

# JURY-DETERMINED SETTLEMENTS AND SUMMARY JURY TRIALS: OBSERVATIONS ABOUT ALTERNATIVE DISPUTE RESOLUTION IN AN ADVERSARY CULTURE

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## I. INTRODUCTION

PROFESSOR Menkel-Meadow's article offers a perceptive overview of the current state of the Alternative Dispute Resolution (ADR) field and the issues that will shape its future. We agree with many of her observations, but we offer a differing view on her central thesis: that adversary legal culture is working to co-opt, subvert, and blunt the goal of "quality justice" sought by original ADR reformers.<sup>1</sup> As an important example of this trend she cites the developing body of litigation involving summary jury trials. She asserts that lawyers are using ADR as just another weapon in the adversarial arsenal to manipulate time, discovery, and procedure for client advantage, not for accomplishment of a 'better' result.<sup>2</sup> Our view is that this charge against the adversary system may be unfair, particularly in the context of the summary jury trial. The problem with the summary jury trial is that it is a court-instituted and court-controlled procedure. Consequently, it has inherent limitations bearing on the rights and interests of the disputing parties. In this commentary we explore some of Professor Menkel-Meadow's assumptions about ADR procedures, examine the summary jury trial in light of this discussion, and then contrast it with another, recently developed, ADR device—the jury-determined settlement—in an attempt to illustrate that adversary culture is not necessarily incompatible with ADR or with "quality" solutions to legal disputes.

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1. See generally Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR,"* 19 FLA. ST. U.L. REV. 1 (1991).

2. *Id.* at 3.

## II. "QUALITY" JUSTICE

In Professor Menkel-Meadow's article, three distinct categories of ADR goals can be identified: 1) transformation of dispute processing, 2) improvements in processual efficiency that are disputant-centered, and 3) increases in administrative efficiency that are court-centered. The first two goals are viewed as leading to improvements in the quality of justice, but the last is often incompatible with a quality outcome.

The first goal, transformation, seeks to radically change the ways that disputes are conceptualized and processed. It is based on the assumption that traditional legal methods of dispute processing are inappropriate for many types of conflicts between persons.<sup>3</sup> Law-thinking, the argument goes, forces disputes to be conceived in win/lose terms, sets standardized rules about how conflicts are processed, and provides limited remedies, such as damages.<sup>4</sup> This rigid approach to conflict resolution is not sensitive to the complex social and psychological factors involved in disputes and prevents the search for creative solutions in which both parties can be winners. Mediation is held to be an ideal alternative model to the legal model because it allows the parties themselves to develop both the processes of resolution and the solutions for their problems.<sup>5</sup> Although transforming ADR devices could be developed within the legal system, it is more likely that such forms of dispute resolution will occur outside the boundaries of formal law.<sup>6</sup>

The second goal, disputant-centered processual efficiency, accepts the traditional legal framework and seeks to improve processual efficiency in the interests of the parties.<sup>7</sup> The first underlying assumption of this goal is that the central issues in many disputes are properly conceived in win/lose terms and remedies such as damages are appropriate.<sup>8</sup> Thus, the patient allegedly injured as a result of medical negligence wants, and should receive, if proof is sufficient, a judgment that the physician was negligent, plus monetary compensation.

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3. *Id.* at 7.

4. *Id.* See also Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984).

5. Menkel-Meadow, *supra* note 1, at 7; Menkel-Meadow, *supra* note 4, at 754.

6. Menkel-Meadow, *supra* note 1, at 7.

7. This goal is not explicitly endorsed in Professor Menkel-Meadow's article, but it is inherent in her recognition of processual justice, Menkel-Meadow, *supra* note 1, at 6-8, in her definition of "quality" justice, *id.*, and in her discussion of the economic efficiency of settlement, *id.* at 9.

8. See *id.* at 6; Menkel-Meadow, *supra* note 4, at 764-94.

The other assumption is that existing procedures may not be very efficient for the disputants. In comparison to what the legal system currently provides, disputants want a speedier resolution of the conflict, a reduction in transaction costs of time and money, elimination of exposure to an extreme outcome, and protection of other interests.<sup>9</sup> For this class of cases, the goal of ADR is to provide procedures that give the parties maximal information to facilitate rational settlements and a more streamlined means of disposing of the unsettled portions of disputes.<sup>10</sup> Thus, early neutral evaluation<sup>11</sup> and summary jury trials<sup>12</sup> are, in theory, possible ways of providing disputants with information that can facilitate settlement.<sup>13</sup> Arbitration guided by legal standards is a means of achieving a more streamlined third-party disposition.<sup>14</sup> It is essential to stress that the purpose of the ADR is centered on disputant interests.

