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Reviving the Civil Jury Trial: Implementing Short, Summary, and Expedited Trial Programs

INTRODUCTION

Civil jury trials are disappearing. In all courts, both state and federal, there is a decline in both the percentage of cases that go to trial and the absolute number of trials¹—all while the number of claims is greater than ever before.² The civil jury trial is losing its place in America’s justice system, with unfortunate consequences: “The decline in jury trials has meant fewer cases that have the benefit of citizen input, fewer case precedents, fewer jurors who understand the system, fewer judges and lawyers who can try jury cases—and overall, a smudge on the Constitutional promise of access to civil . . . jury trials.”³ However, despite the many factors contributing to the decline, there may be a way to invigorate the civil jury trial and restore its vital place in America’s justice system.

This Comment proposes the adoption of short, summary, and expedited (“SSE”) civil jury trial programs in response to the decline of the civil jury trial. These trial programs are a faster and cheaper alternative to the traditional jury trial that still retains many of a traditional trial’s key attributes and benefits. An SSE trial program encourages the use of a jury, shortens the time between initiating the lawsuit and a trial, reduces the overall cost of litigation to all parties, and allows attorneys and judges to gain needed experience—without burdening the already existing civil justice system or violating the constitutional promise of jury trials. Unfortunately, few jurisdictions have implemented these programs, and fewer still have done so in a

1. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459–60 (2004) [hereinafter Galanter, *The Vanishing Trial*].

2. Patrick E. Higginbotham, *Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University School of Law: So Why Do We Call Them Trial Courts?*, 55 S.M.U. L. REV. 1405, 1408 chart 1, 1409 chart 2 (2002).

3. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., A RETURN TO TRIALS: IMPLEMENTING EFFECTIVE SHORT, SUMMARY, AND EXPEDITED CIVIL ACTION PROGRAMS 1 (2012) [hereinafter A RETURN TO TRIALS]. This report was supported by the American Board of Trial Advocates and the National Center for State Courts.

way that supports the traditional jury trial instead of adding yet another way of avoiding it. Scholarship to date on the topic has yet to provide a complete model of an SSE trial program that has the possibility of reviving the jury trial. This Comment remedies this by proposing a model SSE trial program that incorporates the attributes necessary to help revive the civil jury trial.

Part I of this Comment describes the importance of the civil jury trial and the unique benefits that may be lost by its decline. Part II provides the characteristics of a model SSE trial program that incorporates these benefits into a new trial procedure that supplements and strengthens a jurisdiction's established civil trial system.

I. THE IMPORTANCE OF THE CIVIL JURY TRIAL

Our current system of civil trials is not perfect. And the data suggest that these flaws are contributing to the loss of this valuable institution.⁴ The purpose of the Federal Rules of Civil Procedure, a purpose shared by most states' rules, is to "secure the just, speedy, and inexpensive determination" of civil actions.⁵ Unfortunately, these goals are all too often not realized.⁶ The interrelated issues of cost,⁷ delay,⁸ and the potential for unpredictable and unjust jury

4. Many authors and institutions have noted and commented on the worrying phenomenon of the vanishing civil jury trial. See, e.g., Galanter, *The Vanishing Trial*, *supra* note 1; Higginbotham, *supra* note 2; David W. Elrod & Worthy Walker, *Fact or Fiction: Are There Less Jury Trials & Trial Lawyers? If So, What Do We Do About It?*, 3 LITIG. COMMENT. & REV. 53 (June/July 2010); Brian J. Ostrom et al., *Examining Trial Trends in State Courts: 1976-2002*, 1 J. EMPIRICAL LEGAL STUD. 755 (2004); Scott Brister, *The Decline in Jury Trials: What Would Wal-Mart Do?*, 47 S. TEX. L. REV. 191 (2005); Nathan L. Hecht, *The Vanishing Civil Jury Trial: Trends in Texas Courts and an Uncertain Future*, 47 S. TEX. L. REV. 163 (2005); MARC GALANTER & ANGELA FROZENA, POUND CIVIL JUSTICE INSTITUTE, *THE CONTINUING DECLINE OF CIVIL TRIALS IN AMERICAN COURTS* (2011), available at <http://poundinstitute.org/docs/2011%20judges%20forum/2011%20Forum%20Galanter-Frozena%20Paper.pdf>; BOSTON BAR ASS'N, *JURY TRIAL TRENDS IN MASSACHUSETTS: THE NEED TO ENSURE JURY TRIAL COMPETENCY AMONG PRACTICING ATTORNEYS AS A RESULT OF THE VANISHING JURY TRIAL PHENOMENON* (2006), available at <http://www.bostonbar.org/prs/reports/vanishingtrials1006.pdf>; Janine Robben, *Oregon's Vanishing Civil Jury Trial: A Treasured Right, or a Relic?*, OR. STATE BAR BULLETIN, (2009), available at www.osbar.org/publications/bulletin/09nov/jurytrial.html.

5. FED. R. CIV. P. 1.

6. Some of the most common complaints are that our court systems are plagued by "costs, delay, crowded dockets, and perceptions that the system is random and unpredictable." Higginbotham, *supra* note 2, at 1412.

7. Many argue that trial by jury "has become a system that . . . is simply too expensive to use." Brister, *supra* note 4, at 207. Preparing for and conducting trial is "the single most time-intensive stage of litigation," and thus the most expensive, "encompassing between one-

verdicts⁹ often force litigants into alternative methods of resolving their claims.¹⁰ While the challenges facing the current civil justice system are undeniable, so are its advantages. The civil jury trial holds historical and constitutional importance, has a unique ability to provide meaningful legal standards and a just method of conflict resolution, and forms the basis for understanding our civil justice system.

A. An Important Historical and Constitutional Right

The right to a civil jury trial was considered important enough to be written into the Bill of Rights and most state constitutions.¹¹

third and one-half of total litigation time.” Paula Hannaford-Agor & Nicole L. Waters, Nat’l Ctr. for State Courts, *Estimating the Cost of Civil Litigation*, CASELOAD HIGHLIGHTS, (Jan. 2013) 1, 7, available at http://www.courtstatistics.org/other-pages/publications/~media/Microsites/Files/CSP/DATA%20PDF/CSPH_online2.ashx [hereinafter *Estimating*]. There are multiple studies that attempt to quantify the costs and rewards of litigation. See, e.g., BUREAU OF JUSTICE STATISTICS, CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005 (2008), available at <http://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf>; JUDICIAL CONFERENCE ADVISORY COMM. ON CIVIL RULES & COMM. ON RULES OF PRACTICE AND PROCEDURE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION, 3 (2010), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20report.pdf>; *Estimating*, *supra*. By and large, however, the conclusion is that “[c]ivil litigation has been priced beyond the reach of most Americans.” Elizabeth J. Cabraser, *Apportioning Due Process: Preserving the Right to Affordable Justice*, 87 DENV. U. L. REV. 437, 439 (2010).

8. As one scholar noted, “[t]hat the disposition time for too many civil cases that reach a trial is not ‘speedy,’ or at least not ‘speedy enough,’ will surprise few. Delays have been characterized as ‘ceaseless and unremitting’ and, as such, present important challenges to the administration of civil justice.” Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813, 814 (2000). As Kent Syverud stated, “We thus have increasingly designed our system to provide incentives, including delay, that drive almost all to settle.” Kent D. Syverud, *ADR and the Decline of the American Civil Jury*, 44 UCLA L. REV. 1935, 1942 (1997).

9. “[T]here is a perception, on the part of businesses and governments, that there is less predictability, and greater variance, in the results of fact finding by a civil jury than in dispute resolution by other methods.” Syverud, *supra* note 8, at 1943; see also Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1109 (1996) [hereinafter Galanter, *Real World Torts*] (“[C]ritics claim that jury verdicts are irresponsible and capricious.”).

10. An in-depth discussion of these and other potential causes of the civil jury trial’s decline is beyond the scope of this Comment. For a discussion of the potential causes of the decline, including the advancement of alternative dispute resolution or greater use of summary judgment by judges, see Syverud, *supra* note 8, and Royal Furgeson, *Civil Jury Trials R.I.P.? Can It Actually Happen in America?* 40 ST. MARY’S L.J. 795, 851–58 (2009).

11. Margaret L. Moses, *What the Jury Must Hear: The Supreme Court’s Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 185 (2000).

Both the public and courts should be wary of the loss of a widely available and efficient justice system, whether by legislation that limits court access or by the encumbrance of paths that lead to the courtroom.¹² A system that protects the right of free speech or religious freedom only for a certain class of people would be antithetical to our constitutional guarantees of fairness and justice. Unfortunately, this is often the exact result of our current system of civil justice regarding the right to a civil trial by jury.¹³

To be sure, jury trials have never been the typical method of case disposition.¹⁴ For many people, including lawyers,¹⁵ a trial is “an awful contest to be avoided if at all possible.”¹⁶ Trials are adversarial, recorded, and public; they deprive a litigant of control over his or her fate, turning it over to a number of individuals he or she has never seen before.¹⁷ For many, “a trial is [viewed as] a waste of time and money. And trials are not to be trusted. This is especially true of trials with juries. Juries are strange, unpredictable beasts.”¹⁸ It should come as no surprise that many potential litigants and their attorneys often turn to mediation and settlements, which can provide the parties with the feeling that they have more control over their case.¹⁹ There is no dispute that attorneys should be “knowledgeable of, and familiar with, all of these alternative dispute resolution vehicles.”²⁰ It

12. See John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005) (arguing that there exists “structural due process rights” that guarantee access to a system of laws for the redress of wrongs—rights that courts are responsible for upholding).

