The Jury Expert™ For Excellence in Persuasion, Communication & Jury Selection

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# Knowing When and How to Indoctrinate

**By Alan Tuerkheimer, M.A., J.D.**

It's time for voir dire, but is anybody listening? Are jurors listening to attorneys? Are attorneys listening to jurors? More often than not the answer is no. Regardless of case type or jurisdiction, jurors are checking out. Their attention spans are flat-lining during a crucial phase of trial – voir dire.

At a critical time when jurors need to be particularly focused and engaged, they are losing focus and disengaging. Why is this happening? The reasons are varied and the problem is serious.

Sometimes, jurors are put off by an attorney's combative style or demeanor. Other times jurors are confused by awkwardly worded questions they do not understand, or by attorneys who seem more concerned with their next question than with listening to jurors as they respond to the question at hand.

Ironically, it is during voir dire that attorneys have their best chance to bond with the panel. Even if the jury selection is effective, it is during these early stages of voir dire that first impressions are being formed by jurors, and there will never be another opportunity to do just that.

Compounding the problem is that most attorneys say voir dire is their least favorite part of the trial process. Courtroom lawyers thrive on the adversarial nature of trials and have learned how to be effective advocates. However, achieving success during jury selection requires a somewhat different approach. Attorneys need to play by a completely different set of rules if they are going to conduct a successful voir dire. Combative, aggressive or argumentative questions will not help



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## WHAT'S INSIDE

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attorneys connect with the potential jury.

**Get the Jurors Comfortable**

Listening and getting jurors to feel comfortable enough to freely and openly express themselves is the key to success in jury selection. Jurors do not want to feel as if they are being prompted to say merely what the attorney wants to hear. The only answer counsel truly wants to hear during voir dire is an honest one. While indoctrination is an important part of effective jury selection, juror responses during voir dire reveal more about who will determine your client's fate. Not surprisingly, the most useful information is gathered when jurors are the ones doing the talking, and speaking in their own words.

Of course attorneys want jurors to view the case in ways that are favorable to their client and will attempt to indoctrinate the panel to some degree. The trick is to know when to do it and how to do it effectively.

*Generally, the use of indoctrinating questions should be modest and occupy no more than 25 percent of an attorney's total time and questions.*

Generally, the use of indoctrinating questions should be modest and occupy no more than 25 percent of an attorney's total time and questions. Conversely, since 75 percent of voir dire questioning will consist of more open-ended, information gathering questions, it is imperative to pick and choose the most crucial topic areas for indoctrination. The attorney needs to prioritize which questions will be best suited for the indoctrinating approach since there should always be a finite amount of such "questioning" in voir dire.

Jurors should be reminded early on there are no right, wrong or unimportant answers, and then the open-ended phase of voir dire should commence. If indoctrinating questions are asked at the front end of voir dire, this will stifle candid responses important to subsequent open-ended questions. It is these open-ended conversations where the most information about the panel is learned, in what is often a limited amount of time. Three words should guide attorneys at the beginning of voir dire – let them talk.

It is also important to keep in mind that jurors are typically smarter than attorneys give them credit for. Jurors often realize as soon as an attorney asks an indoctrinating question that they are being forced and frequently manipulated into seeing things a particular way. This reality may cause a backlash.

Jurors want to see the attorney listening to them talk and being interested in what they have to say. They do not want to be lectured to or forced to listen to something, especially from someone they have yet to connect with. At the right time, toward the end of voir dire, once rapport has been established with plenty of open-ended questions, some indoctrinating questions can be asked without risk of alienating the vast majority of the panel.

Attorneys sometimes have difficulties connecting with jurors because jurors may have firmly-held, preconceived opinions on topics such as tort reform, corporate mendacity, frivolous lawsuits, and the government's role in regulating corporations, among other interrelated "hot topic" litigation issues. These general beliefs help shape how jurors will view the evidence in the case, so counsel needs to choose which topics should be asked in open-ended fashion and which ones would be more effective in the indoctrination format later on in the process.

Either way, voir dire is the opportunity to get

answers to questions that will help determine whom you do not want sitting on your jury, and it also enables you to start framing the case in a jury-friendly way that is most beneficial to your side.

