Legal Issues Raised by the Summary Jury Trial Process

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CHAPTER 7.1

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I. The Summary Jury Trial Concept

Trials often occur because both sides have different views on how a jury will assess the case. This is particularly true when facts are at issue, or when subjective legal terms, such as "due care," "reckless disregard," "commercial reasonableness," or "bad faith," must be resolved by a jury. Perhaps the paradigm example is a case where liability is not seriously contested, but the extent of damages is subject to widely divergent views. To deal with these situations, federal district courts and courts in most states now offer a nonbinding form of a trial "test balloon," known as a summary jury trial./1/

A summary jury trial involves an abbreviated presentation of the case to an advisory jury, drawn from the court's actual jury venire. Jurors are usually not told that the trial is not "real," although some courts explain the jurors' role at the start of the process. The court may require counsel to submit proposed *voir dire* and

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jury instructions, trial memoranda, and motions *in limine* prior to the selection and seating of the jury. The number of jurors empaneled can vary from the number typically used in the given jurisdiction to a number the judge deems necessary./2/

Though likened to a mock jury trial, where a party to a suit may decide to hire individuals to serve as "jurors" for the purpose of testing a case, the summary jury trial differs in several important respects. First, unlike the summary jury device, a mock trial involves only one side to a dispute offering the arguments of all parties involved. Second, jurors serving in a summary jury trial are "legitimate," in the sense that they are not told until after the proceedings have concluded that theirs is merely an advisory verdict. In this context, both parties rely on the jury to faithfully discharge their civic duties and follow the court's instructions. If jurors are going to sacrifice their time and energy for a trial, it becomes important to them. Third, parties to a mock trial get to keep the results to themselves. A summary jury verdict, on the other hand, apprises both sides of the relative merits of their arguments. Another difference between the mock jury and the summary jury is that the government pays the latter, and frequently at a rate lower than what the market would require of the parties in the former./3/

In the typical summary jury scenario, each side has a limited amount of time, usually less than a day, to summarize the evidence as well as make arguments to the jury. In making their presentations, counsel are limited to material that would be admissible at trial under the rules of evidence. Usually a court does not permit counsel to call either lay or expert witnesses. Sometimes, however, critical documentary as well as other evidence, and the videotaped testimony of critical witnesses is allowed.

After closing arguments, the court gives a summary charge to the jury. The jury then returns an advisory verdict. In most instances, the jurors are instructed to reach a unanimous decision. If a consensus verdict cannot be reached, however, individual verdicts may be returned. Following the verdict the parties and their attorneys are usually allowed to discuss with the jury members their impressions of the case. Although settlement discussions may occur throughout the planning, hearing, and deliberation phases of the summary jury trial, most cases settle after the advisory verdict is rendered./4/ If the parties fail to settle, the case goes on to trial.

The determination of whether a case is suitable for a summary jury trial involves many factors. A case may be suitable for summary jury trial if

— the case is trial-ready and headed for a jury trial of over five days;
— the parties disagree substantially over the likely verdict range and how a jury will view factual evidence or apply legal standards to the facts;
— one or more of the parties have an unrealistic view of the merits of the case; or
— party emotions are a principal obstacle to the settlement.

On the other hand, a case may not be suitable for a summary jury trial if

— the dispute turns on the credibility or persuasiveness of expert or lay witnesses unless the court allows the use of live or videotaped witness testimony;
— the court believes there is clearly no chance to settle;
— one of the attorneys is not especially capable, as the process relies heavily on the performance of counsel; or
— the case involves legal issues of some public importance./5/

In the end, the choice to engage in a summary jury trial must be carefully considered by all parties. While it can be a powerful accelerant to a settlement in suitable cases, a summary jury trial can also be a waste of time and money if the case has not been vetted for its appropriateness for such a proceeding.

II. Advantages and Disadvantages to the Summary Jury Trial

A summary jury trial enables the parties to see how their case will sit with a jury. Put otherwise, corporate executives can observe a "test case" of how their "outside board of directors" in the courtroom will perceive the case. The clients also can assess the attorneys' presentation of the case. This infusion of reality may induce recalcitrant parties to the bargaining table. Some evidence of the powerful effect of this procedure is that virtually none of the cases assigned to summary jury trials ever go on to trial./6/ Although a summary jury is only an advisory jury, its verdict may provide the psychological benefits flowing from having "one's day in court." Thus, even parties that prevail before the summary jury may be encouraged to settle, feeling that their position has been vindicated.

A disadvantage to regular civil trials is the adverse effects of publicity about the proceeding. Where summary jury trials are viewed as part of the settlement process and kept confidential by the court, they can offer distinct advantages to the litigants over a public trial. Moreover, the costs of a protracted trial are significant, and include both lawyers' fees and expenses, as well as management time when the litigant is a corporation.

