
In Cincinnati Gas & Electric Co. v. General Electric Co., the United States Court of Appeals for the Sixth Circuit held that the first amendment did not guarantee the press a right of access to summary jury trial proceedings. This decision was based upon two conclusions: first, summary jury trials have not historically been open to the public; and second, public access to summary jury trial proceedings would not significantly further the effectiveness of the process. This Note will discuss the creation and development of summary jury trials as techniques for alternative dispute resolution, and will explore the evolution and current state of the right of access doctrine. It will also be necessary to examine the evolution of the right of access doctrine in the criminal context, since criminal cases served as the foundation for subsequent decisions in the civil context. Finally, the compatibility of the right of access doctrine with the policies underlying summary jury trials will be discussed.

I. The Summary Jury Trial

The summary jury trial was developed in 1980 by the Honorable Thomas D. Lambros, a judge of the United States District Court for the Northern District of Ohio. While trying two personal injury cases, Judge Lambros concluded that the parties' failure to settle the cases was a result

2. Id. at 903.
of their disagreement over the potential jury verdict. Judge Lambros pointed out that:

[a]n attorney and his client may feel that a jury's perception of liability and damages may be more favorable than any settlement that could be reached in pretrial negotiation. This uncertainty is frequently present in cases involving a "reasonableness" standard of liability, where no amount of judicial or legal interpretation of the standard of liability will assist the parties in resolving the case.

As a result, Judge Lambros devised his own "crystal ball," drawing by analogy on the use of advisory juries in federal courts.

A. Authority

Summary jury trial is a non-binding process designed to aid the parties in realistically assessing the merits of their cases for the purpose of facilitating settlement. The authority to order the parties to a summary jury trial lies in the court's penumbra of pre-trial powers pursuant to Federal Rules of Civil Procedure 16(a)(1), (5), (c)(7), and (c)(11), as well as the court's inherent power to control its docket.

Id. According to Judge Lambros:

[If 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.

Id. (emphasis in original).


FED. R. CIV. P. 39(c) provides:

In all actions not triable of right by a jury the court upon motion or its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.


FED. R. CIV. P. 16 provides in part:

(a) PRETRIAL CONFERENCES; OBJECTIVES. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as (1) expediting the disposition of the action, . . . (5) facilitating the settlement of the case.

Rule 16(c) further provides that "[t]he participants at any pretrial 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."

Judge Lambros cites the advisory committee note as further support:

Since it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible. Although it is not the purpose of Rule 16(c)(7) to impose settlement
This authority has recently been challenged in at least three federal cases. In *Strandell v. Jackson County*, the Court of Appeals for the Seventh Circuit held that the federal district court lacked the authority to order the parties to participate in summary jury trial. This reasoning, however, was not followed in Florida. In *Arabian American Oil v. Scarfone*, the District Court for the Middle District of Florida explicitly rejected the reasoning of the Seventh Circuit and held that the court may order the parties to summary jury trial. According to the court, "[t]he obvious purpose and aim of Rule 16 is to allow courts the discretion and processes necessary for intelligent and effective case management and disposition. Whatever name the judge may give to these proceedings their purposes are the same and are sanctioned by Rule 16." The Eastern District of Kentucky also recently declined to follow *Strandell*, and upheld the discretion of the trial judge to order the litigants to participate in summary jury trial. In *McKay v. Ashland Oil*, the court rejected the opinion of the Seventh Circuit regarding Rule 16 and the court's inherent authority to manage its docket. Instead, the court read Rule 16 broadly and noted that, "[t]he belief of the Judicial Conference that mandatory summary jury trials were authorized by the Federal Rules of Civil Procedure seems apparent." Other jurisdictions have adopted local rules for negotiations on unwilling litigants, it is believed that providing a neutral forum for discussing the subject might foster it. . . . For instance, a judge to whom a case has been assigned may arrange, on his own motion or at a party's request, to have settlement conferences handled by another member of the court or by a magistrate.


9. 838 F.2d 884 (7th Cir. 1987).
10. *Id.* at 887.
12. *Id.* at 449.
13. *Id.* at 448.

Two proposed bills would expand the current authority of federal courts to employ alternative dispute resolution. Representative William J. Hughes, Dem., New Jersey, has introduced a bill in the House of Representatives which would amend part VI of title 28, United States Code, adding a new chapter on alternative dispute resolution. *See* H.R. 473, 100th Cong., 1st Sess.,
the use of summary jury trials. For purposes of this Note, judicial authority to mandate summary jury trials will be assumed.

B. The Process

Judge Lambros strongly recommends that only those cases which are substantially prepared for trial should be ordered to summary jury trial. Otherwise, the jury assessment may lack reliability.

Before a case is assigned to summary jury trial, a pretrial conference is held, at which time the court hears any motions in limine, and rules on potential objections. A few days before summary jury trial, the parties submit trial briefs and proposed jury instructions. Potential jurors are selected, given a description of the case, and asked to complete a brief juror profile questionnaire. A short voir dire is then conducted, during which counsel is limited to two preemptory challenges. Because the purpose of summary jury trial is to afford each party a realistic evaluation of the merits of its case, individual clients are required to attend. Corporate clients must be represented by a top echelon officer or someone with decision-making authority. Unless the judge specifically orders or all the parties expressly desire, the proceedings are neither open to the public, nor are they usually recorded.

Each side is permitted to briefly present its case, and no live testimony is permitted. The attorneys present all the evidence and may incorporate legal arguments in the evidentiary presentations. Opening and closing


20. Id.


22. Id. at 48. Voir dire typically consists of a simple “show of hands” to questions which might elicit answers indicating potential bias. The procedure generally takes no longer than fifteen minutes.


24. Id. at 830-31.


26. Id. Some judges have adopted variations of Lambros' model and one judge has even allowed live witness testimony. Levin & Golash, Alternative Dispute Resolution in Federal District Courts, 37 U. FLA. L. REV. 29, 38 (1985).

27. Summary Jury Trial, supra note 3, at 471.
arguments are combined into a narration of what would be presented at trial. The respective attorneys are each allotted one hour, which may be divided to reserve time for rebuttal. Formal objections may be entertained, but they are not encouraged. Evidentiary rules are few and flexible, and evidence is restricted to what may be admissible at trial. Although attorneys are permitted to read from statements, reports, and depositions, they are not encouraged to do so extensively. After the parties present their case, the judge charges the jury with an abbreviated instruction, and the jury retires to deliberate. Although the jury is encouraged to reach a consensus verdict, it may return individual verdicts listing each juror’s opinion of liability and damages. Summary jury trial participants may stipulate that any consensus verdict will be considered a final determination on the merits entered as the judgment of the court. In addition, “counsel may stipulate to any other use of the verdict that will aid in resolution of the case.” Once the court has received the verdict(s), the judge, jurors and parties discuss the proceeding and the verdict(s). This discussion is unique to summary jury trials and often forms the basis for settlement negotiations, since it is at this point that the parties begin to fully understand the strengths and weaknesses of their respective cases.