**Set the Tone First**

What is the best way to identify and then strike someone who believes all plaintiff lawyers are "money hungry" and will not give your client a fair shake and keep an open mind? How do we identify someone who believes corporations are the root of all evil, and despite pledges to follow the judge's instructions, will expect your corporate client to prove it did nothing wrong? How do plaintiff attorneys differentiate, in the eyes of the jury, between the substance underlying their client's claims and those "other" frivolous lawsuits? How can corporate counsel distinguish between its C.E.O. and those seen on the nightly news being dragged away in handcuffs?

*Easy, open-ended questions get the jury to "open up" for subsequent, more penetrating questions.*

As previously noted, open-ended questions are the best way to get jurors to express themselves candidly and empower them to talk earnestly about their experiences and world views. This is a universal perspective on jury selection, regardless of whether you are working for the plaintiff or the defense. Therefore, all lawyers should always begin with the "easy" open-ended questions first. There are no right, wrong or unimportant answers to these simpler questions, and this approach will often yield valuable information. Additionally, it gets the jury to open up for subsequent, more penetrating questions. These are by no means throwaway questions, but ones that set the tone for the remainder of voir dire.

Say that an attorney begins the voir dire process by immediately pressing jurors on how they feel about a paraplegic's chances of living a happy life as a result of a horrific accident caused by an unstable load on a truck. If the attorney is not careful and sensitive, jurors will (rightfully) check out of the process, harbor some resentment toward the attorney, and likely not communicate their true beliefs on the subject and probably other subjects delved into down the road. Warm-up questions for a case like this one might include questions such as:

- *"Does anyone know someone who is a paraplegic?"*
- *"How do you know that person?"*
- *"What kind of life does this person live?"*
- *"How long has s/he been a paraplegic?"*

Attorneys must not forget that the jurors are real people they are conversing with, so genuine expressions of sympathy, or reactions such as "I am sorry to hear that," will keep jurors listening. If a juror talks about a car accident and the lawyer doesn't follow up by asking whether anyone was hurt as a result of the accident, it will reinforce for jurors that attorneys are self-absorbed and only interested in winning their case. In addition, long lectures about the importance of jury duty and constitutional rights as an American are not recommended. Plaintiff and defense perspectives differ from this point forward, as each side is looking at things through a different lens and playing a different set of cards altogether. However, the proportion and timing of open-ended versus indoctrinating questions is universal.

Defense counsel often has to counteract the plaintiff's painted picture of their client as a distant, unconcerned, profit-driven corporation that will cut corners to save a buck. Receiving answers to the following open-ended question will go a long way toward ascertaining crucial information:

- *"Compared to an individual who has filed a lawsuit, what kind of standard should the defendant corporation be held to?"*

Or, if your client has received some bad publicity, important information and credibility can be

attained by asking the following:

- *"Decisions should be based on the information presented to you here at trial. Therefore, how would you react if, during deliberations, someone makes an argument either for or against my client based on pre-trial media and television?"*
- *"How reliable is information you get from television news?"*

Jurors will provide crucial information to these questions and will become more comfortable and willing to further engage in conversation. As a result, they will candidly answer more probing questions that follow.

In voir dire, the plaintiff has an opportunity to begin to illustrate the contrast between the behavior of their client with that of the defendant corporation. In many cases where the defense does not admit liability, jurors will put themselves in the plaintiff's shoes and wonder if what happened to the plaintiff could have happened to them or someone close to them. The defense will focus on the plaintiff and build a psychological barrier around the plaintiff so jurors do not "connect" and come away thinking this could have been them. Plaintiffs, on the other hand, want jurors to be thinking about how this could have been them. Voir dire should be structured with this in mind. Defense counsel, for example, should ask jurors about their thoughts on how far a corporation needs to go in ensuring its product is used in the proper manner, hoping to lead jurors to the conclusion they would not have done what the plaintiff did or did not do.

*Jurors often realize as soon as an attorney asks an indoctrinating question that they are being forced and frequently manipulated into seeing things a particular way.*



**Timing is Key**

Plaintiff lawyers will find dimensions that enable them to characterize the plaintiff as "any of us." If these are the "key" questions that require indoctrination, counsel better be sure the timing is right to ask these questions. If counsel wants feedback on these issues but does not feel the jury is ready for these questions, it is wise to take the more open-ended approach.