There are disadvantages to the summary jury trial. When it is used on the eve of trial to push parties to settlement, it does nothing to eliminate the typically substantial expense of extensive pretrial litigation costs, especially those associated with extensive discovery such as massive document productions and endless depositions. The solution to the discovery expense problem is to schedule the summary trial reasonably early in the litigation, after a short time for a preliminary and informal exchange of information to take place, but before the kind of exhaustive "no stone unturned" discovery occurs that is often necessary prior to trial. Of course, it is also true that if the summary jury trial process does not, in fact, procure a settlement, the preparation and time involved in the summary trial adds to the total costs of litigation.

Moreover, a summary jury provides only a single financial assessment of the case. Although this may induce the parties to settle, that assessment parallels the "winner-take-all" approach of traditional litigation and offers no creative advice to the parties of how to compromise and overcome their differences to reach a mutually satisfactory outcome./7/ Thus, although summary jury trials have a high settlement rate, the quality of those settlements may be questionable.

With respect to large, publicly traded companies that are often the target of recovery in cases in which the summary jury trial might be most effective, there is some basis for concern that such a mechanism might coerce settlement by those defendants because of requirements pertaining to the disclosure of "material information" in public filings. In the scenario posited by Judge Posner, the possibility of a material "advisory" verdict against them might visit upon those entities significant pressure to settle, rather than defend themselves at trial. In that situation, the summary jury trial becomes something more than just the benchmark it is intended to be. *See* Richard A. Posner, "The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations," 53 *U. Chi. L. Rev.* 366, 387 (1986).

Another disadvantage may be inherent in the shortcomings of the trial simulation. Lawyers reading short summaries of the evidence are sometimes poor substitutes for the kind of evidentiary presentation and exposition that occurs in traditional direct and cross-examination. Time restraints obviously will force each side either to ignore or gloss over key points. Moreover, trial is fundamentally a form of theater, and the outcome can be greatly affected by the presentation. A summary jury trial cannot adequately convey that component of the trial process, which for some cases may be a critical element.

Moreover, unless the jury used in the summary jury trial has been carefully selected for demographic characteristics that are very similar to those anticipated for the actual trial jury, the validity of extrapolating the results of any deliberations is questionable. Studies with similar juries deciding the same case have shown a decided lack of predictability./8/ In addition, many cases turn on the credibility and persuasiveness of a particular witness, often an expert. In most summary trials, actual witnesses are not used and, thus, an important element in the outcome of the actual trial is missing. Thus, the predictive value of the procedure can be questionable.

Finally, there is the "hole-card" problem. In most cases there are key arguments and evidence which, once disclosed to the other side by their use in advance of the actual trial, can be effectively rebutted or diminished by the other side. A party, thus, faces the dilemma of deciding whether to unsheathe the ultimate trial weapon in the summary trial, or keep it hidden for use at trial. A related, and larger, issue is that the summary trial process to a certain extent requires the parties to reveal their trial "game plan." If an actual trial later occurs, litigants may find the earlier revelations about both tactics and strategy will have a significant impact.

III. Legal Issues

A. Source of Courts' Authority to Recommend Summary Jury Trials

A variety of sources provide federal courts with authority to recommend that parties participate in a summary jury trial. Pursuant to 28 U.S.C. § 2071 (1988), district courts are empowered to prescribe rules "for the conduct of their business." Similarly, the Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-58 (West Supp. 2001), requires that, through their local rules, district courts "encourage and promote the use of alternative dispute resolution in [their] districts." *Id.* § 651(b). This statutory authority for the adoption of local rules is liberal, but not completely unlimited. For example, Federal Rule of Civil Procedure 83 provides that district courts may make and amend local rules "not inconsistent with" the other Federal Rules of Civil Procedure. On its face, a summary jury trial process does not seem to conflict with other rules in the Federal Rules of Civil Procedure.

In fact, Federal Civil Procedure Rule 16 supports the view that a court has the power to recommend summary jury trials. Rule 16(a) empowers a trial court to "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; ... and (5) facilitating the settlement of the case." Concerning the facilitation of settlement, Rule 16(c)(9) suggests that efforts to promote settlement are valid mechanisms for the court to employ: "the court may take appropriate action with respect to ... (9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule." Many states, and approximately forty-eight federal districts, have adopted statutory provisions or rules regarding summary jury trial proceedings./9/

The 1993 Advisory Committee Notes clarified that a summary jury trial is a permissible settlement procedure. The Notes state that "the judge and attorneys can explore [the] possible use of alternative procedures such as minitrials, summary jury trials, mediation, neutral evaluation and nonbinding arbitration that can lead to consensual resolution of the dispute without a full trial on the merits." The Rule does not, however, attempt to resolve the question of whether the court may require such proceedings as an exercise of its inherent power.

