Summary Jury Trials: A "Settlement Technique" That Places a Shroud of Secrecy on Our Courtrooms?

First amendment questions rarely fail to provoke lively debate. In the context of this Note, the first amendment right of public access to judicial proceedings is pitted against the judicial interest in fostering pretrial settlement. The implications are profound.

Ever-increasing caseloads and the high cost of litigation[1] have led the federal judiciary, as well as the legislature, to promote alternate methods of dispute resolution.[2] In 1982, Chief Justice Warren Burger, in an effort to alleviate the problem with overloaded court dockets, urged the creation of new dispute resolution tools by using "the inventiveness, the ingenuity and the resourcefulness that have long characterized the American business and legal community."[3] The following year, the Chief Justice again emphasized the need to alleviate overcrowded dockets and recognized that "[f]ederal and state judges throughout the country are trying new approaches to discovery, settlement negotiations, trial and alternatives to trial that deserve commendation and support."[4] Alternate dispute resolution (ADR) has evolved into a broad range of options[5] which operate in the interest of saving time and costs by encouraging settlement.

At the cutting edge of this ADR movement is an innovative procedure known as the summary jury trial, which was developed in 1980 by United

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1. *But cf.* Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Contentious and Litigious Society*, 31 UCLA L. Rev. 4 (1983) (argues that America has not really experienced a "litigation explosion").

2. In 1980, Congress enacted legislation encouraging state and local agencies to establish forums providing for arbitration, mediation, conciliation and other similar procedures for settling disputes outside traditional court-based methods. Dispute Resolution Act, 28 U.S.C.S. App. II (1980).

3. Burger, *1982 Year-End Report on the Judiciary, quoted in* Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461, 465 (1984).

4. Burger, *1983 Year-End Report on the Judiciary, quoted in* Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461, 465 (1984).

5. Some alternative methods of dispute resolution include arbitration, negotiation, conciliation, mediation, minitrial (or miniarbitration), special masters (neutral experts), rent-a-judge, ombudsman and summary jury trial. *See generally* W. Brazil, Effective Approaches to Settlement: A Handbook for Lawyers and Judges (1988); E. Goldberg, E. Green, and F. Sander, Dispute Resolution (1985); Am. Jur. 2d *New Topic Service, Alternate Dispute Resolution* (1985).

States District Court Judge Thomas D. Lambros.[6] The summary jury trial is a court-annexed trial procedure used to facilitate settlement in cases where traditional settlement negotiations have been unsuccessful. Most of the formalities of an actual trial are present; a judge presides and a jury returns a non-binding verdict. The summary jury trial has been referred to metaphorically as a "looking glass"[7] through which litigants can view the strengths and weaknesses of their case in order to make wise decisions regarding settlement. The procedure has been well received as an efficient alternative to lengthy trials.[8]

Still less than a decade old, the summary jury trial is beginning to experience growing pains. In 1984, three public utilities filed a lawsuit in the United States District Court for the Southern District of Ohio against General Electric Company and an architectural and engineering firm.[9] The case, which involved the design and construction of a nuclear power plant owned by the utilities, aroused a great deal of public interest. When the district court ordered the parties to participate in a summary jury trial and closed the proceeding to the press and public, three Ohio newspapers moved to intervene to challenge the unilateral closure by asserting their first amendment right of access to judicial proceedings. The district court judge held that the qualified first amendment right of access "does not attach to this summary jury trial,"[10] and the Sixth Circuit affirmed the trial court's decision.[11]

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6. *See generally* Brenneman and Wesoloski, *Blueprint for a Summary Jury Trial*, MICH. B.J. 890 (Sept. 1986); Gwin, *Summary Jury Trial: An Explanation and Analysis*, 52 KY. BENCH & B. 16 (Winter 1988); Hittner, *The Summary Jury Trial*, 51 TEXAS B.J. 40 (1988); Jackson, *Alternative Dispute Resolution: Nonbinding Summary Jury Trials*, 6 LITIG. NEWS 5 (April 1981); Lambros, *The Summary Jury Trial — An Alternative Method of Resolving Disputes*, 69 JUDICATURE 286 (Feb. 1986) [hereinafter Lambros, *Summary Jury Trial*]; Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution: A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461 (1984) [hereinafter Lambros, *A Report*]; Lambros and Shunk, *The Summary Jury Trial*, 29 CLEV. ST. L. REV. 43 (1980); Marcotte, *Summary Jury Trials Touted*, A.B.A. J. 27 (April 1, 1987); Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986); Rieders, *Summary Jury Trials*, 23 TRIAL 93 (1987); Spiegel, *Summary Jury Trials*, 54 U. CIN. L. REV. 829 (1986).

7. Cincinnati Gas & Elec. Co. v. General Elec. Co., 117 F.R.D. 597, 599 (S.D. Ohio 1987), *aff'd*, 854 F.2d 900 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 1171 (1989).

8. *Cf.* Posner, *supra* note 6.

9. Cincinnati Gas & Elec. Co. v. General Elec. Co., 117 F.R.D. 597 (S.D. Ohio 1987), *aff'd*, 854 F.2d 900 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 1171 (1989). *See generally* Note, *Cincinnati Gas & Elec. Co. v. General Elec. Co.: Extinguishing the Light on Summary Jury Trials*, 49 OHIO ST. L.J. 1453 (1989); Note, *Summary Jury Trials: Should the Public Have Access?*, 16 FLA. ST. U.L. REV. 1069 (1989).

10. *General Elec.*, 117 F.R.D. at 602.

11. *General Elec.*, 854 F.2d 900 (6th Cir. 1988).

General Electric was a case of first impression as it relates to the first amendment right of access to summary jury trials. This Note examines the development of summary jury trials, as well as the dichotomy of the summary jury trial label — "settlement technique" v. "judicial proceeding." It analyzes *General Electric*, and explores the historical basis for the public's right of access to judicial proceedings, arguing that the nature of the summary jury "hybrid" procedure mandates a qualified first amendment right of access.

I. The Summary Jury Trial

A. History

After having presided over two personal injury suits he felt should have been settled prior to trial,[12] Judge Lambros, the brain trust behind this innovative procedure, conducted the first summary jury trial on March 5, 1980.[13] The case had not settled because "counsel and their clients felt that they could obtain a better resolution from a jury than from their pretrial settlement negotiations."[14] Lambros surmised that:

> [I]f only the parties could gaze into a crystal ball and be able to predict, with a reasonable amount of certainty, what a jury *would* do in their respective cases, the parties and counsel would be more willing to reach a settlement rather than going through the expense and aggravation of a full jury trial.[15]

Hence, the summary jury trial was conceived.

Judge Lambros determined that use of the summary jury trial "is firmly rooted in the Federal Rules of Civil Procedure."[16] According to Lambros, the combination of Rule 1, which states that the Federal Rules of Civil Procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action," and the "broad pretrial management provisions of Rule 16" act together with the court's inherent power to manage and control its docket to provide authority for assigning a case to summary jury trial.[17] More particularly, Rule 16(a) provides that "the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or

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12. Lambros, *A Report*, *supra* note 6, at 463.
13. Lambros and Shunk, *supra* note 6, at 43 n.1.
14. *Id.*
15. *Id.* (emphasis in original).
16. *Id.* at 469.
17. Lambros, *Summary Jury Trial*, *supra* note 6, at 287; Lambros, *A Report*, *supra* note 6, at 469.

conferences before trial for such purposes as (1) expediting the disposition of the action . . . and (5) facilitating the settlement of the case."[18] Rule 16(c)(7) and (11) state that "participants at any conference under this rule may consider and take action with respect to . . . (7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute . . . and (11) such other matters as may aid in the disposition of the action."[19] Furthermore, Judge Lambros pointed out that Rule 39(c)[20] provides for the use of an advisory jury.[21]

At least one commentator believes that Rule 16 does *not* provide an adequate basis for authority to assign a case to summary jury trial. Judge Posner of the U.S. Court of Appeals for the Seventh Circuit stated that "[a]ll the [Rule 16(c)(7)] subsection appears to require or authorize, so far as is relevant here, is the discussion (not implementation) at the pretrial conference of *extrajudicial* proceedings — which summary jury trial is not."[22] Judge Posner also said that a summary jury is outside the scope of Rule 39(c).[23]

Nevertheless, the use of summary jury trials has flourished since its introduction in 1980. Many federal district court rules expressly authorize summary jury trials.[24] In 1984, the Judicial Conference of the United States endorsed "the experimental use of summary jury trials as a potentially effective means of promoting the fair and equitable settlement of potentially lengthy civil jury cases," as did Chief Justice Burger in his 1984 Year-End Report to the Judiciary.[25] At least 65 federal courts

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18. FED. R. CIV. P. 16(a)(1) and (5). *See* Lambros, *A Report*, *supra* note 6, at 469.

