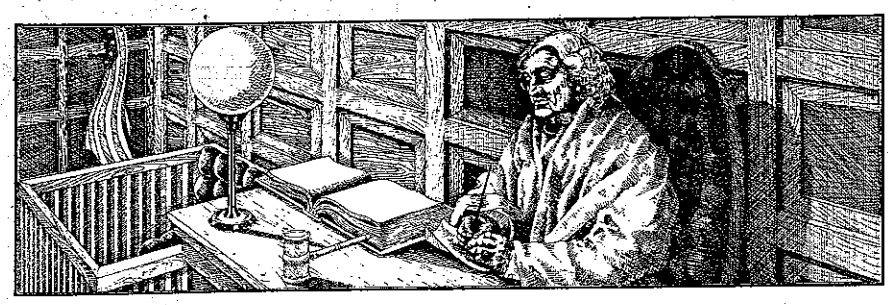

From the Bench

Summary Jury Trials with Ceilings and Floors

by Barry C. Schneider
Civil Presiding Judge
Superior Court of Arizona
County of Maricopa

If the words *summary jury trial* were hyphenated into one word, it would be, on its face, a world-class oxymoron. After all, how could anything be "summary" if it entails the consumptive rigors of a "jury trial"? No wonder the name alone daunts judges and puts off lawyers.

Yet, beyond the name, there is an intriguing concept: The parties present their case, without witnesses and by argument only, to a jury, which then deliberates and returns a nonbinding "verdict." The whole idea—as invented by Judge Thomas Lambros of the United States District Court for the District of Ohio—is to present the parties with an independent jury reaction, which then fosters settlement. See Lambros, "Summary Jury Trials," 13 LITIGATION 52 (Fall 1986). If reality seeps in and settlements result, cases can be resolved in a few streamlined hours rather than in the days, weeks, and even months of a trial. At least, that is the theory.

From practical experience have come lawyers' complaints that summary jury trials are too expensive and their advisory verdicts are not predictive enough for settlement purposes. See Peterson, "Summary Jury Trial Strategies," 16 LITIGATION 31 (Spring 1990). Respected judges like Richard A. Posner of the Seventh Circuit have concerns about lawyers' withholding their full fire in the mock proceeding, weakening the force of the summary jury "verdict," undermining settlement prospects, and compounding everybody's time and expense with two jury trials rather than one.

These criticisms have merit. Take the recent experience of one of my colleagues, Judge Daniel E. Nastro, who conducted a settlement conference in a large insurance bad-faith case and who believed the parties were finally within $100,000 of each other. On his recommendation, the parties conducted the classic summary jury trial with a nonbinding verdict. When the jury returned with a verdict for $2 million in punitives, the insurance company balked, refused to recognize the jury's message, spurned settlement, and later was bombed for a $4.5 million verdict at the hands of a real and, this time, binding jury.

On the basis of this experience, the courthouse wags characterized the summary jury trial concept as a failure: just another judicial gimmick that backfired and cost everybody more time and money. Fortunately, Judge Nastro didn't quit. The real problem, he correctly reasoned, was the nonbinding characteristic of the process—a sort of Dungeons and Dragons game that everyone could ignore if the results did not match expectations. As Judge Nastro saw it, the process had to be changed from an abstract experiment into a binding dispute-resolving mechanism. Yet, no judge can force the parties to abandon their jury trial rights. Indeed, the Seventh Circuit has even held that a trial court cannot compel the parties to participate in a nonbinding summary jury trial. *Strandell v. Jackson County, Illinois*, 838 F.2d 884 (7th Cir. 1988). Although Judge Lambros's summary jury trial order allows the parties to opt for something binding, typically there is no real incentive for the parties to do this—to cut down the safety net and to give up their traditional rights. 103 F.R.D. 461, 487 (N.D. Ohio 1984).

To encourage the parties to surrender themselves to a binding summary jury trial, Judge Nastro came up with the "high-low kicker" concept. It works this way: Suppose the maximum liability was set at $100,000 and the minimum recovery was formulated at

$35,000. If the summary jury came in with a verdict of more than $100,000, the liability would automatically be reduced to $100,000. If the verdict was for anything between zero and $34,999, the defendant would still pay $35,000. However, if the verdict was between the high and the low, the defendant would pay what the summary jury awarded.

There is really nothing new about this concept. It has been around for a long time in arbitration proceedings. The obvious benefit is that it eliminates the high-low risks that both parties face in a traditional trial, with its voir dire, direct examinations and cross-examinations, experts, and repeated opportunities for jury persuasion. With a "ceiling" and a "floor" and with a vastly more economical proceeding, the parties benefit significantly from having traded away all the tried-and-true but enormously expensive trappings of the typical jury trial. For the courts, the benefits are just as important: They can spend more time on the resolution of civil controversies rather than on the numbing oversight of a process fraught with delay, discord, and even boredom.