B. Challenges to Court-Ordered Summary Jury Trials

Although there is authority for a federal district court to recommend that parties participate in a summary jury trial, the source of a court's authority to mandate participation in a summary jury trial is nether uniform nor clear. Indeed, jurisdictions differ on whether that authority may extend to court-ordered summary jury trials when one of the parties to the dispute objects.

Several federal district courts have expressly recognized their authority to mandate participation in a summary jury trial. *See, e.g., Arabian Am. Oil v. Scargone,* 119 F.R.D. 448 (M.D. Fla. 1988); *McKay v. Ashland Oil, Inc.,* 120

F.R.D. 43 (E.D. Ky. 1988); *Federal Reserve Bank v. Carey-Canada, Inc.*, 123 F.R.D. 603 (D. Minn. 1988); *see also In re Matter of Sergeant Farms, Inc.*, 224 B.R. 842 (M.D. Fla. 1998) (recognizing the bankruptcy court's authority to require parties' participation in alternative dispute resolution (ADR)). However, the only two federal courts of appeals to have addressed the issue have held to the contrary. In *Strandell v. Jackson County,* 838 F.2d 884 (7th Cir. 1988), the U.S. Court of Appeals for the Seventh Circuit held that a federal district court may not require litigants to participate in a nonbinding summary jury trial. The Sixth Circuit Court of Appeals, citing *Strandell,* similarly stated that the provisions of Rule 16 do not permit compulsory participation in settlement proceedings such as summary jury trials. *See In re NLO, Inc.,* 5 F.3d 154 (6th Cir. 1993). *But see In re Southern Ohio Correctional Facility,* 166 F.R.D. 391 (S.D. Ohio 1996) (stating that 1993 Amendment to Rule 16 effectively overrules the *NLO* ruling to the extent that *NLO* fails to recognize a court's authority to order a summary jury trial when statutes and local rules permit); *Ohio ex rel. Montgomery v. Louis Trauth Dairy,* 164 F.R.D. 469 (S.D. Ohio 1996) (same).

In *Strandell,* the Seventh Circuit reversed a district court's order holding plaintiff's counsel in contempt for refusing to participate in a summary jury trial. *Strandell* was a civil rights claim by the parents of Michael Strandell, who committed suicide in jail following what the parents contended was an unconstitutional arrest, search, and incarceration.

The Chief Judge of the Southern District of Illinois took note of the trial court's crowded docket, then suggested and later ordered the parties to submit to a summary jury trial. As authority, the trial court cited the Federal Rules of Civil Procedure. The district court had not adopted a local rule providing for summary jury trials. The plaintiffs' counsel refused to participate in the process, arguing a denial of due process because it would force the disclosure of both litigation strategy and work-product privileged information.

Plaintiff's counsel objected to participating in the summary jury trial because the case hinged on the credibility of the witnesses, a matter arguably not suitable for summary jury trial resolution. Additionally, plaintiffs' counsel sought to protect as privileged the twenty-one factual witness statements he had obtained from witnesses identified to the defendants in discovery answers. The defendants had filed a motion to compel production of the witness statements taken by plaintiffs' counsel, which plaintiffs had opposed on the grounds of work-product privilege. The district court denied the defendants' motion to compel on the grounds that the defendants had failed to establish either "substantial need" or "undue hardship." Plaintiffs' counsel contended that the defendant would seek to obtain the statements from the summary jury trial process.

The Seventh Circuit, while expressing a degree of appreciation for the trial court's concern with its congested docket, also was troubled with how the summary jury trial process might adversely affect federal rules regarding work

product and discovery. Further, in a statement that appears to overlook the nonbinding aspect of a summary jury trial, the Seventh Circuit said: "a crowded docket does not permit the court to avoid the adjudication of cases properly within its congressionally mandated jurisdiction." *Strandell,* 838 F.2d at 888.

Other courts have not been persuaded by the reasoning of the Seventh Circuit in *Strandell* and have declined to follow it. For example, in *McKay v. Ashland Oil Inc.,* the district court rejected a plaintiff's objection to the summary jury trial ordered by the trial court pursuant to one of its local rules. Where the Seventh Circuit in *Strandell* found a court-ordered summary jury trial to be inconsistent with Federal Rule 16, the district court in *McKay* held that the summary jury trial was a form of pretrial settlement procedure, and as such authorized by Federal Rule 83./10/

The court in *McKay* noted the validity in other jurisdictions of settlement procedures such as mandatory mediation and nonbinding arbitration. The *McKay* court reasoned that a summary jury trial is "essentially nonbinding arbitration with an advisory jury instead of arbitrators." 120 F.R.D. at 45. The *McKay* court also determined that *Strandell's* concern about violations of work product or other privileges was not well-founded. The *McKay* court pointed to the expansive signs of current discovery practice, which provides for liberal exchanges of information between parties about the nature of their case, exhibits, witnesses, and the like. Other district courts have similarly found that Federal Rule 16 plainly provides adequate authority for a trial court to direct the parties to participate in summary jury trials. *See Arabian Am. Oil Co.,* 119 F.R.D. at 448; *Federal Reserve Bank,* 123 F.R.D. at 603; *Home Owners Fundina Corp.,* 695 F. Supp. at 1343; *see also* Charles R. Richey, "Rule 16: A Survey and Some Considerations for the Bench and Bar," 126 F.R.D. 599, 606-09 (1989) (stating that district courts have authority under Rule 16(c) to order mandatory summary jury trials).

