

# The Summary Jury Trial: An Alternative To The Traditional Alternative Dispute Resolution Process

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## Introduction:

When considering dispute resolution processes, arbitration and mediation are traditionally considered to be the favored avenues. However, they are not generally successful if the parties have a significant difference of opinion over how a jury will value a case. This is because neither process actively involves laypersons who can evaluate a claim. In situations where the parties drastically disagree over the value of a case, the summary jury trial may be an option worth exploring.

## Consider This Scenario:

For the past eighteen months, your company (or your insured) has been defending itself in a highly contentious and heavily litigated lawsuit brought by several of its former employees. The plaintiff-employees are alleging, in graphic detail, that their former supervisor sexually harassed them on a daily basis, and that your company terminated them in retaliation for their complaints about the hostile working environment. Although prompt and effective remedial action was taken against the supervisor and the employees were terminated for legitimate, rather than retaliatory reasons, the employees will nevertheless be able to raise enough fact issues to prevent the company from winning the case by summary judgment. A lengthy jury trial with a less than certain outcome is inevitable unless the case can be settled before trial. Despite your counsel's best efforts to resolve the case for a reasonable amount, the plaintiffs' counsel (and the employees themselves) are convinced that a jury will award them ten times more than the amount that was either offered by your company or that was suggested by the judge or a neutral mediator. They are unwilling to reduce their settlement demand to a rational range for discussion.

In a recent experience involving similar facts, a summary jury trial proved to be the exact type of settlement tool needed to resolve the case.

## How The Trial Works

Although not as well known as other alternative dispute resolution mechanisms, the summary jury trial may be just as effective, if not more effective, in bringing closure to complex or highly contentious employment cases. More-

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over, unlike mediation or arbitration, a summary jury trial does so by turning the biggest unknown – a juror's reaction to the employer's defense – into a highly effective case valuation and settlement tool.

A summary jury trial is a non-binding, condensed version of the real trial, conducted before real jurors and presided over by a judge or magistrate. Generally, a six- to twelve-member jury (depending on the jurisdiction) is empaneled from the regular jury pool that would have otherwise been used to seat jurors in a real trial on that day. The same jury selection process that is used in the real trial is used to pick or exclude the potential jurors. Each side is then typically given ten to fifteen minutes to present opening statements, and, depending on the complexity of the issues and number of parties involved, each side is given one-half to one full day to present its case, with cross-examination by opposing counsel.

Evidentiary rules are relaxed (as in most arbitration proceedings), and evidence may be presented through the summaries of counsel, the reading of depositions or the showing of video-taped depositions, the submission of documentary evidence or through live testimony. Following brief closing arguments, again generally ten minutes per side, the judge instructs the "jury" on the law and submits the case to them for deliberation.

In order to ensure a serious deliberation of the issues, the jury is not informed as to the non-binding nature of its verdict. After the jurors render their verdict (or after a reasonable time has passed for thorough deliberations), the jurors are polled as to their results. The parties are given the opportunity to question the jurors about their thought processes to determine what evidence or issues were most compelling or damaging to each party's case. The verdict and deliberation information are then used to drive settlement discussions.

Depending on the outcome, the results of the summary jury trial will very likely force at least one side to re-examine the merits of its position and the reasonable chances of prevailing at a real trial if the



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case goes forward. If (as in the authors' experience), the employer's counsel is able to convince at least one or two jurors that no or minimal damages should be awarded, the employees and their attorney will be confronted with the sobering fact that they may win nothing at trial, or at the very least, an amount that is much closer to the employer's settlement offer than the employees' previous demand. This is because at the federal level, the verdict in a real trial must be unanimous, and in most state jurisdictions, it must be supported by five out of six or eleven out of twelve jurors. In the subject case, this risk of a hung jury resulted in the employees' reducing their settlement demand by hundreds of thousands of dollars without any movement whatsoever by the employer. It also gave the employees the psychological benefit of "having their day in court," which sometimes presents another obstacle to settlement. In other cases, the plaintiffs' "verdict" may force an employer to reassess its position and settle the case for an amount that is more than what it previously offered, but less than what it appears the real jury would have awarded on the case. This is also beneficial because, in the event of an actual verdict, the employer could be responsible for paying both the jury's award and an additional award of the plaintiffs' attorneys' fees.

If the case does not settle, there are still advantages to be gained from the summary jury trial process. The greatest advantage is the chance for the employer to test its theories on a real jury. Although there may be some reluctance to "show your hand" at the summary jury trial in the hopes of surprising one's adversary at trial, the true likelihood of either party being surprised by something in the other parties' case is slim in light of today's expansive pre-trial discovery procedures. Indeed, there is a clear benefit to determining whether your strategy will resonate with the jurors before, rather than after, a six- or seven-figure jury award is on the line.

Another advantage to the summary jury trial is that it provides the key witnesses in the case with a dress rehearsal

for the real trial. In what amounts to a dry run, the parties can use the summary jury trial as an opportunity to still further prepare their witnesses and to evaluate their performance. The exposure to the courtroom setting and the jurors will also reduce the level of anxiety that the witnesses might have in front of the real jury.

Of course, the summary jury trial will only work properly if both sides take it seriously enough to obtain a result that truly represents the outcome of a real trial. The presentation of evidence by the mere summaries of counsel or the extensive reading of deposition transcripts militates against this result by depriving the jury (and the parties) of the benefit of assessing the credibility of live witnesses. Additionally, while not all of the issues in the case need be (or can be) presented in light of the abbreviated nature of the proceedings, presentation of the most contested and potentially damaging issues are central to the effective use of this alternative dispute resolution procedure.

The timing of the summary jury trial is also important to utilize the full effectiveness of its cost-savings potential. Ideally, a summary jury trial should be used before the parties are forced to incur the heavy financial costs of preparing for trial. We recommend asking the court to schedule the summary jury trial approximately thirty to sixty days after the discovery phase of the litigation, with the real trial scheduled thirty days thereafter. This will save the expense of preparing for trial until it becomes clear that an actual trial will be necessary. It will also give the parties sufficient time to revise their trial strategies to reflect what worked best with the summary jury. Moreover, because the summary jury trial will generally take only one or two days to complete, the costs of preparing for it would likely be the same or close to the costs of arbitration proceedings or an extended mediation.

## Some Recommended Resources

Naturally, the local rules for a particular jurisdiction are a good place to start for instructions on conducting summary jury trials. The New York State Supreme Court for the Eighth Judicial District has published a very informative manual on its Summary Jury Trial Program, as has the Superior Court for the State of New Hampshire. Also, the Dispute Resolution Division for the Better Business Bureau can be a useful resource, as can a database that maintains a directory of legal professional experiences in dispute resolution.

## Conclusion

While some cases truly may be impossible to settle, the summary jury trial should be considered as a viable alternative to simply taking the case to trial. Used properly, it can provide both parties with an accurate impression of how an actual jury might feel about the case. This unique factor might be just the thing needed to bring the parties to resolution where traditional mediation fails. And it may end up saving some money in the process.

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