Compelled Participation in Summary Jury Trials: A Tale of Two Cases

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INTRODUCTION

Summary jury trials1 were introduced into the American legal system as one possible weapon in the procedural arsenal2 to be employed against the malady of crowded3 federal court dockets. The procedure, where upon the end of discovery, attorneys summarize their case before a six-member jury that then renders a nonbinding verdict,4 has met with generally positive reviews from both courts and commentators.5 While any therapeutic innovation faces scrutiny in its application, the delicacy of this particular patient—the due process-oriented

1 Federal District Judge Thomas D. Lambros is the creator of the summary jury trial. Judge Lambros' innovative procedure was prompted by his frustration as to "the need for trial in such cases where both sides wished to avoid litigation, were willing to consider reasonable settlement, and would negotiate in good faith if only some sense of the lay perception of the case could be attained." Lambros, The Summary Jury Trial and Other Alternative Methods of Dispute Resolution, A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System, reprinted in 103 F.R.D. 461, 482 (1984). For a description of the logic and logistics of the summary jury trial see id.

2 Other alternative dispute resolution techniques in the "arsenal" include private arbitration, court-annexed arbitration, mediation, private judging, and the mmm-trial. For a discussion of these techniques see id. at 465-68; see also Readey, Alternative Dispute Resolution—A Trial Lawyer's Primer, 53 INS. COUNSEL J. 300 (1986).

3 The backlog of cases in the federal courts provided the impetus for Judge Lambros' invention. "On January 1, 1975, the United States District Court for the Northern District of Ohio faced 1,973 pending civil cases. By January 1, 1980, that Court had 3,218 civil cases on its docket." Gwin, Summary Jury Trial: An Explanation and Analysis, KY. BENCH AND BAR, Winter 1988, 16.

4 The nonbinding nature of the summary jury trial must be emphasized. "The proceeding is not binding and in no way affects the parties' rights to a full trial on the merits." Lambros, supra note 1, at 469.

Whether a federal district court can require parties to participate in a summary jury trial has been the subject of recent controversy. At the forefront of this dispute are two recent federal decisions, an appellate level opinion and a district court opinion. The appellate level discussion of this issue is found in *Strandell v. Jackson County, Illinois.* This Seventh Circuit decision held that the Federal Rules of Civil Procedure do not confer upon federal district courts the power to require parties to participate in nonbinding summary jury trials. The contrary view, that federal courts do have this power, is voiced in *McKay v. Ashland Oil, Inc.*, an opinion from the Eastern District of Kentucky issued after the *Strandell* opinion. This Comment examines these two opinions and highlights the differences between them that explain much of the distance between the two courts. By analyzing these opinions and other authorities, the author hopes to reveal an approach to the question of a federal district court's authority that responds to the concerns of the Seventh Circuit while maintaining the vitality of the technique.

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6 Then Chief Justice Warren Burger welcomed such scrutiny in his 1983 *Year-End Report on the Judiciary*, writing: "Legal educators and scholars can provide a valuable service by studying new approaches and reporting on successful innovations that can serve as models for other jurisdictions, and on experiments that do not survive the scrutiny of careful testing." *Reprinted in Lambros, supra* note 1, at 465.

7 *Strandell, 838 F.2d at 884 (7th Cir. 1988).*

8 For a more detailed discussion of the role of the Federal Rules of Civil Procedure in this dispute see *infra* notes 42-49, 53-77 and accompanying text.

9 *Strandell, 838 F.2d at 884, 888.*

10 *120 F.R.D. 43 (E.D. Ky. 1988).*

11 *See infra* notes 23-97 and accompanying text.

12 The novelty of the summary jury trial technique forbids the analysis of a long line of cases, particularly as to the narrow issue examined in this Comment.

13 *See infra* notes 98-119 and accompanying text. The scope of this Comment is limited to a federal district court's power to compel parties' participation in a non-binding summary jury trial. This Comment does not address (except when the topic demands) the relative merits and success of the summary jury trial. For a balanced treatment of the technique *compare* Lambros, *supra* note 1 (explaining and advocating summary jury trials) with Posner, *supra* note 5 (raising some questions about the technique).
I. THE SUMMARY JURY TRIAL—A BRIEF DESCRIPTION

The first summary jury trial was conducted by Judge Thomas D. Lambros of the United States District Court for the Northern District of Ohio on March 5, 1980. This innovative alternative dispute resolution technique is designed to encourage settlement in particular cases by exposing parties to a nonbinding jury verdict based on a summary presentation of their case.

