arbitration.[43] As Chief Justice Burger stated in his 1985 Year-End Report on the Federal Judiciary:

> Those who would prefer the known evils of status quo to the unknown benefits of proposed Court improvements urge cautious study of problems until a solution is certain, and postponement of intermediate proposals until reform can be complete; in essence some doubters suggest that we do nothing until we can do everything. After 20 years of private practice and 30 years on the federal bench I disagree.
> "Framers of judiciary acts are not required to be seers; and great judiciary acts, unlike great poems, are not written for all times. It is enough if the designers of new judicial machinery meet the chief needs of their generation."[44]

The chief needs of our times call for implementation of systems which relieve court congestion, facilitate access to justice, and deliver quality justice without undue delay or cost. The summary jury trial is perhaps one of the most promising of the alternatives available because it requires no additional training or resources to implement, and allows parties to have their day in court while allowing the court an opportunity to provide the framework within which settlement may be explored.

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37. GOLDBERG, *supra* note 5, at 490.
38. *See* Lieberman & Henry, *supra* note 6.
39. *See* Singer, *supra* note 34; Fiss, *supra* note 34.
40. Lay, *supra* note 29, at 1063.
41. Lieberman ed., *supra* note 2.
42. GOLDBERG, *supra* note 5, at 313-44.
43. *Id.* at 232-42.
44. Burger, *supra* note 9, at 15 (quoting F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 107 (1928)).

III. Other Methods of Dispute Resolution

Before analyzing how the summary jury trial can be implemented to reduce the trial load in the Iowa courts, it is necessary to examine other forms of alternative dispute resolution available to litigants which may be suggested or imposed by the courts. This will help to understand and identify other avenues of approach to the courts problem.

The phrase "litigotiation" was coined by Marc Galanter to describe the process of disputing under the "shadow of the robe" which involves the strategic pursuit of settlement through mobilizing the court process.[45] "Litigotiation" can offer a structure for dispute resolution which will be perceived by the parties and their attorneys as fair because it places control over presentation of evidence in their hands and provides sufficient rules to maintain a balance of power between the parties.[46]

In addition to the summary jury trial other forms of alternative dispute resolution to consider are: mediation, arbitration, court-annexed arbitration, the special master, the mini-trial and private judging.

A. *Mediation*

The concept behind mediation is that the parties to the dispute, not an external force or a third-party, control the resolution.[47] The mediator functions as a facilitator to assist the parties in reaching their own agreement.[48] The assistance that a skilled mediator can bring includes getting the parties to discuss the problem and focusing on an agenda, clarifying values, loosening of commitments, deflating unreasonable claims, seeking joint gains, keeping the negotiations going and devising new compromises to keep the parties going on the search for a mutually agreeable solution.[49]

Mediation is directed toward bringing about a more harmonious relationship and, as such, works well where there is an ongoing relationship which will be affected by the outcome of the dispute, such as in a dissolution of marriage, especially involving child custody.[50] Mediation offers no rigid structure and is often conducted by the parties without their attorneys present.[51] At a minimum, mediated resolution of cases which have been filed with the courts should require judicial review and approval of the settlement to provide some protection for the weaker or less knowledgeable party.[52] Since the mediator lacks the authority to impose an award or solution, safe-

45. Galanter, *Worlds of Deals*, 34 J. Legal Educ. 268, 268 (1984).
46. *See* Lieberman & Henry, *supra* note 6.
47. Goldberg, *supra* note 5, at 93.
48. *Id.*
49. *Id.*
50. Haynes, Divorce Mediation (1981).
51. *See* Fuller, *Mediation-Its Forms and Functions*, 44 S. Cal. L. Rev. 305 (1971).
52. J. Folberg & A. Taylor, Mediation 244 (1984).

guards should be imposed to prevent mediation from being proposed and not used in good faith by the parties. Additionally, those who mediate should comply with professional standards and ethics.[53]