Lambros and other authorities emphasize the non-binding nature of the summary jury trial proceeding. It is viewed solely as a technique for facilitating settlement. Thus, neither the jury findings nor any statement

28. Id.
29. Id.
30. Id. Usually, these objections are dealt with at the pre-summary jury trial conference. The purpose is to make the presentation as concise as possible in order to preserve its efficient nature.
31. Id. ("Representations of facts must be supportable by reference to discovery materials, including depositions, stipulations, documents, and formal admissions, or by a professional representation that counsel has spoken with the witness and is repeating that which the witness stated"). For a detailed analysis of court’s limitations, see Lambros & Shunk, supra note 21, at 49-50.
32. Id.
33. Id. A sample advisory verdict form appears in Lambros & Shunk, supra note 21, at 57.
34. Id.
35. Id.
36. Lambros, supra note 7, at 146.
37. Id.
38. Summary Jury Trial, supra note 3, at 469. Judge Lambros has observed:
The [summary jury trial] is designed to provide a ‘no-risk’ method by which the parties may obtain the perception of six jurors on the merits of their case without a large investment of time or money. The proceeding is not binding and in no way affects the parties’ rights to a full trial on the merits. SJT is a predictive tool that counsel may use to achieve a just result for their client at minimum expense.
Id. (emphasis added). See also Spiegel, supra note 23, at 833.
by counsel made during the summary jury trial are admissible in a future trial on the merits. Nor can they be construed as judicial admissions.

C. The Results

Although the procedure has been in existence for only eight years, the use of summary jury trials has grown dramatically. An estimated sixty-five federal district courts have conducted summary jury trials. The proponents praise the device as resulting in dramatic cost-savings and higher settlement rates. Summary jury trials are effective because they simulate an actual trial, and it is the reaction of the jurors which prompts the parties to settle. The summary jury trial advisory verdict enables both attorneys to assess how an actual jury would evaluate their case. Because they are required to attend, the clients also have the opportunity to assess the strength of the opposing side's case. Finally, the process enables the clients to have their "day in court," thus providing an emotional outlet.

There is still some controversy as to the effectiveness of the device, as well as its legality. In "the eyes of some, these techniques run counter to the American justice system's concept of ventilation, confrontation, and vindication of rights in a structured adversarial system."
II. A RIGHT OF ACCESS?

The recognition of a constitutional right of access to judicial proceedings is of relatively recent origin. Until recently, courts which recognized a public right of access based their decisions on common law rather than on constitutional grounds. As one commentator noted, "[a]lthough the open courtroom is a pervasive feature of the Anglo-American judicial system, trial courts in the last decade have frequently restricted public access by holding portions of their proceedings in secret or by placing restraints on the dissemination of information by the press or participants." However, since the landmark case of Richmond Newspapers v. Virginia, in which the United States Supreme Court recognized a qualified right of access to criminal trials, the access doctrine has developed significantly. In order to discuss the constitutional right of access to civil trials, it is first necessary to focus on the doctrine in the criminal context, because it was from this context that the civil doctrine evolved.

A. Right of Access in Criminal Trials

In Gannett Co. v. DePasquale, the Supreme Court held that the closure of a suppression hearing, at the request of the defendant, violated neither the first nor the sixth amendments. First, the Court rejected the argument that since the sixth amendment guaranteed the defendant the right to an open trial, there should be a "correlative right in members of the public to insist upon a public trial." The petitioners also argued that the first and fourteenth amendments guaranteed the press and the public the right of access to pretrial hearings. Although the Court expressly declined to decide whether such a right existed, it assumed such a right for the purpose of review. The Court held that even if such a

48. See, e.g., Craig v. Harney, 331 U.S. 367, 374 (1947) ("[w]hat transpires in the court room [sic] is public property").
52. Id. at 394.
53. The sixth amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."
54. Gannett, 443 U.S. at 381. But see Waller v. Georgia, 467 U.S. 39 (1984) (when the government moves to close the suppression hearing over the defendant's objection, several conditions must be met to avoid violating the defendant's sixth amendment rights).
55. Gannett, 443 U.S. at 391.
56. Id. at 392. "[W]hether the First and Fourteenth Amendments may guarantee such access in some situations, [is] a question we do not decide . . . ." Id.
57. Id.
right existed, it was not violated when the trial court balanced the constitutional right of access against the defendant’s right to a fair trial.\(^\text{58}\)

Only one year later, in *Richmond Newspapers v. Virginia*,\(^\text{59}\) the Court addressed the issue of whether the press and public have a constitutional right of access to a criminal trial. The Court reviewed the history of openness in Anglo-American criminal trials, and noted that “one of the most conspicuous features of English justice, that all judicial trials are held in open court, to which the public have free access, . . . appears to have been the rule in England from time immemorial.”\(^\text{60}\) Public access was historically justified because openness increases the likelihood of a fairly conducted proceeding, discourages perjury and participant misconduct, and lessens the likelihood of a biased decision.\(^\text{61}\) Persuaded by history, the Court held that the Constitution guarantees the press and the public the right of access to criminal trials.\(^\text{62}\) Applying a strict scrutiny standard, the Court qualified the holding by noting that the right of access is not absolute, and could be modified by reasonable time, place, and manner restrictions.\(^\text{63}\) However, absent an overriding interest articulated by the trial court, the Court held that a criminal trial must be open to the public.\(^\text{64}\)

Probably the most crucial opinion in *Richmond Newspapers* is Justice Brennan’s concurrence.\(^\text{65}\) While Justice Brennan wholeheartedly endorsed the notion of a constitutional right of access, he proceeded to more clearly define the applicable test.\(^\text{66}\) First, Brennan concluded that the argument in favor of a right of access was much stronger “when drawn from an enduring and vital tradition of public entree to particular proceedings or information.”\(^\text{67}\) Second, he stated that, “what is crucial in

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\(^{58}\) *Id.* at 393. The Court also noted that it was significant in this case that the denial of access was only temporary, and that “[u]nlike the case of an absolute ban on access, therefore, the press here had the opportunity to inform the public of the details of the pretrial hearing accurately and completely.” *Id.*

Although the majority did not address the issue of a right of access, Justice Powell, in his concurring opinion, endorsed the notion of a constitutional right of access. *Id.* at 397 (Powell, J., concurring). Justice Powell concluded, however, that given the agreement of both parties and the unique situation involved, the trial court did not abuse its discretion. *Id.* at 403.