A Case in Point

To show how the process works, let me describe the first summary jury trial in my court. The case involved two plaintiffs who sued a health-maintenance organization for breach of the covenant of good faith and fair dealing and for punitive damages. Practically the entire day before jury selection was spent on motions in limine. After I was accused of turning a two-week trial into a four-week undertaking by my "liberal" rulings on difficult evidentiary issues, I broached the subject of a summary jury trial. The attorneys knew about the futile summary jury trial that had occurred not long before in Judge Nastro's court, and thus they would not stipulate to an advisory summary jury trial. Without being assured of some kind of result that would be dispositive and beneficial, they would not spend the time on our experiment.

Then I suggested a binding summary jury trial with the high-low feature. Now I had their interest. Now it made sense. The lawyers felt that the case was appropriate for a summary jury trial. There was not much dispute on the facts, just on the interpretation and significance of those facts. Witness credibility was not paramount. Even in a full-blown trial, each party's presentation would rely primarily on forensic argument. The attorneys also trusted each other, and that was critically important for this case as well as for others like it. If a summary jury trial is to operate successfully without witnesses, without a court reporter, without a record, and without appellate review, there must be mutual trust among the lawyers.

Unfortunately, the parties and the lawyers came back the next morning, said they were unable to agree on a high figure, insisted that I impanel a real jury, and wanted to start what looked like a four-week trial. At the last minute, I convinced the attorneys to give the summary jury trial one more shot by participating in a settlement conference and by searching one last time for that elusive high limit. Fortunately, we succeeded.

Let me stop the narrative here to talk about the psychological dynamic of negotiating the high and low figures. Often summary jury trials are natural outgrowths of the judicially hosted settlement conferences that our court requires. In that process, the parties are locking themselves into their negotiating positions: The plaintiff is saying that the case is a megabuck slam-dunk, while the defendant counters with talk about no liability or minimal damage. Then I inject the high-low concept and watch each party eat its own words.

If a plaintiff is really confident of a stratospheric verdict, that same plaintiff should not care a whit about the low limit. An equally certain defendant should be cavalier about the ceiling. However, stripped of their negotiating facades and faced with reality, both parties change dramatically and start to negotiate in earnest at both ends of the damage spectrum.

In our case, after the parties finally settled on a high and a low, they surrendered themselves to the binding summary jury trial process with the certainty of how bad, bad can be, how good, good could be, and how much they would save in fees not only at trial but also on appeal. Thus, they tiptoed into that interesting twilight zone between the ceiling and the floor.

In the "trial" itself, there are sensitive problems that must be anticipated and creatively coped with. For instance, what if one of the lawyers takes unfair liberties with the record, says something that is out-of-bounds, and poisons the presentation through gaffe or intentional misbehavior? Because there is neither court reporter nor transcript of prior testimony, how can the lawyers be tethered to a record? What is the "record" anyway? If the attorneys know far enough in advance that there will be a summary jury trial, they can formulate a "record" to support their statements at the summary jury trial. But we did not have that luxury. We were going to conduct the summary jury trial the very next day to accommodate the defendant and its counsel, who were from out of state.

The Attorneys' Solution

The attorneys themselves came up with a solution. If either one of them cheated or accidentally blundered, he would argue his grievances to me at the conclusion of their presentations. I relaxed the requirements for a mistrial because, after all, only one day, not several days or weeks, would be spent on the effort. If a mistrial was appropriate, we would simply pick another jury the next day and promptly do it all over again. I agreed, principally because the lawyers had integrity and the prospects for a mistrial were remote.

Next, we had to settle on jury instructions. It soon became apparent that these instructions need not be as complex as would usually be necessary in a regular trial. For example, there was no need to instruct the jury on assessing the credibility of witnesses. In the interest of speed, we also agreed to streamline the substantive instructions. Finally, we concluded that the jury should be instructed before the attorneys made any presentation so that jurors would have a better frame of reference for understanding the attorneys' arguments. I instructed the jury both orally and in writing.

Next came time limits. Whatever time limits were agreed to, the attorneys knew these restrictions would be strictly enforced. At the start, the jurors were told how long each attorney had, and this communication helped curb any windy excesses from counsel. I also explained to the jurors that this was a procedure whereby four weeks of

(please turn to page 58)

Trial Notebook

(continued from page 50)
titled to go into the bases for the expert's opinion on cross-examination. Rule 705 says so. A cross-examiner is entitled to take all kinds of risks if he wants.