An example of mediation dictated by statute is Iowa Code Chapter 654A which was adopted effective May 30, 1986,[54] and which provides that in relation to agricultural property which secures an indebtedness of over $20,000, a mediation release is required before the creditor may proceed.[55] The Iowa Farmer/Creditor Mediation Service has been providing the mediation required by this statute.[56]

B. *Arbitration*

Arbitrators privately provide the kind of adjudication that the courts provide publicly.[57] Arbitration simply is the imposition of a third-party decision to resolve a dispute after submission of proof.[58] Generally, it is considered to be less expensive and faster than litigation in court, but depending upon the complexity or novelty of the dispute, that is not always the case.[59]

Most private arbitration systems arise out of contracts and allow the parties to select the arbitrator, standards for the final agreement or ruling and procedural rules.[60] Because the parties can choose the arbitrator, there is generally more expertise brought to the problem than by the average judge and jury.[61] Additionally, the decision of the arbitrator is final, so there is no further cost and delay caused by appeal.[62] The proceedings are generally more informal than a court proceeding, again resulting in further savings of time and expense.[63] Finally, arbitration is well established, as evidenced by organizations such as the American Arbitration Association, and is well accepted as a solution to certain business and labor disputes.[64]

C. *Court-Annexed Arbitration*

Court-annexed arbitration is specifically authorized by statute in the federal system.[65] In court-annexed arbitration the court sets guidelines which establish that certain money damage claim cases will be presented to

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53. *Id.* at 260.
54. House File 2473, 71st General Assembly.
55. IOWA CODE § 654.2C (1986).
56. Iowa State Bar Association News Bulletin, September 1986, at 12.
57. GOLDBERG, *supra* note 5, at 189-225.
58. *Id.*
59. GOLDBERG, *supra* note 5, at 190.
60. *See, e.g.*, IOWA CODE § 697A (1985).
61. *See supra* note 54.
62. *Id.*
63. *Id.*
64. GOLDBERG, *supra* note 5, at 189.
65. *See supra* note 30.

an arbitrator or panel of arbitrators; usually volunteer attorneys.[66] Although the parties do not choose the arbitrator, the arbitrator's decision is nonbinding if one party refuses to accept it.[67] To discourage frivolous or delay-seeking requests for a de novo trial, however, there is some sanction if the award obtained at the trial is the same or less as was received from the arbitrator.[68] This type of program is currently in place in Federal and State courts in twelve states.[69]

The success of court-annexed arbitration depends upon the parties' perception that they have received fair treatment and is reflected in the number of de novo trials requested.[70] Even if a de novo trial is requested, the procedure may have value in resolving certain issues or developing settlement discussions between the parties.[71]

D. *Special Masters*

Pursuant to Federal Rule of Civil Procedure 53(a) and Iowa Rule of Civil Procedure 207, the court may appoint a special master to make preliminary fact findings, manage the discovery phase of the case or use the master's input to work with the parties exploring settlement options.[72] The special masters, who are selected by the courts, not the parties, are free to develop systems to handle and evaluate thousands of similar claims.[73] Two

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66. GOLDBERG, *supra* note 5, at 225-32.
67. *Id.*
68. GOLDBERG, *supra* note 5, at 190.
69. *Id.* at 231.
70. *Id.* at 226-27.
71. *Id.* at 225-32.
72. Federal Rule of Civil Procedure 53(a) provides:

> Appointment and Compensation. The court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, an examiner, and an assessor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct; provided that this provision for compensation shall not apply when a United States magistrate is designated to serve as a master pursuant to Title 28, U.S.C. § 636(b)(2). The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

FED. R. CIV. P. 53(a).

Iowa Rule of Civil Procedure 207 provides:

> Reference. A "master" includes a referee, auditor or examiner. On a showing of exceptional conditions requiring it, the court may appoint a master as to any issues not to be tried to a jury. The clerk shall forthwith furnish the master with a copy of the order appointing him.

IOWA R. CIV. P. 207.