The summary jury trial follows the pattern of a full-blown jury trial but in a less formal and time-consuming setting. Jurors are called from the court's regular jury pool, and an abbreviated voir dire is conducted. Upon the selection of the jurors, the court advises them on the nature of the proceedings. Counsel for each party then summarizes each party's case, the court gives the jury an abbreviated charge, and the

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15 Id. Generally, counsel are given one hour each to summarize their case in the summary jury trial. Id. at 43.
16 "From its regular jury pool, the court typically calls ten jurors who complete biographical forms which the parties receive. The court conducts an abbreviated voir dire and/or permits counsel to conduct a brief voir dire. Each party receives an appropriate and equal number of preemptory [sic] challenges." Gwin, supra note 3, at 16.
17 Id.
18 Id. To ensure the jury's diligence, most courts conceal the unbinding nature of the verdict until after it has been reached. Id. But see Posner, supra note 5, at 386 ("If word got around that some jurors are being fooled into thinking they are deciding cases when they are not, it could undermine the jury system.").
19 The Northern District of Ohio, Eastern Division (Judge Lambros' court) has the following rule for the summary presentation of evidence:
7. All evidence shall be presented through the attorneys for the parties. The attorneys may summarize and comment on the evidence and may summarize or quote directly from depositions, interrogatories, requests for admissions, documentary evidence and sworn statements of potential witnesses. However, no witness' testimony may be referred to unless the reference is based upon one of the products of the various discovery procedures, or upon a written, sworn statement of the witness, or upon sworn affidavit of counsel that the witness would be called at trial and will not sign an affidavit, and that counsel has been told the substance of the witness' proposed testimony by the witness.
Reprinted in Lambros, supra note 1, at 487.
20 Gwin, supra note 3, at 17.
jury retires and later renders its nonbinding verdict. The summary jury trial generally takes as little as one day.

II. STRANDELL: THE SEVENTH CIRCUIT SAYS NO TO FORCED SUMMARY JURY TRIALS

A. The District Court Opinion

The Seventh Circuit held in Strandell v. Jackson County, Illinois that the Federal Rules of Civil Procedure do not allow federal district courts to convene mandatory summary jury trials. That decision reversed the Southern District of Illinois’ finding that it had such a power. The Strandell litigation involved a civil rights action arising out of the alleged suicide of a pretrial detainee. The district court projected a trial length of 20 to 25 days and noted that “[s]ince this Court operates on a four-day trial week, this trial could take up five to six weeks of the Court’s docket.” The district judge felt that this protracted trial would only further crowd the docket of one of the busiest district courts in the nation.

21 "If the jury cannot reach a unanimous verdict within a few hours, the court provides each juror with a verdict form to complete individually." Id.
22 Id.
23 838 F.2d 884 (7th Cir. 1988).
24 Id.
at 888.
26 Strandell, 838 F.2d at 884. The Seventh Circuit restated the facts of the case as follows:

Mr. Tobin represents the parents of Michael Strandell in a civil rights action against Jackson County, Illinois. The case involves the arrest, strip search, imprisonment, and suicidal death of Michael Strandell. In anticipation of a pretrial conference on September 3, 1986, the plaintiffs filed a written report concerning settlement prospects. The plaintiffs reported that they were requesting $500,000, but that the defendants refused to discuss the issue.

Id.
27 Strandell, 115 F.R.D. at 334.
28 Id. The Southern District of Illinois operates on a four-day trial week because Mondays are reserved for matters other than trial, such as pretrial conferences. Id.
29 Id. at 336. The district court cited the following figures as evidence of its heavy caseload: “This Court’s most recent statistics show that as of March, 1987 there were 80 criminal and 1,903 civil cases pending in this district which has three full-time judges. In the month of March alone 320 new cases were filed.” Id.; see also Lambros and Shunk, supra note 14, at 44-45 (additional information relating to the workloads of district courts).
The counsel for the plaintiffs in *Strandell* objected to the summary jury trial on the grounds that he would have to "reveal his trial strategy and case preparation prior to trial and to the benefit of the defendants." The court responded that, "[i]n modern litigation, discovery should leave little surprise to litigants as to what their opponent's case is all about." Nonetheless, counsel refused to participate in the summary jury trial and was subsequently held in contempt.

In holding the plaintiffs' counsel in contempt for his refusal to participate in the summary jury trial, the court relied on the edit of an original draft of a Judicial Conference Committee Report. The committee had drafted a resolution endorsing the use of summary jury trials, but "only with the voluntary consent of the parties." The final draft of this resolution supporting summary jury trials did not include the "voluntary consent" language.

In addition to the Judicial Conference Committee's resolution the *Strandell* district court also found authority for mandatory summary jury trials in the Federal Rules of Civil

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30 *Strandell*, 115 F.R.D. at 334.
31 *Id.* This response was shared by the district court in *McKay v. Ashland Oil*, Inc., 120 F.R.D. 43, 48 (E.D. Ky. 1988). See infra notes 80-83 and accompanying text.
33 The refusal of plaintiffs' counsel resulted in a citation for criminal contempt of court and a $500 fine. *Id.*

RESOLVED, the Judicial Conference endorses the use of summary jury trials, *only with the voluntary consent of the parties*, as a potentially effective means of promoting the fair and equitable settlement of lengthy civil jury cases. With proper authorization by local rules, summary jury trials are recommended to District Courts for consideration as an optional device.

*Id.*

35 *Id.*

RESOLVED, that the Judicial Conference endorses the experimental use of summary jury trials as a potentially effective means of promoting the fair and equitable settlement of potentially lengthy civil jury cases.