13. See *Expedited Jury Trials Secure Americans’ Precious Right to Trial by Jury*, PR NEWSWIRE (Aug. 13, 2013), <http://www.prnewswire.com/news-releases/expedited-jury-trials-secure-americans-precious-right-to-trial-by-jury-219438921.html>.

14. Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 J. EMPIRICAL LEGAL STUD. 688, 689 (2004) (“The first point is that the ‘trial’ was never the norm, never the modal way of resolving issues and solving problems in the legal system. In a way, then, we can argue that the ‘vanishing’ is an illusion. There was never much to vanish. There never was a regime of full trials.”).

15. See *infra* note 39 and accompanying text.

16. Terry R. Means, *What’s So Great About a Trial Anyway? A Reply to Judge Higginbotham’s Eldon B. Mahon Lecture of October 27, 2004*, 12 TEX. WESLEYAN L. REV. 513, 516 (2006).

17. *Id.* at 516–17.

18. Friedman, *supra* note 14, at 694.

19. Means, *supra* note 16, at 517 (“[W]ho can blame a litigant and his lawyer for preferring mediation and settlement to the uncertainties of trial—uncertainties that cannot be avoided in the best courtroom with a great jury, presided over by the best trial judge in the land.”).

20. G. Thomas Eisele, *The Case Against Mandatory Court-Annexed ADR Programs*, 75

may very well be true that a jury trial may not be appropriate for every dispute or every client's situation.²¹ The problem with our current system arises when litigants are forced into alternative case disposition methods and cannot choose to exercise their right to a jury trial. Thus, despite the fact that the jury trial has increasingly become "the real ADR, a rarely used alternative to mediation and arbitration,"²² it should be recognized as a unique and essential form of conflict resolution in our justice system.²³

The purpose of strengthening and revitalizing the civil jury trial is not to suggest "that any set of litigants be forced to try a case when they prefer to settle";²⁴ it is to ensure that "our courts are open and ready, willing and able to try [a] lawsuit if that is what [the litigant] want[s] to do."²⁵ Currently, our courts are only open and ready to try a lawsuit if the litigant has the resources, time, and determination to get there. And for many individuals, this is simply not an option. Too often litigants are barred from entering the courtroom and are effectively forced to settle a case that should have gone to trial.²⁶ Often our current civil justice system allows money

JUDICATURE 34, 35 (1991).

21. "[T]he inefficiency of litigation as a dispute-resolution tool stems largely from the fact that it is intended to resolve disputes not by locating common ground but by discerning the truth of the situation. Fact-finding and truth-seeking may not be important in the context of mutual benefit, but they are an essential part of the equity and fairness principles that shape the litigation process." Craig C. Martin, *Avoiding the Inefficiency of Litigation*, 15 PRETRIAL PRAC. & DISCOVERY, Spring 2007.

22. Warren Moise, *Jury Trials—The New Alternative Dispute Resolution*, S.C. LAW., May 2010, at 10, 10.

23. See Eisele, *supra* note 20, at 35 ("There ought to be a place where [justice]—and that alone—controls and defines the parameters of permissible procedures—where one is not forced to submit to something less than due process, even temporarily. . . . I do not expect any to contend that arbitration, or mediation, or mini-trials, or any other ADR is equal to—or even approaches—the effectiveness of, or I might say the majesty of, a properly conducted jury or court trial as a fact-finding, truth-determining, justice-producing device.").

24. Kevin C. McMunigal, *The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 37 UCLA L. REV. 833, 878 (1990).

25. Means, *supra* note 16, at 521.

26. One study reported that "[m]ajorities of attorneys . . . answered affirmatively when asked: 'Does the cost of litigation force cases to settle that should not settle based on the merits?'" CORINA GERETY, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., EXCESS & ACCESS: CONSENSUS ON THE AMERICAN CIVIL JUSTICE LANDSCAPE 9 (2011); *see also* NAT'L CTR. FOR STATE COURTS, SHORT, SUMMARY, & EXPEDITED: THE EVOLUTION OF CIVIL JURY TRIALS 43 (2009) [hereinafter SHORT, SUMMARY & EXPEDITED] ("Combined with attorneys' fees and court costs, litigation expenses often dwarfed the potential damages that a jury might award, forcing some litigants to settle regardless of the merits of their case or possibly even forgo filing a claim at all.").

and procedure to determine which cases are important enough for a trial, rather than the merits of the claim or the desires of the litigants.²⁷ A civil justice system that provides greater access to jury trials and grants litigants at least the option of exercising their constitutional right to a jury trial is vital in order for the system to be truly just.

B. Creation and Promulgation of Normative Legal Standards

Although there can be no question that trials are often prohibitively expensive to the litigants involved, in another sense, the cost of litigation is “incredibly cheap”—at least when compared to a world without it.²⁸ A rule of law requires voluntary compliance and, although “compliance with societal norms must be enforced on occasion by [the civil justice system] to insure people do voluntarily comply,” the few instances of enforcement provide the rules by which others can model their lives.²⁹ One author said it this way:

We need trials, and a steady stream of them, to ground our normative standards—to make them sufficiently clear that persons can abide by them in planning their affairs—and never face the courthouse—the ultimate settlement. Trials reduce disputes, and it is a profound mistake to view a trial as a failure of the system.³⁰

Thus, civil trials serve two purposes: First, they directly resolve a number of disputes, though the number resolved by trial decreases each year. Second, “they project the standards and threats that parties and lawyers use in ‘bargaining in the shadow of the law.’ It is precisely because courts project such educative and deterrent messages that parties and lawyers are able to resolve the vast majority

27. Cabraser, *supra* note 7, at 445 (“[W]e have . . . come to accept all too often that due process is a commodity like any other. It is there for the buying, by anyone with the means to do so, and anyone who can afford it may have as much of it as desired. Those who cannot afford it must do without.”).

28. Judge Randall Rader, U.S. Court of Appeals for the Federal Circuit, Keynote Address at the Summit Conference on Intellectual Property, University of Washington: The Pace and Expense of Litigation in United States Courts (1999), in CASRIP PUBLICATION SERIES NO. 5, July 2000, at 2, available at <http://www.law.washington.edu/casrip/symposium/Number5/pub5atcl1.pdf>; see also Brister, *supra* note 4, at 212 (“The costs of the civil justice system pale in comparison to the societal costs that would follow if contracts could be broken, torts committed, and life, liberty, or property taken without any legal consequences.”).

29. Rader, *supra* note 28, at 3.

30. Higginbotham, *supra* note 2, at 1423.

of disputes without burdening the courts.”³¹ Even though trials only determine a small fraction of the total number of disputes, “the standards enunciated by the judiciary influence not only disputes that are brought to the courts, but also matters that never reach the courts. Beyond this, they influence the behavior of actors throughout society.”³² Individuals and businesses need the standards enunciated by courts in order to plan their affairs. Attorneys need the guidance of trials to be able to calculate the strength and value of a client’s claim—necessary information regardless of the eventual method of claim disposition.

The ability of a case to be appealed, something most alternatives to jury trials lack,³³ adds to the ability of the civil trial system to establish normative standards.³⁴ Without numerous cases applying legal principles to numerous fact scenarios, the legal principle remains “at a level of generality that erodes predictability of results and produces random outcomes,” which in turn reinforces the perception that a civil trial is too unpredictable.³⁵ As access to the courtroom is restricted, there are fewer cases, especially at the appellate level, to guide future behavior and cases, leading to the conclusion that “doctrine multiplies as decisive adjudication wanes.”³⁶ And the individuals bringing the claims that cast the “shadow of the law,” which influences future actions, choices, and disputes, do not include those who did not have the resources or time to pursue their claim. As the system of law affects all members of society, it should be expected in a democratic society that all

31. Galanter, *Real World Torts*, *supra* note 9, at 1101–02.

32. *Id.* at 1102; *see also* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (describing divorce litigation as bargaining in the shadow of legal rules); Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1 (1981) (suggesting that the shadow is cast by cost, risk, and indigenous regulation as well as by formal rules); HERBERT M. KRITZER, LET’S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION 30–56 (1991) (describing the nature of the day-to-day negotiation and settlement of cases in America’s civil justice system).

33. Brister, *supra* note 4, at 211 (“Private alternatives to trial by jury generally do not provide for appellate review or modification, even of obvious errors.”).

34. Chad M. Oldfather, *Error Correction*, 85 IND. L.J. 49, 49 (2010) (“Most depictions of appellate courts suggest that they serve two core functions: the creation and refinement of law and the correction of error.”).

35. Higginbotham, *supra* note 2, at 1419.

36. Galanter, *The Vanishing Trial*, *supra* note 1, at 506. “And as the proportion of tried cases falls, the portion of concluded appeals that are from trials falls and so does the absolute number of appellate decisions in tried cases.” *Id.* at 505.

members of society have the ability to participate in the creation of that system.