73. *See* W. BRAZIL, G. HAZARD & P. RICE, MANAGING COMPLEX LITIGATION: A PRACTICAL

recent major tort cases have used special masters to facilitate settlement: the Ohio United States District Court asbestos cases[74] and New York United States District Court Agent Orange cases.[75] In the Ohio asbestos cases the special masters did detailed research on the values and characteristics of settled asbestos cases and developed an extensive computer program to use the same characteristics to suggest settlement range values in pending cases as a start to the settlement discussions.[76] If the special master appointed is an experienced trial attorney familiar with the particular kinds of claims at issue then the master's opinion of the value of the case could be viewed by the parties with the same legitimacy.[77]

Additionally, special masters have been appointed as mediators.[78] Courts find that special masters can investigate complex public policy issues involving numerous agencies and during the investigation bring all parties involved together to begin a settlement dialogue, and ultimately mediate the dispute to a speedier end than what the court can offer due to judicial time restraints.[79]

E. *Mini-Trials*

A mini-trial is not a court trial and does not use a judicial officer.[80] It is a non-binding, confidential settlement procedure whereby the dispute, usually between businesses who desire or need to maintain an ongoing relationship, is resolved by key officials on each side with the assistance of a third neutral advisor.[81] The procedure combines the attributes of mediation, arbitration and litigation.[82] Prior to the mini-trial there is a brief amount of discovery completed; usually the exchange of documents.[83] Generally, lawyers present their cases to the panel and the neutral advisor acts as mediator between the parties' representatives.[84] The parties decide on the procedure and timing, which can result in cost savings over court litigation.[85] The

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GUIDE TO THE USE OF SPECIAL MASTERS (1983); Brazil, *Referring Discovery Tasks to Special Masters: Is Rule 53(a) Source of Authority and Restrictions?* 1983 AM. B. FOUND. RES. J. 143.

74. *See generally* T. Willging, *Asbestos Case Management: Pretrial and Trial Procedures* (Federal Judicial Center 1985).

75. *In re* Agent Orange Product Liability Litigation, 94 F.R.D. 173 (E.D.N.Y. 1982).

76. *See generally* T. Lambros, E. Green & F. McGovern, *Ohio Asbestos Litigation; Case Management Plan and Case Evaluation and Apportionment Process* (1983).

77. GOLDBERG, *supra* note 5, at 284.

78. *See generally* Suskind, *Court-Appointed Masters as Mediators*, 1 NEGOTIATION J. 295 (1985).

79. *Id.* at 296-97.

80. GOLDBERG, *supra* note 5, at 271-80.

81. Henry, *Mini-Trials: An Alternative to Litigation*, 1 NEGOTIATION J. 13 (1985).

82. GOLDBERG, *supra* note 5, at 271-80.

83. *Id.*

84. *Id.*

85. *Id.*

solutions devised by the business executives are often farther-reaching and more creative than a judge or jury would be able to impose.[86] The input of the parties in the solution, as in mediation, makes them more committed to the success of the result.[87]

The length of the procedure is up to the parties but may range from one-half day to four days.[88] If the parties do not resolve the dispute they can pursue their litigation, often with a better focus to the issues in the case.[89]

F. *Private Judging*

This procedure is similar to a binding mini-trial or arbitration.[90] The parties privately select and pay for a neutral referee, at times a retired judge.[91] The court enters an order or has a rule which recognizes the procedure and allows the ruling to be entered as the decision of the trial court, which is binding and subject to appeal.[92]

The system of private judging has the advantages of speed, confidentiality, low cost and a quick decision.[93] It does, however, expose the parties to the uncertainty and delay of potential appeal.[94] Additionally, some critics argue that private judging creates a wealthy person's justice system, letting those who can afford it buy the judicial services they prefer and leaving tax-supported justice to those who cannot afford to opt out of the system.[95] This criticism ignores the fact that the private judging does not detract from the existing system, but actually enhances the available judicial resources by freeing up judges to deal with criminal and civil cases involving principles as opposed to "merely" money.[96] The removal of a complex business case from the dockets benefits all litigants who are competing for scarce trial docket space.[97]

