

# Hot Coffee, Cold Cash: Making the Most of Alternative Dispute Resolution in High-Stakes Personal Injury Lawsuits

## I. INTRODUCTION

When trial lawyers write about alternative dispute resolution (ADR), they are always quick to point out that not all cases lend themselves equally well to resolution by alternative means.<sup>1</sup> The prevailing view among litigators is that certain types of cases are not amenable to settlement by any ADR techniques and can only be resolved by full-scale litigation.<sup>2</sup> One type of lawsuit generally thought to be ADR-resistant is the high-stakes personal injury suit, a classification which includes medical malpractice, products liability, and severe personal injury claims.

However, ADR can be successful in high-stakes personal injury lawsuits. By examining the recent case of *Liebeck v. McDonald's Restaurants*<sup>3</sup> (popularly referred to as the "hot coffee" case), a personal injury and products liability case where the parties resisted settlement, and by exploring ADR techniques which might have succeeded in that case, it can be seen how, with some modifications, certain types of ADR can be an alternative to protracted and expensive litigation.

The facts of *Liebeck* and a brief overview of high-stakes litigation will be discussed in the remainder of Part I of this Note. Part II will discuss the limited success in high-stakes cases of ADR techniques which are not structured like a trial, such as mediation and negotiation. Part III will explore the use of ADR techniques which have a trial-like structure, such as summary jury trials and mini-trials, in high-stakes cases. In Part IV, the conclusion that trial-like procedures are better-suited to resolving high-stakes suits, and the implications of that conclusion, will be discussed.

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<sup>1</sup> See, e.g., M. Neal Rains, *A Trial Lawyer's Perspective on Alternative Dispute Resolution*, in CORPORATE COUNSEL'S GUIDE TO ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES 1.063, 1.065 (William A. Hancock ed., 1989); ERIC GALTON, *MEDIATION: A TEXAS PRACTICE GUIDE* 5 (1993); James F. Henry, *ADR and Personal Injury Litigation*, TRIAL, Apr. 1987, at 73; Charles Thensted, *Litigation and Less: The Negotiation Alternative*, 59 TUL. L. REV. 76, 95-96 (1984).

<sup>2</sup> Rains, *supra* note 1, at 1.065; Henry, *supra* note 1, at 73.

<sup>3</sup> No. CV-93-02419 (Bernalillo County 2d Jud. Dist. Ct., Bernalillo County, New Mexico, Aug. 29, 1994) (filed Sept. 14, 1994).

### A. Hot Coffee, Cold Cash

Two years ago, on a sunny morning in Albuquerque, New Mexico, Stella Liebeck did something that millions of people do every day: she bought a 49-cent cup of coffee at a McDonald's drive-through window. The 79-year old retired sales clerk placed the coffee cup between her knees and removed the lid in order to add cream and sugar to the coffee, when the scalding hot liquid spilled out of the foam container, causing third-degree burns on Liebeck's legs and groin. The accident sent Liebeck to the hospital for a week, where she underwent skin grafts and reconstructive surgery to correct the damage done by the hot coffee.

Liebeck later informed McDonald's about her injuries and asked for compensation for her medical bills, which totalled almost \$11,000. McDonald's refused to pay, claiming that Liebeck had been careless in placing an open cup of hot coffee between her knees. Liebeck countered with the argument that McDonald's coffee was defective because it was served at temperatures above industry-wide norms. When settlement negotiations between the two sides proved fruitless, Liebeck sued McDonald's in New Mexico state court. After a "mind-numbing"<sup>4</sup> seven-day trial, the jury returned a verdict in Liebeck's favor, awarding her \$160,000 in compensatory damages<sup>5</sup> and \$2.7 million in punitive damages.<sup>6</sup>

When the legal community learned of the astronomical award in Liebeck's case, the question on the minds of defense lawyers everywhere was, "How did this case ever get to trial?"<sup>7</sup> The hospitality industry sees

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<sup>4</sup> Andrea Gerlin, *A Matter of Degree: How a Jury Decided that a Coffee Spill is Worth \$2.9 Million*, WALL ST. J., Sept. 1, 1994, at A1. During the trial, expert witnesses argued for days over the temperature at which coffee causes burns, the optimal temperature for brewing and serving coffee, and the acceptable risk of harm for serving coffee at those temperatures. *Jury Awards Punitive Damages Against McDonald's for Excessively Hot Coffee*, ATLA L. REP., Feb. 1995, at 33.

<sup>5</sup> The jury awarded Liebeck \$200,000, less 20% for her contributory negligence. *Jury Awards Punitive Damages Against McDonald's for Excessively Hot Coffee*, *supra* note 4, at 33.

<sup>6</sup> The jury calculated punitive damages based on an estimate of two days worth of McDonald's coffee sales. The punitive damages award was later reduced by the trial judge to \$480,000 (three times the amount of the compensatory damages). S. Reed Morgan, *McDonald's Burned Itself*, LEGAL TIMES, Sept. 19, 1994, at 26.