Despite what seemed to be a trend in favor of court-ordered summary jury trials, the Sixth Circuit in *NLO,* lining up with the Seventh Circuit, concluded that district courts lack the power to mandate participation in summary jury trials. The Sixth Circuit's *NLO* decision evaluated the district court's power to order participation in the context of a summary jury trial that would be open to the media and the public. The Sixth Circuit could have based its decision on the public aspect of the court-ordered summary jury trial and relied on its earlier decision in *Cincinnati Gas & Electric Co. v. General Electric Co.,* 854 F.2d 900 (6th Cir. 1988) (discussed *infra*), in which it upheld the district court's decision to exclude the press from a summary jury trial. In *Cincinnati Gas,* the Sixth Circuit had indicated that a summary jury trial was a permissible tool for a district court to use in promoting resolution of the cases before it. However, the Sixth Circuit clearly adopted the rationale of the Seventh Circuit in *Strandell,* emphasizing that the summary jury trial at issue in *Cincinnati Gas* was undertaken with the cooperation of the parties.

In *NLO,* the Sixth Circuit granted a petition for mandamus to the defendant in an underlying action. In the underlying action, the plaintiffs had alleged that defendant negligently exposed them to dangerous levels of radioactive and hazardous materials, increasing their risk of cancer and subjecting them to emotional distress. The district court in the underlying action ordered all parties to participate in a summary jury trial open to the media and the public. The district court threatened sanctions against counsel for anything less than full participation. The district court also denied the defendant's motion for reconsideration or, in the alternative, for interlocutory appeal. *See NLO,* 5 F.3d at 155. The defendant filed a petition for mandamus from the Sixth Circuit.

Considering the district court's authority to compel participation in a summary jury trial under threat of sanctions, the Sixth Circuit stated: "Our analysis of this issue relies heavily on the reasoning of the Seventh Circuit in *Strandell.*" *NLO,* 5 F.3d at 157. Although the Sixth Circuit recognized district courts' "substantial inherent power to manage their dockets," it also emphasized that the power must be "exercised in a manner that is in harmony with the Federal Rules of Civil Procedure." *Id.* According to the Sixth Circuit, the provisions of Rule 16 do not permit compulsory participation in settlement proceedings such as summary jury trials. "[J]udges should encourage and aid early settlement," the Sixth Circuit observed, but "they should not attempt to coerce that settlement." *Id.* Explaining further, the Sixth Circuit claimed that reliance on the pure inherent authority of the court is misplaced in justifying court-ordered participation in a summary jury trial. The Sixth Circuit refused to sanction such an "imprudent expansion of the judicial power." *Id.* at 158.

One must question whether the defendant would have ever objected to the summary jury trial in *NLO* if the court had not ordered it to be held in public. Privacy is a driving reason why many litigants seek various types of alternative dispute resolution procedures. If a court wants a case settled, it ought to forego demanding that a summary jury trial be held in public.

Nevertheless, the precedential value of *NLO* has been undermined by the decisions in *Ohio ex. rel. Montogomery v. Louis Trauth Dairy* and *In re Southern Ohio Correction Facility.* In both cases, the Southern District of Ohio determined that the Sixth Circuit's decision in *NLO* was partially overruled by the 1993 Amendments to Rule 16./11/ Using similar language in both opinions, the court concluded that the Amendments specifically allow a court the authority to require participation in a summary jury trial. While the court conceded that *NLO* continues to be binding in so far as a court does not have inherent authority to order a summary jury trial, the court refused the position that a court is without the authority to order a summary jury trial when a statute or local rule provides otherwise. *See Ohio ex. rel. Montogomery,* 164 F.R.D. at 470; *In re Southern Ohio Correction Facility,* 166 F.R.D. at 396.

The rationale of these opinions, however, is questionable. First, Rule 16 makes

clear in the Advisory Committee Notes that it "does not attempt to resolve questions as to the extent a court would be authorized to require such proceedings as an exercise of its inherent powers." Rule 16 Advisory Committee Notes (1993). Such a comment would be unnecessary and unwarranted under the meaning ascribed to Rule 16 by the Ohio district courts.