Finally, the purpose of the third goal, court-centered administrative efficiency, is to provide the means to reduce the workload of the courts by whatever reasonable means are available.<sup>15</sup> Thus, both transformation alternatives and disputant-centered processual improvements are compatible with this goal to the extent that they remove cases from the docket. However, within limits, ADR forms that reduce the individual rights of the parties are also acceptable. Professor Menkel-Meadow has serious reservations, as do we, about the appropriateness of this third goal.<sup>16</sup> We concur with her assessments that

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9. These might include limiting public exposure regarding the nature of the plaintiff's injuries, the plaintiff's personal background, or the defendant's concern about reputation. We take cognizance of the arguments that the public may have an interest in the outcome of the dispute as well, (see Fiss, *Against Settlement*, 93 YALE L.J. 1073; Resnik, *Managerial Judges* 96 HARV. L. REV. 376 (1982)) but we take the position here that private settlement is encouraged by the legal system, and that the radical transformation solutions and court-efficiency solutions also promote private rather than public interests. See discussion *infra* at notes 33-54 and accompanying text.

10. Menkel-Meadow, *supra* note 1, at 9-10.

11. W. BRAZIL, *SETTLING CIVIL SUITS* 44-46 (1985); Levine, *Early Neutral Evaluation: A Follow-up Report*, 70 JUDICATURE 236 (1987).

12. Lambros, *The Summary Jury Trial—An Alternative Method of Resolving Disputes*, 69 JUDICATURE 286 (1986); Lambros & Shunk, *The Summary Jury Trial*, 29 CLEV. ST. L. REV. 43 (1980); Wiegand, *A New Light Bulb or the Work of the Devil? A Current Assessment of Summary Jury Trials*, 69 OR. L. REV. 87 (1990).

13. This does not mean that these ADR devices were conceived primarily to promote disputant-centered goals, only that in theory they *could* foster disputant-centered goals. See *infra* notes 33-40 and accompanying text.

14. L. RISKIN & J. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 297 (1987).

15. Menkel-Meadow, *supra* note 1, at 8-9. See also Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485 (1985).

16. We wish, however, to qualify our agreement. If one views courts as an allocative system

efficiency concerns have motivated many of the court-annexed ADR programs, and that mechanisms that are efficient for the court are often adverse to the interests of the disputants.

Our disagreements with Professor Menkel-Meadow, which predominantly entail only degrees of emphasis, involve four points: 1) she is overly inclusive of the types of cases amenable to transformation alternatives, 2) she places too much faith in mediation processes, 3) she ignores important functions of the adversary system, and 4) she confounds the effects of adversary culture with court co-option of ADR. These matters are not independent of one another, but they are best discussed separately.

We believe that Professor Menkel-Meadow's admitted enthusiasm for mediation as an ideal form of dispute resolution<sup>17</sup> causes her to downplay the large number of instances where a binary decision is probably appropriate. To be sure, she concedes the merits of such law-type solutions when moral principles, imbalances of power, or the need to set precedents are involved in the dispute.<sup>18</sup> There are other cases in addition to these instances, however, where creative, nonlegal

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involving limited organizational resources, reducing the time spent in queuing up for a day in court may have benefits for greater numbers of litigants at the expense of some of their rights. While the majority of litigants may not receive a totally satisfactory day in court, the alternative is an extended or indefinite delay for the majority of disputants in receiving any disposition at all. See L. FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* 20-24 (1975).

17. See Menkel-Meadow, *supra* note 1, at 2, 3, 7, 45-46; see also Menkel-Meadow, *supra* note 4. While we also support the use of mediation in appropriate cases, we offer the caution that to our knowledge there is no uncontested body of empirical research that shows that mediation produces better outcomes than other forms of resolution, including adjudication. There are, moreover, some good theoretical and empirical reasons to question whether mediation forums produce the kinds of results that their proponents claim. See Vidmar, *Assessing the Effects of Case Characteristics and Settlement Forum on Dispute Outcomes and Compliance*, 21 *LAW & SOC'Y REV.* 155 (1987); Vidmar, *The Mediation of Small Claims Court Disputes: A Critical Perspective*, in *RESEARCH ON NEGOTIATION IN ORGANIZATIONS* 187 (R. Lewicki, B. Sheppard, & M. Bazerman eds. 1986) [hereinafter *Small Claims Court Disputes*]; Kressel, Pruitt, & Assocs., *Conclusion: A Research Perspective on the Mediation of Social Conflict*, in *MEDIATION RESEARCH* 394 (K. Kressel & D. Pruitt eds. 1989). In particular we want to emphasize that mediational forums often produce binary, win/lose outcomes similar to those produced in other legal forums. See Vidmar, *supra*; *Small Claims Court Disputes*, *supra*; Start & Yngvesson, *Scarcity and Disputing: Zeroing-in On Compromise Decisions*, 2 *AMERICAN ETHNOLOGIST* 553 (1975). Characteristics of the dispute itself mandate win/lose outcomes on the central issues if justice is to be served. Professor James Alfini's article in this issue of the *Florida State University Law Review* also suggests to us that many mediated outcomes in Florida courts are probably binary in nature. Alfini, *Trashing, Bashing, and Hashing it Out: Is This the End of "Good Mediation"?*, 19 *FLA. ST. U.L. REV.* 47 (1991).