IV. The Summary Jury Trial

The summary jury trial is a half-day proceeding in which attorneys for each side are given one hour each in which to present their cases to a six-

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86. *Id.*
87. *Id.*
88. Green, *Mini-Trial Handbook*, in Corporate Dispute Management, M107 (E. Green ed. 1982).
89. *Id.*
90. Goldberg, *supra* note 5, at 280; Green, *Private Judging: A New Variation of Alternative Dispute Resolution*, Trial, Oct. 1985 [hereinafter Green].
91. Green, *supra* note 90.
92. *Id.*
93. *Id.*
94. *Id.*
95. Green, *Avoiding the Legal Logjam-Private Justice,. California Style*, in Corporate Dispute Management 79 (E. Green ed. 1982).
96. *Id.*
97. *Id.*

member jury.[98] Presentation of evidence is limited and witnesses are generally not allowed.[99] Once the evidence has been submitted to the jury, the judge explains the law and the jury retires and returns with a consensus verdict or, if there is no consensus, with verdict forms expressing individual views of what the verdict should be in the case.[100] The parties at this point sit down together with the judge to use the summary jury verdict as a basis for settlement discussions.[101]

The summary jury trial allows the parties the opportunity to have a non-binding opinion of the merits of the case while avoiding costly and time-consuming full blown trials. Summary jury trial is particularly effective in cases which have not proven amenable to settlement while in the parties' hands, because it provides an objective valuation for a lawyer and client of the inherent strengths and weaknesses of their case.[102] In addition, for those lawyers and clients who have become entrenched in their bargaining positions, and who believe that the true measure of their case can only be made by a jury, the summary jury trial gives them their day in court and provides them with a measure of the reasonableness of their position.[103]

The first summary jury trial was held on March 5, 1980, in the United States District Court for the Northern District of Ohio in the court of Judge Thomas Lambros.[104] With the able advocacy of Judge Lambros, the summary jury has received considerable attention throughout the federal system.[105] To date, the summary jury trial has received less attention in the state system.[106] Although one can perhaps hypothesize reasons for the recalcitrance in accepting the summary jury trial in the state system, that is not our concern here. The fact remains that summary jury trials can be an important alternative to many kinds of traditional litigation in both the State and Federal courts.

A. *Foundation for the Summary Jury Trial*

Rule 1 of the Federal Rules of Civil Procedure mandates that the rules "shall be construed to secure the just, speedy, and inexpensive determina-

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98. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461, 469 (1984) (report to the Judicial Conference of the United States Courts [hereinafter Lambros].

99. *Id.* at 471.

100. *Id.*

101. *Id.* at 484.

102. *Id.* at 471-72.

103. *Id.*

104. Lambros & Shunk, *The Summary Jury Trial*, 29 CLEV. ST. L. REV. 43, 43 (1980).

105. *See* D. Jacoubovitch & C. Moore, *Summary Jury Trials in the Northern District of Ohio* (1982) (Judicial Conference study and recommendation); *see also* Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461 (1984) (a report to the Judicial Conference).

106. *See, e.g.*, Bixler v. J.C. Penney Co., 376 N.W.2d 209 (Minn. 1985).

tion of every action." Rule 16(a) sets out the pretrial powers of the court:

> In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as (1) expediting the disposition of the action . . . and (5) facilitating the settlement of the case.

In addition, Federal Rule of Civil Procedure 16(c)(7) and (11) provide that, "[t]he participants at any conference under this rule may consider and take action with respect to . . . (7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute . . . and (11) such other matters as may aid in the disposition of the action."