\(^{59}\) 448 U.S. 555 (1980).

\(^{60}\) *Id.* at 566-67 (quoting E. JENKS, THE BOOK ON ENGLISH LAW 73-74 (6th ed. 1967)).

\(^{61}\) *Id.* at 569.

\(^{62}\) *Id.* at 580.

\(^{63}\) *Id.* at 581 n.18. Seven of the Justices recognized a right of access in the first and fourteenth amendments.

\(^{64}\) *Id.* at 580-81. The Court distinguished *Gannett* by noting that it involved access to pretrial hearings, not trials.

\(^{65}\) *Id.* at 584 (Brennan, J., concurring).

\(^{66}\) *Id.* at 589.

\(^{67}\) *Id.* (citation omitted).
individual cases is whether access to a particular government process is important in terms of that very process.\(^6\)

This two-prong test was subsequently adopted in other right of access cases. In *Globe Newspaper Co. v. Superior Court*,\(^9\) the Court applied Justice Brennan's two-prong test to strike down a statute excluding the public and press from criminal trials during the testimony of child rape victims. The Court noted that criminal trials have traditionally been open to the public, thus satisfying the first prong.\(^7\) It then stated that "the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole."\(^7\)

Applying a strict scrutiny test, the Court held that the asserted state interests, although compelling, could be effectuated by less restrictive measures than mandatory closure.\(^7\)

In *Press-Enterprise v. Superior Court*\(^3\) (*Press-Enterprise I*), the Court vacated a trial court order excluding the public and press from the voir dire proceedings in the criminal trial of a defendant charged with the rape and murder of a young girl.\(^4\) Applying the two-prong test, the Court reviewed the history of the jury selection process and noted that the process had traditionally been open to the public.\(^5\) The Court further concluded that openness served to further the effectiveness of proceedings by enhancing the public's confidence in the basic fairness of the criminal trial, as well as by providing a "community therapeutic value."\(^6\) The Court then concluded that the state's interests\(^7\) were unsupported by the trial court's findings, and could be effectuated through alternative, less drastic measures.

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68. *Id.*


70. *Id.* at 605.

71. *Id.* at 606.

72. *Id.* at 610. The state interests asserted in support of the mandatory closure statute were "the protection of minor victims of sex crimes from further trauma and embarrassment" and "the encouragement of such victims to come forward and testify in a truthful and credible manner."


74. *Id.* at 503.

75. *Id.* at 507 (citation omitted).

76. *Id.* at 508.

77. When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions. Proceedings held in secret would deny this outlet and frustrate the broad public interest; by contrast, public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected.

*Id.* at 509 (citations omitted).

77. The state's asserted interests, which the lower court upheld, were the protection of the criminal defendant's right to a fair trial and the prospective juror's right to privacy.
Finally, in *Press-Enterprise v. Superior Court* (Press Enterprise II), the Court applied Justice Brennan's two-prong test to hold that a qualified first amendment right of access attached to criminal preliminary hearings. First, the Court held that the "tradition of accessibility" requirement had been met, reasoning that: "Although grand jury proceedings have traditionally been closed to the public and the accused, preliminary hearings conducted before neutral and detached magistrates have been open to the public." The Court further concluded that public access to preliminary hearings satisfied the "function" requirement. The Court noted that "the preliminary hearing in many cases provides 'the sole occasion for public observation of the criminal justice system'" because it is often the final and most important phase of a criminal proceeding. In addition, the Court indicated that the absence of a jury to safeguard the defendant's interests made public access even more important. Finally, the Court held that a denial of access would frustrate the "community therapeutic value" of openness. Because the first amendment right of access did attach to the preliminary hearings, the Court concluded that the automatic closure of the hearings was not sufficiently tailored to the governmental interest of reducing the risk of prejudice so as to justify abridging first amendment rights.

**B. Right of Access in Civil Trials**

The Supreme Court has never expressly recognized whether a right of access attaches in civil proceedings. There is however, persuasive dicta suggesting that the Court would extend the *Richmond Newspapers* rationale to civil cases. Persuaded by this dicta, a number of state and federal courts have found a right of access in various contexts.

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78. 478 U.S. 1 (1986).
79. Id. at 10.
80. Id.
81. Id. at 11-12.
82. Id. at 12 (citation omitted) (quoting San Jose Mercury-News v. Municipal Court, 30 Cal. 3d 498, 511, 638 P.2d 655, 663, 179 Cal. Rptr. 772, 780 (1982)).
83. Id. at 12-13.
84. Id. at 13 (quoting Richmond Newspapers v. Virginia, 448 U.S. 555, 570 (1980)).
85. Id. at 15.
87. See, e.g., Richmond Newspapers v. Virginia, 448 U.S. 555, 580 n.17 ("Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open"). See also id. at 590 (Brennan, J., concurring) ("It appears that 'there is little record, if any, of secret proceedings, criminal or civil, having occurred at any time in known English history'") (quoting Gannett Co. v. DePasquale, 443 U.S. 368, 420 (1979) (Blackmun J., concurring and dissenting)); id. at 596
1. **The Two-Prong Test**

The lower courts differ in their approaches to the right of access issue. Some courts have adopted Justice Brennan's two-prong test, and, once the test is satisfied, apply a strict scrutiny test. In *Brown & Williamson Tobacco v. Federal Trade Commission*, the court of appeals vacated a district court order sealing various documents, despite the existence of a confidentiality agreement between the parties. The court applied the two-prong test and found that "[t]he Supreme Court's analysis of the justifications for access to the criminal courtroom apply as well to the civil trial." The court noted that the resolution of civil disputes often affects third parties or the general public, and concluded that the community catharsis value was necessary in civil as well as in criminal cases. The court further stated that civil cases often expose crucial public issues and expressed the concern that secrecy eliminates an important check on the integrity of the system. Finally, the court noted that fact-finding considerations, such as discouraging perjury and encouraging witnesses to come forward, apply as well in the civil context. Applying a strict scrutiny standard, the court noted that common law exceptions to the right of access had been developed to protect competing interests, such as "privacy rights of participants or third parties, trade secrets and national security." However, the court qualified these exceptions: "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." The court held that the public interest in having access to information which involves the health of citizens outweighed the parties' interest in keeping such information confidential.