19. FED. R. CIV. P. 16(c)(7) and (11). *See* Lambros, *A Report*, *supra* note 6, at 469.

20. Rule 39(c) provides that "[i]n all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury." FED. R. CIV. P. 39(c).

21. Lambros, *A Report*, *supra* note 6, at 470. *See* Note, *Practice and Potential of the Advisory Jury*, 100 HARV. L. REV. 1363, 1368 n.44 (1987) ("The use of the advisory jury as authority for the summary jury trial is particularly apt because the power to call an advisory jury under Rule 39(c) has been interpreted broadly.").

22. Posner, *supra* note 6, at 385 (emphasis in original).

23. *Id.* ("[T]he summary jury is not an advisory jury. It does not advise the jury how to decide the case, but is used to push the parties to settle."). Judge Posner also pointed out that Rule 39(c) allows the district court to use an advisory jury "in all actions not triable of right by a jury," which would seem to exclude summary jury trials because they are used in actions that are triable of right by jury. *Id.* at n.27.

24. *See, e.g.*, C.D. ILL. R. 17(E); N.D. IND. R. 32; S.D. IND. R. 33; E.D. KY. R. 23; W.D. KY. R. 23; W.D. MICH. R. 44; D. MONT. STANDING ORDER No. 6A; D. NEV. R. 185; N.D. OHIO R. 17.02; N.D. OKLA. R. 17.1; W.D. OKLA. R. 17; M.D. TENN. R. 602.

25. *See* Lambros, *Summary Jury Trial*, *supra* note 6, at 290.

nationwide have implemented the procedure.[26] It would seem, therefore, that the summary jury trial is firmly engrafted into the federal judicial system.

B. The Process[27]

The summary jury procedure is "simply a jury trial without the presentation of live evidence."[28] The unique factor which separates the summary jury trial from other alternate dispute resolution methods is the utilization of "the age old jurisprudential concept of trial by jury."[29]

Although Judge Lambros pointed out that all jury cases may be appropriate for summary jury trial,[30] he added that effective pretrial conferencing is the key to determining suitability.[31] The process generally is used when settlement is hindered because the parties cannot agree on how a jury will perceive and evaluate the evidence.[32] Primarily, the

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26. Marcotte, *supra* note 6. States which have used the summary jury trial include Colorado, Connecticut, the District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Montana, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, and West Virginia. *See* Strandell v. Jackson County, 115 F.R.D. 333 (S.D. Ill. 1987), *rev'd*, 838 F.2d 884 (7th Cir. 1988); Caldwell v. Ohio Power Co., 710 F. Supp. 194, 202 (N.D. Ohio 1989); Federal Res. Bank of Minneapolis v. Carey-Canada, Inc., 123 F.R.D. 603 (D. Minn. 1988); McKay v. Ashland Oil, Inc., 120 F.R.D. 43 (E.D. Ky. 1988); Arabian Am. Oil Co. v. Scarfone, 685 F. Supp. 1220, 1221 (M.D. Fla. 1988); Jones-Hailey v. Corp. of TVA, 660 F. Supp. 551, 553 (E.D. Tenn. 1987); King v. E.F. Hutton & Co., Inc., 117 F.R.D. 2, 11 n.14 (D.D.C. 1987); Fraley by Fraley v. Lake Winnepesaukah, Inc., 631 F. Supp. 160, 163 (N.D. Ga. 1986); Hall v. Ashland Oil Co., 625 F. Supp. 1515, 1523 (D. Conn. 1986); Watts v. Des Moines Register, Civ. No. 85-757-A (S.D. Iowa Aug. 1, 1986); Stacey v. Bangor Punta Corp., 107 F.R.D. 779, 782 (D. Maine 1985); Negin v. City of Mentor, Ohio, 601 F. Supp. 1502, 1505 (N.D. Ohio 1985); Muehler v. Land O'Lakes, Inc., 617 F. Supp. 1370, 1372 (D. Minn. 1985).

27. The process described in this Note is based on the model developed by Judge Lambros. However, each court may tailor the process to its own liking. *See* Lambros, *Summary Jury Trial*, *supra* note 6, at 290 (a flexible procedure).

28. Spiegel, *supra* note 6, at 829; Brenneman and Wesoloski, *supra* note 6, at 888 (summary jury trial is a non-binding jury trial without the presentation of live evidence).

29. Lambros, *A Report*, *supra* note 6, at 468. *See* Lambros, *Summary Jury Trial*, *supra* note 6, at 286 (absence of jury in the decision making process is the shortcoming of nearly every settlement alternative).

30. Lambros, *A Report*, *supra* note 6, at 472 (The summary jury trial "is not limited to negligence actions, nor to actions which have only two parties. . . . [I]t has also been successfully utilized in litigation involving multiple parties, and in such substantive areas as products liability; personal injury; contract; age, gender, and race discrimination; and antitrust.").

31. *Id.*

32. *Id.* at 471-72. *See* Lambros, *Summary Jury Trial*, *supra* note 6, at 286 (discusses several possible reasons for inability to settle which make summary jury trial appropriate).

summary jury trial is intended for cases that will not settle through more traditional methods.[33]

Judge Lambros defined the summary jury process as "counsels' presentation to a jury of their respective views of the case and the jury's advisory decision based on such presentations."[34] The parties (clients) *must* attend the summary jury trial because the "clients' awareness of the jury's perception is as important as that of counsels'."[35] Ideally, the proceeding is designed to last only one to two days.[36] It is conducted by a judge, preferably the judge who ultimately will try the case if it goes to full trial,[37] or a magistrate as assigned by the court.[38] As Judge Lambros emphasized, "it is essential that a person of authority conduct the proceeding, in a courtroom, in order to maintain the aura of actual trial."[39]

Summary jury trials are nonbinding unless the parties agree otherwise.[40] Some courts urge the parties to dispose of their cases by stipulating that the summary jury's advisory verdict will be binding.[41] In one case, Judge Lambros stated: "The parties should consider the possibility of consenting to a binding summary jury trial. This would obviate the need for a formal jury trial while providing a just, expedient, and inexpensive means of resolving this dispute."[42]

Prior to the summary jury trial, a final pretrial conference should be held wherein the judge determines that all discovery has been completed and the case is ready for trial.[43] The pretrial conference also provides

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33. Lambros, *Summary Jury Trial*, *supra* note 6, at 286 (the "complex case" is most suitable).

34. Lambros, *A Report*, *supra* note 6, at 468.

35. *Id.* at 470.

36. However, the summary jury trial in the *General Electric* case lasted 14 days. *See* Brief of Appellants on the Merits at 9, *General Elec.*, 854 F.2d 900.

37. Lambros, *Summary Jury Trial*, *supra* note 6, at 288. Lambros explains that a subsequent trial probably will not be affected by the participation of the judge who presided over the summary jury trial because the jury remains the ultimate trier of fact. *Id.* In regard to traditional settlement conferences, many attorneys and commentators have expressed concern over the same judge presiding over both settlement negotiations and the trial of the matter. *See* BRAZIL, *supra* note 5, at 418-24. However, because the summary jury trial is not a "settlement conference," implements the use of a jury, and is supposed to involve only evidence admissible at trial, fairness should not be compromised by the presence of the same judge. In fact, Judge Lambros believes that the quality of the actual trial may be improved because "the judge will have become intimately acquainted with the legal issues posed by the case." Lambros, *Summary Jury Trial*, *supra* note 6, at 288.

38. Lambros, *Summary Jury Trial*, *supra* note 6, at 288.

39. Lambros, *A Report*, *supra* note 6, at 470.

40. Lambros, *Summary Jury Trial*, *supra* note 6, at 286.

41. *Id.* at 290.

42. *Negin*, 601 F. Supp. at 1505.