<sup>7</sup> See William A. Allison, *Cold Facts About Case of Spilled Coffee*, CHI. DAILY L. BULL., Sept. 27, 1994, at 6; Don Young, *Lawyers' "Contributions" to Society*, LEGAL TIMES, Sept. 12, 1994, at 26. Some observers also wondered why McDonald's, after years of settling these types of complaints, would choose to take a case involving severe burn injuries and a

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thousands of personal injury claims every month, and the vast majority of these are settled early in the process by the defendant's insurance company.<sup>8</sup> Even when a personal injury suit results in the filing of a lawsuit, these cases are almost always settled out of court for amounts much smaller than the damages awarded in Liebeck's case.<sup>9</sup>

Although complete records of the settlement negotiations between Liebeck and McDonald's are not available,<sup>10</sup> it appears from what has been reported that the decision not to settle belonged to McDonald's. McDonald's had several opportunities to settle with Liebeck before the case reached trial. McDonald's could have satisfied Liebeck's initial request for compensation for medical expenses and settled for around \$11,000.<sup>11</sup> Later, after retaining an aggressive Houston attorney, Liebeck increased her request to \$90,000 for her medical expenses and pain and suffering.<sup>12</sup> As the trial drew nearer, Liebeck's attorney offered to drop the case for \$300,000, and later said he was willing to accept half that amount.<sup>13</sup> Finally, days before the trial, the judge ordered both sides into a mediated settlement conference, where the mediator recommended that McDonald's settle for \$225,000.<sup>14</sup> McDonald's refused all these attempts at settlement.

There are many reasons why McDonald's may have decided not to settle in this case. The case turned on issues of responsibility and contributory negligence upon which McDonald's thought it might prevail.<sup>15</sup> Indeed, the outpouring of public support for McDonald's following the

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highly sympathetic plaintiff to trial. The answer to that question remains unclear. Gerlin, *supra* note 4.

<sup>8</sup> CHARLES E. ROBBINS, ATTORNEY'S MASTER GUIDE TO EXPEDITING TOP-DOLLAR CASE SETTLEMENTS 209-10, 212-14 (1978).

<sup>9</sup> In the past ten years, McDonald's alone received over 700 similar reports of coffee burns, and settled those claims for amounts ranging from a few hundred dollars to \$500,000. Gerlin, *supra* note 4, at A4.

<sup>10</sup> After the reduction of damages by the trial court, McDonald's appealed the trial court's decision. Before the appeal could be heard, McDonald's and Liebeck settled out of court for an undisclosed amount. As part of the settlement agreement, neither side is permitted to speak about the case. Theresa Howard, *McDonald's Settles Coffee Suit in Out-of-Court Agreement*, NATION'S RESTAURANT NEWS, Dec. 21, 1994, at 1.

<sup>11</sup> Theresa Howard, *Jury Burns McDonald's in \$29 Million Verdict*, NATION'S RESTAURANT NEWS, Aug. 29, 1994, at 1.

<sup>12</sup> Gerlin, *supra* note 4.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Memorandum from the Specialty Coffee Association of America to its Members 2 (Oct. 10, 1994) (on file with author) [hereinafter SCAA Memo].

verdict<sup>16</sup> confirmed McDonald's theory that most people would, at least at first glance, blame the accident on Liebeck's carelessness rather than on the temperature of McDonald's coffee.<sup>17</sup> McDonald's also apparently believed that "no jury would punish a company for serving coffee the way customers like it."<sup>18</sup> The coffee's high temperature is one of the reasons McDonald's sells over a billion cups of coffee a year.<sup>19</sup>

### B. High-Stakes Lawsuits

It has been suggested that the American legal system really has three separate classifications of personal injury lawsuits.<sup>20</sup> The first and largest class, called "low-stakes" suits, consists of routine personal injury torts.<sup>21</sup> This category includes most simple personal injury claims, such as automobile accidents and slip-and-fall cases, where the injured party seeks only restitution for his or her loss. These cases usually involve modest injuries and low damage awards. The second category of tort litigation is the "high-stakes" personal injury suits, such as products liability and malpractice, where the injured party seeks not only restitution but also deterrence of the defendant's allegedly harmful conduct.<sup>22</sup> These cases usually involve severe injuries and the possibility of large damage awards. The third and smallest category is mass torts cases, such as the asbestos and Dalkon shield cases, involving a large number of plaintiffs harmed by a

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<sup>16</sup> Polls taken shortly after the verdict showed that a majority of people were outraged at the size of the verdict. Gerlin, *supra* note 4. See, e.g., Dave Barry, *A Great Year for Victims, Some of Whom Could Be Dangerous*, DALLAS MORNING NEWS, Jan. 1, 1995, at 2F; John Gaines, *Hot Coffee Issue Still Simmering*, SAN DIEGO UNION-TRIB., Feb. 2, 1995, at B1; William Porter, *Enough Already!*, PHOENIX GAZETTE, Dec. 31, 1994, at G1. In response to the public outcry at the size of the award, the newly elected, Republican-controlled Congress vowed to limit punitive damage awards in personal injury lawsuits as part of their much-publicized Contract With America. *Republicans Vow to Fight Against Frivolous Lawsuits*, NATION'S RESTAURANT NEWS, Dec. 5, 1994, at 2.