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(Brennan, J., concurring) ("Also, mistakes of facts in civil litigation may inflict costs upon others than the plaintiff and defendant. Facilitation of the trial fact-finding process, therefore, is of concern to the public as well as to the parties"); *id.* at 599 (Stewart, J., concurring) ("[T]he First and Fourteenth Amendments clearly give the press and the public a right of access to the trials themselves, civil as well as criminal").

88. *See, e.g.*, Middleton, *Should a Court Keep Secrets?*, NAT'L L.J., Oct. 17, 1988, at 1, col. 4. "Although the high court has yet to broaden First Amendment access rights to include civil proceedings, lower courts increasingly are performing delicate balancing acts—based on constitutional, common law or statutory grounds—between the public's right to know and a litigant's right to privacy." *Id.*

90. *Id.* at 1181.
91. *Id.* at 1178.
92. *Id.* at 1179.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 1180.
In another case, Publicker Industries v. Cohen, the Court of Appeals for the Third Circuit held that the first amendment secures to the public and press a right of access to civil proceedings. In Publicker, the trial court closed a preliminary hearing, the purpose of which was to decide whether the defendant was obligated to reveal certain information to its corporate shareholders. The court of appeals held that the trial court had abused its discretion by failing to articulate countervailing interests or specific findings sufficient to overcome the presumption of openness in the hearing. In addressing the issue of a first amendment right of access, the court noted that the common law right of access to judicial proceedings had generally been considered by the Supreme Court in conjunction with criminal proceedings. However, the court relied upon Supreme Court dicta in Gannett to hold that the public has a common law right of access to civil proceedings as well as criminal.

The court found it more difficult to decide whether a first amendment right existed. The court referred to the two-prong test enunciated in Globe Newspaper, and concluded that a review of English and American legal authorities was necessary to determine whether a presumption of openness adheres in the civil context as well. The court cited various English authorities, such as Sir Edward Coke, Sir Matthew Hale, and William Blackstone for

97. 733 F.2d 1059 (3d Cir. 1984).
98. Id. at 1061.
99. Id. at 1072.
100. Id. at 1066.
101. The court stated:

For many centuries, both civil and criminal trials have traditionally been open to the public. As early as 1685, Sir John Hawkes commented that open proceedings were necessary so 'that truth may be discovered in civil as well as criminal matters.' English commentators also assumed that the common-law rule was that the public could attend civil and criminal trials without distinguishing between the two.

Id. at 1067 (citations omitted) (quoting Gannett Co. v. DePasquale, 443 U.S. 368, 386 n.15 (1979)).

102. Id. at 1068.
103. Id.
104. "These words [In curia Domini Regis] are of great importance, for all Causes ought to be heard, ordered, and determined before the Judges of the King's Court openly in the King's Courts, whither all persons may resort . . . ." Id. (emphasis added) (quoting 2 E. COKE, INSTI-

105. Hale stated:

The Excellency of this open Course of Evidence to the Jury in Presence of the Judge, Jury, Parties and Council, and even of the adverse Witnesses, appears in these Par-

106. Blackstone stated that:

This open examination of witnesses viva voce, in the presence of all mankind, is
the proposition that there should be no distinction between civil and criminal trials with respect to the presumption of openness. The court then pointed out that this English common law right of access had been transferred to the American colonies and concluded that, "[t]he explanation for and importance of this public right of access to civil trials is that it is inherent in the nature of our democratic form of government." The court concluded that multiple justifications support access to civil and criminal proceedings. Access enhances and safeguards the integrity of the fact-finding process; it promotes an appearance of fairness, and enhances public respect for the judicial system. In addition, access permits the public to participate in and act as a check on the judicial process and thus plays an important role in the participation and free discussion of governmental affairs. However, the court conceded that the first amendment right was not absolute and could be outweighed by an important governmental interest when there is no less restrictive way of serving that interest. The court also cited various exceptions to the presumption of openness, such as a party's interest in confidential commercial information, and trade secrets, the disclosure of which could cause irreparable harm. The court proceeded to hold that "[b]ecause the district court failed to articulate overriding interests based on specific findings . . . and because the district court failed to consider less restrictive means to keep this information from the public," the district court had abused its discretion in closing the hearing.

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much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law, where a witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal.

*Id.* at 1068-69 (quoting 3 W. Blackstone, Commentaries (1941)).

107. *Id.*
108. *Id.* at 1069. The Court went on to quote Justice Oliver Wendell Holmes:

It is desirable that the trial of [civil] causes should take place under the public eye . . . not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.

*Id.* (quoting Cowley v. Pulsifer, 137 Mass. 392, 394 (1884)).

109. *Id.* at 1070.
110. *Id.*
111. *Id.* at 1071. See infra notes 141-44 and accompanying text.
112. *Id.* at 1074. In weighing the respective interests at issue, the court observed, "[T]he presumption of openness plus the policy interest in protecting unsuspecting people from investing in Publicker 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." *Id.*
2. The Common Law's "Balancing Test"

Some courts continue to apply a common law approach of balancing the public's interest in obtaining information against the government's interest in refusing to disclose it. Other courts have simply incorporated Justice Brennan's two-prong test into their balancing analysis, treating the two components as two additional factors to be considered. For example, in Mokhiber v. Davis, the Court of Appeals for the District of Columbia found a presumptive public right of access to pretrial records in civil litigation, based upon common law considerations. This case involved a reporter who asserted a right to view, inter alia, certain motions filed in connection with the discovery process. In holding that the reporter had a presumptive right of access to these documents, the court carefully distinguished between the filed and unfiled materials: "By submitting pleadings and motions to the court for decision, one enters the public arena of courtroom proceedings and exposes oneself, as well as the opposing party, to the risk, though by no means the certainty, of public scrutiny." While the court observed that there was no tradition of access to discovery hearings and pleadings submitted in connection therewith, it refused to adopt a restrictive approach and discounted the importance of this factor. Instead, the court focused on the importance of the discovery process in civil litigation and concluded that the public interest in such documents remained strong, even though in this case, the motions were never ruled upon because the parties settled. The court cited three reasons for this conclusion: first, the presumptive right of access attaches when the pleadings are filed with the court; second, the court often plays an active role in the process leading to settlement; and third, the court may ratify a resulting agreement, and this decision may be viewed in light of available information, such as the pleadings. Thus, with regard to filed pleadings, the court engaged in

113. See generally Note, supra note 86, at 1126.
114. Id. at 1123-26.
116. Id. at 1108.
117. Id. at 1111.
118. Id.
119. Id. at 1112. The court concluded, "In short, we do not view the common law right of access as one frozen in history but rather as one that, in the finest tradition of our jurisprudence, must reflect changes brought by the times." Id.
120. Id.
121. Id. Accord Atlanta Journal v. Long, 258 Ga. 410, 369 S.E.2d 755 (1988) (presumptive right of access to court documents includes prejudgment records in civil cases and begins when judicial document is filed).
a common law analysis which included Brennan's two-prong test as additional, but not dispositive, factors to be considered.

