SUMMARY JURY TRIALS AS AN ALTERNATIVE TO LITIGATION

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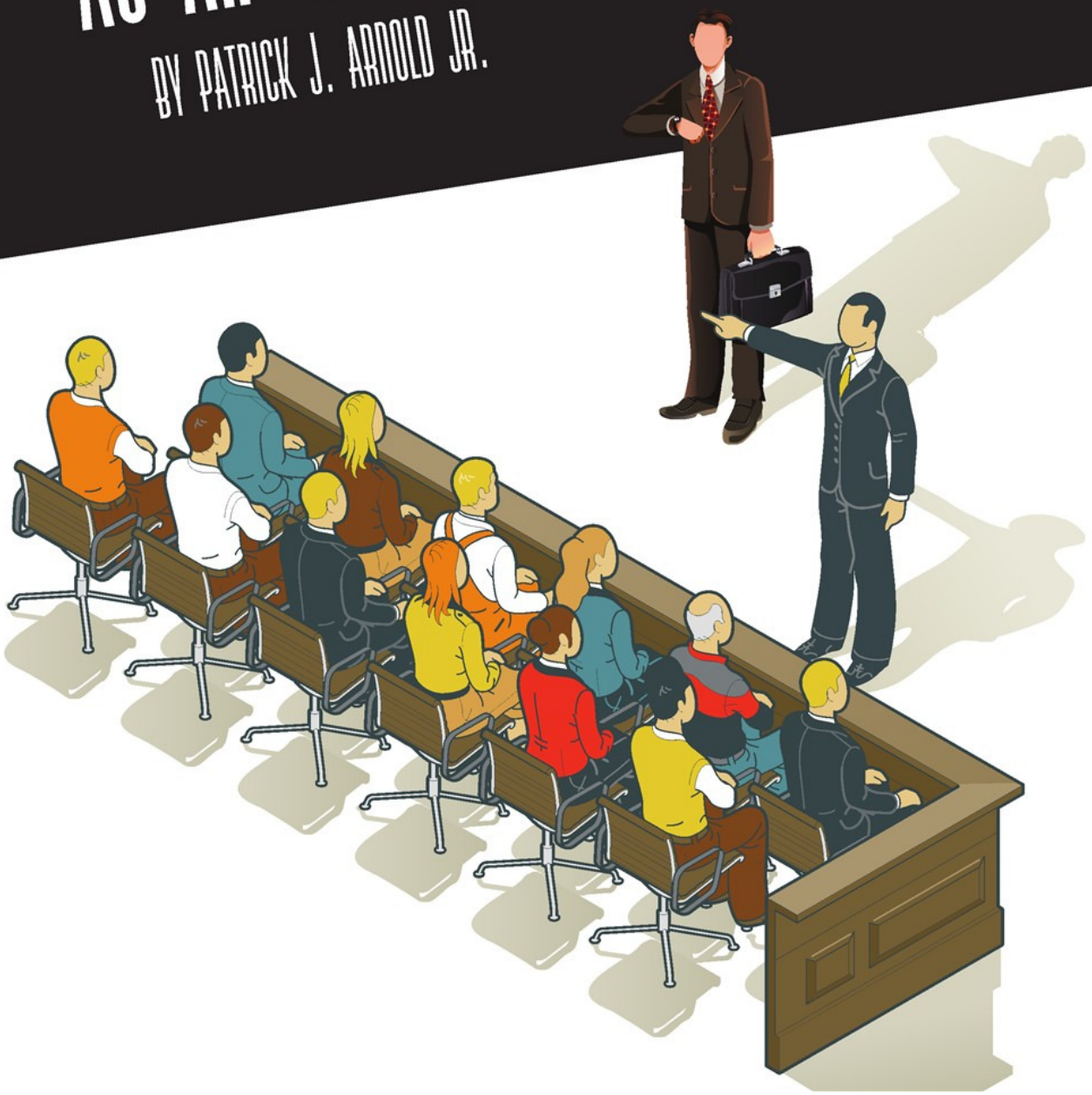

I will never forget what I heard a federal judge declare during a routine motion call a couple of years ago. The judge was in the process of setting a date several months in the future for an evidentiary hearing. Counsel for one of the parties stated that the date would not work because he had a trial scheduled in another case around the same time.

"No, you don't," the judge responded, quickly but courteously. →

COURTS HAVE FOUND THEIR POWER TO HOLD SUMMARY JURY TRIALS UNDER RULE 16 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The counsel, along with all the other lawyers waiting for their motions to be called, looked up with heightened attention.

"No, you don't," the judge repeated, "and I will tell you why. Lawyers have become so expensive that nobody can afford to go to trial anymore. So we are going to set the matter for the date I suggested, and I'll bet dimes to doughnuts that you will not have a conflict."