43. Lambros, *A Report*, *supra* note 6, at 470; Lambros, *Summary Jury Trial*, *supra* note 6, at 287.

an opportunity for setting limits on evidentiary presentations at the summary jury trial.[44] The judge should rule on any motions *in limine* and other objections prior to the proceeding.[45] The objective is to settle as many evidentiary and procedural questions as possible prior to the summary jury trial. Ideally, the proceeding will flow without the interposition of many formal objections.[46]

At least three working days before the summary jury trial, the court should require counsel to file trial memoranda and to propose *voir dire* questions and jury instructions.[47] The court may also require witness and exhibit lists if extensive presentations are expected.[48]

The jury panel, consisting of ten potential jurors, "is drawn from the pool in the same manner as is a regular petit jury."[49] Thus, the court compels ordinary citizens to appear and sit as a jury venire at public expense.[50] Six jurors[51] are chosen via an expedited jury selection which provides "short character profiles" of each juror. The court's *voir dire* examination is brief, and counsel are usually permitted limited challenges for cause and peremptory challenges.[52] The judge explains the summary jury trial procedure to the jury, but advises the jurors to consider the case as seriously as they would if the case were presented in a "traditional" manner.[53] The jury is told that the verdict must be a true verdict based on the evidence, but "nothing more is said about the non-binding nature of the summary jury trial."[54] The non-binding character of the proceeding is not explicitly revealed to the jurors to avoid any possibility that they will not take their duty seriously. Thus, the jurors probably assume their verdict is final.[55]

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44. *Id.*

45. *Id.*

46. *Id.*

47. Lambros, *A Report*, *supra* note 6, at 470; Lambros, *Summary Jury Trial*, *supra* note 6, at 288.

48. Lambros, *Summary Jury Trial*, *supra* note 6, at 288.

49. Lambros and Shunk, *supra* note 6, at 47.

50. Petition for a Writ of Certiorari at 6, *General Elec.*, 854 F.2d 900. *See* Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1877. However, Judge Battisti of the United States District Court for the Northern District of Ohio recently found that federal courts lack authority to compel jurors for summary jury trials. Hume v. M. & C. Management, 129 F.R.D. 506 (N.D. Ohio 1990).

51. Judge John McNaught, United States District Court for District of Massachusetts, uses five jurors to assure no tie votes in the advisory verdicts. BRAZIL, *supra* note 5, at 64.

52. Lambros, *A Report*, *supra* note 6, at 470-71; Lambros, *Summary Jury Trial*, *supra* note 6, at 289.

53. Lambros, *Summary Jury Trial*, *supra* note 6, at 288.

54. *Id.* at 289.

55. Brenneman and Wesoloski, *supra* note 6, at 890 (discussion as to whether it is a wise decision to avoid telling the jurors that the verdict is non-binding).

All evidence is presented by the attorneys who may mingle the factual representations with legal arguments.[56] Opening statements and closing arguments are permitted. Generally, one hour of time is allotted to each side to present its best case.[57] Normally, no live witnesses are presented, although some courts have allowed them.[58] Counsel usually summarize the anticipated testimony of trial witnesses and present exhibits to the jury.[59] However, "counsel are limited to presenting representations of evidence that would be *admissible at trial*. Representations of facts must be supportable by reference to discovery materials, . . . or by a professional representation that counsel has spoken with the witness and is repeating that which the witness stated."[60] Objections during the proceeding are discouraged, but, if needed, will be entertained.[61]

At the conclusion of the presentations, the jury receives streamlined final instructions on the substantive law and is sent into deliberations. Although a unanimous verdict is encouraged, the jury may return separate, individual verdicts if a consensus is not possible.[62] Usually, the jury is given a verdict form eliciting answers to specific interrogatories, including a general inquiry regarding liability and the plaintiff's damages.[63]

After the court receives the verdict, the attorneys, the court, and the parties may engage in dialogue with the jurors to gain insight into the jurors' perception of the case and its presentation. This dialogue may serve as a "springboard" for later settlement negotiations.[64]

The summary jury trial is then concluded. In some cases, settlement negotiations may proceed immediately after the summary jury trial, but usually a settlement conference is scheduled "several days to a month" after the proceeding.[65] The summary jury trial experience is used as a "looking glass" to help facilitate the settlement.

According to Judge Lambros, the purpose behind the summary jury trial is to "provide a predictive tool to be used in the settlement

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56. Lambros, *A Report*, *supra* note 6, at 471; Lambros, *Summary Jury Trial*, *supra* note 6, at 289.

57. This may be broken up so that rebuttal time is allowed. Lambros, *Summary Jury Trial*, *supra* note 6, at 289.

58. Strandell, 115 F.R.D at 334; Levin and Golash, *Alternative Dispute Resolution in Federal District Courts*, 37 U. Fla. L. Rev. 29, 38 (1985).

59. Lambros, *A Report*, *supra* note 6, at 471.

60. *Id.* (emphasis added).

61. *Id.*

62. *Id.*

63. Lambros, *A Report*, *supra* note 6, at 471; Lambros, *Summary Jury Trial*, *supra* note 6, at 289.

64. Lambros, *Summary Jury Trial*, *supra* note 6, at 289-90.

65. *Id.* at 290.

negotiations; it is not a technique to obviate the need for old-fashioned settlement talks."[66] Thus, the purpose behind the process necessarily bifurcates the summary jury trial from the post-summary trial settlement conference and negotiations. The summary jury trial itself is a judicial, or at least quasi-judicial, proceeding — neither settlement discussions nor negotiations occur at this stage.

II. The First Amendment Right of Public Access to Judicial Proceedings[67]

A. Birth of a First Amendment Right to Judicial Proceedings: Richmond Newspapers, Inc. v. Virginia[68]

In its "watershed"[69] decision in 1980, the United States Supreme Court recognized a new branch of first amendment law which guarantees the public and the press a right to observe judicial proceedings.[70] The Court held that "the right to attend criminal trials is implicit in the guarantees of the First Amendment [and] without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated."[71]

The first amendment prohibits governments from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[72] Free speech also carries with it "freedom to listen," also known as a first amendment right to "receive information and ideas."[73] The Court reasoned, "What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long

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66. Lambros and Shunk, *supra* note 6, at 48. Judge Lambros indicates that it is a tool *to be used* in negotiations, not that the procedure itself is part of the settlement negotiations.

67. *See generally* Fenner and Koley, *Access to Judicial Proceedings: To Richmond Newspapers and Beyond*, 16 Harv. C.R.-C.L. L. Rev. 415 (1981); Lewis, *A Public Right to Know About Public Institutions: The First Amendment as Sword*, 1980 Sup. Ct. Rev. 1; Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings*, 91 Harv. L. Rev. 1899 (1978); Recent Development, *Public Access to Civil Court Records: A Common Law Approach*, 39 Vand. L. Rev. 1465 (1986).

68. 448 U.S. 555 (1980).

69. *Id.* at 582 (Stevens, J., concurring).

70. *Id.* at 576.

71. *Id.* at 580.

72. U.S. Const. amend. I.

73. *Richmond Newspapers*, 448 U.S. at 576 (citing Kleindienst v. Mandel, 408 U.S. 753, 762 (1971)).

been open to the public at the time that Amendment was adopted."[74]

Although the Court's holding was restricted to "criminal" trials, Chief Justice Burger noted that the question of whether the public has a right of access to *civil* trials was not presented in the case at bar, but that historically the presumption of openness applied to both civil and criminal trials.[75] Justice Stewart was adamant in his view that the first amendment "clearly" gives the public and press a right of access to both civil and criminal trials.[76] The case represents the Court's consensus view that the "unfettered discretion" of the judge and the parties to close a trial is repugnant to the first amendment.[77]

Historical practice played a distinct part in the decision and will prove instructive in this Note's analysis as well. The Court relied on the significant historical pattern that "throughout its evolution, the trial has been open to all who cared to observe."[78] In fact, the rule in England from "time immemorial" appears to have required all trials to be held in open court with free access to the public.[79] The English attribute of presumptively open trials was carried over into the judicial systems of colonial America.[80] Likewise, the "unbroken, uncontradicted" history of openness is as valid today as it was in centuries past.[81]

The Court in *Richmond Newspapers* also determined that the history of public access demonstrated a widespread recognition that open trials have significant community therapeutic value.[82] The Court reasoned that although citizens in an open society do not demand infallibility, it is nonetheless "difficult for them to accept what they are prohibited from observing."[83] Justice Brennan stated:

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74. *Id.*

75. *Id.* at 580 n.17.

76. *Id.* at 599 (Stewart, J., concurring).

77. *Id.* at 598 (Brennan, J., concurring).