<sup>17</sup> Gerlin, *supra* note 4.

<sup>18</sup> *Id.*

<sup>19</sup> According to the coffee industry, coffee must be brewed at a temperature between 195°F and 205°F and held at at least 185°F to maintain flavor. Most restaurants follow these standards, which are endorsed by the National Restaurant Association. SCAA Memo, *supra* note 15, at 3.

<sup>20</sup> Deborah R. Hensler et al., *Trends in Tort Litigation: The Story Behind the Statistics*, in CPR LEGAL PROGRAM PRACTICE GUIDE ON ADR: PRODUCTS LIABILITY A222, A230-31 (1989).

<sup>21</sup> *Id.* at A230-31.

<sup>22</sup> *Id.* at A231.

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single defendant.<sup>23</sup> The stakes in the mass torts claims vary greatly, depending on the severity of the harm and the number of plaintiffs involved in the lawsuit. *Liebeck v. McDonald's*, although it probably began as a low-stakes suit, evolved into a high-stakes suit when the plaintiff moved beyond claiming only compensation for her injuries and sought to deter McDonald's from selling what she claimed was a defective product.

High-stakes claims are the fastest-growing group of lawsuits in state courts.<sup>24</sup> Over the past decade, the average awards in these cases have increased dramatically, as have plaintiffs' chances of winning.<sup>25</sup> The stakes in these cases are higher because of the "deterrence factor"<sup>26</sup>—the plaintiff's interest in deterring the conduct of the defendant, which is usually achieved through the awarding of large amounts of punitive damages, and the defendant's interest in deterring further suits, which is usually achieved through going to trial and setting precedent.

The deterrence factor gives both sides in a high-stakes suit very little incentive to settle before trial. For some plaintiff's attorneys, "concerns about deterrence have evoked missionary zeal"<sup>27</sup> in high-stakes cases. As in *Liebeck's* case,<sup>28</sup> plaintiffs' attorneys may invest more resources in high-stakes cases because of these deterrence concerns. Once the attorneys have made this investment of time and resources, they may not be amenable to settlement unless they can be assured of recouping their investment. Defendants in high-stakes cases, on the other hand, have a different incentive—to deter future suits of the same type. In some high-stakes cases, the entire future of the company may rest on the outcome of a particular case, so most defendants are willing to invest huge amounts of resources in litigation.<sup>29</sup> Defending against high-stakes cases, rather than settling, is the favored option.<sup>30</sup>

There are few incentives to use ADR in high-stakes cases.<sup>31</sup> The plaintiffs want their day in court, and they want punitive damages from the defendant to deter the defendant from continuing the allegedly harmful

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<sup>23</sup> Hensler et al., *supra* note 20, at A231.

<sup>24</sup> *Id.* at A235.

<sup>25</sup> *Id.* at A247-48.

<sup>26</sup> *Id.* at A247.

<sup>27</sup> *Id.* at A261.

<sup>28</sup> S. Reed Morgan, *Liebeck's* attorney, represented another plaintiff in a 1986 coffee-burn suit against McDonald's that was settled out-of-court for less than \$30,000. Ever since, he has "deeply believed" that McDonald's serves its coffee at dangerously high temperatures. Gerlin, *supra* note 4, at A4.

<sup>29</sup> Hensler et al., *supra* note 20, at A261.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

conduct. The defendants want to deter future lawsuits, and many fear that settling out of court will not be an effective deterrent. Settling out of court, while ending the present litigation, may only serve as an invitation for others with similar claims to file similar lawsuits.

This resistance to ADR in high-stakes personal injury lawsuits is not without its costs to the parties involved. One of the most obvious costs is the negative publicity generated by taking the issue to trial. Settlements are not usually made public,<sup>32</sup> while trials are open to the press and can quickly develop into a media circus around the product or procedure at issue. The publicity over the lawsuit may encourage other "copycat" suits.<sup>33</sup> Additionally, long-standing customer relationships, sometimes a company's most valuable asset, may be irreparably damaged by the negative publicity surrounding the litigation.<sup>34</sup>

## II. NEGOTIATION AND MEDIATION

### A. Negotiation

Negotiation is the polar opposite of adjudication.<sup>35</sup> In negotiation, the opposing parties face each other and haggle over the desired outcome, while in adjudication opposing parties present arguments to a third party and await a binding decision. The distinguishing factor of negotiation is that the parties themselves determine and consent to the outcome.<sup>36</sup> Although negotiation between the parties' legal representatives is the traditional means of settling issues before trial,<sup>37</sup> it is unlikely that litigants in high-stakes suits, who have set their course toward adjudication early on, would be able

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<sup>32</sup> Steve McGonagle, *Secret Law Suits Shelter Wealthy, Influential*, DALLAS MORNING NEWS, Nov. 22, 1987, at 1A. See also Lloyd Doggett & Michael Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643 (1991).