Recent congressional activity similarly supports the contention that federal courts do not have the authority to force parties into summary jury trials. Continuing a project initiated a decade earlier, Congress enacted the Judicial Improvements and Access to Justice Act of 1988, 28 U.S.C. §§ 651-58 (1988) (JIAJA). Considered a five-year congressional experiment, the JIAJA acknowledged two groups of ten federal districts for ADR purposes. The first group was comprised of districts that had in place, prior to enactment of the JIAJA, some form of arbitration practice. With respect to those ten districts, the JIAJA permitted the promulgation of a local rule that required litigants to participate in nonbinding arbitration. As to the second group, created under the statute, only consensual participation in arbitration would be allowed. *See id.* § 651(a). The JIAJA was passed, however, with a self-executing repeal provision which became effective in 1993. *See id.* at §§ 651-58. Since that time, the U.S. Judicial Conference has refused to endorse the mandatory use of ADR beyond the ten pilot programs authorized by the JIAJA, Susan K. Gauvey, "ADR's Integration in the Federal Court System," *Md. B.J.* (Mar./Apr. 2001), and Congress has not seen fit to pass another statute of that sort.

In 1998, Congress was again afforded the opportunity to proclaim the power of the federal courts to mandate participation in ADR proceedings when it passed the Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-58 (West Supp. 2001) (ADRA). In amending many of the same sections that comprised the JIAJA, however, the ADRA provides only that, "[e]ach United States District Court shall devise and implement its own alternative dispute resolution program, by local rule ***... to encourage and promote*** the use of [ADR] in its district." *Id.* § 651(b) (emphasis added). Congress, being at least constructively aware of the ambiguity of the federal rules and having once before clearly stated that certain federal districts were authorized to require ADR participation, here authorizes federal courts only to "encourage" and "promote" ADR. Considering these circumstances, as well as the "plain language" of the ADRA, *Watt v. Alaska,* 451 U.S. 259, 265-66 (1981), federal courts arguably lack the authority to require ADR participation under Rule 16.

As the preceding discussion makes clear, the question of whether a court has the inherent power to order the parties' participation in a summary jury trial remains unsettled. The 1993 Advisory Committee Notes (Notes) pointedly eluded resolution of the issue. The Notes do, however, recognize specifically the courts' ability to employ statutes or local rules that authorize the use of the procedures even when not agreed to by the parties. Legislative activity by Congress in this area, however, leaves uncertain exactly what powers the federal courts have to mandate ADR participation and in what forms.

C. Obligation to Participate

However the parties arrive at the summary jury trial, the parties have an obligation to participate once the summary jury trial is ordered. The required participation may vary significantly depending upon the court's order of what the parties must do at the proceeding. Some courts order the parties and their attorneys to "attend and participate." Others impose more demanding requirements to participate "in a meaningful manner," "fully cooperate and participate," or participate "in good faith."

Courts have found ADR inadequate when the attorney's or client's participation is minimal. For example, in *Gilling v. Eastern Airlines,* 680 F. Supp. 169 (D.N.J. 1988), the court found that the defendants' participation in a court-annexed arbitration was inadequate./12/ The court found that the defendants' attorney did not participate in the arbitration, but rather "went through the motions" when she only read brief position summaries and deposition and interrogatory excerpts. The court determined that these actions did not amount to meaningful participation in the case and imposed sanctions. *See Gilling,* 680 F. Supp. at 170. *See also Turner v. Young,* __ F.R.D. __, No. 01-2324-KHV, 2002 WL 225921, at *3 (D. Kan. Feb. 11, 2002) (holding that "participation" under local Rule 16.3 requires "party representatives with full, meaningful settlement authority to personally appear and directly participate in settlement conferences with a district judge or magistrate judge").

Courts also have the authority to order that "a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute." See Fed. R. Civ. P. 16(c)(16). Many ADR orders routinely require that the parties as well as their attorneys attend the settlement conference. Such orders may, however, cause difficulty especially where a corporate client is involved.

The court's ability to order the presence of the client to a proceeding was considered in *G. Heileman Brewing Co., Inc. v. Joseph Oat Corp.,* 871 F.2d 648 (7th Cir. 1989) (*en banc*). In *G. Heileman Brewing,* the Seventh Circuit upheld a magistrate's order that the defendant send a "corporate representative with authority to settle" to a settlement conference. The defendant argued that it was unreasonable to impose the expense and burden of requiring the corporation's president to leave the business in New Jersey and participate in the Wisconsin trial. While the court conceded that there might be extreme circumstances when requiring the president would be an abuse of discretion, the court determined that such extreme circumstances were not present in this case. Because the claim was for $4 million, the factual and legal issues complex, and the trial expected to take one to three months, the court determined that requiring the presence of the corporate officer was justified.