*Id.*
Procedure. The court referred to Judge Lambros’ interpretation\(^3\) of the Federal Rules of Civil Procedure, particularly Rule 16 and its instructions on pretrial conferences, as granting the district court power to hold mandatory summary jury trials.\(^3\) The \textit{Strandell} opinion found additional support for its power to compel parties to participate in the procedure in the inherent power of the court.\(^3\) Ultimately, the court concluded that its

\(^3\) Judge Lambros states:
The Summary Jury Trial is firmly rooted in the Federal Rules of Civil Procedure. In light of Fed.R.Civ.P. 1, SJT is within the court’s pretrial powers pursuant to Fed.R.Civ.P. 16(a)(1), (5), (c)(11) and the courts inherent power to manage and control its docket.

Rule 1 of the Federal Rules of Civil Procedure states that the Rules, “shall be construed to secure the just, speedy, and inexpensive determination of every action.” Fed.R.Civ.P. 1. Rule 16(a), concerning pretrial activities, states, “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” Fed.R.Civ.P. 16(a)(1) and (5). Furthermore, the Rules recommend that settlement be discussed, as well as potential alternatives to trial. Newly adopted Fed.R.Civ.P. 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.” Fed.R.Civ.P. 16(c)(7) and (11).

The SJT process recognizes the importance our judicial system places on decisions rendered by lay jurors. This is consistent with Fed.R.Civ.P. 39(c), which provides for an advisory jury in cases not triable to a jury as of right. Additionally, use of the SJT is consistent with Fed.R.Civ.P. 83, which provides in pertinent part, “[i]n all cases not provided for by rule, the district court may regulate their practice in any manner not inconsistent with these rules.” Fed.R.Civ.P. 83.

Lambros, \textit{supra} note 1, at 469-70.

\(^3\) \textit{Strandell}, 115 F.R.D. at 335.

\(^3\) \textit{Id.} at 336. In \textit{Eash v. Riggins Trucking}, Inc., 757 F.2d 557 (3rd Cir. 1985), the Third Circuit Court of Appeals upheld monetary sanctions against parties and attorneys making belated settlements. The sanction was not based on a local rule but was sustained because of the “court’s inherent authority over members of the bar.” \textit{Id.} at 568. The Third Circuit went on to state that the district courts have the power, absent a statute or rule promulgated by the Supreme Court to the contrary, to make local rules that impose reasonable sanctions, where an attorney conducts himself in a manner unbefitting a member of the bar, fails to comply with any rule of the court, including local rules, or takes actions in bad faith.

\textit{Id.} at 569.
overwhelming case load, coupled with a federal district court's obligation under the Speedy Trial Act,\(^4\) "require that this Court be allowed to order the parties to engage in an alternative non-binding method of trial."\(^4\)

**B. Reversal By the Seventh Circuit**

The *Strandell* district court's contempt citation of the plaintiff's attorney was successfully appealed to the Court of Appeals for the Seventh Circuit.\(^4\) In finding that the district court lacked the power to compel participation in nonbinding summary jury trials, the Seventh Circuit stressed that the district courts' inherent power to manage their dockets "must, of course, be exercised in a manner that is in harmony with the Federal Rules of Civil Procedure."\(^4\) The appellate court, in construing Rule 16, held that the sections relied upon by the district court "cannot be read as authorizing a mandatory summary jury trial."\(^4\)

The Seventh Circuit gave particular weight to a contested issue below involving the discovery process. The plaintiffs had

\(^4\) *Strandell*, 115 F.R.D. at 336.
\(^4\) *Strandell*, 838 F.2d at 884.
\(^4\) *Id.* at 886. This language mirrors the command in the federal rules that local rules may be made that are "not inconsistent" with the Federal Rules of Civil Procedure. See Fed.R.Civ.P. 83.
\(^4\) *Strandell*, 838 F.2d at 887. The appellate court took issue with the interpretation that federal district courts can force unwilling parties into settlement negotiations:

> In our view, while the pretrial conference of Rule 16 was intended to foster settlement through the use of extrajudicial procedures, it was not intended to require that an unwilling litigant be sidetracked from the normal course of litigation. The drafters of Rule 16 certainly intended to provide, in the pretrial conference, "a neutral forum" for discussing the matter of settlement. However, it is also clear that they did not foresee that the conference would be used "to impose settlement negotiations on unwilling litigants . . . ." As the Second Circuit, commenting on the 1983 version of Rule 16, wrote: "Rule 16 . . . was not designed as a means for clubbing the parties—or one of them—into an involuntary compromise."

obtained statements from 21 witnesses during discovery.\textsuperscript{45} The defendant's motion to compel production of these witnesses' statements was denied. The district court characterized the statements as work-product and held\textsuperscript{46} that the defendants had failed to establish "substantial need" and "undue hardship" as required by Fed.R.Civ.P. 26(b)(3).\textsuperscript{47}