- *"What is a corporation's responsibility to the public at large?"*
- *"What can citizens of this county expect when they walk along XX path near YY river?"*

In many cases, questions should be asked that get at a sense of jurors' global views on personal responsibility.

- *"Juror 21, have you ever been in a car with someone who was so careless and so reckless that you thought at the time this person shouldn't be driving?"*

Of course the last thing counsel wants to do is appear to be blaming the victim, so proper wording is key to finding the right balance between planting a seed that will germinate into doubt about the plaintiff's claims on the one hand, and flat out blaming him for the accident on the other. Plaintiff lawyers should ask about whether, as a consumer, when a company manufactures something, a certain "margin of misuse" should be factored in. Take the following indoctrinating question as an example:

- *"Juror 23, do you believe that a product should be dangerous if it is properly used for its intended purpose? Why/ why not?"*

The obvious answer is no but there will be major differences in how jurors respond to this question depending on when it is asked in the voir dire process. If other, more pressing indoctrinating questions are more of a priority, this information can be gleaned early on simply by asking it in a more open-ended way.

**Discussing Damages**

It is important to be up front with jurors about damages. Plaintiff and defense perspectives differ here as well. The defense will want to receive commitments from jurors that arguing about lesser damages is not any kind of admission on liability or mean-spiritedness. Jurors should be told the client is not negligent, nor did it cause damage to the plaintiff, but in the event the damage phase is reached, the plaintiff's amount is unreasonable and here is why.

Plaintiff lawyers need to be looking out for something else. Jurors are typically more comfortable discussing a total damage amount than determining how much each facet of damages is worth. It becomes important to explain to jurors how this tendency is understandable but that fairness requires them to consider each question discretely. Even if this commitment is ignored during deliberations, the strongest pro-plaintiff supporters will use it to increase damages.

Overall, because the discussion of damages is something counsel often wants to "control," the indoctrinating approach seems best and most comfortable, but in the end this is not true. Determining juror bias is critical during voir dire and the indoctrinating approach does not let jurors with the greatest amount of bias against your case reveal such a bias if you are the one doing the talking. A good open-ended question during this phase is:

- *"How do you feel about pain and suffering?"*

Once jurors answer this question and provide insights into their biases, indoctrinating questions may follow that teach the jurors about pain and suffering. A supplemental jury questionnaire is ideal under this circumstance, but again, attorneys need to fight the urge to indoctrinate in a supplemental jury questionnaire – it never works and can even ruin a certain area of inquiry for oral voir dire.

Open-ended questions in a jury questionnaire are ideal for eliciting candid responses that are windows into juror bias. If lawyers must indoctrinate during oral voir dire, the open-ended information from a questionnaire will pave the way for the indoctrinating questions to be asked orally.

No matter what attorneys are told, they will always want to do some degree of advocating. The challenge is to accept this and then determine how and where this advocating should take place, and when it needs to take a back seat to the less confrontational approach of asking jurors open-ended questions. The key is to ask indoctrinating questions at the right time, and to follow proper sequencing during the voir dire process. If the proper balance is struck and attorneys shed the mold they're so accustomed to, the jury will find it easier to tune in, connect, open up and talk honestly, and as a result offer the most useful information needed to make intelligent decisions during jury selection.

*Jurors typically want to talk about themselves and their world but only when they feel comfortable about doing so – indoctrinating questions early on will not make jurors comfortable talking.*



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# Stories Breathe Life into Law

**By Diane F. Wyzga, R.N, J.D.**

Kierkegaard was right. "Praying doesn't change God, but changes the one who prays." I am an attorney and a storyteller. I recognize that stories change the listener, but in the course of teaching storytelling skills to attorneys, I have come to know how stories change the teller.

One day I was asked if I would teach storytelling skills to a group of plaintiff trial lawyers. They wanted the "silver-bullet" answer: the answer that would help them win, and win more often, and win better and bigger verdicts. They thought that was what they would get. We all did.