78. *Id.* at 564. The Court traced the history of open trials. *Id.* at 565-73. Since the days of ancient Athens, trials have been significant community events. *See* L. MOORE, PALLADIUM OF LIBERTY 2 (1973). In pre-Norman England, cases generally were brought before "moots" which were attended by the freemen of the community. *Richmond Newspapers*, 448 U.S. at 565. Reports of the Eyre of Kent reveal a recognition that public attendance, other than for "jury duty," is important to the proper functioning of justice. *Id.* at 566.

79. *Richmond Newspapers*, 448 U.S. at 566-67 (English courts called the presumptive openness of the trial "one of the essential qualities of a court of justice.").

80. *Id.* at 567. For example, the 1677 Concessions and Agreements of West New Jersey expressly recognized openness of trials as the fundamental law of the Colony. *Id.*

81. *Id.* at 573.

82. *Id.* at 570. "The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.'" *Id.* at 571 (quoting 1677 Concessions and Agreements of West New Jersey).

83. *Id.* at 572.

> Secrecy is profoundly inimical to this demonstrative purpose of the trial process. Open trials assure the public that procedural rights are respected, and that justice is afforded equally. Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law. Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice.[84]

Thus, history is replete with evidence of a continuing adherence to presumptively open trials.

The Court carefully noted that the first amendment right of access is not absolute.[85] However, only an "overriding interest articulated in findings" will overcome the presumption of openness.[86] The Court declined to define the circumstances under which the trial might be closed to the public, but suggested that a trial judge may impose reasonable limitations in the fair administration of justice.[87]

A first amendment right of free and open access to judicial proceedings was explicitly recognized. The proverbial floodgates were swinging open and, as will be seen, the *Richmond Newspapers* offspring successfully expanded, broadened, and extended the reach of this landmark decision.[88]

B. The Progeny: The Expansion of a Doctrine

The United States Supreme Court entertained the issue of public access to judicial proceedings in three post-*Richmond Newspapers* decisions. In 1982, in *Globe Newspaper Co. v. Superior Court*,[89] the Court struck down a Massachusetts statute which mandated the exclusion of the general public from the courtroom during the testimony of a minor

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84. *Id.* at 595 (Brennan, J., concurring).

85. *Id.* at 581 n.18.

86. *Id.* at 581 ("Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.").

87. *Id.* at n.18 ("It is far more important that trials be conducted in a quiet and orderly setting than it is to preserve that atmosphere on city streets. . . . [S]ince courtrooms have limited capacity, there may be occasions when not every person who wishes to attend can be accommodated."). *See id.* at 598 n.24 (Brennan, J., concurring) ("[N]ational security concerns about confidentiality may sometimes warrant closures during sensitive portions of trial proceedings, such as testimony about state secrets."). *See also infra* note 92.

88. One commentator wrote that "after the *Richmond* case, there may at some point in time be no need for [the Freedom of Information Act], or sunshine act of any kind." Goodale, *Gannet is Burned by Richmond's First Amendment 'Sunshine Act'*, Nat'l L. J., Sept. 29, 1980, at 24. *See* Freedom of Information Act, 5 U.S.C. § 552; Federal Sunshine Act, 5 U.S.C. § 552b(c).

89. 457 U.S. 596 (1982).

rape victim.[90] The Court held that the state statute violated the first amendment, which embraces a right of access to criminal trials.[91] However, Justice Brennan noted that the Court's holding was a narrow one: a *mandatory* rule, requiring no particularized determinations in individual cases, is unconstitutional.[92]

In *Globe Newspaper*, the Court bolstered the historical analysis in *Richmond Newspapers*. Although recognizing the right of access was not absolute, the Court actually strengthened the presumption of openness. The Court required that the state's justification in denying access be a "weighty one," that the denial be necessitated by a "compelling governmental interest," and that the denial be "narrowly tailored to serve that interest."[93] The Court reasoned that the compelling interest of protecting minor victims of sex crimes from further trauma or embarrassment does not justify *mandatory* closure.[94] The circumstances should be determined on a case-by-case basis.[95] Thus, the trial court failed to "narrowly tailor" its denial of access to serve the interest involved. Evidence of a compelling governmental interest necessarily mandates a greater scrutiny than the nebulous "overriding interest" standard of *Richmond Newspapers*. The presumption of openness became even stronger with the *Globe Newspaper* decision.

In 1984, the Court expanded its openness doctrine and determined that the guarantee of open public proceedings in criminal trials embraces *voir dire* proceedings.[96] The opinion combined language of both *Richmond Newspapers* and *Globe Newspaper*:

> [T]he presumption may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.[97]

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90. *Id.* at 598 n.1 and accompanying text.

91. *Id.* at 610-11.

92. *Id.* at n.27 (emphasis added) (In certain cases and under appropriate circumstances, the public may be properly excluded from the courtroom during the testimony of minor rape victims).

93. *Id.* at 606-07.

94. *Id.* at 607-08 (The circumstances of the particular case may affect the significance of the interest.).

95. *Id.*

96. Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (*Press-Enterprise I*). The court observed that "since the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown." *Id.* at 505.

97. *Id.* at 510.

In 1986, the Court significantly broadened the reach of the first amendment right of access to include pretrial proceedings in criminal cases,[98] particularly to preliminary hearings where only the prosecution's evidence is presented.[99] The Court determined that the label given to a proceeding is not conclusive evidence and rejected the argument that the first amendment was not implicated simply because the proceeding was not a "trial," but was a "preliminary hearing."[100]

The Court determined, based on its previous first amendment decisions, that in deciding whether the qualified first amendment right of access attaches to a proceeding, two complementary considerations must be examined: 1) whether the place and process have historically been open to the public; and 2) whether public access plays a significant positive role in the functioning of the process.[101] If a particular proceeding "passes these tests of experience and logic," a qualified first amendment right of access attaches, and the court must determine whether a narrowly tailored and compelling governmental interest in closure exists to overcome the presumption of openness.[102]

In addition to the Supreme Court, several federal circuit courts have dealt with this issue.[103] *Brown & Williamson Tobacco Corp. v. F.T.C.*[104]

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98. Press Enterprise Co. v. Superior Court, 478 U.S. 1, 10 n.3 (1986) (*Press-Enterprise II*) ("The vast majority of States considering the issue have concluded that the same tradition of accessibility that applies to criminal trials applies to preliminary proceedings. [citations omitted] Other courts have noted that some pretrial proceedings have no historical counterpart, but, given the importance of the pretrial proceeding to the criminal trial, the traditional right of access should still apply.").

99. *Press-Enterprise II*, 478 U.S. 1.

100. *Id.* at 7.

101. *Id.* at 8. These are described as "considerations" and not "absolute requirements." *Id.*

102. *Id.* at 9.

103. For decisions regarding public right to access judicial proceedings, see, e.g., Bailey v. Systems Innovation, Inc., 852 F.2d 93 (3d Cir. 1988) (pretrial gag order imposed on litigants violated first amendment rights of access); Publicker Industries, Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984) (exclusion of public and press from civil pretrial hearing on injunction motion and sealing transcript of hearing violated first amendment rights); Westmoreland v. Columbia Broadcasting Sys., Inc., 752 F.2d 16 (2d Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985) (first amendment right of access did not permit television news network to televise trial); Doe v. Meachum, 126 F.R.D. 452 (D. Conn. 1989) (court refused request for in-chambers preliminary injunction hearing based upon first amendment presumption of open courtrooms and decision that a less restrictive alternative than blanket closure order could be used to protect the privacy interests of plaintiff inmates with AIDS).