The court, however, declined to extend this right to pretrial depositions, interrogatories, and documents gained through discovery. Although expressly resting its decision on common law considerations, the court engaged in a first amendment analysis, concluding that no public right of access attaches to unfiled discovery materials. Citing various authorities, including the recent Supreme Court decision in Seattle Times Co. v. Rhinehart, the court noted that no other court had extended the presumptive right of access to pretrial depositions, interrogatories, and documents obtained through discovery. In examining the underlying rationales for the lack of a public right of access, the court further noted that these discovery materials were not traditionally open to the public. The court found that not only would access to these proceedings fail to enhance the functioning of the judicial process, it would even have a deleterious effect:

Because discovery typically requires the parties to produce information ultimately irrelevant to the suit and inadmissible at trial, a presumptive right of access by members of the public at large would create a greater burden on the privacy of litigants than does the publicity attending motions and trials. The threat of publicity about discovered information would pressure parties to fight disclosure more vigorously and would probably influence the courts supervising discovery to narrow the parties' access to information, thus vitiating the basic policy of liberal discovery.

The court discussed the differences between viewing the right of access as a common law right, as opposed to a constitutional right. The

123. Id. at 1109; accord In re "Agent Orange" Prod. Liab. Litig., 96 F.R.D. 582, 584 (E.D.N.Y. 1983) ("[T]here is no independent right of access by non-parties to materials produced in discovery and not made part of the public record."); Anderson v. Cryovac, Inc., 805 F.2d 1, 13 (1st Cir. 1986).
124. Mokhiber, 537 A.2d at 1108. The court stated: "In sum, we feel constrained to follow precedent from the Supreme Court and this jurisdiction in resting a presumptive public right of access to pretrial court records in civil litigation on common law considerations." Id. (footnote omitted).
126. Mokhiber, 537 A.2d at 1109. "[T]he public has no common law or constitutional right of access to discovery materials as such, that is, to discovery materials that neither side has introduced as evidence at trial or as documentation in support of trial papers or motions to the court." Id.
127. Id. at 1110.
128. Id. at 1111.
major difference . . . appears to be that a common law right is more easily overcome by reasons favoring secrecy.”

C. Trends

Although it is difficult to discover any rigid classification of when information is or is not accessible, certain trends have become apparent among the lower courts.

1. Timing

One trend among lower courts is to distinguish between pretrial proceedings and trial proceedings. The presumption of openness in pretrial proceedings appears to be somewhat diluted, at least when such proceedings do not implicate the integrity of the fact-finding process. For example, some courts have denied access to depositions,130 interrogatories,131 unfiled discovery materials,132 and preliminary hearings.133

2. Settlement

Another generally recognized exception to the presumed right of access involves settlement proceedings. In Palmieri v. New York,134 the Court of Appeals for the Second Circuit noted that “[s]ecrecy of settlement terms . . . is a well-established American litigation practice.”135 In Minneapolis Star & Tribune Co. v. Schumacher,136

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129. Id. at 1108. The court went on to say: “In most cases, there may be little difference between a common law and constitutional right of access. Both ensure a presumption of access and permit a court to bar disclosure only when the specific interests favoring secrecy outweigh the general and specific interests favoring disclosure.” Id.


Moreover, pre-trial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, and, in general, they are conducted in private as a matter of modern practice. . . . Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.

Id. at 33 (citations and footnotes omitted). See also notes 117-28, supra, and accompanying text.


134. 779 F.2d 861 (2d Cir. 1985).

135. Id. at 865 (quoting In re Franklin Nat'l Bank Sec. Litig., 92 F.R.D. 468, 472 (E.D.N.Y. 1981), aff'd sub nom. FDIC v. Ernst & Ernst, 677 F.2d 230 (2d Cir. 1982)).

136. 392 N.W.2d 197 (Minn. 1986).
Minnesota Supreme Court held that "no first amendment right of access exists in the settlement documents and transcripts sealed by the court." The court noted that historically, most settlements have been private and the involvement of a court is limited to accepting a stipulated agreement and dismissing a claim once notified that the parties have agreed to settle. The court's perception of the historic privacy of settlement agreements was found to be supported by the fact that settlements, offers to settle, and settlement negotiations are all inadmissible under the Federal Rules of Evidence to prove liability. The court reasoned that it would be inconsistent with public policy encouraging settlement to make settlement documents public.

3. Confidential Trade Secrets and National Security

Judicial records involving trade secrets and national security are all generally recognized as exceptions to the preemptive right of access. These exceptions were carved out by courts to protect the competing privacy interests of the litigants. However, two limitations on the trade secret exception must be noted. The court in Brown & Williamson Tobacco stated that "[s]imply 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." The court also noted that the desire to

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137. Id. at 204. But see Bank of Am. Nat'l Trust and Sav. Ass'n v. Hotel Rittenhouse Asso., 800 F.2d 339, 346 (3d Cir. 1986) ("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 common law right of access.").

138. Minneapolis Star & Tribune, 392 N.W.2d at 204. See, e.g., Times Herald Printing Co. v. Jones, 717 S.W.2d 933 (Tex. Ct. App. 1986) (trial court did not abuse its discretion by sealing orders, opinions, and nondiscovery pleadings in compliance with parties' request that was condition of settlement).

139. FED. R. EVID. 408.

140. Minneapolis Star & Tribune, 392 N.W.2d at 204-05.


142. Brown & Williamson Tobacco, 710 F.2d at 1179; accord Mokhiber v. Davis, 537 A.2d 1100, 1115 (D.C. 1988); See also In re NBC, 653 F.2d 609, 613 (D.C. Cir. 1981). Thus, the public may be:

excluded, temporarily or permanently, from court proceedings or the records of court proceedings to protect private as well as public interests: to protect trade secrets, or the privacy and reputation of victims of crimes, as well as to guard against risks to national security interests, and to minimize the danger of an unfair trial by adverse publicity.