In a personal communication to the authors (March 12, 1991), commenting on an earlier draft of this Article, Professor Menkel-Meadow said that she does not exclusively favor a mediation model. Thus, we may be on some common ground. Our view that mediation proponents are not critical enough of the limitations of their preferred procedure, however, remains.

18. See Menkel-Meadow, *supra* note 1, at 12, particularly the implication that adversary approaches are less appropriate for "fact intensive" cases.

solutions may be inappropriate; these include highly fact-intensive cases. The disputes involve such issues as whether the truck driver operates his vehicle in a negligent manner that resulted in the death of another driver, whether a physician's treatment of a patient fell below expected standards of care and resulted in a serious injury, or whether a company breached a contract.

In such cases, not only may there be a single issue around which the dispute revolves, but it is defined by the parties themselves in binary terms, and the remedy sought is one provided by traditional law.<sup>19</sup> The family of the deceased wants monetary compensation from the truck driver; the injured patient will probably be driven exclusively by pecuniary need; the defendant in the malpractice case may seek vindication of her professional reputation or protection of her financial position; the plaintiff in the breach of contract suit may avoid bankruptcy only if he obtains money from the defendant. The central point of these examples, of course, is that many legal disputes are conceived by the parties themselves as win/lose in nature and possibly should remain so.

Another of Professor Menkel-Meadow's assumptions based on the mediation model is that procedures allowing high party participation, or control, will produce better quality outcomes and be perceived as fairer.<sup>20</sup> She equates "nonadversarial" resolution with disputant control, and views mediation as an ideal form because the affected parties have control over both the resolution process and the outcome of the dispute. Although a substantial body of empirical research has found that control is a very significant factor in determining whether disputants will judge a procedure as fair,<sup>21</sup> the matter is more complicated. In many conflicts, the disputants perceive the need to have a third party, rather than themselves, decide the outcome. They recognize that their interests are diametrically opposed, and an authoritative ruling is needed. They want to retain control over evidence gathering, presentation, and arguments about the meaning of the evidence but recognize that someone else, a neutral third party, needs to decide the final outcome. Thus, procedures that include important aspects of ad-

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19. At least the single issue overrides other considerations. Note also that for the plaintiff, who seeks both money and a vindicating statement that the defendant was wrong, the issue is still cast in win/lose terms, which may be true for the defendant as well.

20. Menkel-Meadow, *supra* note 1, at 7, 12.

21. For reviews of this research, see J. THIBAUT & L. WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975); see also A. LIND AND T. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).

versary adjudication or arbitration are often judged more fair and acceptable than those, such as mediation, that do not.<sup>22</sup>

This brings us to consider the functions of the adversary system. Two very important characteristics of the adversary system are that it allocates responsibility for case development to the disputants and it allows lawyers to assist the disputants in this responsibility.<sup>23</sup> Its utility in cases involving the setting of precedents, vindication of rights, and imbalances of power between the parties is generally recognized by ADR proponents. In addition, however, the adversary system serves positive functions even in cases that are predominantly fact intensive.<sup>24</sup> It is arguably more thorough than other approaches in producing the facts applicable to the dispute, organizing them, and placing them in the best light for the respective parties.<sup>25</sup> Further, an adversary representative can speak for the inarticulate or emotionally involved disputant. She can also attempt to ensure that fair procedural and substantive standards are applied during the resolution process and the determination of the outcome. These functions of the adversary system should not be ignored or denigrated when considering alternative dispute resolution. Incidentally, research on procedural justice shows that disputants recognize these merits of the adversary system.<sup>26</sup>

We also need to consider the possibility that the problems leading to the development of "a common law of ADR" may not be directly caused by the adversary system, but rather may be the result of court co-option of ADR. Although she blurs the distinction, Professor Mendel-Meadow describes two different phenomena in her article. First, she discusses the adversary legal culture and its influence on ADR; second, she describes the processes by which the courts have attempted to co-opt ADR. While these processes are often intertwined, such as in the litigation regarding ADR, they are best viewed as separate and distinct problems.

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22. See A. LIND & T. TYLER, *supra* note 21, at 61, 128, 203-220; J. THIBAUT & L. WALKER, *supra* note 21, at 6-16, 22-27; Vidmar, *The Origins and Consequences of Procedural Fairness*, 15 LAW AND SOC. INQUIRY 877 (1990).