<sup>33</sup> Eight days after the verdict was announced in Liebeck's case, a Michigan woman filed a lawsuit against Burger King, seeking \$65,000 for burns caused when coffee spilled in her lap. Her lawyer claimed the suit was not motivated by the award in the Liebeck case. *Copy-Cat Coffee Case?*, NAT'L L.J., Sept. 12, 1994, at A10.

<sup>34</sup> Joseph T. McLaughlin, *Disputes Involving Products, Services, and Insurance*, in ALTERNATIVE DISPUTE RESOLUTION AND RISK MANAGEMENT, at 109, 120 (PLI Litig. & Admin. Practice Course Handbook Series No. 338, 1987).

<sup>35</sup> DONALD G. GIFFORD, LEGAL NEGOTIATION: THEORY AND APPLICATIONS 2 (1989).

<sup>36</sup> *Id.* at 3.

<sup>37</sup> Charles B. Renfrew, *A Survey of Dispute Resolution Methods*, in CORPORATE COUNSEL'S GUIDE TO ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES, *supra* note 1, at 1.029.

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to work together in the polar opposite of that process to determine an outcome that would be acceptable to both sides.

Conventional settlement negotiations in high-stakes lawsuits have two inherent drawbacks.<sup>38</sup> First, *trial* lawyers are not hired to obtain settlements; they are hired to litigate because their clients have already either ruled out compromise, or have attempted to compromise and have failed. Any negotiation beginning upon this premise already has a lessened chance of succeeding. Second, the parties involved and, to some extent, their lawyers, may have an exaggerated view of the strength of their position. Often in these cases, neither side makes a realistic evaluation of the strengths and weaknesses of their cases early enough in the process to support settlement negotiations.

Take, for example, *Liebeck v. McDonald's*. Shortly after Liebeck's injury occurred, McDonald's could have honored her request for \$11,000 compensation for her medical bills and pain and suffering, and the case would have ended there.<sup>39</sup> Instead, McDonald's made a ridiculously low offer of \$800,<sup>40</sup> which Liebeck refused, and a lawsuit was set in motion. Given this wide disparity between what the two parties thought the case was worth, it is doubtful that negotiation could have intervened.

Although negotiation is an essential part of ADR, negotiation alone is not usually enough to reach a settlement in high-stakes suits. In order for negotiation to be effective in high-stakes suits, another method of dispute resolution must be utilized in order to halt the mad dash towards litigation so that reasoned, realistic negotiations may take place.

### B. Mediation

Mediation is similar to negotiation, but with the addition of an outside facilitator.<sup>41</sup> In mediation, the parties submit their dispute to an impartial third party who can suggest settlements, but has no power to enforce them.<sup>42</sup> The mediator's job is to gain the confidence of both parties and ascertain their "bottom lines"—the amount for which each party is willing

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<sup>38</sup> Renfrew, *supra* note 37, at 1.030.

<sup>39</sup> Liebeck testified under oath that she would never have filed this suit if McDonald's had not dismissed her initial request for compensation for her medical expenses. Gerlin, *supra* note 4, at A4.

<sup>40</sup> *Id.*

<sup>41</sup> William A. Hancock, *Mediation*, in CORPORATE COUNSEL'S GUIDE TO ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES, *supra* note 1, at 4.001.

<sup>42</sup> George H. Friedman, *When Is Mediation an Alternative to Litigation?*, NAT'L L. J., Mar. 4, 1985, at 20, reprinted in CORPORATE COUNSEL'S GUIDE TO ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES, *supra* note 1, at 4.021

to settle.<sup>43</sup> Then, based upon that bottom line amount, the mediator seeks to negotiate a compromise between the parties.

Mediation is most successful in cases involving long-term relationships which will extend into the future, because one of the primary goals of mediation is to restructure the relationship of the disputants.<sup>44</sup> Mediation is usually unworkable when a great imbalance of power exists between the parties.<sup>45</sup> For these reasons, mediation is not likely to be successful in resolving disputes between parties with only a provider-customer relationship, like the relationship between Liebeck and McDonald's, which is the typical relationship in most high-stakes suits.<sup>46</sup>

One type of mediation which has been employed in high-stakes suits is the court-ordered settlement conference.<sup>47</sup> In these conferences, the judge or another neutral third party will act as the mediator and try to encourage settlement.<sup>48</sup> Unfortunately, the settlement conference has met with limited success in high-stakes litigation.<sup>49</sup>

*Liebeck v. McDonald's* offers a perfect illustration of the problems with settlement conferences in high-stakes litigation. First, settlement conferences often come too late in the process to do much good.<sup>50</sup> In *Liebeck*, the conference was held only days before the trial. At this point, the parties are usually committed to going to trial and are probably set in their beliefs about the strength of their position. Second, the settlement conference often fails to take into account the actual worth of the lawsuit to the parties and instead bases the settlement suggestion on what a jury would be likely to award.<sup>51</sup>

This is exactly what the retired judge mediating the *Liebeck* settlement conference did. The mediator suggested \$250,000 as a likely jury verdict

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<sup>43</sup> Renfrew, *supra* note 37, at 1.031.