For decisions regarding public access to judicial records, see, e.g., F.T.C. v. Standard Fin. Management Corp., 830 F.2d 404 (1st Cir. 1987) (sealed financial statements filed with court as part of settlement agreement considered court-related documents to which first amendment presumption of public access attached); Bank of America Nat. Trust and

is a particularly important decision because the court concluded that the first amendment rights of access apply to civil, as well as criminal, trials.[105] The Sixth Circuit relied on the Supreme Court's reasoning in *Richmond Newspapers*: "The concern of Justice Brennan that secrecy eliminates one of the important checks on the integrity of the system applies no differently in a civil setting. In either the civil or criminal courtroom, secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption."[106]

At issue in *Brown & Williamson Tobacco Corp.* were sealed documents containing information on the tar and nicotine contents of cigarettes. The Sixth Circuit held that the district court abused its discretion in sealing the documents.[107] In particular, the circuit court held that "simply showing that the information would harm the company's reputation is not sufficient to overcome the strong common law presumption in favor of public access to court proceedings and records."[108] The Sixth Circuit concluded that in this type of case a court should not seal the records unless legitimate trade secrets are involved, a recognized exception to the right of public access to judicial records.[109]

Another leading case applying the first amendment considerations of *Richmond Newspapers* to a civil setting was *Publicker Industries, Inc. v. Cohen*.[110] The Third Circuit not only held that the first amendment

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Sav. Ass'n. v. Hotel Rittenhouse, 800 F.2d 339 (3d Cir. 1986) (once a settlement is filed in court, it becomes a judicial record and is subject to public access); *In re* Reporters Comm. for Freedom of the Press, 773 F.2d 1325 (D.C. Cir. 1985) (district court did not violate first amendment right of public access by sealing documents only until entry of judgment, although common law right may have been violated); Wilson v. American Motors Corp., 759 F.2d 1568 (11th Cir. 1985) (access to sealed record of settled products liability action allowed by subsequent plaintiff; defendant's desire to prevent use of the trial record in other proceedings was not adequate justification for closure); *In re* Continental Illinois Sec. Litig., 732 F.2d 1302 (7th Cir. 1984) (newspapers entitled to special litigation committee report in shareholder derivative suit); Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984) (confidentiality agreement between parties did not bind court with respect to access to documents); Joy v. North, 692 F.2d 880 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983) (special litigation committee report should not have been sealed); United States v. Kentucky Util. Co., 124 F.R.D. 146 (E.D. Ky. 1989) (confidentiality orders arrived at by the parties in absence of press and public, even though endorsed by court, should not be binding when subsequent motion seeking access is filed).

104. 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

105. *Id.* at 1179 ("The policy considerations discussed in *Richmond Newspapers* apply to civil as well as criminal cases.").

106. *Id.*

107. *Id.* at 1176.

108. *Id.* at 1179.

109. *Id.* at 1180. *See infra* Section IV(C).

110. 733 F.2d 1059 (3d Cir. 1984).

rights of public access apply to civil trials, but that the presumption of openness also attaches to pretrial hearings.[111] The case involved a proxy fight over control of a corporation. The circuit court held that the district court abused its discretion by excluding the public and the press from the hearing on temporary injunction motions.[112]

Since the *Richmond Newspapers* decision, the federal courts have gradually expanded the reach of the first amendment right of public access to include *voir dire* proceedings,[113] preliminary hearings in criminal cases,[114] civil proceedings, pretrial proceedings, civil court records, and even sealed settlement agreements.[115] Based on the courts' growing tendency to apply the first amendment presumption of openness to modern courtroom proceedings and records, and the considerations involved, it is inevitable that the qualified first amendment rights of public access should attach to summary jury trials.[116]

III. The *General Electric* Case[117]

The plaintiffs, three Ohio utility companies, jointly undertook to build the William H. Zimmer Nuclear Power Plant. In July of 1984, the plaintiffs sued General Electric ("G.E."), alleging that G.E. sold them a nuclear reactor containment system knowing that it was incapable "of meeting all regulatory requirements and operating in a safe manner."[118] Early in the litigation process the parties requested that certain discovery material be kept confidential and agreed on a comprehensive protective order, approved by the magistrate, which classified various documents as either "confidential" or "highly confidential."[119]

In June of 1987, the district court ordered the parties to participate in a summary jury trial.[120] The order closed the summary jury proceeding to the press and the public.[121] The appellants, three Ohio newspapers,

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111. *Id.* at 1074. *See also* Doe v. Meachum, 126 F.R.D. at 455.

112. *Publicker*, 733 F.2d at 1074.

113. *Press-Enterprise I*, 464 U.S. 501.

114. *Press-Enterprise II*, 478 U.S. 1.

115. *See* cases cited *supra* note 103.

116. *See infra* Section IV.

117. Cincinnati Gas & Elec. Co. v. General Elec. Co., 117 F.R.D. 597 (S.D. Ohio 1987), *aff'd*, 854 F.2d 900 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 1171 (1989).

118. Plaintiffs' Second Amended Complaint and Jury Demand, Joint Appendix at 76, 96, *General Elec.*, 854 F.2d 900.

119. *General Elec.*, 854 F.2d at 901.

120. *Id.*

121. The decision to close the summary jury trial was actually a compromise between the court and the parties. G.E. had initially opposed the summary jury proceeding. *See* General Electric Company's Motion to Vacate Summary Jury Trial, Joint Appendix at 258, *General Elec.*, 854 F.2d 900. Judge Spiegel's "order closing the summary jury trial was in response to General Electric's substantial concerns regarding the potential lack of confidentiality." *General Elec.*, 854 F.2d at 902 n.2.

moved to intervene for the limited purpose of challenging the closure order based upon their first amendment right of access.[122]

The district court denied the motion to intervene, holding that the newspapers had no right to attend the summary jury trial.[123] The court concluded that "[t]he summary jury trial, for all it may appear like a trial, is a settlement technique,"[124] that there is no tradition of access to summary jury trials, and that public access to summary jury trials does not play a particularly significant positive role in the actual functioning of the process.[125] The court also amended its original closure order by including a gag order on the jurors and sealing the jury list.[126]

Finally, two months after the summary jury trial concluded and the parties had reached a settlement, the court issued an order approving the terms of the settlement and dismissing the action with prejudice.[127] The court continued the gag order and sealed the transcript and jury list indefinitely.[128]

The intervenors appealed, claiming that the first amendment right of access adheres to the summary jury trial proceeding.[129] The Sixth Circuit determined that a proper analysis of a first amendment claim of access involves two complementary considerations: 1) the proceeding must be one where a "tradition of accessibility" has existed, that is, whether the place and process were historically open, and 2) the public access must play a "significant positive role in the functioning of the particular process in question."[130]

In addressing the first consideration, the Sixth Circuit agreed with the district court's reasoning that because summary jury trials had existed for less than a decade, no historically recognized right of access applies.[131] Because the summary jury trial was designed to promote settlement, the court designated it as a "settlement technique" and determined that "[s]ettlement techniques have historically been closed to the press and public."[132] The court concluded that the "tradition of accessibility" element had not been met.[133]

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122. *General Elec.*, 854 F.2d at 902.
123. *Id.*
124. *Id.* (quoting *General Elec.*, 117 F.R.D. at 600).
125. *Id.* (quoting *General Elec.*, 117 F.R.D. at 602).
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 903 (quoting *Press-Enterprise II*, 478 U.S. at 8). However, the language of *Press-Enterprise II* indicates that these are "considerations" which have been "emphasized" in prior decisions, not that they "must" be present. *Press-Enterprise II*, 478 U.S at 8.
131. *General Elec.*, 854 F.2d at 903.
132. *Id.*
133. *Id.* at 904.

A glaring absence from the court's discussion of the "tradition of accessibility" consideration is the determination of whether the *location* involved in the process has been historically open to the public. There was no mention of what part the public courtroom plays in the summary jury proceeding.[134] A proper analysis of this point should have altered the court's determination.[135]

Regarding the second consideration, the Sixth Circuit summarily disagreed with the appellants' contention that "public access would have community therapeutic value because of the importance of the nuclear power and utility rate issues raised."[136] No specific reason was given for this disagreement. Instead of considering the many positive roles public access would play in this summary jury trial, the court *weighed* public access against the interest in settlement.[137] The court decided that settlement was more important — that if settlement could not be achieved with public access, then public access should not be allowed.[138] The court explained that "public access to summary jury trials over parties' objections [because of their interest in confidentiality] would have significant adverse effects on the utility of the procedure as a settlement device."[139] In particular, the court reasoned that "allowing access would undermine the substantial governmental interest in promoting settlements, and would not play a 'significant positive role in the functioning of the particular process in question.'"[140] Properly viewed, however, balancing a "substantial governmental interest" against public access is the qualifying test used to determine whether an interest in closure is sufficient to overcome the presumption of openness, not whether the presumption should exist at all.[141] The court prematurely tied the balancing process of the competing interests of closure and openness to the second con-

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133. *Id.* at 904.

134. The consideration of "tradition of accessibility" involves an examination of whether the *place* and *process* have traditionally been open to the public. *Press-Enterprise II*, 478 U.S. at 8. The Sixth Circuit addressed the "process" question, but not the "place."

135. *See infra* Section IV(B)(1).

136. *General Elec.*, 854 F.2d at 904. The appellants also recited several other reasons why public access plays a significant role in the summary jury trial. *See infra* note 184. However, the court ignored them.