Id.

shield prejudicial records could not be accommodated without "seriously undermining the tradition of an open judicial system." The court continued:

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. In such cases, a court should not seal records unless public access would reveal legitimate trade secrets, a recognized exception to the right of public access to judicial records.45

Finally, the court stressed that a confidentiality agreement between litigating parties does not bind a court in any way.46

4. Divorce Proceedings

Some courts have permitted the closure of divorce proceedings to the public. For example, in Katz v. Katz,47 the court reversed an order opening to the public divorce hearings pertaining to equitable distribution of marital property. Conceding the existence of a presumptive public right of access to civil trials, the court noted that this right was not absolute.49 The court found that "a party seeking closure has the burden of showing that the proceedings will involve material of the type which courts will protect and that there is good cause for closure." Good cause is established "on a showing that disclosure will work a clearly defined and serious injury to the party seeking closure." The court concluded that good cause for closure

144. Brown & Williamson Tobacco, 710 F.2d at 1180.
145. Id.
148. Id. at 462, 512 A.2d at 1375.
149. Id. at 465, 514 A.2d at 1377. For a case involving a long-closed domestic relations case, see Sentinel Communications Co. v. Smith, 493 So. 2d 1048 (Fla. 5th DCA 1986):

While citizens collectively as the general public have a right to know how the legal system is functioning—so that the system can be altered and reformed—neither the general public nor the press has a legitimate right to intrude into a long closed court case in order to learn, publish, and sell embarrassing assertions as to the intimate details of an individual citizen's private life, merely because the assertions and details have been disclosed in a judicial forum in a case involving private civil litigation to which the general public—the State—is not a party.

Id. at 1048-49.
151. Id. (quoting Publicker Indus. v. Cohen, 733 F.2d 1059, 1071 (3d Cir. 1984)).
was established in order to protect the privacy interests of individuals engaged in often painful divorce proceedings.152

III. ACCESS TO SUMMARY JURY TRIALS

The lower courts have taken divergent approaches to public right of access in civil proceedings. Often, this diversity stems from the variety of circumstances in which the right is asserted. Because of the need for a case-by-case analysis, a mechanistic "bright-line" rule approach would be problematic and difficult to apply. *Cincinnati Gas & Electric Co. v. General Electric Co.*153 is illustrative of the problem as both the district court and the Sixth Circuit Court of Appeals declined to adopt a rigid, formalistic test.

A. The Facts

In *Cincinnati Gas*, the plaintiffs were three electric utility companies who had jointly undertaken the construction of the William H. Zimmer Nuclear Power Plant.154 In 1984, the plaintiffs filed suit against the General Electric Company and Sargent & Lundy Engineers, an architectural and engineering firm. The grounds for the lawsuit were breach of contract, and a common law right of action concerning modification of the plant. The plaintiffs' amended complaint also charged General Electric with fraud and RICO act violations.

Because of the confidential information that would be disclosed during discovery, the parties negotiated a comprehensive protective order. This order, which the magistrate approved, restricted the use of, and reference to, certain documents the producing parties classified as "confidential" or "highly confidential." In 1987, the district court ordered the litigants to participate in a summary jury trial, and the court's order included a provision closing the proceeding to the

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152. *Id.* The court stated:

Trials of divorce issues frequently involve painful recollections of a failed marriage, details of marital indiscretions, emotional accusations, and testimony which, if published, could serve only to embarrass and humiliate the litigants. While the public has a right to know that its courts of justice are fairly carrying out their judicial functions, no legitimate purpose can be served by broadcasting the intimate details of a soured marital relationship.

*Id.*


154. *Id.* at 901.
press and public.\textsuperscript{155} Subsequently, various newspapers moved to intervene to challenge the order closing the summary jury trial, alleging that the presumptive public right of access to civil trials applied equally to summary jury trials.\textsuperscript{156}

\textbf{B. The District Court}

The district court denied the motion to intervene, finding that "the First Amendment right of access to certain judicial proceedings does not attach to [the] summary jury trial."\textsuperscript{157} To reach this conclusion, the court engaged in a well-reasoned analysis and application of Justice Brennan's two-part test.\textsuperscript{158}

\textit{1. The "Tradition" Prong}

The movants argued that because of the similarities between the summary jury trial and a trial on the merits, the summary jury trial should fall under the general civil trial category, making "General Electric's contention that there is no 'tradition of accessibility' for such proceedings ... incorrect."\textsuperscript{159} Also, the movants emphasized that the parties could stipulate that the summary jury trial verdict be binding. However, the court rejected these arguments as "exalt[ing] form over function."\textsuperscript{160} The court noted that given the short existence of the technique, there was no historically recognized right of access to summary jury trials.\textsuperscript{161} The court stated that the summary jury trial, despite its outward appearance of a trial, was nonetheless a settlement technique, and "while the history of the summary jury trial is limited, there is general agreement that historically settlement techniques are closed procedures rather than open."\textsuperscript{162} However, while the court emphasized that even though the parties had not stipulated to a binding summary jury trial verdict and that such a stipulation would

\textsuperscript{155} Id. at 901-02. In addressing the jury on the need for confidentiality, Judge Spiegel explained, "The concern among some of the parties is that if the contents or the results of your decision became public, the prospects of the settlement might be diminished and might increase the difficulty of selecting a jury in the future when this case comes up for trial in a couple of months." Cincinnati Gas & Elec. Co. v. General Elec. Co., 117 F.R.D. 597, 604 (S.D. Ohio 1987), aff'd, 854 F.2d 900 (6th Cir. 1988), cert. denied sub nom. Cincinnati Post v. General Elec. Co., 109 S. Ct. 1171 (1989).

\textsuperscript{156} Cincinnati Gas, 117 F.R.D. at 598.

\textsuperscript{157} Id. at 602.

\textsuperscript{158} See supra notes 65-68 and accompanying text.

\textsuperscript{159} Cincinnati Gas, 117 F.R.D. at 600.

\textsuperscript{160} Id.

\textsuperscript{161} Id. at 599.