*Stories are the most powerful tools for communicating since they enter our heart by engaging our imagination.*

I taught storytelling skills to seven plaintiff litigators for eight hours a day over five consecutive Saturdays. I taught them that stories are the most powerful tools for communicating since they enter our heart by engaging our imagination. I taught them that a story is a narrative account of an event or events, which is dependent on listening, imagination, themes, plots, sensory images, and emotional content to convey meaning from facts. I taught them that the only way to heal the possible damage that law school had done in preparing them to advocate in the courtroom was to restore their imagination.



**Story and Law School**

Law school can erode imagination by fostering uniformity in thinking, emphasizing a dependency on intellectualism, and linear thinking. However, law school ways of thinking are not always the best way to convey the complex problems presented by our clients. What shapes the story is not just the facts but also the personal, emotional and conflicting aspects. These can change the picture and create different stories from the same facts.

**Identify Truth**

Great stories always have an element of truth which we know without empirical evidence. A story delivered with a truth helps the jury feel curious, transformed, and maybe even a little hopeful that they have the guidance to do something right. A story also helps jurors cut through their misconceptions and prejudices to get to the truth of the client's experience. Art takes the complex and brings it into something manageable.

**Facts Themselves Have No Life**

Most legal cases consist of a stale set of facts with at least two different interpretations. A story breathes life into a set of facts. It condenses information and gives meaning which moves a juror to action. If the story stimulates the jurors to think actively about its implications, the expectation is that they can collaborate to imagine further implications, recreations of ideas and new concepts. They can become co-creators of knowledge, fresh perspectives and solutions. The lawyer with a persuasive legal story has a better chance of prevailing.

**What Changed?**

What plaintiff litigators have come to know and appreciate is that we are all natural born storytellers, i.e., homo narrans. We have an ear exquisitely tuned to hear the human story, which consists of what the facts mean. Indeed, what the juror believes to be the meaning of the facts becomes truth about what it is to be human. John Steinbeck knew this when he wrote, "No man listens long to a story that isn't about himself."

Once the attorneys became aware of their own creative forces, they became more careful and accurate listeners and better representatives of their client's interests. When they learned how to listen for the client's themes and metaphors, they were able to bring out the truth and not just the facts. The transforming moment for

me was witnessing seasoned litigators learn how to listen to the whole person, not just to words or information.

A simple short story can reveal a truth more vividly and consistently than any laundry list of facts. This is certainly no less true than when an attorney tells his client's story.

**One Lawyer's Story**

*Understanding that there are many ways to craft and effectively deliver a story emboldened me to deliver Marco's story in a memorable and persuasive manner. I told Marco's story of being badly injured in a car crash as a hero's journey. I told the story of who he is as a man, a doctor, a Naval officer, and not just my client. Learning storytelling skills and techniques empowered me to go beyond the facts to see his life story and present the several themes of the case: a wounded military doctor at a career crossroads, a career officer precluded from realizing his dream of achieving the rank of captain, a man who has devoted his life to public service no longer able to serve the sick because of someone's momentary negligence.*

*When attorneys learn how to listen for the client's themes and metaphors, they are able to bring out the truth and not just the facts.*

*Over time I shaped and delivered Marco's story in a truthful but imaginative way that tapped into the listeners' emotions. These listeners were deciding Marco's case: mediators, insurance adjusters, defense counsel. The emotional content directed the listener and suggested Marco's true personality and good character. I could see and feel the story in my own imagination unfolding in the moment with the listeners.*

*The listeners said they could actually see the priest talking to the young Marco about his dream to be a doctor working in the Amazon jungle. The listeners became involved by placing themselves in the story with the images I provided. While I never directly said that Marco was a "good doctor," they filled it in from the story images, which were instrumental in describing Marco as a man.*

*Marco's story did not really insist that the listeners accept it. It merely invited them to listen and join in with their imagination. There was nothing adversarial about it. This is the kind of story that would prevail in a courtroom, in jury deliberations, because it would be remembered. Sure, Marco's story may be tied to facts and logic, but through imagination and emotion the story influences the juror on a deeper level. In turn, the juror adopted the story and felt as though his opinions come from his own personal experiences.*

*I used many story techniques and I knew enough to let my story rest and stop talking. I believe Marco and I connected as men over the power of a story. Using storytelling skills has helped me become a better storyteller, not of my own story, but of each client's story. I am learning how to discover and present truth in a heartfelt story artfully told. In this way I am developing skills of deep listening and oral expression. I am a storyteller.*

**Silver Bullet**

The essential question is, "What will persuade, educate, inform, inspire, or motivate a jury to act on your behalf?" The answer is, "A heartfelt story artfully told." Or as writer Zora Neale Hurston once said, "There is no agony like bearing an untold story inside you."