Because the major purpose of the summary jury trial is aimed at encouraging settlement, one can see the ineffectiveness of such a proceeding if no one is present

or easily accessible with the actual authority to settle the case. Therefore, the court's ability to mandate participation is necessary to guarantee that settlement is appropriately within reach of the parties.

D. Public Access to Summary Jury Trials

As noted above, one of the attractions of a summary jury trial is the avoidance of publicity for matters that may be sensitive to either party. While settlement negotiations are generally entitled to privacy from the press, a trial is public and fair game for reporting. Because the summary jury trial is part trial and part settlement negotiations, questions have been raised regarding the public's right to have access to summary jury trials.

In *Cincinnati Gas & Electric Co. v. General Electric Co.,* 854 F.2d 900 (6th Cir. 1988), *cert. denied,* 489 U.S. 1033 (1989), the Sixth Circuit upheld the trial court's order directing that the summary jury trial be kept confidential. In doing so, the Sixth Circuit rejected the media's claim of a First Amendment right of access to summary jury trials. The *Cincinnati Gas* case originated as a construction and breach of contract dispute between three Ohio utility companies and General Electric Company. The federal district court directed the parties to engage in a summary jury trial, with the explicit understanding that it would be kept confidential. A two-week long summary jury trial produced a settlement.

Just prior to beginning the summary jury trial, several newspapers challenged the confidentiality of the summary jury trial and sought access to the proceeding. The trial court denied them access, and the summary jury trial was held privately in a courtroom. Moreover, the trial court told the jurors not to discuss their deliberations with anyone, and their names were kept secret.

In rejecting the media's claim of a First Amendment right of access to summary jury trials on appeal, the Sixth Circuit found, contrary to the contention of the press, that summary jury trials are not like civil trials on the merits. Instead, according to the Sixth Circuit, because of their nonbinding nature, summary jury trials are more akin to traditional settlement procedures to which there is no public right of access. The media had further asserted that the case merited press coverage because of the important public issues involved. Disagreeing, the Sixth Circuit viewed the complex dispute as one that likely would have clogged the court's docket if confidentiality had not been offered and maintained.

The Sixth Circuit reaffirmed its position in *Cincinnati Gas* that the press does not have the right of access to a summary jury trial. *See In re George Voinovich,* 92 F.3d 383 (6th Cir. 1996). In this case, the district court ordered the parties to participate in a summary jury trail. Relying on *NLO,* the defendants moved to vacate the order on the ground a court may not compel participation in a summary jury trial. The district court denied the defendants' motion. The defendants then agreed not to seek a mandamus to vacate the summary jury trial if the proceeding would be closed to the public. Shortly thereafter, the *Cincinnati Enquirer* filed a

petition seeking to open the proceedings to the public. One member of the court issued an order temporarily prohibiting the court from conducting the proceedings without permitting public access. The district court then continued the summary jury trial in open court.

The defendants filed a petition for a writ of mandamus seeking to vacate the summary jury trial proceedings because the proceedings were now required to be open to the public. In response to the defendants' petition, the Sixth Circuit entered an order, contemporaneous with its order in *In re Cincinnati Enquirer*, 94 F.3d 198 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 1107 (1997), holding that the press does not have the right of access to the summary jury trial, denying the *Cincinnati Enquirer*'s petition for a writ of mandamus, and vacating the district court's prior ruling that allowed public access to the summary jury trial. These orders thereby rendered moot the defendants' objections to the summary jury trial.

Thus far, the other circuits have not addressed the issues of whether the press has the right of access to a summary jury trial. While it is difficult to predict whether other cases will follow the lead of the Sixth Circuit, the logic of the cases seems correct. The nature of the proceeding and its overriding purpose, make it more similar to a settlement procedure than a traditional trial. While the press's claim of a public interest in reporting on matters of importance or significance has validity, courts may also justifiably balance that value against the importance of resolving such issues promptly, and keeping dockets clear to administer justice to other litigants. If the press is not deprived of its First Amendment rights when disputants settle a controversy before filing suit, then it does not inexorably follow that merely filing suit and having a nonbinding summary jury trial creates a constitutional right of access. The issue is one that is likely to be litigated again whenever a significant issue is involved.

E. Confidentiality of Summary Jury Trial

As in settlement negotiations, confidentiality of the process is an important consideration to a party considering whether to participate in a summary jury trial. In addition to limiting public access to summary jury trials, participants themselves must agree to respect the confidentiality of the proceeding. To protect the integrity of the process, courts also must respect the parties' confidentiality agreement, as did the Seventh Circuit in *Russell v. PPG Industries, Inc.*, 953 F.2d 326 (7th Cir. 1992).