23. See Landsman, *Readings on Adversarial Justice: The American Approach to Adjudication*, 1988 A.B.A. SEC. LITIG. (especially chapters 1, 2, & 5); Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497 (1990); Saltzburg, *Lawyers, Clients, and the Adversary System*, 37 MERCER L. REV. 647 (1986).

24. See Saltzburg, *supra* note 23; J. THIBAUT AND L. WALKER, *supra* note 21, at chapters 4 and 5.

25. J. THIBAUT AND L. WALKER, *supra* note 21, at chapters 2, 8, and 9.

26. *Id.* at chapter 3; A. LIND AND T. TYLER, *supra* note 21, at chapters 4 and 5.

Courts began early to incorporate ADR devices to resolve disputes.<sup>27</sup> Professor Menkel-Meadow describes this as a process in which the courts took the ADR methods and put them to their own use. We agree that the courts are frequently motivated by objectives not primarily designed for the parties' benefit. Specifically, they are often predominately interested in court-centered efficiency: saving the court time and money.<sup>28</sup> Many of the court-administered procedures have not been successful when judged by other, and perhaps more appropriate, goals. They certainly have not transformed the disputes to foster better quality solutions and nonadversarial results. In addition, they often do not increase disputant-centered processual efficiency. As Professor Menkel-Meadow correctly states, what is efficient for the courts is not necessarily efficient for the parties.<sup>29</sup> The end result of many of the courts' attempts at ADR has been processual inefficiencies and injustice such as injection of delay,<sup>30</sup> the obtaining of nondiscoverable evidence,<sup>31</sup> and manipulation of the rules, time, or information.<sup>32</sup>

It is not surprising, therefore, that many disputants view these attempts as unwelcome additional steps in the litigation process. It is also not surprising that adversarial attorneys have turned to litigation to protect their clients' interests. But what if court-caused effects are removed? Is adversary legal culture necessarily hostile to the concept of ADR? We now compare the summary jury trial, a child of the court, and jury-determined settlements, a privately developed and administered voluntary ADR device.

### III. THE SUMMARY JURY TRIAL: ITS ASSETS AND LIABILITIES

The summary jury trial (SJT), developed by federal judge Thomas Lambros,<sup>33</sup> is an ADR procedure that aims to achieve settlements without full length trials. The disputants' lawyers present summaries

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27. Menkel-Meadow, *supra* note 1, at 8.

28. We also concur with her that the evidence does not appear to support the inference of courts that these measures are cost-efficient. Menkel-Meadow, *supra* note 1, at 9-10; M. JACOBVITCH & C. MOORE, *SUMMARY JURY TRIALS IN THE NORTHERN DISTRICT OF OHIO* (1982); J. ALFINI, L. GRIFFITHS, R. GETCHELL & D. JORDAN, *SUMMARY JURY TRIALS IN FLORIDA: AN EMPIRICAL ASSESSMENT*, Florida Dispute Resolution Center (1989); Wiegand, *supra* note 12, at 89, 103; MacCoun, Lind, & Tyler, *Alternative Dispute Resolution in Trial and Appellate Courts*, in *THE HANDBOOK OF PSYCHOLOGY AND LAW* (D. Kagehiro & W.S. Laufer eds.) (forthcoming, 1991).

29. Menkel-Meadow, *supra* note 1, at 22.

30. *Id.* at 23.

31. *Id.* at 19-20.

32. *Id.*

33. *See supra* note 12.

of their respective evidence and arguments to a jury composed of regular veniremen in a hearing limited to one day or less. The jury then renders a verdict, and the lawyers and their clients are encouraged to talk to the jurors about how they perceived the merits of the two positions. The verdict is not binding on the parties, and they can have a regular trial *de novo* on an expedited calendar if no settlement is forthcoming. The theory of the SJT is that by presenting their positions quickly and efficiently in the abbreviated hearing, the parties can learn about the "probable" verdict if the case is submitted to a regular jury. They can then negotiate a reasonable settlement in light of the predicted verdict to avoid the higher costs associated with a full scale trial. Not only do the parties presumably benefit if a settlement is reached, but the case is removed from the court's trial docket.

Observe that the SJT preserves important aspects of the traditional legal approach to the resolution of conflict. First, the advisory verdict is couched in terms of winning and losing.<sup>34</sup> The outcome, if the plaintiff wins, is limited to the setting of a quantum of damages. Second, it preserves components of the adversary system (though serious restrictions on it are involved).<sup>35</sup> Lawyers describe evidence favorable to their client's side and argue why, under the law, their client should win. Third, and very significantly, it uses judgments—if only advisory—from a group of laypersons rather than a judge (or arbitrators).