There may be some question whether Rule 16(c)(7) is in fact a sufficient license for implementing the summary jury trial procedure.[107] Rule 16(c)(7) does not make any specific mention of the summary jury trial. The rule only appears to authorize discussion of extrajudicial procedures at the pretrial conference. It is clear, however, that Rule 16(c)(7) was intended to permit the district courts to facilitate settlements by being neutral forums for settlement discussions. Nor is it correct to assume that the summary jury trial is a "judicial" procedure not contemplated by the rule. At the time this rule was being suggested, the Advisory Committee Notes stated, in pertinent part:

> Since it obviously eases crowded court dockets and results in savings to litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible. Although it is not the purpose of Rule 16(c)(7) to impose settlement negotiation on unwilling litigants, it is believed that providing a neutral forum for discussing the subject might foster it. (Citations omitted). For instance, a judge to whom a case has been assigned may arrange, on his own motion or at a party's request, to have settlement conferences handled by another member of the court or by a magistrate.

The only real limitation on Rule 16 would appear to be the extent to which the court's action would adversely affect the case.[108] The summary jury trial procedure resolves this by being *advisory* only.[109] This is analogous to the advisory jury of Federal Rule of Civil Procedure 39(c), which allows for advisory juries in cases in which a jury trial is not required by right.[110]

In Iowa, the federal district courts have recently adopted a local rule which states:

> A Judge may, in his or her discretion, set any appropriate civil case for a

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107. *See* Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 385-86 (1986).

108. *See* Lambros, *supra* note 48, at 485.

109. *Id.*

110. C. WRIGHT & A. MILLER, 9 FEDERAL PRACTICE & PROCEDURE § 2335 (1971).

> judicially supervised settlement conference or any other alternative method of dispute resolution he or she may choose before a Judge or Magistrate.[111]

Prior to this, United States Magistrate James Hodges had conducted the first summary jury trial for the Northern District of Iowa in 1985.[112] On March 10, 1986, Judge Donald E. O'Brien held a summary jury trial in *Newman v. Carlson*.[113] Judge William C. Stuart of the United States District Court for the Southern District of Iowa held a summary jury trial in *Watts v. Des Moines Register*.[114] It is clear that the federal courts in Iowa are well on their way to utilizing the summary jury trial to aid in settlement by "giving the parties and counsel a glimpse of the reaction of lay persons to the dispute."[115]

Although the Iowa Rules of Civil Procedure do not specifically provide recognition for alternative forms of dispute resolution, there does appear to be a constitutional and statutory basis for its adoption and implementation. The Iowa Constitution, article V, section 4 provides that "[t]he Supreme Court . . . shall exercise supervisory and administrative control over all . . . judicial tribunals throughout the state." With these powers, the Iowa Supreme Court would have the authority to provide for alternative dispute resolution techniques facilitated by the courts. Furthermore, Iowa Code section 684.18 states:

> The supreme court shall have the power to prescribe all rules of pleading, practice and procedure, and the forms of process, writs and notices, for all proceedings of a civil nature in all courts of this state, for the purpose of simplifying the same, and of promoting speedy determination of litigation upon its merits. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.

A review of the current Iowa Rules of Civil Procedure does lend some basis for suggesting that the summary jury trial can be implemented in Iowa district courts. At present, Rules 136(b)(10) and (14) of the Iowa Rules of Civil Procedure provide:

> (b) Pretrial conference. After issues are joined the court may in its discretion, and shall on written request of any attorney in the case, direct all attorneys in the action to appear before it for . . . a conference to consider, so far as applicable to the particular case:
>
> (10) Possibility of settlement . . . .

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111. Local Rules of the United States District Court for the Northern and Southern District of Iowa.

112. Telephone conversation with James Hodges, United States Magistrate (Feb. 26, 1986).

113. Civ. No. 84-45-E (S.D. Iowa Mar. 10, 1985).

114. Civ. No. 85-757-A (S.D. Iowa Aug. 1, 1986).

115. *Health Care Equalization Committee v. Iowa Medical Society*, 501 F. Supp. 970 (S.D. Iowa 1980).

> (14) Any other matter which may aid, expedite or simplify the trial of any issue.