C. Experienced Lawyers and Judges

As fewer cases go to trial, there are fewer opportunities for lawyers, judges, and jurors to gain experience with trials. This fact is both a contributing factor in the decline of civil trials as well as an argument for its preservation.³⁷ The lack of experience with trials limits a lawyer's ability to "(1) objectively advise whether to pursue a trial or an alternative resolution forum; (2) effectively and efficiently conduct pre-trial discovery; (3) make accurate 'jury-value' predictions; (4) objectively assess a settlement offer; (5) effectively negotiate the best possible settlement for the client; and, (6) effectively assist the client in mediation."³⁸ The entire structure of our civil justice system, its procedures, incentives to settle, and the ethical rules that govern attorney action, is based on a process that many lawyers seldom, if ever, experience.³⁹ This lack of experience with trials can negatively "impact nearly every decision" made by an attorney outside of the trial.⁴⁰

37. Robert P. Burns, *Advocacy in the Era of the Vanishing Trial*, 61 U. KAN. L. REV. 893, 893 (2013) ("If lawyers increasingly view trials as deviant events, their approach to litigation cases will itself become one of the causes of the trial's disappearance.").

38. Tracy Walters McCormack & Christopher J. Bodnar, *Honesty is the Best Policy: It's Time to Disclose Lack of Jury Trial Experience 4* (Univ. of Tex. Sch. of Law Pub. Law and Legal Theory Research Paper Series, Working Paper No. 151, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1375103.

39. *Id.* at 10 ("[A] majority of . . . litigators had not tried a single case to a jury until they had practiced for approximately 7 years."); McMunigal, *supra* note 24, at 837 ("Can one expect lawyers to understand, respect, and adhere to the values of an ethical and legal system premised, as ours is, upon a process of adjudication lawyers seldom, if ever, experience?"); Burns, *supra* note 37, at 895 ("[T]he entire structure of civil procedure has been built up as a path to an adversary trial It is hard to understand much of civil practice . . . without understanding the trial.").

40. McCormack & Bodnar, *supra* note 38, at 15. The need for trial experience extends, in some measure, even to transactional lawyers. See David K. Bissinger & Trent T. McKenna, *Arbitration, Bench Trial, or Jury Trial? A Functional Guide for In-House Counsel*, THE ADVOC., Fall 2011, at 32, 32 ("In truth, the value of arbitration versus court litigation depends on the case, the facts, and the parties. Moreover, parties typically must decide to arbitrate at a contract's inception, when the parties generally expect that their deal will succeed, not fail. Indeed, the parties preparing the contract predominately use transactional lawyers, not litigators. As a result, the parties and the lawyers documenting the deal may lack trial experience that could help make an informed decision."); Moise, *supra* note 22, at 12 ("Even transactional lawyers need to know how things pan out in court, how those documents will be received by juries and what is admissible at trial.").

There are also, of course, significant costs to having an inexperienced attorney at trial. A “right to a jury trial would be meaningless” if the attorney cannot effectively represent his client’s interests.⁴¹ Inexperienced attorneys waste time, increase their client’s litigation costs, and may effectively deprive their client of his day in court. Many law firms have recognized this serious issue, establishing “formal programs under which young lawyers are permitted, indeed encouraged, to take on small cases” or participate in other training methods to gain the experience needed to handle a case at trial.⁴² Even though most cases will never go to trial, the fact remains that the shadow of the civil jury trial influences how disputes are resolved, and an attorney who has little experience with trials will be at a disadvantage.

The decline in trials has impacted both sides of the bench. “With fewer trials there are fewer lawyers with trial experience and, consequently, fewer judges taking the bench with trial experience.”⁴³ Where “substantial trial experience” was once a requirement to be a judge, this requirement “could not practically be enforced today, given that only prosecutors and criminal defense lawyers regularly try cases.”⁴⁴ This is troubling, considering that trial judges are accorded a great deal of discretion in court procedures and rulings, and the “justification of [that] discretion . . . rests on a claim that the trial judge has special knowledge,” which can only come from a judge’s “skill and experience.”⁴⁵ The lack of trials means that judges take the bench with little trial experience and little hope of gaining more, as judges now “conduct trials at only a fraction of the rate that their predecessors did.”⁴⁶ This inexperience calls into question whether discretion is being (or even can be) exercised properly. The concern over judicial inexperience may be yet another factor driving potential litigants away from the courthouse, as a judge that is inexperienced

41. Eisele, *supra* note 20, at 40.

42. BOSTON BAR ASS’N, *supra* note 4, at 26–28.

43. Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745, 755 (2010). Judge Higginbotham also notes that “Federal trial judges selected today . . . often lack relevant trial experience, thereby reinforcing the need for delegation [of the judge’s work to magistrate judges, law clerks, and other staff].” *Id.* at 760–61.

44. *Id.* at 755–56.

45. Elizabeth G. Thornburg, *The Managerial Judge Goes to Trial*, 44 U. RICH. L. REV. 1261, 1295 (2010).

46. Galanter, *The Vanishing Trial*, *supra* note 1, at 460.

with trials may issue incorrect rulings, forcing a party to decide whether an appeal is less costly than an erroneous and unjust result.⁴⁷

II. REVIVING THE CIVIL TRIAL SYSTEM THROUGH SHORT, SUMMARY, AND EXPEDITED TRIAL PROGRAMS

A. Overview of Implemented and Proposed SSE Trial Programs

Short, summary, and expedited (“SSE”) trial programs, under various names, have existed for several years now, but few jurisdictions have implemented them, and there is no single model that has been adopted.⁴⁸ Generally, these programs are attempts to provide a faster and less expensive alternative to the traditional jury trial while still retaining some of the benefits of a jury. Programs vary widely from one jurisdiction to another with “some courts view[ing] their program as one of several ADR tracks, while others view it as a legitimate jury trial.”⁴⁹ The goal of the SSE trial program proposed in this Comment is to establish a program that both functions and is

47. In the field of patent law, the Federal Circuit Court of Appeals “reverses more than 30 percent of the patent appeals it hears,” which “high reversal rate is attributable [in part] to judicial inexperience.” Bruce Moyer, *Creating Patent Expertise in the District Courts*, WASH. WATCH (June 2007), <http://www.fedbar.org/Advocacy/Washington-Watch/WW-Archives/2007/June-2007.aspx>. This judicial inexperience with patents stems from the fact that a district court judge only sees a patent case once every seven years. *Id.* Although district judges currently try civil cases (of any kind) more frequently than that, if the decline continues, we may soon approach that result. For example, in 2002 Marc Galanter estimated that there were around seven civil trials (five jury and two bench) per sitting district judge in that year, but points out that even that low number overstates the actual number of trials conducted by a sitting judge. Galanter, *The Vanishing Trial*, *supra* note 1, at 521–23. And the number of trials only continues to decrease. See David J. Beck, *A Civil Justice System With No Trials: Are We Sure We Want to Go There?*, 76 TEX. B.J. 1073, 1073 (2013) (reporting that in 2010, “Article III judges tried fewer than four civil jury trials”).

48. SSE trial programs, with different names, structures, and results, have been implemented in Arizona, California, Colorado, Florida, Nevada, New Jersey, New York, Oregon, Texas, South Carolina, and Utah. For some, the program has been implemented state-wide; for others, like Nevada, only a few judicial districts have adopted the new programs. RACHEL LITTLE, BAYLOR UNIVERSITY SCHOOL OF LAW, STATE-BY-STATE SUMMARY OF EXPEDITED JURY TRIAL PROGRAMS; GINGER APPLEBERRY ET AL., LOCKE LORD, NEW EXPEDITED ACTION RULES GO INTO EFFECT IN TEXAS (2013), *available at* http://www.lockelord.com/qs_2013newtexas/. This Comment refers to these programs collectively as “short, summary, and expedited” trial program as that is the name adopted by the Institute for the Advancement of the American Legal System, the American Board of Trial Advocates and the National Center for State Courts in their report. See *generally* A RETURN TO TRIALS, *supra* note 3. This name also encapsulates the purpose and major features of these trial programs—short trials, dealing with only certain limited issues, that are heard expeditiously.

49. SHORT, SUMMARY & EXPEDITED, *supra* note 26, at 3.

treated as a legitimate jury trial—a program that supplements, but not supplants, the existing civil justice system. For such a program to be successful, it must maintain the benefits of a traditional jury trial while minimizing the aspects that reduce access, most notably cost and delay.⁵⁰ It also has to integrate into the existing jury trial system without adding complicated, costly, and time-consuming procedures to the system, which defeat its purpose.⁵¹

Aside from this Comment, the only major discussion on how an SSE trial program should be designed is provided by the Institute for the Advancement of the American Legal System (“IAALS”),⁵² the American Board of Trial Advocates (“ABOTA”),⁵³ and the National Center for State Courts (“NCSC”).⁵⁴ These organizations released a joint report proclaiming their “support of existing expedited jury trial programs” and “encourag[ing] the adoption of similar programs throughout all jurisdictions.”⁵⁵ ABOTA provided a list of five features of an SSE program that it considered were “critical for success.”⁵⁶ Their goal was to provide a “flexible roadmap” instead of a “specific set of parameters to be implemented in every program and for every case.”⁵⁷ The features described in ABOTA’s report are

50. Cost and delay have been cited as the motivating factors in those jurisdictions that have already adopted SSE trial programs. *See, e.g.*, NATALIE BROWN ET AL., COLORADO AT THE CROSSROADS: CIVIL ACCESS PILOT PROGRAM (2011), available at http://www.cobar.org/tcl/tcl_articles.cfm?articleid=6855 (discussing a proposed SSE trial program in response to a “crisis of cost and delay” in access to Colorado’s civil justice system).