137. *General Elec.*, 854 F.2d at 904.

138. *Id. But see infra* Section IV(C)(1).

139. *Id.*

140. *Id.* (quoting *Press-Enterprise II*, 478 U.S. at 8). The court relied on Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) and Courier-Journal v. Marshall, 828 F.2d 361 (6th Cir. 1987) in its analysis. However, as the appellants correctly pointed out, these two cases are inapposite because they concerned access to raw discovery materials possessed by the parties and not filed with the court. *See* Brief of the Appellants on the Merits at 28 n.7, *General Elec.*, 854 F.2d 900.

141. *See infra* Section IV(C).

sideration of whether public access would provide a significant positive role. By manipulating this test, the court successfully sidestepped the second consideration.

Judge Edwards concurred in part and dissented in part. He joined the majority in holding that "the negotiations which led to the settlement of this case could properly be conducted *in camera*."[142] However, he did not agree that the "record can appropriately continue to be sealed after a settlement has been effected."[143] Judge Edwards reasoned that although the right to access may impede settlements, he could not "reconcile complete suppression of this record with the First Amendment which our forefathers placed as the first condition for the founding of our nation."[144]

IV. The First Amendment Right of Access Should Attach to Summary Jury Trials[145]

A. The Dichotomy of a Label: Settlement Technique or Judicial Proceeding?

Central to the question of whether the first amendment rights of access attach to the summary jury trial is the dichotomous nature of the process. The actual proceeding, conducted by a judge in front of an actual petit jury in a public courtroom, involves no settlement discussions or negotiations.[146] It is an adversary proceeding encompassing the presentation of evidence and trial advocacy. Even Judge Spiegel, in

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142. *General Elec.*, 854 F.2d at 905 (Edwards, J., concurring in part and dissenting in part).

143. *Id.* Appellants thoroughly discussed issues related to the propriety of sealing the transcript and continuing the gag orders. However, those issues are outside the scope of this Note.

144. *Id.*

145. Some commentators have addressed this issue as it relates to the rent-a-judge procedure. *See* Gnaizda, *Secret Justice for the Privileged Few*, 66 Judicature 6 (June-July 1982); *Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society*, 37 Vand. L. Rev. 845, 1019-28 (1984); Note, *The California Rent-A-Judge Experiment: Constitutional and Policy Considerations of Pay-As-You-Go Courts*, 94 Harv. L. Rev. 1592, 1608-15 (1981). The rent-a-judge process bypasses the formal court system. A referee selected and paid by the litigants presides over the case and renders a binding decision. Note, *id.* at 1592.

146. However, assuming *arguendo* that the summary jury trial does involve settlement communications, it "by no means follows that material from settlement negotiations is protected from discovery just because a rule of evidence would make that material inadmissible for certain purposes at trial." Brazil, *supra* note 5, at 306. *See* Fed. R. Evid. 408.

General Electric, conceded that the summary jury trial is not a settlement conference, but a pretrial proceeding.[147]

The summary jury trial "facilitates" settlement of disputes, as does the entire litigation process. The proceeding is not, in and of itself, a recognized settlement session, such as an in-chambers settlement conference, a private negotiation, or a mediation, all of which involve characteristic "give and take" discussions.[148] The traditional settlement conference takes place *after* the summary jury trial — after an advisory verdict is presented and the advocacy ends.

Therefore, labeling a summary jury trial a "settlement technique" is a misnomer, and does not necessarily lead to closure. "[T]he First Amendment question cannot be resolved solely on the label we give the event, *i.e.*, 'trial' or otherwise, particularly where [the proceeding] functions much like a full-scale trial."[149] The tradition of openness is inherent in the unique elements of the summary jury trial. Summary jury trials, with their use of a petit jury and the presumptively open courtroom, graft the public aspects of judicial proceedings onto the alternate dispute resolution process and result in hybrid public procedures requiring qualified first amendment rights of access.

B. Complementary Considerations

1. Tradition of Accessibility.—Historical analysis requires consideration of whether both the "place" and the "process" have been traditionally open to the public.[150] The first prong of the tradition of accessibility is whether the "place" has been historically open to the public. Summary jury trials use the courtroom, a place which undoubtedly has been historically open to the press and public. Hence, summary jury trials easily satisfy the locality element of tradition.

The traditional public aspect of the courtroom has remained steadfast throughout the centuries. "[A] trial courtroom . . . is a public place where the people generally — and representatives of the media — have a right to be present, and where their presence has been thought to enhance the integrity and quality of what takes place. . . . 'What transpires in the courtroom is public property.'"[151] The summary jury trial takes place in a traditionally public forum where people historically have

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147. *General Elec.*, 117 F.R.D. at 602.

148. *See generally* Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory*, 1983 Am. B. Found. Res. J. 905.

149. *Press-Enterprise II*, 478 U.S. at 7.

150. *Id.* at 8.

151. *Richmond Newspapers*, 448 U.S. at 578, 573 n.9 (quoting Craig v. Harney, 331 U.S. 367, 374 (1947)); *see also*, *id.* at 593 (Brennan, J., concurring) and at 600 (Stewart, J., concurring).

enjoyed a right of access. Furthermore, Judge Lambros relied on the use of the courtroom to promote the realistic character of the summary jury trial and enable it to function as a reliable predictor of the outcome of a full trial. Judge Lambros explained that "[i]t is essential that a person of authority conduct the proceeding, *in a courtroom*, in order to maintain the aura of actual trial."[152]

In *General Electric*, the Sixth Circuit ignored the tradition of accessibility given to the courtroom.[153] The court did not address the significance of the "place," which is important to the tradition of accessibility analysis. It is especially important when dealing with a summary jury trial analysis because the process is relatively new and any history of access is virtually nonexistent. Therefore, special emphasis should have been given to the place and resources used.

The second prong of the tradition of accessibility consideration is whether the "process" has been historically open to the public. Because the summary jury trial process is still young and evolving, an analysis of its tradition of accessibility is rather premature and somewhat irrelevant. However, it is important to note that the history of summary jury trials, although brief, shows no tradition of closure. The Sixth Circuit, in applying the right of access to judge disqualification proceedings, concluded that a tradition of closure is necessary to rebut a presumption of openness.[154] In fact, the summary jury trial has been presumptively open in the past. Judge Lambros instructed that "to achieve the goal of facilitating settlement, the summary jury trial is conducted in open court with appropriate formalities . . . ."[155] This attitude is consistent with the emerging trend of openness exhibited by the courts.[156] A presumption of openness should be maintained.

Summary jury trials are also analogous to ordinary civil jury trials, which the courts have deemed presumptively open to the public. In fact, Judge Spiegel described the summary jury trial as "simply a jury trial without the presentation of live evidence,"[157] and Judge Lambros referred

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152. Lambros, *A Report*, *supra* note 6, at 470 (emphasis added).

153. *See supra* note 134 and accompanying text.

154. *In re* National Broadcasting Co., 828 F.2d 340, 344 (6th Cir. 1987) (the court surveyed prior disqualification cases and found none "in which the proceedings were closed or the record sealed").

155. Lambros, *Summary Jury Trial*, *supra* note 6, at 286. Although Lambros originally had written in 1984 that summary jury trials were not open proceedings, he apparently changed his mind after more experience with the process. *See* Lambros, *A Report*, *supra* note 6, at 471. *See also Judges Should Have Call on Use, Closure of Proceeding, Lambros Says*, 2 Alternative Dispute Resolution Report (BNA) 251, 252 (July 21, 1988) (Judge Lambros has a preference for open proceedings, but says that a judge should decide).

156. *See supra* Section II(B).

157. Spiegel, *supra* note 6, at 829.

to it as a "capsulized trial procedure" which is "like a regular jury trial, only shorter."[158] The procedural likeness alone implies an historical presumption of openness.

The similarities between summary jury trials and civil jury trials run deeper than the surface. As the appellants in *General Electric* pointed out, "[b]oth use the courtroom facilities, the resources, and the power of the public judicial system to resolve disputes between litigants. In doing so, both procedures are the only civil proceedings that employ juries."[159] Judge Lambros also emphasized the role of the jury in the summary jury trial.[160] He stated that the jury is "central to the American tradition of justice" because it brings a "fresh viewpoint to the analysis of human affairs . . . [and] involves the citizens of this country in the process of deciding issues of importance to their community."[161]

The public has enjoyed the right to observe jury proceedings in public forums for centuries.[162] From ancient Athens to early England and colonial America, history is replete with evidence that the "public character of [jury] proceedings [has] remained unchanged."[163] The petit jury and the public courtroom have been recognized as "hallmarks of openness."[164] The presumption of openness applied to petit jury proceedings throughout history should naturally extend to summary jury trials. The public nature of the courtroom, coupled with the presumptively open process, exhibits that the historical tradition of accessibility is present in the summary jury trial.