The whole courtroom laughed, with the possible exception of the presenting lawyer. For most of us it was nervous laughter.

A slightly modified version of so-called "summary jury trials" could provide an affordable solution to the problem the judge identified. In a summary jury trial, both parties participate in a mock trial before an advisory jury. A summary jury trial is non-binding and is intended to be a flexible process. An abbreviated procedure is used. The advisory jury may hear only lawyers' arguments, or they may hear some testimony from witnesses for both sides.

The courts have found their power to hold summary jury trials under Rule 16 of the Federal Rules of Civil Procedure and under the court's inherent power to manage its cases.

While summary jury trials were designed to facilitate pretrial settlement of the litigation, much like a standard settlement conference, I propose that a summary jury trial could also be used as a sort of "mini-trial" – with some binding effect -- after initial discovery has been completed, but well before the close of discovery. The parties could agree, perhaps with the court's encouragement, that witnesses, subject to cross-examination, will provide evidence on only the main issues, or on some of the main issues.

In addition, the parties could agree that such evidence would be accorded the same evidentiary status that it would have if taken during a deposition.

If used in this way at an early stage of a case, the summary jury trial would allow each party to observe the perception of jurors on the main merits of its case. The parties then could make an early assessment of settlement potential. This also would be an efficient and cost-saving form of discovery, regardless of whether the case settles. Each side would be able to see the other's key documents and witnesses, as actually used to present a case.

This would allow them to strip away much of the clutter that clogs the discovery process, and it would help boil down the key evidence. Counsel for both sides would likely be in a better position to streamline any further discovery and prepare for trial. And, if the parties failed to reach settlement, they'd still have enough money left to try the case on the merits.

I believe that this proposed solution will gain traction, because there clearly has been a movement afoot to find ways to reduce costs for litigants. The Federal Civil Practice Section Council of the Illinois State Bar Association, for example, has been working on several proposals to cut trial costs down, such as reducing the need for and complexity of certain filings and procedures, and the United States District Court for the Northern District of California has adopted an expedited trial program.

Some of the details of the California program are worth exploring, to both understand the program itself and to compare it to the proposed modified summary jury trial. It offers parties the option of consenting to a binding one-day trial to occur six months after the parties agree to the process. The stated purpose is to "offer litigants access to justice in a more efficient and economical fashion." The nuts and bolts of the California program demonstrate a concentrated effort to reduce costs at all phases of a case:

- The program is consensual and binding.
- A case may be tried to a judge or jury.
- To participate, the parties execute an "Agreement for Expedited Trial and Request for Approval."
- Expedited time schedules and rules of procedure begin when the court approves the Agreement.
- The goal is to try the case in six months.
- Discovery is limited to 10 interrogatories, requests for production and requests for admission by each party, and 15 hours of deposition time to be used at their discretion.
- Experts are limited to one per side, absent agreement of the parties or leave of the court.
- Pretrial motions require leave of court and may not exceed three pages.
- Neither the terms of the Agreement nor its existence may be revealed to the jury.
- Juries will consist of six jurors. That may be reduced to five should a juror become unable to serve.
- The judge conducts jury voir dire and sets time limits for openings and closings.
- Each side is allowed three hours for presentation of its case, including cross-examination.
- Post-trial motions are limited to recovery of costs and attorneys' fees.
- Grounds for new-trial motions and appeals are limited.

While this program appears to have some real merit, a review of many of its provisions – specifically, for example, the 10-document request limit, the goal to try the case in six months, and the time limits for opening and closing statements – suggests that it will mainly serve cases with little or no complexity. My proposed modified summary jury trial procedure, however, is designed to be useful for all cases, and perhaps especially for complex ones.

The trick in complex cases is to evaluate all of the facts and issues and boil them down to a comprehensive and understandable theory of the case. Complex cases may require more than 10 document requests and 15 hours of deposition. But, after enough discovery is completed to formulate a theory of the case, a chance to then proceed quickly to a truer evaluation of those theories would prove invaluable for settlement, trial evaluation, and ultimately for reduction in costs.

By way of example, this could work extremely well in patent cases, which by their very nature are complex. Counsel for both the patent owner and the accused infringer in patent cases spend a great deal of time analyzing the meaning of specific words in the asserted patent claims and the application of those words to the accused product. This evaluation is done early in the case, yet two or more years of discovery will often elapse before there is any real opportunity for each party to legitimately "put on a case."

The fact gathering and surmising process that takes place during discovery is different than the actual presentation of those facts by a witness as part of an established theory of a case, but the sooner both parties can participate in and evaluate the latter, the better. A summary jury trial serves to accelerate the process in a cost-efficient way. ■

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