<sup>44</sup> Frank E.A. Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 U. FLA. L. REV. 1, 13 (1985).

<sup>45</sup> Kenneth A. Ehrmann, *A Mediator's Story*, in CORPORATE COUNSEL'S GUIDE TO ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES, *supra* note 1, at 4.016.

<sup>46</sup> Hensler et al., *supra* note 20, at A247.

<sup>47</sup> For a very brief history of the development of the settlement conference as an ADR mechanism, see Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 490-93 (1985).

<sup>48</sup> Stephen L. Tober, *The Settlement Conference*, TRIAL L.Q. Summer 1983, at 42, 44.

<sup>49</sup> Menkel-Meadow, *supra* note 47, at 493-98.

<sup>50</sup> See, e.g., HERBERT M. KRITZER, LET'S MAKE A DEAL 5-10 (1991) (discussing the delayed use of pretrial settlement conferences in several well-known high-stakes cases); ROBBINS, *supra* note 8, at 616-17.

<sup>51</sup> Menkel-Meadow, *supra* note 47, at 508.

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and tried to talk McDonald's into settling for that amount.<sup>52</sup> What the mediator may have failed to consider was that McDonald's was far less concerned about the amount of the damages than about the precedent that such a settlement would set. After settling with Liebeck, McDonald's would have two choices in the future: continue settling future suits of this kind, or lower the temperature of their coffee. Neither choice was acceptable to McDonald's; therefore, settlement was not an option. However, McDonald's may have been willing to pay the costs of going to trial for a chance to avoid setting such a precedent. Perhaps if the mediator had focused his efforts on McDonald's chances of actually prevailing in the suit, rather than the amount of damages involved, a settlement would have been more likely.

The parties in high-stakes suits are not concerned about "resolving" the dispute in the traditional ADR sense of the term.<sup>53</sup> In ADR, resolution means that the parties find a solution with which they both can feel relatively satisfied. To parties in high-stakes litigation, resolution means winning. When both sides are interested only in winning, mediation and ADR will almost always be a losing proposition. In order for ADR to succeed, the objectives of the parties must be changed from winning at all costs to finding the most efficient resolution to the problem.

### III. MINI-TRIAL AND SUMMARY JURY TRIAL

#### A. *Mini-Trial*

One way to change the parties' objectives is to allow them to arrive at a realistic assessment of their chances of winning. The ideal method for doing this is by giving the parties an opportunity to see how their cases will look to the trier of fact. The mini-trial is an excellent way to do just that.

Traditionally, the mini-trial has been used as a method of resolving complex and protracted disputes between corporations.<sup>54</sup> In traditional corporate mini-trials, each party sends a representative with settlement authority to a meeting where each side (usually through its attorney) has the opportunity to present its case.<sup>55</sup> The goal of the mini-trial is "to expose the

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<sup>52</sup> Gerlin, *supra* note 4, at A4.

<sup>53</sup> Hensler et al., *supra* note 20, at A260-61.

<sup>54</sup> James F. Henry & Erica S. Fine, *Alternative Dispute Resolution and Product Liability*, in CPR LEGAL PROGRAM PRACTICE GUIDE ON ADR: PRODUCTS LIABILITY, *supra* note 20, at A3, A6.

<sup>55</sup> John H. Wilkinson, *Resolving Disputes by Using the Mini-Trial*, in CORPORATE COUNSEL'S GUIDE TO ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES, *supra* note 1, at 3.043, 3.045.

principals for the first time to an objective assessment of the strengths and weaknesses of all sides."<sup>56</sup>

It has generally been thought that cases where an individual is pitted against a corporation, such as personal injury cases, are not suitable for resolution by mini-trial.<sup>57</sup> Several theories have been advanced to support this generalization, among them the ideas that personal injury cases are too "emotionally charged" to be amenable to the mini-trial format<sup>58</sup> and that individuals are likely to find mini-trials unattractive because punitive damages are not usually awarded in mini-trials.<sup>59</sup> It has also been suggested that mini-trials would not be successful in personal injury claims because such claims are usually controlled by plaintiffs' attorneys retained on a contingency basis and insurance claims adjusters, neither of whom has an interest in settlement.<sup>60</sup>

Despite these concerns, the mini-trial has been successfully adapted for use in high-stakes personal injury and products liability cases.<sup>61</sup> These successful mini-trials are patterned closely upon the inter-corporate model, except that the plaintiff sends no representative other than his or her lawyer(s).<sup>62</sup> At the personal injury mini-trial, the plaintiff's and defendant's lawyers present their sides of the issues of liability and damages to the representative of the defendant corporation.<sup>63</sup> The corporate representative listens to both sides, asks whatever questions she or he wishes, considers the matter, and decides what amount the corporation will pay.<sup>64</sup> The plaintiff's attorney considers this and decides if the amount is acceptable to his client.<sup>65</sup> If the amounts are comparable, the parties can begin settlement negotiations on a much stronger footing.

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<sup>56</sup> Renfrew, *supra* note 37, at 1.031-1.032; ABA Subcommittee on Alternate Means of Dispute Resolution, *The Effectiveness of the Mini-Trial in Resolving Complex Commercial Disputes: A Survey*, in CORPORATE COUNSEL'S GUIDE TO ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES, *supra* note 1, at 3.001, 3.022.