2. Public Access: A Significant Positive Role in the Summary Jury Trial Process.—The second consideration in the analysis of a first amendment right of access is whether public access would play a "significant positive role in the functioning of the particular process in question."[165] Public access would play a significant positive role in summary jury trials in several ways.

A summary jury trial is designed to encourage settlement and clear the case from the court docket. It can have a final and decisive effect

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158. Lambros, *Summary Jury Trials*, 3 LITIG. 52, 53 (Fall 1986).

159. Brief of Appellants on the Merits at 24, *General Elec.*, 854 F.2d 900. *But cf.* Hume v. M. & C. Management, 129 F.R.D. 506 (N.D. Ohio 1990) (federal courts lack authority to summon jurors for summary jury trials).

160. Lambros, *Summary Jury Trial*, *supra* note 6, at 286.

161. *Id.*

162. *Richmond Newspapers*, 448 U.S. at 564-73; *Publicker*, 733 F.2d at 1068-70. *See generally* F. POLLOCK, THE EXPANSION OF THE COMMON LAW 30, 140 (1904); 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 312, 317 (3d ed. 1922); Wells, *The Origin of the Petty Jury*, 27 L. Q. REV. 347, 355 (1911).

163. *Press-Enterprise I*, 464 U.S. at 506.

164. Petition for Writ of Certiorari at 18 n.12, *General Elec.*, 854 F.2d 900.

165. *Press-Enterprise II*, 478 U.S. at 8.

on the outcome of civil litigation. The summary jury trial is similar to the pretrial criminal proceedings which have been afforded first amendment rights of access.[166] In *Press-Enterprise II*, the Supreme Court observed that although preliminary hearings do not result in convictions, the outcome usually leads to final disposition through plea bargaining instead of trial.[167] The Court emphasized: "But these features, standing alone, do not make public access any less essential to the proper functioning of the proceedings in the overall criminal justice process. Because of its extensive scope, the preliminary hearing is often the final and most important step in the criminal proceeding."[168] Justice Powell stated a similar reason in acknowledging a first amendment right to observe pretrial suppression of evidence hearings: "[I]n this case there was no trial as, following the suppression hearing, plea bargaining occurred that resulted in guilty pleas. [Thus,] the public's interest in this proceeding often is comparable to its interest in the trial itself."[169]

Likewise, although the summary jury trial is nonbinding, the impact of the procedure nearly always results in settlement of the case.[170] District Court Judge Richard A. Enslen, Western District of Michigan, reported that neither the attorneys nor the clients want to try the case after the summary jury trial.[171] He said the clients "came to the courtroom, they saw the psychological clash they had been waiting for, they were either relieved or upset with the jury verdict, and they were not too willing to go on and do this process again."[172] Accordingly, the summary jury trial generally becomes the conclusive step in the civil proceeding. This is emphasized further by the ability of the parties to stipulate that the summary jury verdict is a "final determination on the merits."[173]

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166. Brief of Appellants on the Merits at 28, *General Elec.*, 854 F.2d 900. The appellants in *General Electric* referred to the summary jury trial as the "civil counterpart of the pretrial criminal proceedings." *Id.*

167. *Press-Enterprise II*, 478 U.S. at 12.

168. *Id.*

169. Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 397 n.1 (1979) (Powell, J., concurring); *accord* United States v. Criden, 675 F.2d 550, 556-57 (3d Cir. 1982) (pretrial hearings often are "the most critical stage" because their outcomes "often determine whether the defendant or the Government wants to proceed to trial"); *In re* Herald Co., 734 F.2d 93, 98 (2d Cir. 1984) (public has right of access to pretrial criminal hearings because of their "decisive effect" upon the outcome of a prosecution).

170. Since 1980, Judge Lambros has conducted approximately 200 summary jury trials and only six have gone on to actual trial. *Judges Should Have Call on Use, Closure of Proceedings, Lambros Says*, 2 Alternative Dispute Resolution Report (BNA) 251, 252 (July 21, 1988).

171. *SJT, "Mediation," and Mini-Trials in Federal Court: An Interview with Judge Richard A. Enslen*, 2 Alternatives to High Cost Litig. 4, 7 (Oct. 1984).

172. *Id.*

173. Spiegel, *supra* note 6, at 831.

Some argue that all cases which settle prior to trial preclude the public from hearing the arguments on issues of public concern.[174] However, summary jury trials are not used for cases that otherwise could settle by traditional negotiations. The summary jury trial provides the psychological benefit of a trial by jury without the binding effect.[175] A case which settles after summary jury trial is not commensurate with one that settles by traditional means. In a summary jury trial, the court uses the public resources of an actual trial to settle a case which could not otherwise be settled. Therefore, because the summary jury trial usually supplants the actual jury trial, the proceeding should be open to the public because it "provides the sole occasion for public observation" of the judicial system at work.[176]

Public access would also provide a "community therapeutic value" to summary jury trials.[177] Open judicial proceedings provide an important outlet for "community concern, hostility, and emotions" raised by a particular case.[178] The Sixth Circuit recognized the community therapeutic value of open proceedings in *Brown & Williamson Tobacco Corp.*: "The resolution of private disputes frequently involves issues and remedies affecting third parties or the general public. The community catharsis, which can only occur if the public can watch and participate, is also necessary in civil cases. Civil cases frequently involve issues crucial to the public."[179] *General Electric* exemplifies the important public interest in access. The parties raised issues regarding the safety of nuclear power plants, the integrity of a major corporation in selling key components of the plants, and whether millions of dollars spent in modifying the Zimmer power plant would be passed on to Ohio residents.[180] The district court even recognized that these were "matters of paramount public concern," and that the public "would be well-served by an airing of the issues" through an open summary jury trial.[181] Public access would have created a critical audience and encouraged a truthful exposition of facts, an "essential function of a trial."[182] As it stands, the public will

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174. *See General Elec.*, 117 F.R.D. at 601. *Cf.* Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) ("To be against settlement is only to suggest that when the parties settle, society gets less than what appeals, and for a price it does not know it is paying.").

175. However, the parties may stipulate that the verdict is a final determination on the merits.

176. *Press-Enterprise II*, 478 U.S. at 12 (quoting *Richmond Newspapers*, 448 U.S. at 572).

177. *See Richmond Newspapers*, 448 U.S. at 570.

178. *Id.* at 571.

179. *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1179.

180. Brief of Appellants on the Merits at 33, *General Elec.*, 854 F.2d 900.

181. *General Elec.*, 117 F.R.D. at 600.

182. *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1178.

remain in the dark regarding these important issues. "[N]o community catharsis can occur if justice is done in a corner [or] in any covert manner."[183]

Although other significant roles could be explored,[184] the decisive effect of the procedure and the community therapeutic value together provide enough evidence that public access plays a particularly significant role in the functioning of the summary jury trial. Therefore, the historical tradition of accessibility and the evidence that public access plays a significant role in the summary jury trial together satisfy the considerations of a proper first amendment right of access claim. Summary jury proceedings, like other modern courtroom procedures, should carry a presumption of openness.

C. A Qualified Right of Access

The first amendment right of public access is not absolute. When the right applies to a proceeding, however, a closure order is subject to strict scrutiny. The first amendment right of access will be violated unless the court demonstrates that closure is necessary to further "a compelling governmental interest, and is narrowly tailored to serve that interest."[185] In addition, the court must articulate findings that are "specific enough that a reviewing court can determine whether the closure order was properly entered."[186] The interest behind the closure must sufficiently overcome the presumption of openness, and the method of closure must be the least restrictive means of protecting that interest.[187]

The contours of a "compelling governmental interest" differ from case to case. The interest may involve the content of the information at issue, the relationship of the parties, or the nature of the controversy.[188] For instance, Justice Brennan suggested that national security concerns about confidentiality would warrant closures "during sensitive portions" of trial proceedings,[189] and several other federal courts have dealt with this weighing process since the *Richmond Newspapers* decision.[190]

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183. *Id.* (quoting *Richmond Newspapers*, 448 U.S. at 571).