The effect of a mandatory summary jury trial on the discovery process was the primary concern of the Seventh Circuit. The court noted that the rules concerning discovery and the work-product doctrine "reflect a carefully-crafted balance between the needs for pretrial disclosure and party confidentiality..."\textsuperscript{48} The Seventh Circuit felt that a compelled summary jury trial, "could easily upset that balance by requiring disclosure of information obtainable, if at all, through the mandated discovery process."\textsuperscript{49} Apparently some question existed as to the credibility of certain witnesses in Strandell.\textsuperscript{50} The attorney who, on appeal, successfully represented the plaintiffs' counsel, stated\textsuperscript{51} that these credibility questions made this case unsuitable for a summary jury trial.\textsuperscript{52}

In addition to the work-product and discovery concerns, the appellate court also emphasized the statutory origins of the federal courts' powers.\textsuperscript{53} The opinion intimated that any expansion in these powers must pass through the rigors of "the national rule-making process outlined in the Rules Enabling Act."\textsuperscript{54} While sympathetic to the district courts' workload,\textsuperscript{55} the Seventh Circuit firmly noted that "a crowded docket does

\textsuperscript{45} Id. at 885.
\textsuperscript{46} Id.
\textsuperscript{47} Fed.R.Civ.P. 26(b)(3); see also Hickman v. Taylor, 329 U.S. 495 (1947).
\textsuperscript{48} Strandell, 838 F.2d at 888.
\textsuperscript{49} Id.
\textsuperscript{51} Id.
\textsuperscript{52} For a discussion of the suitability of cases for summary jury trial see infra notes 110-14 and accompanying text.
\textsuperscript{53} Strandell, 838 F.2d at 888.
\textsuperscript{54} Id. See 28 U.S.C. § 2072.
\textsuperscript{55} The Seventh Circuit states: "We certainly cannot take issue with the district court's conclusion that its caseload places great stress on its capacity to fulfill its responsibilities." Strandell, 838 F.2d at 888.
not permit the court to avoid the adjudication of cases properly within its congressionally-mandated jurisdiction.’”

III. McKAY v. ASHLAND OIL, INC.: THE STRANDELL DECISION IS CHALLENGED

The Seventh Circuit’s assertion that “the parameters of Rule 16 do not permit courts to compel parties to participate in summary jury trials” did not long remain unchallenged. In McKay v. Ashland Oil, Inc., the Eastern District of Kentucky found itself in “respectful disagreement with the Seventh Circuit” on this point. This complex case centered around a wrongful discharge complaint against the Ashland Oil Corporation and was set for a six-week jury trial if not settled. The plaintiffs’ original objection to the summary jury trial was overruled, but a motion for reconsideration of that ruling was filed after the Seventh Circuit issued its opinion in Strandell. The McKay opinion was primarily a response to the plaintiffs’ motion, but was also a direct response to the Seventh Circuit.

A. Local Rule 23

The McKay court relied on Local Rule 23 of the Joint Local Rules for the United States District Courts of the Eastern and

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56 Id. The court also noted this admonition in an earlier case: “Innovative experiments may be admirable, and considering the heavy case loads (sic) in the district courts, understandable, but experiments must stay within the limitations of the statute.” Taylor v. Oxford, 575 F.2d 152, 154 (7th Cir. 1978).
57 Strandell v. Jackson County, Ill., 838 F.2d 884, 888 (7th Cir. 1988).
59 Id. at 44.
60 The case involved allegations of illegal bribes of Middle Eastern officials by Ashland Oil representatives. The plaintiffs maintained that their refusal to participate in the illegal activities and the ensuing coverup resulted in their discharge from employment. Id. For more background on the case, see the related shareholder derivative action, Howes v. Atkins, 668 F. Supp. 1021 (E.D. Ky. 1987).
61 McKay, 120 F.R.D. at 44.
62 Id. at 43-44.
63 The opinion first disposes of the motion before the court. Id. at 43-46. Then, in a section entitled “The Strandell Opinion: Lambros’ Godchild Gets a Bum Rap,” the court defended the summary jury trial and responded to the Seventh Circuit. Id. at 46-51.
Western Districts of Kentucky, in finding the power to compel parties to participate in summary jury trials.\textsuperscript{64} Local Rule 23 reads in full:

A judge may, in his discretion, set any civil case for summary jury trial or other alternative method of dispute resolution.\textsuperscript{65}

Given this local rule, the dispositive question facing the court was the rule's validity. Federal Rule 83 grants district courts the ability to formulate local rules that are "not inconsistent" with the Federal Rules of Civil Procedure.\textsuperscript{66} The \textit{McKay} court felt that the validity of Local Rule 23 was unassailable since "far greater intrusions into the autonomy of trial lawyers and parties have been upheld under the aegis of Rule 83."\textsuperscript{67} To support this contention, the court cited an appellate decision that upheld local rules authorizing the district judge to refer certain cases to mandatory mediation\textsuperscript{68} and another that allowed for the referral of cases to mandatory nonbinding arbitration.\textsuperscript{69} The court also noted the United States Supreme Court ruling in \textit{Colgrove v. Battin},\textsuperscript{70} which approved a district court's

\begin{itemize}
\item \textsuperscript{64} Id. at 43-46.
\item \textsuperscript{65} LR 23.
\item \textsuperscript{66} Rule 83 provides:

\begin{quote}
Each district court by action of a majority thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. A local rule so adopted shall take effect upon the day specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public. In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.
\end{quote}