<sup>57</sup> *Id.* at 3.022.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 3.022 n.41.

<sup>61</sup> See Henry & Fine, *supra* note 54, at A6-A7, A13-A14 (discussing the successful use of the mini-trial in settling a personal injury products liability lawsuit brought by employees of Union Carbide against the company).

<sup>62</sup> Robert A. Butler, *Use of the Mini-Trial in Product Liability Litigation*, in PREPARATION AND PRESENTATION OF THE PRODUCT LIABILITY CASE 14-1, 14-4 (Southern Methodist University Products Liability Institute, 1983).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

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The advantage of using a mini-trial over another procedure, such as a settlement conference, is that the mini-trial allows the parties to focus realistically on their chances of winning and losing as well as on the verdict amount.<sup>66</sup> In their presentations, each party's counsel can explain to the corporate representative how they would present their case to a jury and how they think the jury might react. Had a mini-trial been used in *Liebeck*, McDonald's corporate representative might have realized how heartless its claims that "there are more serious dangers [than coffee burns] in restaurants"<sup>67</sup> would appear to the trier of fact.<sup>68</sup> An additional benefit of the mini-trial is that it eliminates the "filtering" work of the lawyers and allows the corporation's executives to make their own decisions.<sup>69</sup>

Some attorneys express the concern that suggesting a mini-trial in high-stakes litigation, where appearances are everything, might be viewed as a sign of weakness.<sup>70</sup> However, if the attorneys take the proper approach to suggesting a mini-trial (such as suggesting mini-trial early in the suit and presenting the suggestion to both the lawyers *and* the clients<sup>71</sup>), it is possible for their suggestion to be viewed as a sign of strength, rather than weakness. After all, an invitation to a mini-trial is fundamentally the same as an invitation to traditional adjudication—each side is asking the other to do battle on the merits of their respective cases and to test their positions to see how well they will hold up before a trier of fact.<sup>72</sup> The only difference is that in a mini-trial the trier's decision is non-binding.

### B. Summary Jury Trial

The Summary Jury Trial (SJT)<sup>73</sup> is another ADR technique with a trial-like structure which has been successful in encouraging settlement in high-

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<sup>66</sup> James F. Davis & Lynne J. Omlie, *Mini-Trials: The Courtroom in the Boardroom*, 21 WILLAMETTE L. REV. 531, 532 (1985).

<sup>67</sup> Gerlin, *supra* note 4.

<sup>68</sup> Members of the jury in *Liebeck* told reporters that they awarded large punitive damages because McDonald's refusal to compensate Liebeck early on in the case indicated what one juror called "callous disregard for the safety of the people." Gerlin, *supra* note 4.

<sup>69</sup> LINDA R. SINGER, *SETTLING DISPUTES: CONFLICT RESOLUTION IN BUSINESS, FAMILIES, AND THE LEGAL SYSTEM* 26 (1990).

<sup>70</sup> Henry & Fine, *supra* note 54, at A12.

<sup>71</sup> Butler, *supra* note 62, at 14-5 to 14-6.

<sup>72</sup> Davis & Omlie, *supra* note 66, at 532-33.

<sup>73</sup> The summary jury trial is the invention of Judge Thomas Lambros of the United States District Court for the Northern District of Ohio. See generally Thomas D. Lambros and Thomas H. Shunk, *The Summary Jury Trial*, 29 CLEV. ST. L. REV. 43 (1980); Thomas D.

stakes lawsuits which were previously thought to be unseizable.<sup>74</sup> Like a mini-trial, an SJT involves presentation by the parties' attorneys to a trier of fact, but in the SJT the trier of fact is a real jury, selected from the court's normal jury pool. The jury's nonbinding verdict<sup>75</sup> is then used as a basis for subsequent negotiations.<sup>76</sup> The SJT, like the mini-trial, is not a free-standing ADR mechanism, but rather an adjunct to settlement negotiations.<sup>77</sup> SJTs are not designed to supplant other, more conventional forms of settlement encouragement, such as the settlement conference; they are the next step to be taken when those more conventional methods fail.<sup>78</sup>

The SJT is most effective in cases "where the parties have strongly divergent views about the outcome [of the case] and have held those views despite prior settlement efforts."<sup>79</sup> SJTs are highly effective in cases which would take over ten days to litigate, especially cases where the main issue is the valuation of the damages.<sup>80</sup> All of these conditions are usually present in high-stakes personal injury litigation. It may be precisely the factors that place a case into the high-stakes classification (strongly divergent expectations about the case's outcome, disputed valuations for injuries and punitive damages) that make it well-suited for use of the SJT.

One of the major advantages of the SJT over almost any other ADR method is that the SJT gives the parties a chance to have their day in

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

<sup>74</sup> See text accompanying notes 83-90.

