

# SETTLEMENT THROUGH SUMMARY JURY TRIALS

BY GEOFFREY L. HARRISON

**S**ETTLEMENT IS THE ONLY LEGAL WAY to eliminate litigation risk. Plaintiffs typically prefer to eliminate the risk by settling for considerably more substantial relief than defendants typically care to pay. Plaintiffs tend to think defendants have undervalued their case, while defendants often think plaintiffs are delusional. Still, the vast majority of cases settle.

The most decisive way to determine which party's valuation perspective is correct is to try the case. The *deus ex machina* is the jury's verdict, which sets the value of the case. The jury's verdict also fundamentally changes the settlement landscape. After verdict, the parties' evaluation of the litigation risk no longer turns on what the case is worth—the verdict determined that—and instead turns on the verdict's ability to withstand an appeal.

## Predicting Outcomes Through Mock Trials

If parties accurately could predict the jury's verdict, they would be much better situated to settle their cases. Parties in significant cases often spend tens of thousands of dollars conducting mock trials in the search for more and better information. They hope to learn how an impartial mock jury will evaluate their claims and defenses in order to get a fix on how the future real jury—which presumably shares demographic similarity with the mock jury—will evaluate the issues and perhaps decide the case.

Parties always conduct their mock trials in secret from the other side. Parties that “win” mock trials draw encouragement from the results and are less inclined towards the kind of compromise that makes settlement possible. Parties that “lose” mock trials, of course, tend to be more willing to compromise in order to contain the newly obvious litigation risk.

Even if a party discloses its mock trial results to its opposing party—this is a real possibility when the mock trial results in a mock victory, and unheard of when it doesn't—the opposing party has little basis to accept the results. Absent a degree of trust or naivete all too uncommon in litigation these days, the opposing party will not believe the mock trial results based just on the other side's say-so. The opposing party also surely will doubt that the mock trial presentation fairly and persuasively presented its case.

The opposing party may run out and conduct its own mock trial—and present the other side's case with presumed similarly absent enthusiasm—and achieve a mock victory that stands in stark contrast to the other side's claimed mock victory. It's nice for everyone to win their mock trial, but it makes a mockery of the prospect of settlement.

**“The day after the summary jury trial, the parties' decision makers—and counsel should mediate the case, now armed (or disarmed) with the summary jury's verdict.”**

## Section 154.021

Imagine how much more credible and effective a mock trial would be if both parties showed up and argued their own cases at the same mock trial before the same mock jury. The parties together would observe their chosen advocates

make their mock presentations of choice and then simultaneously receive the same mock verdict. There may be tears, but no excuses.

Section 154.021 of the TEXAS CIVIL PRACTICE & REMEDIES CODE authorizes Texas state courts to encourage parties to settle their disputes through various alternative dispute resolution procedures. These alternative dispute resolution procedures include mediation, mini-trial, moderated settlement conference, summary jury trial, and arbitration. See TEX. CIV. PRAC. & REM. CODE §§ 154.023-154.027. Section 154.026(a) describes a summary jury trial as “a forum for early case evaluation and development of realistic

settlement negotiations.” Subsections (b)-(e) provide that each party is to “present the position of the party” to a jury that may issue a non-binding “advisory opinion regarding the liability or damages of the parties or both.” Federal courts in Texas also have the authority to use summary jury trials as a method of alternative dispute resolution. See, e.g., Southern District of Texas Local Rule 16.4(A); Northern District of Texas Civil Justice Expense and Delay Reduction Plan III.C.

A summary jury trial is a mock trial in which each party presents a truncated version of its own case in a real courtroom before a real black-robed judge and a real jury, which at the end of the day will render a verdict. The jury’s verdict is not binding, but it provides a helpful reality check on the parties’ often divergent valuations of the litigation risk. The summary jury’s verdict is the best proxy the law provides for how a real jury will decide the case.

**Mediation Following The Summary Verdict**

The most effective way to approach settlement through a summary jury trial is to couple it with a mediation. The mediator and each party’s decision-makers should attend and observe the summary jury trial in person. Once the summary jury issues its verdict, courts typically will permit each party’s decision-makers and counsel to question the summary jury about its verdict and about how it viewed particular arguments and pieces of evidence.