51. A RETURN TO TRIALS, *supra* note 3, at 6 (“The SSE program should be designed to address existing obstacles that impede efficient case processing and resolution in that jurisdiction, but without introducing procedures or requirements that affect otherwise well-functioning processes.”).

52. IAALS “is a national independent research center at the University of Denver dedicated to the continuous improvement of the process and culture of the civil justice system.” A RETURN TO TRIALS, *supra* note 3.

53. As stated on their website, “[t]he American Board of Trial Advocates is a national association of experienced trial lawyers and judges dedicated to the preservation and promotion of the civil jury trial provided by the Seventh Amendment to the U.S. Constitution. First and foremost, ABOTA works to uphold the jury system by educating the American public about the history and value of the right to trial by jury.” AM. BD. OF TRIAL ADVOCATES, <https://www.abota.org/> (last visited Jan. 25, 2014).

54. NCSC “is a nonprofit organization dedicated to improving the administration of justice by providing leadership and service to the state courts . . . [and] engages in cutting-edge research to identify practices that promote broad community participation in the justice system.” A RETURN TO TRIALS, *supra* note 3.

55. A RETURN TO TRIALS, *supra* note 3.

56. *Id.* at 3–4.

57. *Id.* at 2.

indeed critical to a successful SSE program, but are insufficient on their own to establish a program that can truly revive the declining civil jury trial system.

This Comment provides a model SSE trial program that describes the specific components and characteristics that an SSE program should have to increase the chance of reviving the civil jury trial. While these include the attributes found in the joint report, the Comment also includes many that were either omitted or described as optional. To be sure, there are many factors that can and should be considered in implementing a new trial program;⁵⁸ however, this Comment addresses only those that are essential to creating a system by legislative or judicial action that supports the traditional civil jury trial.

In reviewing these features, this Comment will draw comparisons to the Eighth Judicial District of Nevada's Short Trial Program ("STP").⁵⁹ The information about the Nevada STP comes mainly from a report by the National Center for State Courts that describes in some detail most of the implemented state SSE trial programs.⁶⁰ Nevada's program was chosen due to its established record, positive acceptance by participants, national public recognition,⁶¹ and incorporation of the necessary characteristics. Furthermore, in the Nevada district courts that have adopted the program, the number of short trials has exceeded the number of traditional trials. This demonstrates an SSE trial program's proven ability to strengthen, supplement, and revive the traditional civil jury trial.⁶² Although not perfect, the Nevada STP is an excellent real-world example of the capabilities of a properly designed SSE trial program.

58. Such characteristics could include establishing the number of jurors who will serve and the number required for a verdict, the selection process for the judge or judge pro tempore, the types of cases that can be heard in an SSE trial, the number and types of motions that can be brought, and whether there will be limits on the amount of recoverable damages. See *id.* at 7, for a list of additional characteristics.

59. This district serves Clark County, which includes Las Vegas and is the most populous county in Nevada; its civil filings comprise 77 percent of all Nevada civil filings. SHORT, SUMMARY & EXPEDITED, *supra* note 26, at 43 n.27.

60. SHORT, SUMMARY & EXPEDITED, *supra* note 26. The description of the Nevada program is found on pages 42–53 of the report. Further references will be made to the Nevada Short Trial Rules, abbreviated N.S.T.R.

61. The Nevada short trial program has won the National Achievement Award from the National Association of Counties as an innovative program that contributes to and enhances county government in the United States, as well as coming in first place in the 15th Annual Better Government Competition sponsored by the Shamie Center for Restructuring Government at the Pioneer Institute for Public Policy Research. *Id.* at 51.

62. *Id.* at 47, n.52.

*B. The Characteristics and Components of a Model SSE Trial Program**1. The program encourages trial by jury*

One of the most valuable hallmarks of our current civil justice system is the availability of a jury.⁶³ While there are many critics of this feature,

serious students of the jury are virtually unanimous in their high regard for the jury as a decision-maker. . . . [R]esearchers concur that jurors on the whole are conscientious, that they collectively understand and recall evidence as well as judges, and that they decide factual issues on the basis of the evidence presented.⁶⁴

When compared to bench trials, juries most often rule the same way as an experienced and competent judge.⁶⁵ And juries have value that goes far beyond dispute resolution.⁶⁶ The civil jury is a competent and fair institution for resolving conflicts, and an SSE program should encourage its use.⁶⁷

The best way to encourage the use of juries is to incorporate procedures that make it easier and more attractive to do so. In Nevada's STP, for example, the judge uses Nevada's model jury instructions and the parties prepare evidence booklets containing all the reports and documentary evidence that will be used at trial.⁶⁸ These procedures help simplify the process of using a jury by allowing the parties to know exactly what the jury will hear, both the law and the facts, before the trial begins. The booklets in particular

63. Brister, *supra* note 4, at 212–15.

64. Galanter, *Real World Torts*, *supra* note 9, at 1109.

65. *Id.* at 1110 (“[J]uries decide cases along the same lines as judges. . . . Judges and juries agreed on liability in seventy-nine percent of the cases.”). Another study concluded that “unjustified payments [issued by a jury] are probably uncommon.” Mark I. Taragin et al., *The Influence of Standard of Care and Severity of Injury on the Resolution of Medical Malpractice Claims*, 117 ANNALS INTERNAL MED. 780, 780 (1992).

66. *The Civil Jury*, 110 HARV. L. REV. 1408, 1421–22 (arguing that “[e]ven if juries are imperfect factfinders, they serve and represent other incommensurable values that must also be taken into account in any comprehensive assessment of the jury system,” as they serve “as a bulwark against despotism, as a legitimator of trial outcomes, and as a forum for democratic process”).

67. SHORT, SUMMARY & EXPEDITED, *supra* note 26, at 51 (reporting that the use of juries in short trials has not seemed to “offer a distinct advantage for either plaintiffs or defendants”).

68. *Id.* at 44–45. Parties may propose or agree to additions to the standard jury instructions, which the judge may include. N.S.T.R. 25.

help the jury to fully comprehend the evidence that will be relied upon by the parties at trial.⁶⁹

Nevada's STP also allows the parties to choose how many jurors they want empanelled; the default number is four, but the parties can stipulate to a six- or even eight-person jury.⁷⁰ This encourages jury use in two ways: First, the default small jury panel decreases the cost of obtaining a jury.⁷¹ Second, the option of stipulating to a larger panel alleviates potential fears of excessive and unpredictable results by a small number of individuals.⁷² These features, in conjunction with the other features described below, make easier and encourage the use of a jury.

As an SSE trial program encourages and allows for an abbreviated trial by jury, the procedures that the program implements cannot violate the Seventh Amendment or its equivalent in a state's constitution. These constitutional guarantees have generally been held to preserve only the "fundamental elements" of the right to a civil jury, not the "great mass of procedural forms and details" that accompany the system.⁷³ The SSE trial program as outlined is specifically designed for a jury of peers to determine the facts that lead to an enforceable judgment, the fundamental elements of a civil jury trial.

69. Chris A. Beecroft, Jr., *The Nevada Short Trial Program*, NEV. LAW., June 2014, at 21, 22 (reporting that some jurors "commented that, because they received the evidentiary booklets before the trial, they were completely familiar with the evidence long before they entered the deliberation room").

70. SHORT, SUMMARY & EXPEDITED, *supra* note 26, at 44 n.32.

71. The jury fees for a four-person jury in Nevada's program are \$160 and "are paid by the party demanding the jury". *Id.* at 45.

72. Smaller jury panels have withstood constitutional attack. *See Colgrove v. Battin*, 413 U.S. 149, 157 (1973) (quoting *Williams v. Florida*, 399 U.S. 78, 100-01 (1970)) (rejecting "the notion that the reliability of the jury as a factfinder is a function of its size") (alterations and quotation marks omitted). Although constitutional, studies do show that increased jury size leads to more moderate and predictable results. *See, e.g.*, Jill P. Holmquist, *Does Jury Size Still Matter? An Open Question*, THE JURY EXPERT (May 1, 2010), www.thejuryexpert.com/2010/05/does-jury-size-still-matter-an-open-question/; NICOLE L. WATERS, JUDICIAL COUNCIL OF CALIFORNIA, DOES JURY SIZE MATTER: A REVIEW OF THE LITERATURE (2004). Another option is to require that parties have a high-low agreement for damages in place, as Utah has done, which limits the possibility of wild results from a small jury as the award has both a ceiling and a floor. *See UTAH CODE ANN. § 78B-3-903(6)(d) & (8)*.