But what about direct examination? Wouldn't it be a strange perversion of both the old and the new rules to let the expert recite the inadmissible evidence in front of the jury?

No, said the court in *American Universal Ins. Co. v. Falzone,* 644 F.2d 65 (1st Cir. 1891). It permitted a fire marshal to repeat conversations he had with co-workers that supported his notion that a fire had human origins.

And a number of other circuits agree.

Wait a minute, you say. If the information is not admissible—if it is not good enough to base a decision on—why should we be able to launder it by running it through an expert witness? What about the hearsay rule?

You don't understand, say the courts that admit this testimony. This is not admitted for its truth. It is admitted only for the limited purpose of explaining the expert's opinion.

But wait one minute, you say. If these out-of-court statements are not true, then they don't support the opinion, do they? Isn't the real relevance of this evidence based on the assumption that it is true?

Some lawyers feel that those questions are not adequately answered by the courts that admit the inadmissible support for expert opinions. They wonder whether the old rules that excluded this sort of evidence were based on not only logical consistency but reason that comes from experience.

Minnesota attacked the problem by amending its evidence rules with a new Rule 703(b):

> Underlying expert data must be independently admissible in order to be received upon direct examination; provided that when good cause is shown in civil cases and the underlying data is particularly trustworthy, the court may admit the data under this rule for the limited purpose of showing the bases for the expert's opinion.

• The new law of experts has escalated the discovery war in virtually every case.

The old law was designed to screen expert opinions before they came in evidence. Under the new rules, though, the screening waits until cross-examination—when it is too late.

Moreover, the information you get about the expert and his opinion from interrogatories under Rule 26(b)(4)(A)(1) of the Federal Rules of Civil Procedure is thin at best. So the only safe thing to do is take the expert's deposition.

Finally, if you are uneasy about what sort of expert testimony you may face in a civil case, think about what can happen in criminal cases, when you do not even have discovery. The problem is discussed with uncomfortable reality in Linda S. Eads's "Adjudication by Ambush: Federal Prosecutors' Use of Nonscientific Experts in a System of Limited Criminal Discovery," 67 N. Car. L. Rev. 577 (1989).

From the Bench

(continued from page 4)
evidence would be compressed into three hours and that they should pay close attention because there would not be very much redundancy in the presentations.

To maintain the necessary pace, everyone agreed that I, not the attorneys, would conduct a limited voir dire of a smaller-than-usual panel. Of course, the attorneys provided their own input. The jury was not told about the high-low agreement because silence on that point would help ensure objectivity.

The last decision concerned exhibits. Should the jury have them while it was deliberating? Should the jury get them only by request? The attorneys did not want the jury fussing with fine print when the time was short for oral elaboration about the exhibits.

Finally, the attorneys presented the arguments, and the jury retired to deliberate. It was apparent to me that the procedure was a success. I saw it on the faces of the parties: They had their day in court, and their cases were presented by articulate champions. At the same time, the parties were spared the grinding unpleasantries of a protracted trial, the endless waiting on the typical appeal, and the economic hemorrhaging from triple-digit hourly rates. Regardless of the outcome, justice was served.

After they brought in their verdict, the jurors said how they, too, liked the summary trial. Its speed did not interfere with their ability to absorb the information or reach a reasoned decision. As a plus, this swift procedure did not unduly interfere with their lives. Significantly, the jurors were confident that they had all the information necessary for a proper verdict.

Later, I personally confirmed the jury's conviction about having had all the information it needed. After holding that first binding summary jury trial with high and low limits, I heard a minitrial that involved an implied easement dispute and that had the same format as a summary jury trial but was tried to the court. Because the parties had waived a jury and because witness credibility was not very important, I suggested a minitrial and encountered the same problem again: establishing the damage limits. Not interested in a high-low arrangement, the defendant resisted the concept, believed that it would win on appeal, and refused to bargain away its appellate leverage.

At last, we found a solution: There would be a minitrial, but the parties preserved their appellate rights. Consequently, both parties stipulated that my fact-findings from the minitrial would bind them but my conclusions of law would be appealable. If there was an appeal, the parties would argue only the legal issues, not the facts.

Before the minitrial began, the parties submitted trial memoranda and proposed findings of fact and conclusions of law. The attorneys then made their presentations, using the proposed findings and conclusions as an outline. As the minitrial unfolded, I could appreciate how right the summary jurors had been in saying that they had all the facts needed for a decision. Having

heard the attorneys' presentations without redundant testimony, evidentiary tussles, formalistic questions, disputatious interludes, and boring distractions, I was totally comfortable with my ruling.