*This article is excerpted with permission from the National Storytelling Network and originally appeared in the Jan/Feb 2005 edition of Storytelling Magazine, the journal of the National Storytelling Network.*

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**Quick Courtroom Tips**

**By Bob Gerchen**

# Raise Emotion By Speaking Lower

It's an old saw that if you want people to listen to you, speak softly. Unfortunately, some lawyers take that to mean that their entire opening or closing should be spoken at a volume level audible only to dogs. That's not quite the idea.

The idea is, if you've been speaking in a normal tone of voice, or even loudly, and you suddenly lower the volume, people tend to sit forward and listen more attentively. Used judiciously, it's a great tool for raising the stakes. For example:

*"They can talk all they want about the mistakes my client, The Plaintiff, made, but let me tell you one thing about that (pause, much softer). She's owned up to those mistakes. And she's paid for those mistakes. Now it's time for them to own up, too."*

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*For more information on Bob Gerchen's book, **101 Quick Courtroom Tips for Busy Trial Lawyers**, visit www.CourtroomPresentationTips.com.*

**Jury News**

**By Joe Custer, J.D.**

# Jury Selection: Is There an Anti-Education Bias?[1]

While scholars put appreciable stock in the belief that higher educated members of jury pools are weeded out during the selection process in favor of a relatively under-educated jury, a recent article from the Connecticut Law Review finds otherwise.

## Findings

1. From a survey of the venire of the Connecticut federal courts, there is no significant evidence that the selected jury is undereducated relative to the venire. Roughly 50 percent of the venire had college degrees, as did roughly 50 percent of the jury. The slight variation that did exist was consistent with what would be expected had the selection of juries been completely random.

2. When comparing the education levels of the aggregated jury venires to those of the panels qualified by judges in Connecticut federal courts, there is no tendency on the part of judges to over-excuse the more educated members of the venire.

3. There was also no visible showing of increased peremptory challenges being executed against higher educated individuals by either the defense or the prosecution in regard to criminal cases, or by the plaintiff or defense attorneys in regard to civil cases.



## Conclusion

Scholars who put significant weight on the education critique may not be familiar with the existing practices of lawyers and the jury consultants who advise them in jury selection. This might help explain why the study did not support the expected anti-education bias of selected juries.

*Joe Custer is the Associate Director of the University of Kansas Wheat Law Library. He is also a faculty lecturer at the University of Kansas School of Law and adjunct professor in the Legal Information Management program at Emporia State University. He holds a B.A. from the University of Northern Iowa, a M.A. from the University of Missouri and a J.D. from the University of Arkansas. He is a member of the Missouri Bar, Kansas Bar, American Bar Association and the American Association of Law Libraries. He may be reached at jcuster@ku.edu.*

[1]Based on:
Levin, Hillel Y. and Emerson, Jay. (2006). Is There a Bias Against Education in the Jury Selection Process? *Connecticut Law Review, 38*. Hillel Y. Levin is a former law clerk for Judge Chatigny of the United States District Court of Connecticut. Jay Emerson is an Assistant Professor of Statistics at Yale University.

# The Summary Jury Trial: A Tool for Discovering Juror Reactions

**By Edahn Small**

We all think our case is a winner, right? Drawing from research in social psychology, Donna Shestowsky, a Professor of Law at U.C. Davis, calls this phenomenon naïve realism. Naïve realism is the tendency to overestimate the likelihood that jurors will share our viewpoint and disregard our opponent's as irrational. One solution is to find out how jurors would actually respond to your case. When this is your goal, the summary jury trial is the closest you can get to an actual jury trial. Summary jury trials offer several advantages to litigators and have been shown to assist in settlement.



**What Are Summary Jury Trials?**

The summary jury trial (S.J.T.) is a non-binding abbreviated trial in which both parties to the litigation participate. The rules for S.J.T.'s can vary slightly by jurisdiction and can be modified by advance stipulation. Parties may even agree to make the S.J.T. binding.