184. Appellants in *General Electric* provided several additional ways that public access serves the functioning of summary jury trials: it builds public confidence in the proceedings, it enhances the procedure's purpose of allowing the public to participate in the judicial process, it enhances the settlement function, and it serves as a check on the court's broad power of conscription. Brief of Appellants on the Merits at 35-42, *General Elec.*, 854 F.2d 900.

185. *Globe Newspaper*, 457 U.S. at 606-07.

186. *Press-Enterprise I*, 464 U.S. at 510.

187. *See Publicker*, 733 F.2d at 1074.

188. *Id.* at 1073.

189. *Richmond Newspapers*, 448 U.S. at 598 n.24 (Brennan, J., concurring).

190. *See* cases cited *supra* note 103.

1. Interest in Settlement.—The court in *General Electric* enunciated a commanding interest in encouraging settlement;[191] an interest which it believed was more important than the public's safety concerns regarding a nuclear power plant within its community.[192] The Third Circuit,[193] in holding that the district court abused its discretion by denying a motion to unseal settlement agreements filed in the court, clearly stated: "Even if we were to assume that some settlements would not be effectuated if their confidentiality was not assured, the generalized interest in encouraging settlements does not rise to the level of interests that we have recognized may outweigh the public's . . . right of access."[194]

The Eleventh Circuit also broached this issue when it ordered a settled judicial record to be unsealed.[195] The court concluded, "There is no question that courts should encourage settlements. However, the payment of money to an injured party is simply not 'a compelling governmental interest' legally recognizable or even entitled to consideration in deciding whether or not to seal a record."[196]

Most recently, a federal district court in Kentucky determined that the conclusory statement "settlements will be impeded if confidentiality cannot be guaranteed" would not be sufficient to deny a newspaper access to documents obtained during discovery in a settled antitrust action.[197] This case is factually similar to the *General Electric* case and, interestingly, occurred in a district within the same circuit. One of the parties was a public utility accused of illegal antitrust activities which could have increased electric rates. The court determined that "the nebulous and conclusory showing of cause for protecting the documents is offset by the strong legitimate public concern demonstrated by the intervening newspaper in this matter."[198] The court found that "the public has a strong legitimate interest in being informed of the facts of any such activities."[199] This attitude is a far cry from the Sixth Circuit's decision in *General Electric*.

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191. *General Elec.*, 854 F.2d at 904. *Contra* Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) ("Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.").

192. *Id.* (and also the possible increase in utility rates that the consumers might incur).

193. Bank of America Nat'l Trust v. Hotel Rittenhouse, 800 F.2d 339 (3d Cir. 1986).

194. *Id.* at 346.

195. Wilson v. American Motors Corp., 759 F.2d 1568 (11th Cir. 1985).

196. *Id.* at 1571 n.4.

197. United States v. Kentucky Util. Co., 124 F.R.D. 146, 153 (E.D. Ky. 1989).

198. *Id.*

199. *Id.*

2. Interest in Corporate Reputation.—In *General Electric*, G.E. originally opposed the summary jury procedure and voiced concerns regarding a need for confidentiality to protect its reputation.[200] Judge Spiegel honored G.E.'s concerns and closed the summary jury trial.[201] Several federal courts have balanced a company's interest in protecting its reputation against the presumption of openness and concluded that a simple showing that the company's reputation would be harmed does not overcome the strong presumption in favor of public access to court proceedings and records.[202] The Third Circuit strongly pointed out that "[t]he presumption of openness plus the policy interest in protecting unsuspecting people from investing in [the company] in light of its bad business practices are not overcome by the proprietary interest of present stockholders in not losing stock value or the interest of upper-level management in escaping embarrassment."[203] Furthermore, the Sixth Circuit itself had previously determined that:

> [t]he natural desire for parties to shield prejudicial information . . . from competitors and the public . . . cannot be accommodated by courts without seriously undermining the tradition of an open judicial system. Indeed, common sense tells us that the greater the motivation a corporation has to shield its operations, the greater the public's need to know.[204]

The Sixth Circuit then concluded that only legitimate trade secrets would be a recognized exception to the right of public access in this type of situation.[205]

3. Interest in Subsequent Litigation.—Another fear that G.E. expressed regarding an open summary jury trial was the possibility of subsequent actions.[206] The First Circuit held[207] that a broad generalization that disclosure would be "detrimental to [a party] in other litigation"

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200. Transcript of In-Chambers Conference, Joint Appendix at 227, 229, *General Elec.*, 854 F.2d 900 (G.E. said that there was "[t]oo much at stake in terms of potential injury to [its] shareholders and [its] reputation and so forth.").

201. *Id.*

202. *Wilson*, 759 F.2d at 1571; *Publicker*, 733 F.2d at 1074; *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1179.

203. *Publicker*, 733 F.2d at 1074.

204. *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1180.

205. *Id.* General Electric never alleged the need for confidentiality based on protection of trade secrets. Petition for Writ of Certiorari at 10 n.6., *General Elec.*, 854 F.2d 900.

206. General Electric Company's Motion to Vacate Summary Jury Trial, Joint Appendix at 258, 261, *General Elec.*, 854 F.2d 900 ("G.E. cannot settle . . . because of the risk that such a settlement might encourage other utilities using similar containment systems to bring actions against G.E.").

207. F.T.C. v. Standard Fin. Management Corp., 830 F.2d 404 (1st Cir. 1987).

was an unacceptable reason for overriding the presumption of openness.[208] The court emphasized that the litigation involved a government agency and an alleged series of deceptive practices that allegedly resulted in widespread consumer losses.[209] The court determined that "[t]hese are patently matters of significant public concern," and the "threshold showing required for impoundment of the materials is correspondingly elevated."[210]

All of these decisions demonstrate that the first amendment right of public access to judicial proceedings and records "is no paper tiger."[211] If summary jury trials are arbitrarily closed to the public, litigants are likely to abuse the proceeding in an effort to avoid unwanted publicity, and the presumptively open trial will be undermined. Therefore, only the most compelling reasons should overcome the presumption of openness in summary jury trials.

V. Conclusion

General Electric provides dangerous precedent.[212] A summary jury trial uses public resources: ordinary citizens serve as jurors, a judge presides over the proceeding, and the venue is a public courtroom. The proceeding is characteristic of those which have been historically open, and public access serves a significant positive role in the summary jury trial by providing community therapeutic value to a process which supplants the ordinary trial.

Admittedly, the summary jury trial serves the purpose of facilitating settlement, but the process itself involves trial advocacy, not settlement negotiations, and can be decisively final. To summarily close to the public this unique process would serve a grave injustice — it would place a shroud of secrecy on our courtrooms.[213]

Opening the summary jury trial would not be tantamount to opening "old-fashioned settlement talks"[214] to the public. The summary jury

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208. *Id.* at 412.

209. *Id.*

210. *Id.*

211. *Id.* at 410.

212. At least one district court has followed the Sixth Circuit's decision regarding closure of the summary jury trial. *See* Federal Reserve Bank of Minneapolis v. Carey-Canada, Inc., 123 F.R.D. 603, 607 (D. Minn. 1988) ("The parties have voiced a concern over the potential for premature publicity and public disclosure as a result of the SJT. This concern was alleviated by this court's agreement to close the SJT to the public. [citation to *General Electric*]").

213. *See Richmond Newspapers*, 448 U.S. at 595 (Brennan, J., concurring) ("Secrecy is profoundly inimical to . . . the trial process.").

214. Lambros and Shunk, *supra* note 6, at 48.

proceeding does not involve negotiations; therefore, it does not require the privacy afforded to such "confidential" conferences. If parties are concerned with confidentiality, they should strive to settle the matter in one of the many private ADR methods available before and after litigation ensues.[215] However, when the parties cannot settle without the opinion of a petit jury and require the resources of the public courtroom, secrecy should give way to a right of access. The parties should not be allowed to coerce the court into closing the summary jury trial by implying that settlement will not occur if the proceeding is open. Likewise, the courts should not be seduced by the opportunity to settle a case at the expense of the public's constitutional rights.

Several courts have addressed this issue and determined that a generalized interest in encouraging settlement does not rise to the level that would outweigh the public's right of access.[216] Excluding the press and the public from a summary jury trial is repugnant to the first amendment of the United States Constitution. The qualified first amendment right of access should attach to summary jury trials.

ANGELA WADE*

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215. For example, mediation, arbitration, mini-trial, and conciliation. *See generally* BRAZIL, *supra* note 5.

216. *See supra* Section IV(C)(1).

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