73. *Galloway v. United States*, 319 U.S. 372, 390 (1947) ("[T]he [Seventh] Amendment was designed to preserve the basic institution of the jury trial in only its most *fundamental elements*, not the great mass of procedural forms and details.") (emphasis added); *see also Parklane Hosiery v. Shore*, 439 U.S. 322, 336-37 (2010).

A jurisdiction that implements an SSE program will want to ensure that its procedures support this constitutional right. In the single case that addressed the constitutionality of an SSE trial program, the plaintiff challenged a statute that required the award of mandatory, non-binding arbitration to be included in the evidence presented to the jury during a short trial in Nevada.⁷⁴ The plaintiff argued that this requirement violated his right under the Nevada Constitution to a trial by jury because it deprived the jury of its ability to independently determine the facts, including the final award amount.⁷⁵ The Nevada Supreme Court rejected this argument, finding that a mandatory jury instruction explicitly told the jury not to give the award undue weight and that the jury was responsible to “arrive at a conclusion based upon [its] own determination of the cause of action.”⁷⁶ This case highlights the importance of ensuring that the jury is the finder of fact and is appropriately instructed. By so doing, the SSE trial program upholds, rather than weakens, a constitutional right to a civil trial by jury.

2. The program can issue enforceable judgments

One of the major differences between a trial and a settlement or mediation is that a trial results in an enforceable verdict and judgment. A settlement or mediation agreement, however, results in merely a contract or promise to pay, which must be reduced to a judgment through another legal proceeding—adding yet another step before it can be enforced. As the Fourth Circuit stated:

From the view of the Plaintiffs, a judgment in their favor is far preferable to a contractual promise by the Defendants in a settlement agreement to pay the same amount. This is because district courts have inherent power to compel defendants to satisfy judgments entered against them . . . but lack the power to enforce the terms of a settlement agreement absent jurisdiction over a

74. *Zamora v. Price*, 213 P.3d 490, 493–95 (Nev. 2009). The plaintiff argued that his substantive due process rights were infringed “because his case is subject to [short trial] procedures that cases with amounts at issue greater than [\$40,000] are not.” *Id.* at 495. The Nevada Supreme Court, applying rational basis review, rejected this argument, finding that the distinction was a “rational legislative choice because it provides more expedited and less expensive proceedings for smaller claims, while preserving litigants’ right to a jury trial and appeal.” *Id.*

75. *Id.* at 493.

76. *Id.* at 494.

breach of contract action for failure to comply with the settlement agreement.⁷⁷

If the goal is to achieve a stronger, more robust civil jury trial system, then the methods proposed to strengthen it must have the ability to issue enforceable judgments. Otherwise, the method is just ADR with a jury and may become just another time—and money—consuming step in a drawn-out litigation process.⁷⁸ This vital aspect of an SSE program provides litigants their “day in court.” In the Nevada STP, the judgment of the judge pro tempore is enforceable, though it must be approved by a district court judge.⁷⁹ In this way, Nevada’s program allows for enforceable judgments after a jury trial, entered by a “true” judge, but without the judge being required to oversee the entire trial.⁸⁰

3. *The trial itself is short*

As noted above, preparing for and conducting the trial takes up a majority of attorney time invested into any given case.⁸¹ As attorney time usually drives attorney fees, the trial in an SSE trial program must be restricted in order to decrease the costs involved. Nevada’s STP allows fifteen minutes to each party for voir dire and three hours to each side to present their case.⁸² The most important effect of this restriction is that it eliminates the possibility for long, drawn-out, and expensive trials. Delay and cost are reduced for all parties. However, these benefits require attorneys to tightly focus their

77. *Simmons v. United Mortg. & Loan Inv., LLC*, 634 F.3d 754, 765 (4th Cir. 2011); *see also Zinni v. ER Solutions, Inc.*, 692 F.3d 1162, 1168 (11th Cir. 2012) (“A judgment is important . . . because the district court can enforce it. Instead . . . Appellants were left with a mere promise to pay. If Appellees did not pay, Appellants faced the prospect of filing a breach of contract suit in state court with its attendant filing fees—resulting in two lawsuits instead of one.”).

78. Richard A. Enslin, *ADR: Another Acronym, or a Viable Alternative to the High Cost of Litigation and Crowded Court Dockets? The Debate Commences*, 18 N.M. L. REV. 1, 10, 13 (1988) (“The Mini-Trial is not a trial at all. . . . It is a settlement device. . . . It is binding on no one . . .”); *see also Eisele, supra* note 20, at 35.

79. This was not always the case. The Nevada Supreme Court chose to implement this feature in 2008, though its reasons for doing so could not be found. SHORT, SUMMARY & EXPEDITED, *supra* note 26, at 46. The judge pro tempore’s judgment has almost always been approved. *Id.* at 49–50.

80. *See infra* Part II.B.4 for a discussion of Nevada’s use of judges pro tempore and the advantages and disadvantages of the same.

81. *Supra* note 7.

82. SHORT, SUMMARY & EXPEDITED, *supra* note 26, at 44.

arguments on only the essential, contested facts. One judge pro tempore from Nevada stated that “the time constraints on presenting a case make short trials even more rigorous than regular jury trials. Trial lawyers must be more prepared and more focused on essential trial issues.”⁸³ An additional benefit of a short trial is that jurors generally appreciate the ability to fulfill their civic duty within one day, with less chance of wasted time.⁸⁴

There is a due process concern with limiting a party’s time to present her case.⁸⁵ Generally, judicially imposed time limits have been upheld as a valid exercise of a trial court’s inherent power, within certain boundaries.⁸⁶ In order to satisfy due process, the parties must have sufficient time for an “efficient, yet effective, presentation” of their claims.⁸⁷ One factor that mitigates this concern is that parties to an SSE trial know in advance the time constraints placed on their case and can plan accordingly. The ability of a party to remove the case to a full trial court, discussed below,⁸⁸ may be essential in ensuring that due process is not violated; if a case is too complex for a party to effectively present her case within the strict time limits, she has the option of removing the case to the less-restrictive trial court.

83. *Id.* at 50. This statement should not be read to mean that an attorney must spend more time preparing for an SSE trial as compared to a regular trial—the opposite should be true. However, due to the time restraints, an attorney must decide well in advance of trial the issues that are most important and prepare to use every minute wisely, as he does not have the freedom to cover every issue, ask every question, or describe every piece of evidence.

84. *Id.* at 48; Beecroft, *supra* note 69 (“Many [jurors] were so satisfied with the one-day trial that they said that they would be willing to serve again.”).

85. Another related issue is that SSE programs typically limit the time available for voir dire, which has been a source of complaints with both Nevada’s and California’s SSE trial program. SHORT, SUMMARY & EXPEDITED, *supra* note 26, at 51; Yixi Cheng, A Law and Economics Approach to the California Expedited Jury Trials Act 10 (Spring 2012) (unpublished legal studies honors thesis, University of California, Berkeley), *available at* <http://legalstudies.berkeley.edu/files/2012/06/Cecilia-Cheng-Sp12.pdf>. However, “[t]he right to voir dire is not a constitutional right but is a means to achieve the end of an impartial jury.” *People v. Boulterice*, 7 Cal. Rptr. 2d 279, 285 (Cal. Ct. App. 1992) (citing *People v. Bittaker*, 774 P.2d 659, 681 (Cal. 1989)).

86. See John E. Rumel, *The Hourglass and Due Process: The Propriety of Time Limits on Civil Trials*, 26 U.S.F. L. REV. 237, 238 (1992).

87. *MCI Comm. Corp. v. American Telephone and Telegraph Co.*, 708 F.2d 1081, 1172 (7th Cir. 1983).

88. *Infra* Part II.B.10.

4. *The trial date is certain and fixed*

One of the most important aspects of an SSE trial program is that the trial date is set and continuances are rarely, if ever, granted. This forces the parties to be prepared for the trial on the date for which it is scheduled. This drives the pretrial process, focuses the parties on the key issues, and reduces unnecessary expenses. One way of ensuring that the trial date is fixed is by the use of judges pro tempore or similar positions. By assigning the SSE trials to practitioners who don't have a busy docket to manage, the trial date is more likely to stay firm and avoids overwhelming trial judges' dockets.⁸⁹ Nevada's short trials are presided over by judges pro tempore who "must be active members of the state bar, have a minimum of ten years of civil trial experience or its equivalent, and fulfill at least three hours of accredited continuing legal education on short trial procedures each year."⁹⁰ Nevada's STP cases are scheduled for trial within 240 days after the parties' stipulation to enter the program.⁹¹ Continuances are rarely granted, though some defendants, especially those "who view a relative delay in trial as a strategic advantage in settlement negotiations," have complained that scheduling the trial date within six months of the stipulation moves things too quickly.⁹²

The advantages of expeditious calendaring gained from using judges pro tempore or similar positions must be balanced, however, against the desire to have SSE trials be viewed as "real trials with real judges."⁹³ "Real judges" help reinforce the legitimacy of the SSE trial program. However, increasing the workload of already busy judges by assigning them more cases would seem to do little to

89. Theodore Eisenberg & Kevin M. Clermon, *Trial by Jury or Judge: Which is Speedier?*, 79 JUDICATURE 176, 199 (1996) ("[T]he actual trial and eventual decision by a judge are more prone to interruption and delay than the jury process. . . . [T]he irregular or discontinuous scheduling of trial dates . . . meet[s] the convenience of the judge. . . . [The delay is] attributed to the diversion of other duties.").