Today, almost unique among the world's legal systems, Americans continue to place great store in the ability of a jury of one's peers to decide suits involving civil matters.<sup>36</sup> Jury decisions are treated as having greater legitimacy than those rendered by professionals. In our own research with ADR in medical malpractice and other personal injury suits, we have found that plaintiff and defense lawyers alike have resisted arbitration procedures on the grounds that they believe a jury would render a fairer outcome. Their clients sometimes prefer a jury resolution on symbolic or emotional grounds. For example, in one case the parents involved in a wrongful death suit stated that they wanted a jury rather than an insurance adjuster or lawyer to say what they should be compensated for the life of their daughter. Neverthe-

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34. Undoubtedly, there may be compromise verdicts taking contributory negligence rules into consideration, but such verdicts still lie along a continuum of win/lose, and they follow legal guidelines.

35. The restrictions will be discussed more fully at footnotes 37-39 and accompanying text.

36. See, e.g., V. HANS & N. VIDMAR, *JUDGING THE JURY* (1986); H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966); Galantar, *The Civil Jury as Regulator of the Litigation Process*, 1990 U. CHI. LEGAL F. 201, 203-205; MacCoun & Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 LAW & HUM. BEHAVIOR 333 (1988); Rosen, *Liberal Battle Zones and the Study of Law and the Media*, 14 LAW & HUM. BEHAV. 511 (1990).



less, despite a preference for resolution by jury, parties often do not want to endure the slow, inefficient, and costly court system to obtain a jury verdict.

Despite its potential assets, the SJT largely fails. First, it is non-binding. Professor Menkel-Meadow argues that the fact that court-adopted ADR procedures are nonbinding is their saving grace.<sup>37</sup> In an important sense she is correct: it would be unfair to impose ADR on disputants without allowing them a trial *de novo* so as to exercise their full rights. It is also an imperative, given federal and state constitutional guarantees of jury trials in civil matters. However, the nonbinding nature points up a primary limitation of court-annexed ADR. At minimum, disputants do not get the promise of a termination of their conflict and thus must endure an extra step in the resolution process with the added costs of time and money. At worst it allows the SJT to be used as an adversarial weapon to force a compromise of strategy or resources that will be used at trial.

The second limitation of the SJT is that it is court-instituted and court-controlled. Legal and political constraints on the court result in compromised procedures, and court-centered efficiency concerns ultimately take precedence over disputant-centered interests. The courts put pressure, sometimes explicit and sometimes implicit, on parties to engage in SJTs.<sup>38</sup> Yet consider what the parties get. The SJT is carefully controlled by the court. The hearing is theoretically limited to a half day or, at most, a full day.<sup>39</sup> Generally, the court keeps a tight rein on jury selection, procedural matters, the form of evidence presented to the jury, and even the instructions to the jury. Thus, live witnesses are usually verboten even though the case may hinge on the credibility of these witnesses. Why is there not more flexibility? The answer, of course, is that court-centered administrative efficiency concerns take priority over disputant-centered processual interests. The court cannot justify devoting more time, space, and judicial resources to a procedure that does not promise to remove the case from the docket.

Thus, courts adopt ADR to relieve pressure on caseloads but are limited by legal constraints to nonbinding procedures. The nonbinding nature not only goes against disputant interests in termination of the case, but it causes the courts to devise the procedure so as to serve the courts' efficiency interests over the disputants' interests. The conse-

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37. Menkel-Meadow, *supra* note 1, at 30, 42-43.

38. *Id.* at 18-20. See also J. ALFINI, L. GRIFFITHS, R. GETCHELL & D. JORDAN, *supra* note 28. For an additional review of cases and literature, see Wiegand, *supra* note 12.

39. Wiegand, *supra* note 12, at 88. In practice, the SJTs may last up to a week, but this is rare.

quence is litigation by adversary lawyers to protect those interests, which adds to court caseloads. The developing "common law" of ADR that Professor Menkel-Meadow takes note of is not caused by adversariness but rather is a result of the process.

This analysis leads us to the conclusion that court-centered ADR frequently will result in compromised procedures that serve neither the interests of the court nor the interests of the disputants. At best its overall success, measured against either goal, will be marginal. In contrast, the real opportunities for quality justice can be found in the realm of voluntary ADR. Furthermore, we submit that adversarial culture is not necessarily incompatible with ADR when the effects of court-centered interests are removed.<sup>40</sup> Our own research with jury-determined settlements helps to illustrate this proposition.

#### IV. JURY-DETERMINED SETTLEMENTS: VOLUNTARY ADR IN AN ADVERSARY SETTING

Over the past several years, the authors and our colleagues, in association with the Private Adjudication Center,<sup>41</sup> have experimented with an ADR device that we have labelled a Jury-Determined Settlement (JDS). It was originally developed for medical malpractice cases through Duke Law School's Medical Malpractice Research Project.<sup>42</sup> More recently, however, it has been used in other types of personal injury suits.