\textsuperscript{162} Id.
not change the "character" of the proceeding, it vacated the order relating to the parties' option to make such a stipulation.163

While the court agreed with the movants that the two proceedings were similar, the court suggested two reasons why this similarity would not be dispositive of the first prong of Brennan's test. First, "while movants have focused on the similarities between a trial on the merits and a summary jury trial, the differences are manifold."164 The court noted that the parties had only seven days to participate in a summary jury trial, whereas the actual trial would take months.165 Because of these time limitations, not all of the available evidence would be presented at the summary jury trial, nor would there be live testimony or cross-examination of witnesses. In addition, only selected issues would be presented at the summary jury trial. The issues tried would be only "those issues that appear to be central to any meaningful settlement discussions in this case."166 While the court conceded that the jurors were selected from the community to participate in the summary jury trial proceeding, the court distinguished the jury's function in summary proceedings from the jury's function in an actual trial on the merits.167 The jurors were told at the beginning of the action that they would be participating in a dispute resolution proceeding, and that their input would aid the parties in assessing the strengths and weaknesses of the case as well as its value.168 The jury would also engage in considerations directed toward settlement that would not occur at trial, because they would assume liability and assess any damages. Finally, the jury verdict would be advisory.169 The court's second reason stemmed from these similarities: "We readily agree that we attempt to have the proceeding mimic trial procedures to the degree possible, but this effort does not detract from the stated goal of settlement—to the contrary, the realism of the procedure is key to successful functioning."170

2. The "Function" Prong

The newspapers also argued that access to this summary jury trial was important in terms of the process of the proceeding, because it

163. Id. at 600-01. "However, in an abundance of caution, on our own initiative, which is unopposed by the parties in this case, we hereby vacate paragraph 20 of our June 28 Order relating to counsels' ability to stipulate that a consensus verdict be deemed a final determination of the merits." Id. at 601.
164. Id. at 601.
165. Id.
166. Id.
167. Id.
168. Id.
169. Id. See supra note 43 and accompanying text.
“may result in the settlement of the case so that the ‘sole occasion’ for public observation of the justice system’s role in this type of dispute resolution, in a case involving issues of paramount public interest concerning nuclear power plants will be lost.” 171 While the court did not dispute that these were issues of public importance, 172 the court noted that a similar result would always follow in a case which settles prior to actual trial. 173 “Thus, should this case settle, either pursuant to more traditional settlement techniques or the summary jury trial, the public would be precluded from hearing the actual evidence in the case.” 174

The newspapers also argued that public access to the summary jury trial would ensure that the proceedings were conducted fairly. 175 The court rejected this argument, concluding that there were already sufficient safeguards for fairness. The court noted that “these proceedings are nonbinding and, other than fostering the hope of settlement, they have no effect on the merits or outcome of the case.” 176 The court stated that the jury would also act as the “inestimable safeguard” against unfairness by constituting public participation, albeit limited. 177 Thus, instead of adopting a rigid, categorical approach, the court focused on the underlying purposes and structure of the summary jury trial to conclude that “summary jury trials, as recognized settlement techniques, are in a class of proceedings that have been closed to the public to best effectuate their purposes.” 178

C. The Court of Appeals

The Court of Appeals for the Sixth Circuit affirmed the district court’s decision, concluding that the first amendment right of access to civil proceedings did not apply to this summary jury trial. 179 The

172. Id. The court concluded:
We are in complete agreement with movants that the issues central to the merits of this case present matters of paramount public concern. And, as an aside, we note that were the matter one purely within the Court’s discretion, we would advocate opening the procedure to the press and public, in the belief that all parties, as well as the public, would be well-served by an airing of the issues.

Id.
173. Id. at 601.
174. Id. “[T]he fact that the summary jury trial is a more formal process than the traditional settlement conference is not determinative of the existence of a First Amendment right of access.” Id.
175. Id. at 602. See supra notes 61, 76 and accompanying text.
178. Id.
Cincinnati Post argued that the district court's refusal to allow intervention for the purpose of attending the proceeding was error because "the summary jury proceeding is analogous in form and function to a civil or criminal trial on the merits, and therefore, the first amendment right of access which encompasses civil and criminal trial and pre-trial proceedings also encompasses the summary jury proceedings." Further, they argued that "public access would play a significant positive role in the functioning of the judicial system and summary jury trials." The Court of Appeals, however, agreed with the appellee's arguments that settlement proceedings were not traditionally accessible, that it exalted form over function to argue that summary jury trials were indistinguishable from actual trials, and that public access would not significantly further the functioning of the process.

The Court of Appeals rejected the argument that summary jury trials should be considered historically open to the public due to their structural similarity to civil trials. The court discussed the dissimilarities between the two procedures, focusing on the summary jury trials' abbreviated arguments, informal verdicts, lack of witnesses and discouragement of evidentiary objections. The court concluded that some of the evidence presented in a summary jury trial proceeding may not be admissible in an actual trial on the merits. The court also focused on the settlement function of summary jury trials in describing the dissimilarity, particularly the mock jury's assessment of damages even where it finds no liability. Another settlement aspect noted by the court is the informal discussion held after the advisory verdict is rendered. There, the parties, the court, and the jurors discuss the strengths and weaknesses of each side's case a process unavailable in civil trials. Finally the court emphasized the nonbinding nature of the summary jury trial, rejecting the argument that the proceeding was like an adjudication because the parties were compelled to participate. The court noted in this regard:

180. *Id.* at 902.
181. *Id.* at 903-05.
182. *Id.* at 904.
183. *Id.* See generally notes 26-40, *supra*, and accompanying text.
184. *Cincinnati Gas*, 854 F.2d at 904. Although an argument might be made that, given the informality of the proceedings and the emphasis on expediency, evidence in a summary jury trial proceeding is restricted to evidence which would be admissible at trial, it is clear that some otherwise inadmissible evidence will of necessity be introduced at a summary jury trial proceeding. *See supra* note 27 and accompanying text.
185. *Cincinnati Gas*, 854 F.2d at 904. "At every turn the summary jury trial is designed to facilitate pretrial settlement of the litigation, much like a settlement conference." *Id.*
The district court expressly stated that the proceeding was undertaken with the cooperation of the parties. Although the court denied appellants' motion to vacate the order setting the summary jury trial, it accommodated appellants' concerns to keep the proceeding confidential, thereby making it unnecessary for appellants to challenge the court's denial of the motion.186

The Court of Appeals reasoned that allowing public access to summary jury trial proceedings over the parties' objections would significantly limit the procedure's utility as a settlement device, and would therefore undermine the government's substantial interest in promoting settlement.187 The court's understanding of the summary jury trial's function as a settlement device led it to further conclude that the claim of a "right to know" has "no validity with regard to summary jury trials."188 The court also noted that the public would have no entitlement to observe any negotiations leading to a traditional settlement of the case, and the parties would be under no constitutional obligation to reveal the content of the negotiations.