Typically, 10 jurors are selected from the jury pool and given questionnaires which are returned to the attorneys prior to voir dire. During a brief voir dire process, each attorney is given two challenges, leaving six jurors to hear the case.

Each side delivers a truncated opening statement, followed by a summary of their witness testimony and evidence. Only evidence that would be admissible at trial can be offered and live testimony is generally not presented. The rules of evidence are relaxed and marginal evidence is sometimes omitted.

After a 15-minute closing argument, the judge delivers a brief set of jury instructions. The judge may then individually poll jurors as to their verdict or damage recommendation, or wait until after deliberations. Both sides are then given an opportunity to discuss the case openly with the jurors. And don't worry: If you don't settle, the results of the S.J.T. are inadmissible at a subsequent trial.

**The S.J.T. Advantage**

The S.J.T. turns out to be quite cost-effective for clients as experts do not testify. They also tend to cut down on time as the entire trial usually takes less than a day and attorneys typically limit their preparation. A typical S.J.T. can be conducted for as little as $2,000.

*S.J.T.'s can assist attorneys by providing more reliable predictions about juror reactions. Attorneys can use this information to evaluate their case and respond more precisely to settlement offers.*

S.J.T.'s are superior to informal focus groups since they share more similarities with actual trials. In the S.J.T., both parties are given an opportunity to present their case, making the case and the jury's decision more realistic. Furthermore, the S.J.T. is conducted in a courtroom and jurors are rarely told that their decision is nonbinding. In fact, many jurors are led to believe just the opposite.

S.J.T.'s also give attorneys a chance to preview and evaluate the strength of their evidence, jury selection strategies, and case theory with the assistance of a trial consultant.

**Will It Really Help?**

S.J.T.'s can assist attorneys by providing more reliable predictions about juror reactions. Attorneys can use this information to evaluate their case and respond more precisely to settlement offers. In fact, research indicates that

95 percent of cases that undergo S.J.T. result in settlement.[1]

Critics object that 90 percent of all cases settle anyway.[2] However, a study published in 1999 of roughly 300 civil cases suggests that S.J.T.'s do indeed result in more frequent settlement than cases that undergo no A.D.R. whatsoever. Specifically, the study found that only 3.6 percent of cases eligible for S.J.T. actually went to trial. In contrast, of cases that were ineligible for any A.D.R., 10 percent resulted in trial.[3]

**What types of cases are appropriate for S.J.T.?**

S.J.T.'s have been used in single and multiple-party civil litigation involving personal injury, contracts, products liability, toxic torts, discrimination and antitrust. The amount in controversy has not been a limiting factor.

S.J.T.'s are especially appropriate for cases where:

- Complex issues are involved, but not so complex that they can't be summarized.
- Your case involves one or two key issues.
- Trial is expected to last more than four days.

S.J.T.'s are less appropriate for cases where:

- Litigation is brought as a matter of principle.
- Attorneys have strong vested interests in the outcome.
- The issues are too complex to be summarized.
- Your case turns on witness credibility.

When you need realistic juror feedback on your case, whether to evaluate a settlement offer or to evaluate a trial strategy, consider the summary jury trial. It can save you time and money without sacrificing the integrity of a real courtroom jury trial.

*Edahn Small received his B.A. in Psychology from U.C.L.A. and is currently a J.D. candidate (2006) at U.C. Davis School of Law. He plans to enter the fields of litigation consulting and research upon graduation. He may be reached at (818) 357-8225 or by e-mail at edahn.small@gmail.com.*

## From the Editor:

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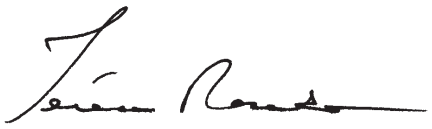
Thanks for reading *The Jury Expert*!



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[1] Employment Coordinator, Alternative Dispute Resolution. Private "Trials": Summary Jury Trials (2001).

[2] According to the 1987 Annual Report of the Director of the Administrative Office of the U.S. Courts, about 95 percent of the civil cases filed in federal courts terminate before trial begins.

[3] Connolly, John S. (1999). A Dose of Social Science: Support for the Use of Summary Jury Trials as a Form of Alternative Dispute Resolution. *William Mitchell Law Review 25,* 1430.

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