Like the summary jury trial, the JDS is designed for disputes that are basically binary in nature. JDS is an abbreviated procedure, and uses a jury to decide the outcome. It differs, however, from the summary jury trial in some very key aspects. It is voluntary, the parties and their lawyers retain almost total control over the process, and the jury verdict is binding.

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40. These alternatives are by their very definition beyond the reach of the courts. For ADR reformers this may be a safe haven because the possibility that the ADR efforts will be co-opted by the court are eliminated.

41. The Private Adjudication Center, Inc., is a nonprofit affiliate of the Duke University School of Law. Alternative dispute resolution constitutes the central core of its research, service, and education missions.

42. The Project is supported, in part, by research grants from the Robert Wood Johnson Foundation and the State Justice Institute. The senior author of the article is a co-investigator along with Professors Thomas B. Metzloff of Duke Law School and David Warren of Duke University's Departments of Health Administration and Community and Family Medicine. The goals of the Project are to develop an empirical profile of medical malpractice litigation in North Carolina, experiment with various forms of ADR for medical malpractice cases, and to study the effects of legislation mandating procedural changes in the courts.

The assumptions underlying the JDS are straightforward. Parties in personal injury disputes often attempt a settlement. They want to settle to decrease transaction costs, avoid the risks of trial, and have a final resolution as early as possible.<sup>43</sup> They may also want to avoid publicity or the emotional trauma of a lengthy trial. The focal point of settlement negotiations involves arguments about how a jury is likely to decide the case.<sup>44</sup> Although both parties may be acting reasonably, impasses occur when there are different interpretations about evidence and jury equities. Often a mindset towards trial overtakes both parties at this point. Additionally, many forms of ADR are viewed as inappropriate to break the deadlock. Mediation is unlikely to change their differing interpretations of how the jury will decide, and arbitration is seen as rendering a less fair result than a jury of laypersons will provide. Even if a court procedure, such as a summary jury trial, is available, the parties may be concerned about compromising key evidence or jeopardizing other legitimate adversary concerns.

The JDS was designed as a process whereby the parties can agree to settle many issues, and agree to disagree on certain issues, but seek to resolve the latter by quasi-traditional means. Specifically, the JDS attempts to satisfy the disputants' interests by providing them with an abbreviated trial decided by a jury, which is binding and which allows the exercise of adversarial control over the procedures. The parties also set limits on the range of the jury's award through a high-low agreement. In cases in which liability is strongly contested, the low may be set at zero.<sup>45</sup> For cases primarily involving damages, the high is typically determined by the least amount plaintiffs assert they will take to settle the dispute, and the low is determined by the most defendants assert they will give to settle. In this latter instance, plaintiffs are guaranteed the amount specified by the low regardless of the verdict, and defendants are protected from an extreme award by the agreement that they will pay no more than the high even if the verdict falls outside that limit.

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43. Although it is frequently argued that as repeat players medical insurers are not risk averse, in fact they have financial and organizational incentives to clear their caseloads and reserves. Medical insurers, along with the plaintiff bar and medical associations, have been supportive of the Duke Medical Malpractice Research Project.

44. See, e.g., H. ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS* (1970); Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808 (1986); Galanter, *Jury Shadows: Reflections on the Civil Jury and the "Litigation Explosion,"* in *THE AMERICAN CIVIL JURY 15* (Roscoe Pound - American Trial Lawyers Foundation 1987); Galantar, *supra* note 36.

45. Despite the chance of a zero outcome, the plaintiff may still find the JDS preferable to a regular trial because of lower transaction costs and faster resolution.

In JDS "trials" conducted to date, the Center has solicited the cooperation of the local court to provide both jurors and a courtroom,<sup>46</sup> though jurors could be obtained in other ways and the procedure could take place in a private setting. Although the Center provides guidance and advice, the parties negotiate how the rest of the trial will be carried out. Negotiations include: choosing a judge;<sup>47</sup> setting a discovery schedule and trial date; determining length of total proceeding and allocation of time between parties; setting the size of the jury<sup>48</sup> and the length of voir dire; and agreeing on numbers of witnesses and form of testimony, evidentiary rules, and jury instructions. The negotiations over these procedural issues are often intense and adversarial.<sup>49</sup> The end result has been "trials" that lasted as long as two-and-a-half days<sup>50</sup> and included live witnesses who also were cross-examined.<sup>51</sup>

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46. The North Carolina courts have cooperated rather enthusiastically in these ventures. Some of their enthusiasm can be ascribed to curiosity and interest in ADR for its own sake; of course, because settlement is guaranteed, court-oriented efficiency concerns are served. The jurors are called by the court, but in most instances the Center has reimbursed the court for the fees paid the jurors. Concerns about using jurors for JDS proceedings have not as yet been raised, as they have for summary jury trials. *See* Wiegand, *supra* note 12, at 113. However, because the court is reimbursed and because the procedure is binding, these issues are less likely to be raised by the JDS. As to any concerns regarding juror cynicism about being used for improper purposes, their decision is in fact more binding than in a real trial where the verdict is potentially subject to a judgment notwithstanding the verdict or reversal on appeal (jurors have not been informed of the high-low agreement, however). Interviews with the jurors at the end of proceedings indicate interest in the novel procedure and enthusiasm. Finally, it is noteworthy that the jurors appear to take their task as seriously as jurors in regular trials. This appears to be because the judge and the lawyers have reminded them throughout the proceeding that even though it is an abbreviated proceeding, their decision is real.