Finally, the court rejected the appellants' argument that summary jury trials should be open because of the final and decisive effect on the outcome of the litigation.189 In making this argument, the appellants relied on the language in Press Enterprise II which suggested that preliminary criminal hearings must be open to the public because of their decisive effect on criminal cases.190 The court determined, however, that a preliminary criminal hearing is distinguishable from a summary jury trial because the former results in a binding judicial determination, whereas the latter does not present matters for adjudication by the court. The lack of a binding determination is the essence of the summary jury trial as a settlement technique, and participation in the summary jury trial does not affect the parties' right to a full trial de novo on the merits.191 "Thus, it is the presence of the exercise of a court's coercive powers that is the touchstone of the recognized right to access, not the presence of a procedure that might lead the parties to voluntarily terminate the litigation."192

186. Id. at 904-05 n.5.
187. Id. at 904. "Consistent with this rationale, courts have rejected first amendment claims of access, even though the information involved was of undeniable public interest."
Id. at 905 n.6. The court cited Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984), in which the Supreme Court upheld the issuance of a protective order prohibiting the public dissemination of information obtained in pretrial discovery despite a strong public interest.
188. Cincinnati Gas, 854 F.2d at 905.
189. Id. Once again, the same could be argued with respect to any settlement negotiations.
190. Id.
191. Id. at 905 n.7.
192. Id. at 905.
D. Analysis

One of the primary difficulties inherent in applying Justice Brennan's two-prong test to a summary jury trial lies in the fact that the two prongs are inextricably intertwined. It seems to beg the question to argue that summary jury trials have not traditionally been open to the public due to their relatively recent origin. However, summary jury trials—as settlement procedures—also fail the "tradition of accessibility" prong. In order to effectively negate this "tradition" prong, one must examine the "purpose" prong as well. By examining why access to these procedures is not important to their functioning, one can see why they are not traditionally open to the public. This analytic difficulty is illustrated by the district court's opinion in which the two prongs of the test were treated as interdependent.

Another difficulty lies in positioning summary jury trials on a spectrum between actual trials and pure settlement negotiations. The newspapers attempted to position summary jury trials immediately adjacent to actual trials because of their facial similarities. In contrast, the proponents of closure argued that the summary jury trial belonged at the opposite end of the spectrum because its purpose is to promote settlement. The district court and the court of appeals, however, adopted a more functional, realistic approach, by discussing the differences between the techniques and the reasons underlying those differences. By examining the abbreviated procedures, the evidentiary flexibility, the lack of a binding adjudication, and the preservation of the right to a full trial on the merits, both courts concluded that despite its superficial similarity to an actual trial, the summary jury trial had functional differences substantial enough to establish its primary role as a settlement device.

Implicit in the appellate court's discussion of settlement was its acceptance of policy concerns militating against access to settlement procedures. The major concern, as other courts have noted, is the strong public policy favoring the settlement of private disputes without having to resort to litigation. As the Minnesota Supreme Court noted in

193. See supra notes 66-68 and accompanying text.
195. Id. at 600. See supra notes 164-70 and accompanying text.
196. Cincinnati Gas, 854 F.2d at 903.
197. See supra notes 160-70, 178, 187-90 and accompanying text.
198. See supra notes 187-88 and accompanying text.
199. See, e.g., Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197 (Minn. 1986).
Minneapolis Star & Tribune Co. v. Schumacher, "[o]ne of the reasons parties agree to settle is that they do not wish to go to trial and expose their disputes to the public."\textsuperscript{200} The court went on to conclude that the public policy favoring settlement militated against disclosing to the public the content of settlement documents. "Such reasoning would tend to discourage settlements rather than [encouraging] them."\textsuperscript{201}

The same reasoning applies equally for public access to summary jury trials. Allowing the public to scrutinize the events in a procedure designed for settlement would defeat one of the primary purposes of the process and add an additional barrier to settlement.

In Cincinnati Gas the court concluded that "allowing access [to summary jury trials] would undermine the substantial governmental interest in promoting settlements."\textsuperscript{202} This is not to say that summary jury trials must always be closed; the final decision, according to Judge Lambros, should be left to the discretion of the court. He notes that "judges should have the call when ADR won't function if the process is public."\textsuperscript{203} Judge Lambros observed that "if ever there were a case for closure of the proceedings to the public, 'the General Electric Case was it.'"\textsuperscript{204} In its successful opposition to a motion by the newspapers to have Judge Lambros appointed as amicus curiae, General Electric quoted the judge as "generally favoring open SJT's, but also as favoring the vesting of broad discretion in district judges 'to adapt the procedure to the individual and to conduct the summary jury trial in the manner that is most conducive to settlement.'"\textsuperscript{205}

IV. Conclusion

One of the principal features of our democratic form of government is the right of the people to freely discuss the governmental process. Unless the people can observe that governmental process at work, there is little to discuss, and the fiercely protected freedom of speech is severely undermined. However, this right is not absolute. A criminal defendant's right to a fair trial may outweigh this right, and the Supreme Court has recognized that states, in such cases, may regulate access to

\textsuperscript{200} Id. at 205.
\textsuperscript{201} Id.
\textsuperscript{202} Cincinnati Gas, 854 F.2d at 904.
\textsuperscript{203} Judges Should Have Call on Use, Closure of Proceeding, Lambros Says, 2 Alternative Dispute Resolution Report (BNA) 251, 253 (July 21, 1988).
\textsuperscript{204} Id.
\textsuperscript{205} Press Claims Right of Access to Summary Jury Trial Record, 2 Alternative Dispute Resolution Report (BNA) 155, 156 (Apr. 28, 1988). In fact, Judge Lambros reportedly closed part of a summary jury trial and denied the Wall Street Journal access to the verdict, although not the hearing, of an antitrust dispute.
the courts. Also, the right of access might not extend to certain proceedings in which the participants’ privacy interests are implicated. Thus, courts have denied access to divorce hearings, confidential trade secrets, and settlement documents. In Cowley v. Pulsifer, then Judge Oliver Wendell Holmes denied access to pleadings that had never reached the court. He stated that “[t]hese [documents] do not constitute a proceeding in open court. Knowledge of them throws no light upon the administration of justice.” Summary jury trials, too, shed no light on the administration of justice because they present no matter for adjudication by the court. They merely provide the litigants with an effective device for facilitating settlement. The substantial governmental interest in promoting settlements outweighs any rights of access to a summary jury trial that the public and press may claim.

Susan Tillotson

206. See supra notes 62-63 and accompanying text.
207. See supra notes 147-52 and accompanying text.
208. See supra notes 141-46 and accompanying text.
209. See supra notes 134-40 and accompanying text.
211. Id. at 394.