Since then, I have been involved in a number of other summary jury trials and have confronted another problem that defense lawyers often worry about: the psychological law of primacy. Under this "law," if a plaintiff makes the initial presentation, the jurors might make up their minds during the plaintiff's oratory, and the defendant would be doomed by going second. To solve this problem, each side gets 10 minutes to make a miniopening statement immediately after my instructions but before each side makes its plenary presentation. It works.

In summary, the evolving characteristics of the summary jury trial procedure are:

1. High-low limits are set.
2. Evidentiary issues are resolved in advance.
3. Jury instructions are prepared.
4. Time limits are set.
5. Exhibits are considered, and decisions are made as to whether they will be received in evidence. If the exhibits are to be received, decisions are made about when the exhibits will be given to the jury—before deliberation, during deliberation, or only upon the jury's request.
6. A venire of 20 is called, and an 8-person jury is chosen, allowing 4 peremptory strikes and a cushion of 4 who might be excused for cause. The judge conducts an expedited voir dire with input from the lawyers.
7. The jury is instructed orally and in writing.
8. Plaintiff and defendant make 10-minute miniopening statements.
9. Plaintiff puts on its opening presentation.
10. Defendant puts on its presentation.
11. Plaintiff puts on its rebuttal presentation.
12. Parties reserve the right to move for a mistrial.
13. Verdict is entered.

Alternative dispute resolution techniques like the summary jury trial are relative newcomers to the courts. We should bid them welcome and not be defeated by their defects or their limitations. Instead of doing business as usual and chewing up time, money, and goodwill, trial judges and trial lawyers must constantly search for new, creative, and flexible solutions to civil litigation problems that have, in the past, vexed and daunted the best of us.

By taking summary jury trials one step beyond, into binding high-low agreements, we can increase the positives, reduce the negatives, and enhance the justice system. Do we dare take this step beyond? Do we dare not to?

Verdict Strategy

(continued from page 44)

look for ways to structure the form of questions so that in closing you can give the jury a convenient formula for answering them your way. For example, it may be helpful if all the even-numbered questions are to be answered yes.

Depending on how they are answered, many questions submitted to the jury will require answers to additional questions. For example, a series of questions might ask:

1. DO YOU FIND THAT THE DEFENDANTS FRAUDULENTLY MISREPRESENTED THE VALUE OF ABC CORPORATION'S STOCK?

YES _____
NO _____

IF YOUR ANSWER TO QUESTION 1 IS YES, YOU MUST ANSWER QUESTION 2. IF YOUR ANSWER TO QUESTION 1 IS NO, YOU SHOULD SKIP TO QUESTION 3.

2. WHAT DO YOU FIND WAS THE CORRECT VALUE OF ABC CORPORATION'S STOCK?

$_____

3. DO YOU FIND THAT THE DEFENDANTS FRAUDULENTLY MISREPRESENTED THE VALUE OF XYZ CORPORATION'S STOCK?

YES _____
NO _____

IF THE ANSWER TO QUESTION 3 IS YES, YOU MUST ANSWER QUESTION 4. IF YOUR ANSWER TO QUESTION 3 IS NO, YOU SHOULD SKIP TO QUESTION 5.

4. WHAT DO YOU FIND WAS THE CORRECT VALUE OF XYZ CORPORATION'S STOCK?

$_____

A special-issue verdict form may contain a number of predicated questions relating to particular issues or separate counts. Try to structure all those questions so that they can be answered conveniently and easily the desired way. For example, the defense lawyer may argue to the jury that every question be answered in such a way that the succeeding questions do not have to be answered.

Verdict Forms and Record

In Illinois and some other states, a statute makes it reversible error for a judge to refuse to submit a proper special interrogatory to the jury. See Ill. Rev. Stat. ch. 110, § 2-1108. Even in jurisdictions where judges have more discretion, it still may be possible to appeal a judge's refusal to submit a requested verdict. It's imperative to make a record.

Under Rule 49 in federal court and in many states, a party waives its right to a jury trial on any issue the court does not include in special verdicts or interrogatories unless the party demands submission of the issue before the jury retires. Thus, you should be prepared to propose all interrogatories necessary for your theory of the case.

Moreover, in addition to requesting the interrogatories, you must formally object if the court fails to submit them. Otherwise, you will be held to have waived your right to a jury trial on the omitted issue. This requirement may seem harsh, but it does give the judge an opportunity to correct any inadvertent omissions of important issues.

Of course, if the court proposes issues to which you object, your proper objection must be noted and a ruling obtained from the court; otherwise, you will not make a proper record for appeal.

The burden of ensuring a jury verdict on all the issues thus falls squarely upon the parties. If a party fails to request submission of an issue, its right to a jury trial on that issue is waived, and