The day after the summary jury trial, the parties’ decision-makers and counsel should mediate the case, now armed (or disarmed) with the summary jury’s verdict. Each side will have had at least the evening to attempt to rationalize and to digest the summary jury’s verdict—along with dinner and a bottle or two of wine—and to reconsider its settlement posture before the next day’s mediation. I’ve had dinner and a touch of wine under such circumstances.

**Intellect v. Cadence**

In *Intellect Communications, Inc. v. Cadence Design Systems, Inc.*, No. DV99-5670, Dallas State Court Judge Anne Ashby decided to invest one day of her time and a jury’s time in a summary jury trial in the hope of saving three weeks of everyone’s time in a real trial. It turned out to be a good investment.

Intellect had sued Cadence for breach of contract. Intellect and Cadence each signed a contract by which Cadence would acquire one of Intellect’s subsidiary companies for \$15 million cash. Cadence admitted that it signed the signature pages

to the contract, but argued that the contract never became effective because it did not deliver its signature pages to Intellect. Cadence decided at the last minute that the subsidiary was worth only \$5 million, not the full \$15 million contract price. Intellect argued that the contract did become effective because Cadence delivered its signature pages to the closing agent and also constructively delivered its signature pages to Intellect by telling Intellect it had signed the contract and the deal was done.

Intellect sought \$10 million in actual damages, the difference between the \$15 million contract purchase price and Cadence’s new \$5 million valuation of the company, plus lost profits of \$90 million. Cadence argued Intellect was entitled to no damages. The parties mediated the case and did not come close to settling.

The parties told Judge Ashby it would take about three weeks to try the case. Judge Ashby ordered the parties to conduct a one-day summary jury trial in her court, followed the next day by a mediation session with Dallas mediator Talmage Boston. On the day of the summary jury trial, Judge Ashby let each side conduct a ten-minute *voir dire* of a panel of 16 potential jurors and gave each side one strike. Judge Ashby asked the jury to take its job very seriously and explained that this was a one day summary trial and intended to help the parties settle the case.

I presented plaintiffs’ case-in-chief for Intellect for 90 minutes. My presentation was a combined opening statement/closing argument, and included an audio-visual display of documents and several very short videotaped deposition clips that I ran from my laptop at the lectern. Byron Wilder of Gibson Dunn & Crutcher then presented defendant’s case-in-chief for Cadence, and he, too, used an audio-visual display of documents and deposition clips that his colleague ran from behind counsel table.

After my brief rebuttal, Judge Ashby sent the jury off to deliberate for an hour. The jury came back after 45 minutes and awarded Intellect \$21.5 million in actual damages.

It’s nice to win a \$21.5 million verdict, even if it isn’t binding. The summary jury’s verdict gave full value to Intellect’s \$10 million breach of contract damages and some modest value to Intellect’s lost-profits damages. The verdict plainly opened Cadence’s eyes about its exposure and litigation risk, it ever moderated Intellect’s expectations about recovering substantial lost-profits damages. Talmage Boston mediated a \$9.45 million settlement a few days later. Without the summary

jury trial, there is no way the parties would have settled the case before trial.

Cadence's lawyer Byron Wilder was willing to share some of his thoughts on summary jury trials for inclusion in this article. Wilder agrees that summary jury trials can be an effective settlement tool, particularly in cases where mediation already has failed to produce a settlement. Wilder notes, however, that each side's amount of presentation time is so compressed compared to an actual trial that jurors may not accurately or even adequately understand the issues. Wilder suggests that perhaps a two-day summary jury trial would be more useful than a one-day summary trial because it would allow more time fairly to present each side's case and also to interview the jury.

Wilder's insightful comments reflect the inherent tension

in any summary jury trial—the very shortness of time that makes summary jury trials attractive also limits their usefulness as an accurate predictor of the actual outcome of a much longer actual trial.

#### Conclusion

Summary jury trials provide parties with excellent information about their case's jury appeal and fundamentally can change parties' willingness to settle. Courts and parties increasingly should engage in summary jury trials as they are the best way to have your day in court and still eliminate litigation risk.

*Geoffrey L. Harrison is a partner at Susman Godfrey, L.L.P., where he litigates commercial matters for plaintiffs and defendants. Harrison was recently elected to the Litigation Section Council and is a member of THE ADVOCATE'S Editorial Board.*