\item \textsuperscript{67} \textit{McKay}, 120 F.R.D. at 45.
\item \textsuperscript{68} See \textit{Rhea v. Massey-Ferguson, Inc.}, 767 F.2d 266 (6th Cir. 1985).
\item \textsuperscript{69} See \textit{Davison v. Sinai Hospital of Baltimore, Inc.}, 462 F. Supp. 778 (D. Md. 1978), aff'd, 617 F.2d 361 (4th Cir. 1980). This case was particularly relevant given the \textit{McKay} court's characterization of a summary jury trial as "essentially nonbinding arbitration with an advisory jury instead of arbitrators." \textit{McKay}, 120 F.R.D. at 45.
\item \textsuperscript{70} 413 U.S. 149 (1973).\end{itemize}
local rule allowing for jury trials with six jurors in civil trials.\footnote{71} The Supreme Court stated in \textit{Colgrove} that the "requirement of a six-member jury is not a 'basic procedural innovation.'"\footnote{72} The \textit{McKay} opinion, relying on a Third Circuit case\footnote{73} interpreting \textit{Colgrove}, felt that this statement imposed merely a non-outcome-determinative limitation on the scope of local rules.\footnote{74} The \textit{McKay} court held that a mandatory summary jury trial, despite its inherent expense,\footnote{75} did not affect the outcome of the trial because the procedure is merely advisory in nature.\footnote{76} Local Rule 23, the court held, was within the ambit of local rule limitations as defined by \textit{Colgrove}.\footnote{77}

\footnote{71} McKay, 120 F.R.D. at 45.
\footnote{72} Colgrove, 413 U.S. at 164 n.23.
\footnote{73} Eash v. Riggins Trucking, Inc., 757 F.2d 557, 569 (3rd Cir. 1985).
\footnote{74} McKay, 120 F.R.D. at 43-44; the Supreme Court discussed the issue as follows: \textit{Amicus} also suggests that \textit{Miner} [Miner v. Atlass, 363 U.S. 641 (1960)] should be read to hold that all "basic procedural innovations" are beyond local rulemaking power and are exclusively matters for general rulemaking. We need not consider the suggestion because, in any event, we conclude that the requirement of a six-member jury is not a "basic procedural innovation." The "basic procedural innovations" to which \textit{Miner} referred are those aspects of the litigatory process which bear upon the ultimate outcome of the litigation and thus, "though concededly 'procedural,' may be of as great importance to litigants as many a 'substantive' doctrine . . . ." 363 U.S. at 650. Since there has been shown to be "no discernible difference between the results reached by the two different-sized juries," . . . a reduction in the size of the civil jury from 12 to six plainly does not bear on the ultimate outcome of the litigation. \textit{Colgrove}, 413 U.S. at 164 n.23 (citation omitted).
\footnote{75} The expense of the summary jury trial is pivotal in any consideration of the procedure's value as a settlement technique. The short-term costs of the procedure, both to the parties and the court, must be weighed against the money saved in litigation costs avoided by settlement. This measurement is, however, beyond the scope of this Comment, and the author relies on the following discussion of costs: Foremost, counsel cite the extra work and expense for their clients. My answer is 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 their clients' expenses. If the summary jury trial fails to settle the case, the work of counsel and the Court hasn't been wasted as trial on the merits will be scheduled shortly thereafter. \textit{Spiegel}, \textit{Summary Jury Trials}, 54 U. Cin. L. Rev. 829, 835 (1986) (the text of a speech on summary jury trials by the Hon. S. Arthur Spiegel); see also Lambros, \textit{ supra} note 1, at 472-74 (discussing the court's costs in summary jury trials).
\footnote{76} McKay, 120 F.R.D. at 46; \textit{see also supra} note 4.
\footnote{77} \textit{See supra} notes 70-74 and accompanying text.
Having validated its local rule and thereby disposing of the plaintiffs' motion to reconsider, the McKay court's work was technically finished. Still, the district judge, "in a spirit of furthering constructive debate," addressed the arguments of the Strandell court.  

B. Response to the Seventh Circuit

The McKay court characterized the discovery concerns expressed by the Seventh Circuit in Strandell as "misplaced." Aligning itself with the Southern District of Illinois, the court felt that the reach of modern discovery prevents any abuse of the summary jury trial technique, particularly when combined with modern federal court requirements that mandate "a comprehensive pre-trial order, exchange of witness lists and summaries of anticipated testimony, and the listing and marking of all exhibits." These measures, the McKay court maintained, eliminated "[t]rial by ambush... from the federal system."