90. SHORT, SUMMARY & EXPEDITED, *supra* note 26, at 46–47. Even though they are not responsible for trying STP cases, district court judges in Nevada are free to "utilize the short trial format for any civil case tried" if the parties agree to it, allowing the judges to gain the benefits and experience of the shorter STP procedures. Beecroft, *supra* note 69.

91. SHORT, SUMMARY & EXPEDITED, *supra* note 26, at 44.

92. *Id.* at 51.

93. *Id.* at 70. This has been one of the goals of California's program, but despite the program's attempt at legitimacy, it lacks many of the features described in this Comment that help reduce cost and delay.

promote the “expedited” part of “short, summary, and expedited.” Indeed, cases in California’s SSE program, which employs “real judges” unlike Nevada’s STP, “do not advance through the pretrial phases of litigation more quickly than non-[SSE] cases and generally do not receive a calendar preference.”⁹⁴ As a result, California’s SSE trial program does little to reduce the time involved with litigation—a frequent driving factor of litigation cost.⁹⁵ If expediency is a goal of the program, as it should be, then shifting the burden of trying SSE trials to non-judges appears to be one of the best means of achieving it.

An additional advantage to having a certain and fixed date is that some programs, such as Nevada’s STP, allow litigants to know who their judge will be at the time the trial is set. This helps the “program achieve[] a level of certainty and predictability that may not otherwise be available,”⁹⁶ helping jury trials shed their reputation for unpredictability.

5. The program extends to the whole litigation process—not just the trial

Extending the “short, summary, and expedited” nature of the program to the whole litigation process is often a naturally occurring result of the two characteristics described above. Keeping the process firmly set, predictable, and streamlined ensures that a jurisdiction can “not only decrease the amount of time [and money] involved in [discovery and trial], but do so without shifting that time [and money] to other litigation tasks.”⁹⁷ When the trial date is strictly set for the near future, and the attorneys know they are limited in the time they have to present their case, all pretrial issues become more focused. Instead of making far-reaching discovery requests, the parties are incentivized to focus their attention on only the key issues and to develop their trial strategy as quickly as possible. This reduces both the cost and the time required to prepare for trial; attorneys do not need to prepare multiple lines of arguments as they know they only have a limited amount of time to present their case.

In Nevada’s program, there are three main events to a short trial: the discovery and settlement conference, which takes place within thirty days of the appointment of the judge pro tempore (which itself

94. *Id.*

95. *See supra* notes 7 & 8.

96. A RETURN TO TRIALS, *supra* note 3, at 3.

97. *See Estimating*, *supra* note 7, at 7.

happens at the time the trial date is set); the pretrial conference, which takes place no later than 10 days before the short trial; and the trial. At the first conference, the parties and the judge “confer, exchange documents, identify witnesses . . . formulate a discovery plan, if necessary, and . . . discuss the possibility of settlement . . .”⁹⁸ At least seven days prior to the pretrial conference, the parties must submit the evidentiary booklets that will be used in trial and a pretrial memorandum that “includes a brief statement of the claims and defenses; a complete list of witnesses, including rebuttal and impeachment witnesses; and a description of their expected testimony, a list of exhibits, and any other matters to be resolved at the pretrial conference,” including objections to evidence or potential amendments to the jury instructions.⁹⁹ The judge then rules on any motions or objections at the pretrial conference, which takes place no later than 10 days before trial.¹⁰⁰ Finally, the trial is held. All of these events, including any discovery, happen within 240 days of entering the program. This expedited schedule not only reduces the delay present in traditional litigation, it also directly reduces litigation expenses as the parties have little time to conduct extensive discovery or submit multiple motions.

These expedited procedures raise similar due process concerns as the limitations on a party’s time to conduct a trial; decreasing a party’s time to fully prepare for his case may impact his ability to give an effective presentation of his claims.¹⁰¹ These constitutional concerns can be avoided by granting parties the ability to remove the case to the district court, as discussed below.¹⁰² The removal option both benefits the parties and strengthens the SSE trial program: for the parties, the district court’s schedule is likely to be less demanding and more flexible, allowing more time for discovery and other pretrial activities if it is needed. As to the program itself, requiring parties to remove their case from the SSE trial program entirely (as opposed to granting continuances or exceptions to the SSE trial procedures) preserves the program’s expedited, consistent, and streamlined nature.

98. N.S.T.R. 8.

99. SHORT, SUMMARY & EXPEDITED, *supra* note 26, at 47–48.

100. N.S.T.R. 10.

101. *See supra* notes 85–87 and accompanying text.

102. *See infra* Part II.B.10.

6. *The program relaxes evidentiary standards and encourages issue agreements and evidentiary stipulations*

While most SSE trial programs state that the normal rules of civil procedure and evidence apply, many have provisions that relax those rules in limited ways.¹⁰³ The multi-institutional joint report supporting SSE trial programs encouraged “relaxed evidentiary foundational standards” to “save time and narrow the focus to the key issue(s)” involved.¹⁰⁴ In Nevada’s program, the judge pro tempore admits all “report[s], document[s], [and] other item[s] into evidence without requiring authentication or foundation by a live witness,” unless there is an objection about the evidence’s authenticity.¹⁰⁵ These items, which include expert witness reports, are then incorporated into the evidentiary booklets once the judge has ruled on any objections.¹⁰⁶ By lowering the standards and relying on documentary evidence, parties do not have to spend time and money preparing live witnesses—including expert witnesses—and can focus on only the disputed issues. Each side is incentivized to stipulate, or at least not object, to the other side’s evidence.

One disadvantage of such relaxed standards is that they may not fully prepare attorneys for non-SSE trials, which have more procedural requirements and stricter evidentiary standards. Even so, “several experienced trial attorneys and judges pro tempore described the educational benefit of the short trial program, especially for younger lawyers who may lack opportunities to try comparatively low-risk cases to a jury.”¹⁰⁷ A Nevada district court judge who had both litigated and judged STP trials “claimed that he liked to do short trials both to keep his trial skills sharp for higher-value cases and to experiment with new trial techniques in lower-risk cases.”¹⁰⁸ Another judge pro tempore actually stated that STP trials are “even more rigorous than regular jury trials.”¹⁰⁹ While SSE trials may not be perfect in terms of preparing attorneys to negotiate the

103. *See, e.g.*, N.S.T.R. 1(c) (“The Nevada Rules of Evidence and Civil Procedure apply in short trials except as otherwise specified by these rules.”).

104. A RETURN TO TRIALS, *supra* note 3, at 3.

105. N.S.T.R. 17.

106. *See supra* note 99 and accompanying text.

107. SHORT, SUMMARY & EXPEDITED, *supra* note 26, at 50.

108. *Id.* It should also be noted that many newly elected district court judges in Nevada’s Eighth Judicial District gained experience as judges pro tempore. *Id.* at 47 n.53.

109. *Id.* at 50.

full set of evidentiary and procedural rules, practitioners and judges agree that some court experience is better than none.

7. The program is typically voluntary but, if mandatory, is structured to avoid constitutional issues

In spite of the fact that “voluntary processes are often slow to catch on,” the joint report states that the voluntariness of an SSE trial program is a critical characteristic of such a program; indeed, voluntary programs seem to be the majority approach, and for good reason.¹¹⁰ An SSE trial program is meant to protect an individual’s right to choose to resolve his dispute through a jury trial. Allowing the process to be voluntary (i.e., requiring the parties to stipulate to its use) preserves the right of the litigants to decide what method is appropriate for their dispute. This is important, as “reduced cost and delay, however desirable in their own right, cannot be counted on to increase litigant satisfaction and to enhance feelings of procedural justice.”¹¹¹ One goal of implementing an SSE trial program is to enhance the respect and reputation of the civil justice system. Forcing litigants into a program they do not want does little to further that goal. This feature also helps strengthen the program against potential due process and equal protection claims.¹¹² When the SSE trial is a wholly voluntary process, the parties waive any potential constitutional issues.¹¹³

110. A RETURN TO TRIALS, *supra* note 3, at 4; SHORT, SUMMARY & EXPEDITED, *supra* note 26, at 83.

111. E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants’ Evaluations of the Experiences in the Civil Justice System*, 24 LAW & SOC’Y REV. 953, 984 (1990).

112. Mandatory SSE trial programs could arguably violate due process, as they impose restrictions on how a party can present their case; however, these restrictions may be justified by the fact that SSE trials are designed for simpler, lower-value cases. See Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL’Y REV. 1, 8 (2006) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (“[A]t a minimum [Due Process] require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing *appropriate to the nature of the case.*” (emphasis added))). Equal protection concerns are raised if a certain class of plaintiffs, such as those with small amounts in controversy, is required to be subject to the restrictions of an SSE trial court. Similar distinctions, however, have withstood constitutional attack in the context of mandatory arbitration. See William P. Lynch, *Problems with Court-Annexed Mandatory Arbitration: Illustrations from the New Mexico Experience*, 32 N.M. L. REV. 181, 194–95 (2002) (reporting that New Mexico courts have rejected equal protection claims that the programs “arbitrarily assign cases to mandatory arbitration based on the amount or the subject matter of the case” after applying a rational-basis standard of review).