<sup>75</sup> Usually jurors do not know that their verdict is non-binding until after the trial, although some courts explain the jury's advisory role at the beginning of the trial. Some commentators have questioned the ethics of not informing summary juries that their verdicts are nonbinding, see Richard A. Posner, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 386-87 (1986), while others have reasoned that keeping the jury in the dark is the only way to arrive at accurate verdicts, see Recent Development Note, *Summary Jury Trials in United States District Court, Western District of Oklahoma*, 37 OKLA. L. REV. 214, 217 n.16 (1984).

<sup>76</sup> CENTER FOR PUBLIC RESOURCES, JUDGE'S DESKBOOK ON COURT ADR 19 (1985).

<sup>77</sup> James J. Alfani, *Summary Jury Trials in State and Federal Courts: A Comparative Analysis of the Perceptions of Participating Lawyers*, 4 OHIO ST. J. ON DISP. RESOL. 213, 234 (1989).

<sup>78</sup> D. MARIE PROVINE, *SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES* 70 (1986); see also Thomas D. Lambros, *The Judge's Role in Fostering Voluntary Settlements*, 29 VILL. L. REV. 1363, 1376 (1984).

<sup>79</sup> Roger J. Patterson, *Dispute Resolution in a World of Alternatives*, 37 CATH. U. L. REV. 591, 596 (1988).

<sup>80</sup> Gladys Kessler & Linda Finkelstein, *The Evolution of a Multi-Door Courthouse*, 37 CATH. U. L. REV. 577, 589 (1988).

## ADR IN HIGH-STAKES PERSONAL INJURY LAWSUITS

court.<sup>81</sup> Plaintiffs in high-stakes personal injury suits have often been through a great deal of emotional turmoil in the time between their injury and their court date. Allowing them to have their story told to a jury in a courtroom, and giving them a forum in which to vent their grievances can be an emotional catharsis which facilitates calm emotions and makes settlement talks fruitful.<sup>82</sup>

SJTs have been successful in bringing about settlement in several recent high-stakes cases which were thought to be unseizable. In a personal injury case in Dayton, Ohio,<sup>83</sup> the plaintiff's emotional state and the defendant's steadfast refusal to settle caused lawyers on both sides to despair of ever reaching settlement. After more than four years of expensive discovery, a federal magistrate ordered both sides into a one-day SJT. After both sides had presented their case, the jury delivered a non-binding verdict for the defense.

The magistrate then asked the jury to deliberate a second time, this time to determine how much the plaintiff would have been awarded if the defense had been found liable. After this second non-binding verdict, the two sides resumed negotiations and settled shortly thereafter.<sup>84</sup> Attorneys on both sides praised the SJT for providing both sides with a "reality check" on the strengths and weaknesses of their arguments. They also praised the SJT for taking some of the highly charged emotions out of the case, so that a settlement was within reach.<sup>85</sup>

The SJT was also successful in *Stites v. Sundstrand Heat Transfer, Inc.*,<sup>86</sup> a Michigan case involving toxic torts. The procedure in this case was similar to that in the Dayton personal injury case, except that the jury of ten was divided into two groups of five for deliberations. After the two groups returned a split verdict (one group for the plaintiff, one group for the defendant), the parties immediately proceeded to settlement negotiations and

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<sup>81</sup> The SJT "is the only dispute resolution technique which uses the input of a jury of lay[persons] as fact-finders. It is this facet of the SJT which permits the parties . . . to believe that their story has been told, and a decision reached by an objective body." *Federal Reserve Bank of Minneapolis v. Carey-Canada, Inc.*, 123 F.R.D. 603, 605 (D. Minn. 1988).

<sup>82</sup> See, e.g., *Dayton SJT Defuses, Settles Highly Charged PI Dispute*, 6 ALTERNATIVES TO THE HIGH COST OF LITIG. 49, 52 (1988). See also *McKay v. Ashland Oil, Inc.*, 120 F.R.D. 43, 50 (E.D. Ky. 1988) (SJTs satisfy the parties' "psychological need for a confrontation.").

<sup>83</sup> See *Dayton SJT Defuses, Settles Highly Charged PI Dispute*, supra note 82.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> 660 F. Supp. 1516 (W.D. Mich. 1987).

settled a short time later.<sup>87</sup> The attorney for the defense stated that "this case was settled because of the procedure used [SJT]," because the SJT gave each side "a feeling of how their cases would play in Peoria. . . . [The SJT] gave us a range of values for the case and a better sense of the risks involved."<sup>88</sup>

The use of the SJT in *Stites* drew criticism as well as praise. The defense attorneys resented the fact that they were denied the opportunity to object to some of the plaintiff's more emotional arguments, while the plaintiff regretted missing the opportunity to call the injured party as a witness.<sup>89</sup> The attorneys also found the use of two separate panels, which resulted in two separate verdicts, to be initially confusing. "Ironically, though," one attorney later reported, "the inconsistency of the two verdicts may well have been the guarantee of a settlement. Each party could leave the courtroom feeling as if it could win at trial, yet well aware of the risks."<sup>90</sup>

That awareness of the risks of going to trial would have benefitted both sides in *Liebeck*. There can be no doubt that the use of an SJT in that case would have, at the very least, caused McDonald's to rethink its position. In fact, McDonald's filed an appeal after the verdict in *Liebeck*, but before the appeal could be heard the parties settled out of court for an undisclosed amount.<sup>91</sup> Apparently, the verdict made McDonald's realize how its steadfast refusal to settle or to take remedial measures to prevent future accidents appeared to a jury,<sup>92</sup> and to the public. This realization about the merits of its case might have to come to McDonald's much sooner, and much less expensively, through the use of a summary jury trial.