The effect that a summary jury trial has on discovery requires the consideration of two additional points. First of all, the evidence presented during the summary jury trial is completely left to the discretion of the respective parties. Privileged information does not have to be presented. If a party

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78 McKay, 120 F.R.D. at 46.
79 Id. at 46-51.
80 Id. at 48.
82 McKay, 120 F.R.D. at 48.
83 Id. The Seventh Circuit might respond, however, that, while trial by ambush has been removed, respect for the work-product privilege still remains a constraint on discovery.
84 A party may withhold evidence it feels the other party is seeking for trial. This half-hearted participation, however, might make that party feel even less bound by the verdict of the summary jurors. This scenario—a party merely going through the motions of the mandatory summary jury trial, with no desire for pretrial settlement—points out the potential futility of forcing unwilling litigants to participate in nonbinding settlement techniques. Still, the advocates of summary jury trial maintain that the technique provides an outlet for the adversary emotions of the opposing sides and forces them to more rationally weigh the benefits of pursuing trial. By providing the parties with a more objective perspective the summary jury trial is supposed to increase the likelihood of settlement, even by unwilling participants. See id. at 50.
feels that the summary jury trial is being used as a parasitical discovery device he may withhold certain information from the process. Secondly, the "verdict" rendered by the group of jurors is used merely to encourage settlement. If a party feels the brevity of the technique has obscured the true merit of his case, he may continue to trial without penalty.

IV. DIFFERENCES BETWEEN STRANDELL AND MCKAY

While the Strandell and McKay opinions are in "respectful disagreement," differences between the two cases have kept their actual holdings from being completely contradictory. The two primary differences are the presence of Local Rule 23 in McKay, and the different postures of the litigants resisting the summary jury trial in each case.

A. Effect of the Presence or the Absence of a Local Rule

A pivotal difference between Strandell and McKay is the presence of Local Rule 23 in the Eastern District of Kentucky. The Strandell district court had no such rule to turn to for the authority to order the participation of the plaintiffs' attorney.

The absence of a similar local rule in the Southern District of Illinois suggests the question of whether Local Rule 23 would have prevented the Seventh Circuit's reversal. The answer seems to be an emphatic "no." The presence of a local rule would not have allayed the discovery and work-product concerns voiced by the Seventh Circuit. Also, the appellate court's fear that the "carefully-crafted balance between the needs for pretrial disclosure and party confidentiality" might be upset by mandatory summary jury trials would not have been appeased by a

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85 See supra note 4.
86 Although in theory a party may proceed to trial with impunity, this trial will be presided over by a federal district court judge who may not be pleased with that party's failure to settle.
87 Strandell v. Jackson County, Ill., 838 F.2d 884 (7th Cir. 1988).
89 Id. at 44.
90 Id.
91 Id.
92 Strandell, 838 F.2d at 888.
local rule. Deference to a district court local rule would not seem likely from an appellate court which so diligently upheld the principle that any extension of a federal district court's powers go through the proper channels. The Seventh Circuit stated:

We do not believe it is reasonable to assume that the Supreme Court and the Congress would undertake, in such an oblique fashion, such a radical alteration of the considered judgments contained in Rule 26 and in the case law. If such radical surgery is to be performed, we can expect that the national rule-making process outlined in the Rules Enabling Act will undertake it in quite an explicit fashion.93

It seems doubtful, given this oath of allegiance to the systematic evolution of court rules, that the Seventh Circuit would have felt constrained by Local Rule 23.

B. **Differing Postures of the Protesting Litigants**

A second difference between the Seventh Circuit's opinion in *Strandell* and the *McKay* opinion is the type of legal issue each court addressed. The *McKay* opinion is merely a response to a party's motion for reconsideration of an overruled objection.94 The court's denial of the motion was not appealed to the Sixth Circuit,95 and the disgruntled plaintiffs ultimately participated in the summary jury trial.96 The Seventh Circuit, on the other hand, was faced with a party whose refusal to participate in the summary jury trial resulted in a citation for contempt and a $500 fine.97 The plaintiffs' attorney in *Strandell*

93 *Id.; see also* 28 U.S.C. § 2072 (1966) (giving the U.S. Supreme Court the authority to prescribe rules of civil procedure for the federal courts).
94 *McKay*, 120 F.R.D. at 44.
95 The *McKay* case ultimately went to a jury trial. The plaintiffs were victorious, and a settlement was achieved pending the defendants' appeal.
96 The *McKay* district judge stated that he was "gambling a five-day summary jury trial against a six-week real trial." *McKay*, 120 F.R.D. at 49. The fact that the case ultimately went to a full trial indicates that in this instance, the gamble failed. Yet it should be noted that summary jury trials can provide benefits other than settlement. For example, the technique may "aid in streamlining jury trials so that the trial process undergoes a more efficient use of time." Lambros, *supra* note 1, at 468.
97 *Strandell*, 838 F.2d at 885.
had taken the strongest stand possible against the summary jury trial. The decision to uphold a contempt citation against a member of the bar who is acting to protect his client is perhaps not as easily made as the decision to overrule an objection.