Another possibility would be for the Iowa Supreme Court to adopt an amendment similar to Rule 16.03 of the Minnesota Rules of Civil Procedure, adopted in 1985, which provides in part:

> The participants at any conference under this rule may consider and take action with respect to:
> (7) The possibility of settlement or the use of extrajudicial procedures to resolve the dispute.[116]

In order to facilitate the use of summary jury trials, as well as other methods of dispute resolution, the Iowa Supreme Court should propose to amend Iowa Rule 136 to conform to Minnesota Rule 16.03.

B. *The Process*

While the results to date of the summary jury trial are promising, its effectiveness will depend upon how well litigants and judges understand the process. In many aspects, a summary jury trial resembles an actual trial.[117] It is essential that cases coming on for summary jury trial be in complete trial readiness.[118] Three days prior to the summary jury trial the parties should have submitted trial memoranda, sample voir dire questions, as well as proposed jury instructions and verdict forms.[119] In addition, counsel should present the court with any potential procedural and evidentiary questions which could arise during the course of the summary jury trial.[120] These matters will be resolved before the summary jury trial has begun.[121]

To be most effective, the summary jury trial should be conducted by a judge or magistrate. In order to have the same impact on the litigants as the traditional trial, the summary jury trial must be administered by someone of authority in a courtroom.[122] The summary jury trial will not be open to the public, however, and will not be reported unless the parties agree to and arrange for a court reporter.[123]

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116. MINN. R. CIV. P. 16.03.
117. Lambros, *The Summary Jury Trial*, at 9.
118. Lambros, *supra* note 98, at 470.
119. *Id.*
120. *Id.*
121. *Id.*
122. Unlike other settlement techniques which would require a different judge to handle the settlement from the one who eventually handles the trial, the summary jury trial judge avoids the potential danger of losing impartiality. *But cf.* Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 433-35 (1982) (arguing that management by judges would pose problems of impartiality when involved in personally mediating disputes).
123. *But see Juries Find R&T Stock Violations*, BUSINESS RECORD, Aug. 4-10, 1986, col. 4. Apparently, in the *Watts* summary jury trial a number of outsiders were allowed to sit in on the proceeding.

It is essential that parties with authority to settle the dispute be in attendance throughout the entire proceeding.[124] Obviously, without the parties present the effectiveness of the summary jury trial is completely diluted.

A limited number of jurors will be called, anywhere from ten to fourteen.[125] These jurors can be drawn from the same pool as those selected for other trials.[126] The clerk explains the process to the potential jurors, the nature of the case, and introduces the parties and attorneys involved.[127] Once the jury pool is seated, the clerk distributes a questionnaire for them to complete.[128] These forms include basic information, relieving the court and counsel from having to obtain extensive voir dire.[129] The attorneys are given copies of the juror profiles.[130] A brief voir dire conducted by the court follows.[131] Counsel are permitted two or three challenges, depending upon the number of jurors called.[132]

One possible area of disagreement in the procedure for summary jury trial is when to tell the jurors that their verdict is non-binding. Not telling the jury until the close of the proceeding may have the effect of permitting them the mistaken belief that their decision is binding. One potential outcome of this method is that as jurors come to believe that they are being "tricked," their conscientiousness as jurors may decline. The other position lets the jury know at the outset that their verdict is advisory. The danger here is that jurors will believe that their role is limited in importance and once again take their responsibility lightly.[133]

Although this can only be resolved after careful study of a significant number of cases,[134] some tentative responses suggest that the most effective time to inform the jury that their verdict is non-binding is after it has returned with a verdict. Magistrate Hugh Brenneman of the United States District Court for the Western District of Michigan, after conducting twenty-eight summary jury trials, has found that jurors prefer to be told after they return with a verdict.[135] Many of the jurors stated that they would not have taken the process seriously if they had been told at the outset that their verdict was non-binding.[136] Magistrate Brenneman counteracts

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124. *See* Lambros, *supra* note 116, at 9.