47. Typically the judge is a former judge or an attorney with substantial trial experience.

48. Eight-person juries have been used in all the JDS proceedings. This is an arbitrary size that was initially chosen as a compromise: the twelve-person jury used in North Carolina courts was seen as too cumbersome for the abbreviated proceeding, but lawyers were unhappy with the idea of six-person juries as used in two of the three federal courts in North Carolina.

49. Indeed, in several instances the negotiations have almost foundered over disagreements about substantive or procedural matters. Yet, the fact that the parties had agreed on the central issue—to have the dispute resolved by a jury of laypersons—helped them to overcome the conflict on what had become collateral matters.

50. These cases would have taken two to three weeks to complete in regular trials.

51. Several examples help to illustrate the types of cases submitted to JDS proceedings.

Example 1: The parents of a child who suffered severe birth-related injuries sued the obstetrician who performed the delivery. The complaint asserted that the physician had negligently misestimated the delivery date, had failed to take adequate precautions in light of a breach presentation (bottom and feet first, greatly increasing chances of umbilical cord prolapse and oxygen deprivation), had failed to obtain adequate informed consent for treatment, and had failed to adequately monitor fetal distress. Settlement talks broke down when the physician's insurer denied liability. However, plaintiffs needed immediate financial aid, the physician was very concerned about adverse effects of trial publicity, and the insurer was subject to a potentially large damage exposure if plaintiff prevailed on liability. With assistance from the Malprac-

Even though the parties must share the costs of the proceeding<sup>52</sup> and extensive time is spent in negotiations and preparation for the JDS

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tice Project, the parties subsequently agreed to a two-and-one-half-day JDS procedure (as opposed to an estimated four-week trial) under a high-low agreement ranging from several hundred thousand dollars to under two million dollars. The JDS, involving an eight-person jury (prescreened and then selected in a ninety-minute voir dire), was held in a courtroom and was guided by North Carolina rules of evidence and law. At trial, the plaintiff presented two experts on the issue of negligence and, by videotape, two experts on damages. The plaintiffs also testified. Jurors were also given a reading period to become familiar with summarized records and documents. Next, the defense presented its case by calling the defendant and two experts who testified about standards of care, plus a neonatologist who testified that the umbilical prolapse could have occurred prepartum. No defense evidence contested plaintiff's damages experts. In rebuttal, plaintiff called another expert and read evidence from additional experts. After arguments and an abbreviated charge by the judge, the jurors deliberated almost two hours and returned a verdict of eight million dollars for the plaintiff (the amount indicated by plaintiff experts and uncontested by the defendant). Counsel for both sides felt they had enough time to present their cases (defendant did not use all of the time allocated), and interviews with jurors indicated that they understood the issues in the case and took their task seriously. Although the jury award was much higher than the agreed limit, plaintiffs and their counsel were happy with the outcome; the defense, while unhappy with the outcome, spoke favorably of the procedure and about the limitation on exposure (which their own damages experts, never called to testify, had estimated to be well in excess of the agreement high).

Example 2: In a predominantly rural and fiscally conservative community, the operator of a tow truck collided with an oncoming automobile, instantly killing the twenty-one-year-old driver. Negligence was uncontested, but the parents of the child who was killed and the insurer were far apart with respect to the amount of the settlement. The plaintiffs agreed to the JDS for three principal reasons: 1) they did not want an insurance adjuster to determine what the life of their child was worth, 2) they did not want to endure the emotional trauma of a full trial, and 3) they wanted the matter to be disposed of as quickly as possible. Lawyers for the two sides negotiated a binding high-low agreement (somewhat over one hundred thousand dollars on the low end, and about seven hundred and fifty thousand dollars on the high end), and a day-and-a-half proceeding was conducted within ten months of the accident. In addition to the live testimony of the parents, the eight-person jury heard videotaped depositions of the deceased's friends, teachers, and minister, and the videotaped deposition of an economist. The defense in the trial consisted solely of cross-examinations of the plaintiff's witnesses, particularly the economist, about issues related to damages, and arguments to the jury that the amounts claimed were in excess of a reasonable sum. After deliberations lasting slightly over one hour, the jury returned a verdict of two hundred and five thousand dollars. All parties and their legal counsel were satisfied with the verdict and the proceedings.