The plaintiff in *Russell* was injured while working at defendant's plant. Plaintiff's employer had contracted with the defendant to perform certain construction and repairs at defendant's plant. Plaintiff attempted to sue defendant, but the trial court found that plaintiff was a "loaned employee" of defendant, thus limiting him to his workers' compensation remedy. On appeal, plaintiff attempted to disclose to the Seventh Circuit information from a summary jury trial in which the parties had participated to bolster his contention that he was not a loaned employee.

Emphasizing that the parties voluntarily participated in the summary jury trial, the Seventh Circuit observed that plaintiff "chose to play the game and, having done so, must live by the rules." *Id.* at 333. One of those rules, according to the Seventh Circuit, was that the "verdict would be kept 'under wraps.' " *Id.* The Seventh Circuit reasoned that any potential the summary jury trial process might have as a settlement tool would be undermined if the participants failed to adhere to the basic strictures of the process. Citing Rule 408 of the Federal Rules of Evidence, the Seventh Circuit stated that settlements, offers to settle, and settlement negotiations are all inadmissible to prove liability. The Seventh Circuit concluded that plaintiff's attempt to refer to the results of the summary jury trial was inappropriate.

The Seventh Circuit in *Russell* recognized the importance of confidentiality to the summary jury trial process. Without it, the utility of the summary jury trial as a settlement device is significantly undermined.

F. Courts' Power to Summon Jurors for Summary Jury Trials

In the typical summary jury trial, the court impanels a jury from its regular group of jurors who have been summoned under court process for trial duty. Typically the jurors are not told the trial is nonbinding, at least until it is over. The ability of the federal district courts to provide jurors to sit on a summary jury trial is critical to the process.

Significantly, the federal district court in *Hume v. M&C Management,* 129 F.R.D. 506 (N.D. Ohio 1990), held that it lacked requisite authority to summon jurors for summary jury trials. The *Hume* court considered its power under the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 (1982), noting that the statute only authorized courts to summon jurors to serve on advisory juries, grand juries, or petit (trial) juries. The *Hume* court then inferred that it had no authority under the Act to summon jurors for duty in summary jury trials. *Accord United States v. Exum,* 748 F. Supp. 512 (N.D. Ohio 1990) (both the *Hume* and *Exum* opinions were authored by Judge Battisti).

The court's reasoning in *Hume,* while technically correct, seems unduly legalistic and pinched in practicality. If the act authorizes jurors for advisory jury service, there is no meaningful difference to summoning them for another form of nonbinding jury service, albeit not labeled as an "advisory jury."/13/ Congress has recently expressed a clear mandate in the Judicial Improvements and Access to Justice Act of 1988 for a wide variety of experimentation by trial courts to use ADR procedures and clear their dockets. The mandate includes experimentation with court-ordered arbitration, which may include penalties should a party reject a settlement but fail to improve that party's position after a trial. Moreover, the April 1990 report of the Federal Courts Study Committee strongly endorses the use by federal district courts of alternative and supplemental techniques to resolve cases and keep dockets current.

IV. Conclusion

Summary jury trials have become part of both the federal district and state trial courts' arsenal of techniques to encourage settlement. The power of the district courts to recommend participation in a summary jury trial has a firm basis in the Federal Rules of Civil Procedure. However, their power to mandate such participation, as well as their power to summon the necessary jurors, has been questioned. When federal courts have demonstrated a willingness to use the summary jury trial process and protect the integrity of the process by ensuring its privacy and confidentiality, the summary jury trial is likely to remain a viable and effective form of judicial alternative dispute resolution.

ENDNOTES

/1/ *See* Lambros, "The Summary Jury Trial and Other Alternative Methods of Dispute Resolution," 103 F.R.D. 461 (1984).

/2/ The concept is often credited to Judge Thomas A. Lambros of the Northern District of Ohio. For example, courts sometimes have a jury of twice the normal size to hear the summary jury trial, but then divide them into two separate juries for purposes of deliberating and reaching their verdicts.

/3/ Responding to the question of whether such judicial subsidization of settlement processes can be justified, Chief Judge Richard Posner stated that:

> In this age of swollen case loads ... it can be. The benefits of settlement go not only to the parties but to other users of the court system, who face shorter queues and less harried judges as the settlement rate rises. Since parties who settle create external benefits, maybe they should be allowed to create some offsetting external costs, too.

Richard A. Posner, "The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations," *U. Chi. L. Rev.* 366, 372 (1986).

/4/ The persuasive effect of the summary jury trial is further demonstrated in *Brotherton v. Cleveland,* 141 F. Supp. 2d 894 (S.D. Ohio 2001), where the district court, over objection of a class member, found that the summary jury verdict supported the approval of the proposed settlement agreement as "fair, adequate, and reasonable" under Federal Rule of Civil Procedure 23. *Id.* at 904-06.