V. SURVIVAL OF THE SUMMARY JURY TRIAL: IS COMPULSORY PARTICIPATION ESSENTIAL?

A major question facing summary jury trial advocates in the wake of *Strandell* is whether the technique will remain viable if the district court lacks the power to compel parties' participation. As noted earlier, the Eastern District of Kentucky and the Southern District of Illinois did not receive the same response when they attempted to compel parties to participate in summary jury trials. Undoubtedly, numerous tangible and intangible variables affected the differing decisions of the *Strandell* and *McKay* plaintiffs. Two possible considerations for the parties were (1) the presence of a local rule, and (2) the propriety of the summary jury trial technique in each case. Discussion of these two issues helps to point toward a future for the summary jury trial.

A. Chilling Effect of Local Rule on Attorney Resistance

While the correlation may be forced, the fact remains that between *Strandell* and *McKay*, the court with a local rule was able to compel participation in its summary jury trial and the court without a local rule was defied. Perhaps stronger evidence of the power of a local rule may be found in the novelty of the issue of the district courts' power. The first summary jury trial was held on March 5, 1980. The Seventh Circuit's January 21, 1988, opinion in *Strandell* was the first appellate-

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*Strandell v. Jackson County, Ill., 838 F.2d 884 (7th Cir. 1988).*

*See supra* notes 94-97 and accompanying text.


*See Lambros and Shunk, supra note 14, at 43 n.1.

The *Strandell* appeal was argued before the Seventh Circuit on September 10, 1987, and decided on the same day. The opinion was dated January 21, 1988, as corrected January 28, 1988. *Strandell*, 838 F.2d at 884.
level discussion of a district court's power to compel participation in the procedure.\(^\text{103}\) The acquiescence of the Bar in the interim indicates a belief that district courts have the power to compel participation, or at least a perception that the issue is not worth appealing.

The Northern District of Ohio, the birthplace of the summary jury trial and a court with a local rule, had assigned 131 cases for summary jury trials as of April 1985,\(^\text{104}\) without having their authority challenged to an appellate court. The Eastern District of Kentucky, prior to the McKay opinion, had held five summary jury trials without any appeal to the Sixth Circuit.\(^\text{105}\) While these statistics are not conclusive, they provide a basis for the argument that a local rule places a district court in a "stronger position"\(^\text{106}\) when faced with a reluctant party. The McKay district judge noted that in two of the cases he has settled via the summary jury trial, "but for my making summary jury trials mandatory in these cases, they would not have occurred."\(^\text{107}\)

If mandatory summary jury trials are engrained into the procedural rules of a court, parties would seem less likely to

\(^{103}\) The few opinions that have addressed mandatory summary jury trials point to a split between the appellate and district courts. The Strandell and McKay district judges are aligned with District Judge Lambros in support of the proposition that district courts can compel a party's participation. The Southern District of Ohio, while not forced to decide the issue, has stated: "We believe that the Court has the power to conduct summary jury trials either under Rule 16, Fed.R.Civ.P., or as a matter of the Court's inherent power to manage its own cases." Cincinnati Gas & Elec. Co. v. General Elec. Co., 117 F.R.D. 597, 599 (S.D. Ohio 1987) (holding that qualified first amendment right of access to judicial proceedings does not attach to summary jury trial).

\(^{104}\) Ranii, supra note 5, at 30, col. 1.

\(^{105}\) McKay, 120 F.R.D. at 49.

\(^{106}\) Id. at 44; the Third Circuit has stated that a district court may "make local rules that impose reasonable sanctions where an attorney conducts himself in a manner unbecoming a member of the bar, fails to comply with any rule of court, including local rules, or take actions in bad faith." Eash v. Riggins Trucking, Inc., 757 F.2d 557, 569 (3d Cir. 1985) (emphasis added). This language indicates that if the local rule is valid, the attorney may be sanctioned for disobeying it.

\(^{107}\) McKay, 120 F.R.D. at 49; the McKay court also responded to Judge Posner's request for scientific data on the success of the summary jury trial by stating that "a controlled scientific experiment such as that suggested by Judge Posner cannot be effectively conducted unless summary jury trials are mandatory." Id. at 49. For a statement of Posner's criteria for evaluation, including his requests for scientific verification, see Posner, supra note 5, at 366-68.
be surprised or offended by the procedure. The district judge in *Strandell* noted that "attorneys are usually reluctant to participate in procedures which break from traditional and familiar methods of litigation."\(^{108}\) The *McKay* district judge also noted attorney reluctance but stated 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."\(^{109}\) This conversion capsulizes that court's belief that the inertia of the Bar is an easily surmountable barrier to the success of certain alternative dispute resolution techniques. Naturally, district courts desire the ability to compel participation in these procedures and demonstrate (and evaluate) their merits. Local rules allowing for mandatory summary jury trials would seem a necessary and effective tool in combatting attorney reluctance, and ultimately the larger opponent-crowded court dockets.