125. Judge Stuart's order in *Health Care Equalization* specified 14 jurors. Lambros normally calls ten jurors. Lambros, *supra* note 98, at 470.

126. Lambros, *supra* note 98, at 470.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 471.

132. *Id.*

133. *See* Posner, *supra* note 107, at 386-87.

134. *Id.* at 374-76.

135. Telephone conversation with Hugh Brenneman, Magistrate of the United States District Court for the Western District of Michigan (Feb. 28, 1986).

136. *Id.*

the potential that jurors may feel tricked by explaining to the jurors how important this process is in facilitating settlement of cases.[137] He informs them that nearly all summary jury trials lead directly to settlement, and that their decision—although not binding—is key to these settlements.[138] Until a more thorough study is completed suggesting a different conclusion, it would appear that the most effective method to implement in Iowa is to inform the jury of their advisory capacity after they have reached a verdict.

After counsel exercise their challenges, the evidence is then delivered to the jury by the attorneys in a narrative form without the aid of witnesses. Normally one hour is allowed each side to present its evidence.[139] Each party may reserve some time for rebuttal.[140] Factual assertions must be supportable by discovery materials, including depositions, stipulations, affidavits and answers to interrogatories.[141] Material may be read to the jury if it is not too lengthy.[142] Physical evidence may be exhibited and submitted for the jury's consideration during deliberations.[143]

Objections during the course of the summary jury trial are discouraged.[144] Most of the potential objections should have been resolved prior to the summary jury trial.[145] In those cases when opposing counsel has clearly gone beyond the bounds of admissible evidence, however, an objection should be sustained.[146]

At the conclusion of the presentation of evidence and argument, the jury is given an abbreviated charge along with instructions.[147] Although it may take somewhat more time to read, the court should give a full set of instructions so that the jury may better understand the applicable law,[148] and so counsel feel no mistakes have occurred due to a failure to apply the law to the facts.

The jury will be urged to return a consensus verdict.[149] The jury may, however, return separate verdicts on individual forms.[150] Although non-consensus verdicts may suggest that the predictability of the summary jury trial is minimized, the individual insights of jurors will be very instructive for settlement purposes.[151] The judge and attorneys may at this point ask the

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137. *Id.*
138. *Id.*
139. Lambros, *supra* note 98, at 483.
140. *Id.*
141. *Id.* at 484.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *See* Lambros, *supra* note 116, at 14.

jury questions and engage in a discussion of the case in order to gain insight into the decision rendered.[152] In addition to discussing the merits of the case, counsel may even choose to ask the jury about the effectiveness of the presentation.[153] The jury is then discharged.[154]

Now armed with these insights into the strengths and weaknesses of their respective positions, counsel at this point confer with the judge to determine whether there is a basis for settlement, or whether any of the issues presented can be narrowed or resolved. If there is not an immediate resolution available, the court should set a date in the near future for trial or further settlement discussions.

C. *Selection of Cases*

Although initially there may have been a notion that courts should carefully select those cases they believed appropriate for summary jury trial disposition, it now appears that the pool of possible cases may be much broader than had been expected.[155] While it is especially effective in personal injury cases and cases involving only two parties, it has also proven a valuable tool in complex, multiparty litigation, and in such areas as products liability, contracts, antitrust, as well as age, sex, and race discrimination.[156]

In addition, those cases which hinge on the credibility of each side's witnesses, and normally become a swearing contest between the parties, may also prove appropriate for summary jury trial. While we would have expected that these cases would be unsuited for summary jury trials, they appear to settle just as often, albeit for different reasons than in most cases.[157] For these parties, having had the cathartic experience of their day in court, their desire to proceed to full trial appears to wane.[158]

The amount of relief potentially to be awarded should not be a deciding factor in determining whether a case is appropriate for a summary jury trial. Magistrate Brenneman tells of a summary jury verdict in an antitrust case in which the jury awarded $25 million (trebled to be $75 million).[159] Unhappy with this verdict, the losing party chose to try the case, the jury this time coming back with a $23 million verdict (trebled to be $69 million).[160]