113. See *Hodges v. Easton*, 106 U.S. 408, 412 (1882) (noting that the parties could

Jurisdictions, however, also have good reason for making SSE trials mandatory for certain litigants by, for example, requiring all litigants with cases worth less than \$50,000 to participate.¹¹⁴ Mandatory participation allows a jurisdiction to clear a large number of cases on a district court's docket quickly¹¹⁵ and avoids the problem that "voluntary processes are often slow to catch on."¹¹⁶ However, if the program is mandatory, it is more likely to come under constitutional attack.

There is a middle ground, as demonstrated by Nevada's STP. Nevada's program allows litigants to opt into the program by choosing it in place of mandatory arbitration (required for cases under \$50,000) or waiting nearly four years for a traditional trial; the STP program is mandatory, however, for litigants who appeal a decision made in mandatory arbitration.¹¹⁷ The advantages of decreased cost and delay are weighed against the limitations of the STP, allowing most litigants the choice of the option that best fits their situation.¹¹⁸ This system seems to have worked, as the STP program has become fairly well known, used, and liked by attorneys and judges.

A jurisdiction has a choice of where to fall on the voluntary/mandatory spectrum: it can make the SSE trial program voluntary, thus potentially helping to increase its reputation; it can require the program's use by certain litigants, thus clearing court dockets of small cases and forcing the adoption of the program; or it can fall somewhere in between those two options, attempting to gain the benefits of both. Ultimately though, if the program is mandatory to some degree, either by allowing a plaintiff to unilaterally bring suit

waive their right to a jury trial).

114. It does not appear that any state or jurisdiction has adopted a strictly mandatory program.

115. Nevada's program reported that "the short trial program . . . relieves the district court judges of routine case management for a sizeable portion of their civil dockets." SHORT, SUMMARY & EXPEDITED, *supra* note 26, at 50.

116. A RETURN TO TRIALS, *supra* note 3, at 4.

117. SHORT, SUMMARY & EXPEDITED, *supra* note 26, at 44. The STP program is required before trial de novo. *Id.* However, "the parties can opt out of the STP by timely filing a demand for removal and paying an opt-out fee" even when appealing a mandatory arbitration award. Beecroft, *supra* note 69.

118. Although the majority of Nevada's STP cases are appeals from mandatory arbitration (and so are required to enter the STP program), there is a significant number of cases—almost one-seventh of all STP cases—that were stipulated into the program, showing that the program is catching on. Beecroft, *supra* note 69, at 23.

in an SSE trial court, by requiring participation based on the amount in controversy, or, like Nevada, by requiring participation in place of some form of mandatory alternative dispute resolution, an implementing jurisdiction should guard against potential constitutional concerns by allowing the parties a restricted ability to remove the case to a trial court.¹¹⁹

8. Litigants have at least a limited right of appeal

As already discussed, one of the values of the civil justice system is that participants have the ability to participate in the creation and promulgation of legal standards.¹²⁰ Allowing litigants to appeal judgments or procedural errors allows the SSE trial program participants to be fully engaged in the civil justice system. The ability to appeal “protects both private litigants and the justice system as a whole.”¹²¹ As the SSE trial program will likely be a new feature to a jurisdiction’s civil justice system, the appellate courts will be “needed to announce, clarify, and harmonize the rules of decision employed by the legal system.”¹²² This may be especially important if the judge presiding over the SSE trial is not a traditional trial court judge, as with Nevada’s use of judges pro tempore.¹²³ Such judges often have less experience and training and may thus have greater need to be corrected more frequently. Allowing parties to appeal helps to legitimize and protect the integrity of the new program and indicates that SSE trials are not inferior or second-rate trials, but full trials that grant the same important protections and privileges to the litigants as a traditional trial before a district judge.

Allowing SSE trial litigants access to an appellate court requires two things: First, the trial must be on the record. While this may increase the cost of running the program,¹²⁴ it also helps legitimize

119. See *infra* Part II.B.10.

120. *Supra* Part I.B.

121. Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1219 (2013).

122. PAUL D. CARRINGTON, DANIEL J. MEADOR & MAURICE ROSENBERG, JUSTICE ON APPEAL 3 (1976); see also Cassandra Burke Robertson, *Forum Non Conveniens on Appeal: The Case for Interlocutory Review*, 18 SW. J. INT’L LAW 445, 455 (2012) (“The classic remedy for inconsistent application of the law is appellate review.”).

123. As discussed, Nevada’s STP has opted to allow experienced litigators who meet certain requirements to act as judges pro tempore. See *supra* Part II.B.4; SHORT, SUMMARY & EXPEDITED, *supra* note 26, at 46–47.

124. Though the cost can be shifted to and borne by the parties. See *infra* Part II.C.1.

the program by making it more similar to traditional civil trials. Second, the jurisdiction must determine what issues may be appealed. The best way to legitimize an SSE trial program is to allow the same right of appeal as a traditional trial.¹²⁵ Nevada's STP has gone this route, granting participants the same rights of appeal as litigants in cases before a district judge.¹²⁶ The appeal goes directly to the Nevada Supreme Court, though it appears that few litigants have availed themselves of this opportunity.¹²⁷

Such a full right of appeal does have the potential to introduce unnecessary costs and delay into an SSE program, allowing a party to put off the enforcement of the judgment. In contrast to Nevada, Utah's SSE trial program has opted for a limited right of appeal. The only issues that may be appealed are instances of judicial or juror misconduct, corruption, fraud, or the correction of errors of law.¹²⁸ The benefit of a limited right of appeal is that it keeps the cost and length of the litigation process down—one of the central features of an SSE program.¹²⁹ Either system would be appropriate, as both systems allow appellate courts to correct "obvious error" and to review and promulgate legal principles and standards. While Nevada's program has the most legitimacy, Utah's system may be the more pragmatic option as it helps reduce the cost and delay of reaching a final verdict.

9. The program limits the recovery of fees and costs

An SSE trial program principally relies on the time restraints to control costs. The structure of the program drives the parties to stipulate to all but the key issues, limiting the amount of work that needs to be done by attorneys. In addition to these structural limitations, the SSE trial program should have rules restricting the amount of attorney fees and court costs that can be recovered from

125. This also helps alleviate fears of using an untested, new program as a party knows that they can appeal any procedural or legal error.

126. SHORT, SUMMARY & EXPEDITED, *supra* note 26, at 45.

127. *Id.* at 49 & n.65 (reporting that the researchers only found two cases involving an appeal from short trials).

128. UTAH CODE ANN. § 78B-3-906.

129. It should be noted that appeals, while adding considerable time to litigation, may not add a great deal more cost. See *Estimating*, *supra* note 7, at 2, 6 (finding that post-disposition billable time, including various post-trial motions and appeals activity, typically only took up 7-9% of total litigation hours spent on a case).

the other party under existing rules.¹³⁰ These caps supplement the structural limitations on costs, as parties know in advance that they will likely not be able to recover all of their litigation costs from the other party. By imposing recovery caps, parties are incentivized to limit the amount of discovery, the number of expert witnesses, and the amount of time spent preparing for trial to only that which is needed to litigate the essential issues.

The Nevada STP restricts recoverable fees and costs to \$3,000 per side.¹³¹ It also places a cap of \$500 per expert on the amount of recoverable expert witness fees.¹³² These limitations have reportedly increased the ability of plaintiffs to bring lower-value suits with less risk; plaintiffs know that they will only be responsible for paying their attorney and at most a limited amount to the other side if they lose. Some Nevada defendants have complained about the attorney fee cap, saying that it restricts their ability to fully develop their defense strategy, especially when the plaintiff can establish a contingency fee arrangement.¹³³ Admittedly, such caps often work more to the benefit of plaintiffs than defendants.¹³⁴ It should be noted, however, that most of the attorneys for the defendants participating in Nevada's program were salaried attorneys for insurance companies, which reduces the potential expenses incurred for attorney fees.¹³⁵ Although there has been at least one challenge to the limits, "concerns that litigation costs be minimized to the greatest degree possible have kept those proposals at bay."¹³⁶

10. Litigants have a limited ability to remove or transfer to a traditional trial court

There may be instances where a party initially elects or is forced to resolve a dispute within the SSE trial program that is not fit for the program. It may be that the issues are too complex for the

130. This model does not propose to include any new fee-shifting provisions, only a cap on the amounts that can be recovered under existing provisions.

131. SHORT, SUMMARY & EXPEDITED, *supra* note 26, at 45.

132. *Id.*

133. *Id.* at 52.

134. *Id.* ("[T]he general consensus among stakeholders was that this feature had little detrimental impact on attorneys and a fairly significant upside for the plaintiffs.").

135. *Id.*

136. *Id.*

limited time available in a one-day SSE trial¹³⁷ or the parties need more time prior to trial to prepare their case.¹³⁸ In order to address this issue, a jurisdiction that chooses to adopt an SSE trial program should also adopt a mechanism by which a party can remove or transfer the case to the traditional trial court. If a jurisdiction has opted to make participation in the SSE trial program mandatory, this feature helps avoid unfairness and injustice by allowing the disadvantaged party or parties to have their case heard before a traditional trial court.