Example 3: The eighteen-year-old driver of an automobile sued another driver who allegedly improperly turned in front of her, causing her to swerve into an oncoming lane of traffic and collide with a third automobile. She was thrown through the passenger-side window, suffering cuts on her face and neck, the latter resulting in hypertrophic scars that may be permanent. The defendant's insurer contested his negligence, argued that the plaintiff was contributorily negligent, and asserted that the damage claim was excessive. Plaintiff's counsel, who had participated in a previous JDS, suggested the proceeding and the insurer agreed to experiment, in large part to protect the defendant, who carried only limited liability protection. A binding high-low agreement of \$12,000-\$40,000 was set, and the proceeding was carried out over a two-day period (it could have been completed in one day but both sides preferred to have final arguments and deliberations when the jury was fresh). The eight-person jury was selected in an eighty-minute voir dire. The plaintiff testified (and was cross-examined) regarding the accident, visits to a plastic surgeon, and about her reactions to the scar. Videotaped testimony of the driver and an occupant of the third car was presented, as was the deposition of the plastic surgeon. The defen-

“trial,”<sup>53</sup> the parties and their lawyers have generally expressed great satisfaction with the procedure. Plaintiffs receive a verdict rendered by a jury, are guaranteed at least the money provided for in the low agreement, and receive their damages immediately after the trial rather than after lengthy appeals. Defendants and their insurers have been spared the risk of exposure to large damage awards. In the malpractice cases, physicians are spared the days or weeks away from their office practices that regular trials would consume. In addition, the trial is arranged privately and public exposure is reduced. Our interviews with the parties and their lawyers suggest that the most important key to party and lawyer satisfaction is the extent of processual control that is provided by the JDS procedure. The lawyers are encouraged to negotiate creative solutions to procedural road blocks or other matters rather than have them imposed by a judge. On balance, adversarial interests may be better served by the JDS than by traditional legal proceedings.

We do not contend that the JDS is suitable for every dispute, not even every dispute that may be cast in binary terms.<sup>54</sup> Indeed, its applicability may be limited to a class of disputes within the binary category. What we do argue, however, is that the JDS demonstrates that adversarial approaches to dispute resolution are not necessarily incompatible with one of the goals of the ADR movement, namely to provide better quality disputant-centered processual efficiency.

## V. SUMMARY AND CONCLUSIONS

Our commentary has involved two main themes. First, we believe more attention needs to be given to assumptions about the mediation and adversary models and about the types of disputes that enter the legal system. Second, by separating court-centered efficiency effects

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dant testified on his own behalf and denied negligence. Medical reports and the report of the investigating state trooper also were introduced in the trial. After a charge by the judge, the jury deliberated for an hour and returned a verdict stating that the defendant was negligent and the plaintiff was contributorily negligent. Thus, the plaintiff received only the \$12,000 specified in the agreement.

52. Cost for a JDS may be as high as \$8,000 to \$10,000. This financial cost points to one of the limitations of the JDS, but it can yield benefits in cases involving modest amounts. *See supra* note 51, example 3.

53. The abbreviated nature of the JDS requires more intense planning and organization than a regular trial, wherein lawyers have time to ad lib as the proceedings laboriously unfold. We do not have any figures comparing the time invested for JDS versus a regular trial, but attorneys for both sides have indicated that many hours are invested in preparing for the JDS.

54. *See* note 52 *supra* regarding cost of the JDS. In addition to cost, both sides must have the desire to seek a settlement and a relationship that will allow negotiations on the procedural issues to progress to a resolution.

from adversarial approaches to dispute resolution, we conclude that adversarialness is not necessarily incompatible with ADR.

Many ADR proponents seem wedded so strongly to the mediation model as the ideal mode of dispute resolution and to the goal of dispute transformation, that they give short shrift to disputes for which resolution along more traditional legal lines is appropriate. The proponents also ignore the social and psychological limits of disputants' desire for control over the resolution process, and they misconceive legal-adversarial approaches to disputes as incompatible with—indeed, hostile to—ADR.

Although we focused on the Jury-Determined Settlement as a vehicle for illustrating how adversary legal culture and ADR can be compatible, over the past several years our own research has shown highly adversarial lawyers willing to experiment with a number of ADR procedures, including arbitration and mediation as well as the JDS. And this has occurred with what is reputed to be one of the most intractable types of litigation, namely medical malpractice. We ascribe this willingness of lawyers to consider new forms of dispute resolution to the educational effects of the ADR movement. To us, then, the challenge for ADR proponents is to conceptualize disputes so as to recognize legitimate adversary concerns and then devise procedures to accommodate them. Of course, the educational process must also continue.