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152. *Id.*
153. *Id.*
154. *Id.*
155. Brenneman, *supra* note 132.
156. Lambros, *supra* note 116, at 471-72.
157. Brenneman, *supra* note 132.
158. *Id.*; *but see* Posner, *supra* note 107, at 374. Posner argues that the essential function of the jury is to assess the credibility of the witnesses. In the summary jury trial, he points out, the jury can only assess the credibility of the lawyers. *Id.* The problem Posner is concerned with could be resolved by having the key witness whose credibility is at issue take the stand and read brief portions of the witness' deposition.
159. Brenneman, *supra* note 132.
160. *Id.*

Although this will not occur in every case, the proximity of the summary jury verdict reached after only one day to that reached at trial goes to substantiate the validity of the summary jury's verdict.

One potential issue courts will confront is whether to assign cases for summary jury trial, or to allow the parties the option of choosing it. Because the summary jury trial is non-binding on the parties, however, coercion into using this procedure to settle their cases should not be a concern. Having chosen to resort to the courts to resolve their disputes, the parties should have to abide by the methods of docket control which the courts provide.

Perhaps the only qualification that should be drawn as the kind of case that should be chosen is that it be projected to take longer than five days to try the case in order to be a candidate for a summary jury trial.[161] With that limitation, in the final analysis, deciding which cases are suitable for summary jury trials should be left to the courts, having as their pool of available cases all jury cases.

D. *Results in Other Jurisdictions*

At present, summary jury trials have been used in a number of jurisdictions, among them Ohio, Michigan, Massachusetts, Illinois, Iowa, Minnesota, Kentucky, Rhode Island, and others.[162] Although there will be those who will dispute the results that have been obtained in the summary jury trials to date as being an unreliable sampling with which to draw any conclusions,[163] the results do suggest a remarkable pattern. In the Northern District of Ohio, Judge Lambros reports that as of August 1, 1985, 139 cases had been assigned to summary jury trial, fifty-nine cases settled prior to summary jury trial, and eighty summary jury trials have been held.[164] Of these eighty, seventy cases settled after summary jury trial, one case was stayed due to bankruptcy, five cases went on to trial, one case settled during trial, and three cases were still in settlement negotiations.[165] This makes a total of 134 cases which settled or were in settlement negotiations, for a settlement rate of 96 percent.[166]

In the Western District of Michigan, Magistrate Brenneman reported that as of February 28, 1986, he had held twenty-eight summary jury trials.[167] Twenty-four of these cases settled as a result of using summary jury

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161. *Id.*

162. Lambros, "Report to the Judicial Conference of the United States on the Summary Jury Trial and Other Alternative Methods of Dispute Resolution," Addendum at 7 (August 1985).

163. *See* Posner, *supra* note 107, at 375.

164. *Id.*

165. *Id.*

166. *Id.*

167. Brenneman, *supra* note 62.

trials.[168] One-third of these settled on the same day as the summary jury trial.[169] Of the four remaining, one additional case settled during trial.[170] This makes a total of 89 percent of cases which settled.

Although these results will no doubt have to be tested by careful statistical analysis,[171] the pattern so far is quite similar. The summary jury trial is proving to be very effective in getting parties to settle their lawsuits short of trial.

V. Conclusion

We have not purported to suggest that summary jury trials will by themselves relieve crowded dockets in Iowa. Rather, what we conclude is that summary jury trials could prove to be an invaluable tool in the extrajudicial arsenal that Iowa courts may utilize to resolve burgeoning caseloads. Over time, we are certain that experience will eliminate many of the doubts that detractors may currently have about the summary jury trial. For now, we are confident that, if adopted, summary jury trial will go far to relieve the stress being placed on Iowa Federal and State courts without depriving litigants of their day in court.

168. *Id.*
169. *Id.*
170. *Id.*
171. *See* Posner, *supra* note 107, at 374-85.