As an example, the Nevada STP allows for removal upon payment of a \$1,000 fee.¹³⁹ This limitation is not without controversy, as some parties “argued that it was unfair to impose an additional \$1,000 expense on parties who want a full jury trial before a district court judge and without the procedural restrictions.”¹⁴⁰ On the opposite side, others “argued that eliminating the opt-out fee would undermine the legitimacy of the short trial program by making it appear to be a second-class, albeit faster, alternative It would also provide a means for parties seeking delay for strategic reasons to achieve that objective.”¹⁴¹ Other jurisdictions, such as Utah, have allowed for transfer upon a showing of “good cause.”¹⁴² Regardless of the method chosen, it is important to limit the abilities of a party to unilaterally force another party into a more expensive and slower process. This helps limit some undue settlement leverage, one of the issues the SSE trial program attempts to prevent.¹⁴³ The restriction on removal should not be so great, however, that it effectively forecloses removal—otherwise, the benefits of removal are lost and constitutional issues may arise, especially if participation is mandatory.

137. *See supra* Part II.B.3.

138. *See supra* Part II.B.5.

139. SHORT, SUMMARY & EXPEDITED, *supra* note 26, at 46.

140. *Id.* at 52.

141. *Id.* at 53.

142. UTAH CODE OF JUD. ADMIN. 4-501(1), *available at* <http://www.utcourts.gov/resources/rules/ucja/ch04/4-501.htm>.

143. Of course, limiting the availability of the traditional trial court may also provide settlement leverage to the party that wants to stay in the SSE trial court.

C. Potential Structural Issues with Implementing an SSE Trial Program

While the programs already implemented have been well-accepted, successful implementation of a new SSE trial program will require overcoming several challenges. The joint report describes and offers advice regarding several challenges that such a program may face, such as the need to get “buy-in” by both the legal and non-legal community, the need to avoid the potential for malpractice suits, and the need to provide for ongoing review of the program to ensure it continues to address the jurisdiction’s needs.¹⁴⁴ There are two additional concerns that an implementing jurisdiction may have: first, whether the program will increase costs to tax-payers and strain judicial budgets; second, whether the availability of “cheap lawsuits” will encourage a new wave of litigation, including increased numbers of frivolous lawsuits. The first issue can be ameliorated by proper structure; the second, in light of the goals of an SSE trial program, is not truly an issue at all.

1. Potential costs to the public and judiciary

It is possible for an SSE trial program to be self-sustaining, allowing greater access to the courts without the need for additional taxes or appropriations from the court budget. Nevada’s STP is an example of an SSE trial program that is both self-sustaining and has actually reduced the cost to the public and the judiciary. As district court operations in Nevada are paid by tax revenues, cases that are resolved through the STP reduce the cost to taxpayers by requiring the parties to bear the cost of the trial.¹⁴⁵ The judiciary has approved the program as it has “relieve[d] the district court judges of routine case management for a sizeable portion of their civil dockets, permitting them to concentrate on more complex cases requiring more individual attention.”¹⁴⁶ As reported by the first administrator of the Nevada STP, “Since STP trials cost virtually nothing and conclude in no more than a day, the program has saved judges 2,350 judicial days and the taxpayers almost \$6 million.”¹⁴⁷

144. A RETURN TO TRIALS, *supra* note 3, at 8–11.

145. SHORT, SUMMARY & EXPEDITED, *supra* note 26, at 46.

146. *Id.* at 50.

147. Beecroft, *supra* note 69, at 22.

The fees for Nevada's program are all covered by the participants in the program. The STP is administered by the Office of the ADR Commissioner, which is funded by a \$15 filing fee for both complaints and answers.¹⁴⁸ The jury fees of \$160 are paid by the party demanding the jury.¹⁴⁹ The fee for the judge pro tempore, \$150 per hour up to a maximum of \$1,500, as well as up to \$250 in reimbursable expenses, is split between the parties.¹⁵⁰ The judge's responsibilities include leading the discovery and pretrial conferences, conducting the trial, and filing the requisite paperwork with the district court. It does not appear that Nevada's implementing counties have had difficulty in finding attorneys to take on the responsibilities of a judge. In fact, many of the new district court judges were elected to the bench after litigating STP trials and acting as judges pro tempore, suggesting that the program has had the additional benefit of helping future judges gain more trial experience.¹⁵¹ The only issue that Nevada's STP has struggled with is the availability of courtrooms, which, as the program becomes more popular, is becoming a greater issue.¹⁵² The fact that this is the most concerning issue facing the program is indicative of its success and popularity.

2. Potential flood of litigation

Another concern that may hinder the implementation of an SSE trial program is that the availability of a cheap lawsuit may lead to a flood of litigation.¹⁵³ This is potentially problematic in two ways: first, by overloading already busy courts; second, by increasing the number of meritless claims filed. The answer to the first concern is that, as described above, the SSE trial program can be designed to be self-sustaining. These cases do not add to the trial court's busy

148. SHORT, SUMMARY & EXPEDITED, *supra* note 26, at 46.

149. *Id.* at 45.

150. *Id.*

151. *Id.* at 47 n.53. These judges in turn are a source of support to Nevada's SSE trial program as they understand the program and encourage its use. *Id.*

152. *Id.* at 51 ("The ADR commissioner reported that the demand for short trials greatly exceeds available space in which to conduct the trials He did not, however, foresee a remedy for courtroom shortages in the near future.").

153. Some commentators have noted that reducing delays in litigation may only result in increasing the demand for litigation by reducing parties' incentives to settle. Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 130-31 (2003). Presumably, the same may be true for reducing litigation costs.

calendar as the program can operate almost completely independent of the trial court. The Nevada STP only requires that the district judge be involved to approve the final judgment. Otherwise, the judge pro tempore has all the other powers normally granted to the district judge and can resolve and rule on all other matters and motions.¹⁵⁴ Furthermore, the program has actually reduced the number of cases handled by the district courts. There is little need to worry about a flood of litigation when the litigation pays for and takes care of itself.

The second concern is the fear is that by opening the courtroom doors to deserving litigants with meritorious claims, other litigants with meritless claims will also enter. This concern cannot be entirely assuaged as there is always the chance that a plaintiff will bring a frivolous suit, even in a traditional trial court. The programs do have built-in safeguards, such as requiring litigation costs to be split between the parties, as well as the other protections available in traditional trial courts, such as motions to dismiss (which are still ruled on before trial) or for sanctions. It is important to remember, though, that the purpose of an SSE trial program, as described, is to *encourage* parties to avail themselves of a civil jury trial—such a program opens the courthouse doors for people to bring their dispute to the courthouse, people who could not, or would not, choose to do so before. These programs are designed help revive the civil jury trial; an SSE trial program that does not encourage trials has, quite simply, failed its purpose. “[C]ivil disputes must be resolved somewhere,” and there is no reason to avoid implementing a program that can make that resolution easier, cheaper, and fairer for a number of individuals.¹⁵⁵

In terms of numbers, Nevada’s STP “conduct[s] more than 100 short trials” each year, most of which come from appeals from mandatory arbitration decisions.¹⁵⁶ This number is still only a fraction of the total number of STP cases filed each year, as 80 percent of STP cases settle, “ostensibly due to the relative speed and certainty of the trial date.”¹⁵⁷ Thus, even though the program allows for greater access to a jury trial, most litigants still opt to settle their case. Another study, analyzing California’s SSE trial program, found

154. SHORT, SUMMARY & EXPEDITED, *supra* note 26, at 47.

155. Brister, *supra* note 4, at 220.

156. SHORT, SUMMARY & EXPEDITED, *supra* note 26, at 47.

157. *Id.*

that there was actually “a decrease in litigation intensity in the affected case categories,” with the program “[giving] rise to a reduction in resolution time, whether by trial or settlement,” and that automobile cases in particular “tend[ed] to settle faster” after the program was implemented.¹⁵⁸ These programs, while encouraging litigants to exercise their right to a jury trial, do not seem to create an overwhelming flood of litigation. Weak claims are likely to be dismissed or settle before trial, just as with traditional litigation. SSE trial programs provide a cheaper and faster alternative to traditional litigation to parties who cannot or choose not to resolve their disputes any other way.

III. CONCLUSION

The decline of the civil jury trial is a worrying phenomenon for many reasons, from the historical and constitutional importance placed on the civil jury trial to its unique ability to provide meaningful legal standards and a fair method of conflict resolution. High costs and long delays are serious challenges in our current system and need to be addressed. One part of that should be the implementation of short, summary, and expedited civil jury trial programs. SSE trials, if modeled as described, are legitimate jury trials that minimize the costs and delays associated with traditional jury trials while still retaining their irreplaceable benefits, the most important being the value placed on a jury to render a just verdict. These trials are not for all cases, but for many lower-stakes or less-complex disputes they can increase access to the court. These programs are self-sufficient, efficient, and effective. Implementing SSE trial programs can help revive the civil jury trial, restore faith in America’s system of civil justice, and reopen the doors to courthouses that have long been closed to far too many individuals.

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158. Cheng, *supra* note 85, at 50, 52. The study also found that attorneys and judges lauded the program “for its ability to reduce time and monetary costs” while supporting the value of the jury trial. *Id.* at 51.

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