**B. The "Right" Case for a Summary Jury Trial**

In the summary jury trial, the abbreviated presentation of evidence limits a party's ability to expose the jury to certain weaknesses of their opponent's case. This trade-off of thoroughly tested evidence for increased expediency, may be fatal to certain cases. As noted earlier, the *Strandell* litigation supposedly involved questions about the credibility of witnesses.\(^{110}\) If witness credibility is central to the litigation, then the advisory verdict of the summary jurors is based upon an inadequate exposition of the relevant evidence. The strong belief that a summary jury trial was improper in his particular case undoubt-

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\(^{108}\) *Strandell* v. Jackson County, Ill., 115 F.R.D. 333, 336 (S.D. Ill. 1987). The district court continued: "Reliance on totally voluntary use of nonbinding alternative dispute resolution procedures where the attorneys are aware of the Court's inability to mandate their participation will severely undermine the utility of such procedures." *Id.*

\(^{109}\) *McKay*, 120 F.R.D. at 49. It should be noted that both the district and appellate courts are charged with balancing "the needs for judicial efficiency and the rights of the individual litigant." *Strandell*, 838 F.2d at 886-87. The perspective each court brings to this challenge is, however, inherently different. The appellate court reviews an objective record, virtually free of influence by the personality of any litigant. The district court judge is constantly exposed to the frustration of uncooperative litigants.

\(^{110}\) See *supra* note 50 and accompanying text.
edly strengthened the *Strandell* attorney’s resolve in the face of a contempt citation.

The success of the procedure depends upon the wise use of the district court discretion as to when it should be employed. Judge Lambros developed the summary jury trial for

a large class of cases where the only bar to settlement among parties is the uncertainty of the perception of liability and damages held by the members of a lay jury. These cases involve issues, similar to “the reasonable man” standard in negligence litigation, where no amount of jurisprudential refinement and clarification of the law can aid in resolution of the case.\(^\text{111}\)

Even such a staunch defender of the summary jury trial technique as the author of the *McKay* opinion, Judge William O. Bertelsman of the Eastern District of Kentucky, does not see the technique as a “panacea”\(^\text{112}\) or adaptable to a large volume of cases.\(^\text{113}\) The nature of the summary jury trial\(^\text{114}\) demands a district judge’s contemplation of the technique’s propriety.

C. *Strandell Meets McKay: A Possible Reconciliation*

The propriety of the summary jury trial must be weighed against the necessity of compelled participation for its survival. These two considerations are not, however, irreconcilable. The local rule relied upon by the *McKay* court makes the district court judge’s decision to hold a summary jury trial discretionary.\(^\text{115}\) Even if such a rule were in place in the Southern District of Illinois when *Strandell* was decided, the Seventh Circuit would not be forced to invalidate the rule to reverse the district court’s contempt citation. If the appellate court felt strongly

\(^{\text{111}}\) Lambros and Shunk, *supra* note 14, at 45. Judge Bertelsman, the author of the *McKay* opinion, states that: “I believe a summary jury trial is a useful device, however, to settle a complex case with one or two key issues, where the problem with settlement is that the parties differ in their views of how the jury will react to the key issues.” *McKay*, 120 F.R.D. at 49-50.

\(^{\text{112}}\) *Id.* at 49.

\(^{\text{113}}\) *Id.*

\(^{\text{114}}\) The expense of the process and the pressure placed on the attorneys demand a court’s serious consideration of whether to hold a summary jury trial.

\(^{\text{115}}\) See *supra* text accompanying note 65 for the text of Local Rule 23.
enough about the impropriety of the technique, they could simply rule the order mandating the party's participation an abuse of discretion. Under this approach attorneys who feel they cannot in good conscience proceed with the summary jury trial may still protest but must face the heightened "abuse of discretion" burden of proof at the appellate level.

CONCLUSION

The Strandell and McKay opinions are not at war with one another. Rather, they reflect the necessary struggle involved in implementing new judicial procedures and the differing roles district and appellate courts play in this process. The district court opinions supporting mandatory summary jury trials indicate the near desperate district courts' willingness to make a pragmatic stand against the problem of docket congestion. The Seventh Circuit's opinion in Strandell represents the appellate level view that any technique which expands the federal district court's power must pass through the rigors of the Rules Enabling Act.

These two competing positions seem to be best balanced by allowing the federal district courts to mandate summary jury trials at their discretion with appellate level reversal only when this discretion is abused. This safety net for cases that are not

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116 The district courts' sensitivity to any assault on their power to mandate participation in alternative dispute resolution techniques is largely attributable to their burgeoning caseloads. This sensitivity is implicitly shown by the following statement from the McKay opinion: "Some appellate courts have also backed up the trial judges in the trenches by upholding local rules providing for the imposition of costs as a sanction for last-minute settlements entered into after the taxpayers have incurred the expense of bringing in the jury." McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 45 (E.D. Ky. 1988) (emphasis added). This quote reflects the view that the district court is the foot soldier who daily encounters the enemy, overwhelming docket congestion. The appellate court is cast as the dispassionate arbiter of the propriety of their weapons, and the inference is that on some occasions the foot soldiers in the trenches aren't always "backed up."

117 This experimentation and review approach to alternative dispute resolution is in line with the "scrutiny" and "careful testing" of new techniques that Chief Justice Burger solicited in his 1983 Year-End Report on the Judiciary. See Lambros, supra note 1, at 465.


119 See supra notes 53-56 and accompanying text.
proper for the technique does not leave the district judge a David with an unloaded slingshot—an unacceptable position given the Goliath-like dockets.

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