/5/ *See* Plapinger, "Judges' Desk Book on Court ADR," reprinted at 12 *Alternatives* (CPR Institute for Dispute Resolution) p. 13-14 (Jan. 1994).

/6/ *See* A. Levin & D. Golash, "Alternative Dispute Resolution in Federal District Courts," 37 *U. Fla. L. Rev.* 29 (1985). *See also* Todd H. Bailey, "Summary Jury Trial Settles $250 Million Case Three Years after First Attempt," reprinted at 14 *Alternatives* (CPR Institute for Dispute Resolution) p. 75-76 (June 1996). Mr. Bailey provides an example of a case illustrating the effectiveness of the summary jury trial. In an effort to resolve

a $250 million patent dispute, the parties in an undisclosed case engaged unsuccessfully in two other forms of ADR (review of the case before a joint task force and a minitrial) before successfully reaching settlement as a result of a three-day summary jury trial. The author believes that the summary jury trial provided the parties with a frame of reference against which to check the integrity of their outstanding settlement offers and, when faced with this reality, the parties settled the case.

/7/ This shortcoming can sometimes be effectively overcome through the use of carefully crafted jury verdict special interrogatories, that can provide an issue-by-issue breakdown of how the jury viewed different aspects of the case.

/8/ For example, *Stites v. Sundstrand Heat Transfer, Inc.*, involved a toxic tort claim for alleged groundwater contamination in the Northern District of Michigan. After a summary jury trial held before ten jurors, they were divided into two five-member panels for deliberations. One returned a $2.8 million plaintiff's verdict, the other a defense verdict. The case settled shortly thereafter for $3.5 million. *See* 1 ADR Rep. (BNA) 339 (Dec. 23, 1987). Of course, to the extent that a summary jury trial should reflect what an actual trial might produce, the *Stites* example arguably meets that goal: juries sometimes appear to have the consistency of a random coin toss.

/9/ *See e.g.*, Ala. Code Ann. § 16-7-201 (1997); Ark. Code Ann. § 16-7-202 (Michie 2001); Cal. Civ. L.R. 16.5 (1998); Colo. Rev. Stat. Ann. § 13-22-313 (1998); D.C. Colo. L.R. 53.2; U.S. Dist. Ct. Rules, N.D. Fla., Expense & Delay Reduction (1998); Ga. Code Ann. § 15-23-2 (West 1993 & Supp. 2001); Ind. Alt. Disp. Resol. Rule 1.1 (1998); N.D. Iowa L.R. 72.1 (1998); Kan. Civ. Proc. Code § 5-502 (West 2000); Ky. Rev. Stat. Ann., App. A, Circuit Court Guidelines for Settlement Conferences (2001); U.S. Dist. Ct. Rules E.D. La., Expense & Reduction Plan (1998); Mass. L.R. 16.4 (1998); Minn. Stat. Ann. § 484.74 (West 1990 & Supp. 2001); Mo. Sup. Ct. Rule 17.01 (1997); Mo. 22d Jud. Cir. Ct. Rule 38.16 (1997); Neb. Rev. Stat. § 25-1155-57 (1998); Nev. Rev. Stat. § 16-5 (1995); N.H. Sup. Ct. Rule 171 (1998); E.D.N.C. L.R. 31.00 (Michie 1995); N.C. Sup. & Dist. Ct. Rule 23 (Michie 1995); Ohio Rev. Code Ann. § 179.03 (West 1995); E.D. Okla. Civ. Rules, Expense and Delay Reduction Plan, Alt. Disp. Resol., Summary Jury Trial (Dec. 15, 1998); Tex. Civ. Prac. & Rem. § 154.026 (West 1997); Utah Code Ann. § 58-39a-2 (West 2001); Va. Code Ann. § 8.01-576.1 *et seq.* (1992); W. Va. Code Ann. § 55-7b-6B (Michie 2001) (medical malpractice cases); Wis. Stat. Ann. § 802.12 (West 1994 & 2001).

/10/ It should be noted that the 1993 Amendments of Rule 16 supersede *McKay* to the extent that *McKay* recognized a court's inherent authority to require participation in a summary jury trial.

/11/ For a discussion of the Amendments to Rule 16 see § III.A. *supra.*

/12/ Court-annexed arbitrations are forms of ADR that typically result in a neutral reaching a nonbinding advisory ruling.

/13/ This is not to say, however, that there is no difference. The summary jury

is not an advisory jury. It does not advise the judge how to decide the case, but is used to push the parties to settle. In light of this distinction, some have argued that the authority to summon jurors for summary jury service is questionable at best. *See* Posner, note 4 *supra,* at 385-86. ("[L]ack of clear authority is a reason for hesitation in sensitive areas. Summary jury trial is an enlargement of the use of the jury. Jury service is, after all, a form of conscription; and conscription is not popular in this country.")