#### IV. CONCLUSION

It appears that the best hope for alternative dispute resolution in high-stakes personal injury suits is the utilization of trial-structured forms of

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<sup>87</sup> *Two Non-Binding Jury Verdicts Lead to \$3.5 Million Toxic Tort Settlement*, 1 *Alternative Disp. Resol. Rep. (BNA)* 339 (1987).

<sup>88</sup> *Id.*

<sup>89</sup> Clifford J. Zatz, *Toxic Tort Case Unlikely to Have Settled Without Summary Jury Trial*, 2 *Alternative Disp. Resol. Rep. (BNA)* 145, 149 (1988).

<sup>90</sup> *Id.* at 150.

<sup>91</sup> *McDonald's Makes Out-of-Court Settlement in Hot Coffee Case*, CHI. TRIB., Dec. 2, 1994, at 1; Howard, *supra* note 10.

<sup>92</sup> Jurors interviewed after the verdict said McDonald's suggestions that Liebeck's burns were statistically insignificant led to the jury's conclusion that McDonald's was "not taking care of their customers." Gerlin, *supra* note 4.

## ADR IN HIGH-STAKES PERSONAL INJURY LAWSUITS

ADR, especially the mini-trial and the summary jury trial. There are two reasons why this is so.

First, there are often great disparities in goals, resources, and bargaining power between the parties in high-stakes personal injury litigation. Most of these suits involve individual plaintiffs of modest means with lawyers retained on contingency suing large, powerful corporations with almost infinite legal resources.<sup>93</sup> In the face of these great differences, there is very little likelihood that these disparate parties will be able to find anything to agree on when using ADR procedures which are not structured like a trial. Providing the parties with realistic assessments of their case through the use of trial-structured ADR techniques will level the playing field considerably, thereby facilitating the settlement process.

Second, high-stakes personal injury suits are also high-emotion suits. Usually the emotion is highest on the part of the plaintiff, but the defendant's stubborn refusal to settle in some cases (like *Liebeck*)<sup>94</sup> is also an indication of high emotions. These heightened emotional states make traditional settlement negotiation extremely difficult and usually unproductive.<sup>95</sup> Summary jury trials (and, to a lesser extent, mini-trials) can help to rein in some of this rampant emotion, allowing the parties to negotiate rationally and reasonably.

SJTs and mini-trials are effective routes to settlement in different types of cases. SJTs are best suited for cases involving factual disputes which require a jury's opinion.<sup>96</sup> Mini-trials, on the other hand, are better suited to cases which combine questions of law and fact.<sup>97</sup>

Of course, there is no guarantee that any form of ADR will be successful in all high-stakes personal injury suits. The lawyers and judges involved must tailor these techniques to the individual case in order to ensure the most favorable outcome not just for their client, but for the process itself. The lawyers on each side will almost certainly have to engage in a fair amount of persuasion in order to convince their clients that going to trial is not always the best option in these cases.<sup>98</sup>

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<sup>93</sup> Hensler et al., *supra* note 20, at A259-61.

<sup>94</sup> See *supra* text accompanying notes 10-16.

<sup>95</sup> GALTON, *supra* note 1, at 120.

<sup>96</sup> Timothy Kratz, Comment, *Alternative Dispute Resolution in Complex Litigation*, 57 UMKC L. REV. 839, 862 (1989).

<sup>97</sup> *Id.*

<sup>98</sup> Lawyers must also take care to ensure that the opposing party does not have ulterior motives for suggesting or agreeing to ADR. Sometimes the opposing side is not interested in resolving the case using ADR, but participates in or suggests ADR as a means to obtain free discovery or to get a free preview of what might happen at trial. Robert B. Fitzpatrick, *Nonbinding Mediation of Employment Disputes*, TRIAL, June 1994, at 40.

Proponents of ADR have long touted the flexibility that the various types of dispute resolution provide. ADR provides a wide range of mechanisms that allow lawyers and clients greater flexibility in choosing how to resolve disputes than the traditional adversary system.<sup>99</sup> In encouraging clients in high-stakes lawsuits to choose ADR, advocates must emphasize the benefits that this flexibility provides, both to the client and to the legal system. A lawyer with her clients' best interests at heart should not refuse to consider ADR solely because of the tired cliché that "ADR can't work in high-stakes personal injury cases." It can, and it does.

*Elizabeth Sherowski*

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<sup>99</sup> Marguerite S. Milhauser, *In Choosing ADR, the People, As Well As the Problem, Couns.*, in CORPORATE COUNSEL'S GUIDE TO ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES, *supra* note 1, at 1.079.