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ARTICLES

HIGH TECHNOLOGY DISPUTES: THE MINITRIAL AS THE EMERGING SOLUTION

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INTRODUCTION

High technology disputes require prompt resolution. The issues are usually complex, the rights and duties rarely free from doubt, and the technology fast changing in the race for constant innovation and improvement. The parties are not always comfortable having their technological developments aired before a public forum such as a judge and jury. Even a private forum, such as an arbitration, would involve outsiders. These outsiders can be unpredictable in their understanding of the intricacies of the technology or the true significance, in technological terms, of the areas in dispute. Furthermore, businesspersons in high technology areas have become frustrated with the uncertainties and costs of most kinds of dispute resolution. They are no longer willing in every case to expose their investors to third party resolution processes from which an appeal is, for all practical purposes, either too late or hamstrung by a complex trial record.

In this atmosphere the minitrial is gradually emerging from behind the shadow of arbitration and litigation, and other more advertised kinds of dispute resolution, to provide an extremely useful format for resolving high technology disputes. It is an alternative that experienced high technology executives are increasingly coming to expect to be advised about in discussions with their attorneys, and are increasingly hearing about in discussions with their col-

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leagues in related industries and reading about in professional journals.

The minitrial has evolved to some degree through experience in the construction industry and in complex supply contracts. Nonetheless, there have been an increasing number of minitrials involving technology issues. These minitrials are being based, to a large extent, upon the techniques learned in other industries. The purpose of this discussion is to provide a special insight into the current state of the minitrial and its developing procedures.¹

MINITRIAL DEFINED

A minitrial is a flexible, private, consensual proceeding in which the parties make an expedited presentation of their best case to senior executives from each side.² The minitrial "saves face" for the parties. It provides the senior executives an immediate, non-threatening opportunity to become fully informed about the dispute without being openly committed to offering a settlement. It opens the door to direct discussions between the businesspersons, absent the vitiating effects of an ongoing discovery process or the manipulative posturing—and hardening of positions—which are incident to the final preparation for trial.

The minitrial succeeds because it provides a current update to senior executives on the dispute from opposing points of view. The briefing permits the executives to obtain a much different perspective, and broader factual understanding, than in-house briefings from their own independent counsel or employees.³

Some parties initiate minitrials after litigation has begun. However, the minitrial has the best chance of success if conducted prior to the complaint being filed. At this point, the parties still may have hope of working together—or have the fear that once

1. In the authors' recent survey of over 100 general counsels of major American corporations, nearly 20% already had experience with minitrials. The survey comments are on file with General Counsel, Tandem Computers Incorporated, Cupertino, California. Increasingly, the subject of minitrials is being advanced in Silicon Valley legal circles and high technology dispute resolution seminars.

2. See generally Eric D. Green, *Growth of the Mini-Trial*, 9 LITIG. 12 (1982); B.C. Hart, *Alternative Dispute Resolution: Negotiation, Mediation, and Minitrial*, 37 F.I.C.C.Q. 113, 122 (1987). The minitrial also has been described as a "carefully structured settlement negotiation," Sandra Rolitsky, *University of Michigan Alternative Dispute Resolution Workshop*, LAW. BRIEF, Dec. 31, 1985, at 12, 13; see also Elizabeth M. Tannon, *Implementing a Successful Minitrial*, KY. BENCH & B., Winter 1988, at 12; Tom Arnold et al., *Minitrials: Opportunities For Compromise*, 51 TEX. B.J. 34 (1988).

3. Jonathan B. Marks, *An Overview of Alternative Dispute Resolution Techniques, Success and Obstacles*, 53 ANTITRUST L.J. 283, 290 (1984).

started the arbitration or litigation will inexorably lead to a binding result in which one of them for certain, or perhaps both, will be the loser. If successful, the minitrial results in a new relationship. If either party concludes that the minitrial will not be productive, it is free to terminate the minitrial at any time and proceed with some other form of traditional dispute resolution, such as conciliation, mediation, arbitration, or trial. If the party has participated to any meaningful extent in the minitrial, it then at least will have laid the factual groundwork for a later effective conciliation or mediation, or possible settlement.⁴

In essence, the minitrial is a key waypoint on the road to informed dispute resolution, providing a convenient respite in which intelligent negotiation can take place. The success of the minitrial rests upon the well-recognized proposition that approximately 90% of all suits settle, in any event, before trial.⁵

The minitrial only takes a limited period of time, such as three or four hours or, in more complicated cases, perhaps a day or two. After the executives have heard the facts, they generally realize that: (i) resolving the dispute on a business basis will avoid potentially high costs of litigation; (ii) each side has something to say for its position; and (iii) each side has an identifiable risk of losing.

In sum, the minitrial permits the parties to obtain a mini-view of the case, at low cost, with little injury to business or reputation.⁶

ADVANTAGES

The minitrial forces the parties to focus on their underlying economic interests. Most other trial-type dispute resolution procedures seek a litigation-type result, i.e., a conclusion in which one party wins. The minitrial promotes innovative business solutions, sometimes involving an exchange of technology in other areas which are not central to the dispute but which are nonetheless im-

4. See, e.g., John Wilkinson, *Resolving Disputes By Using The Minitrial*, N.Y.L.J., Aug. 27, 1987, at 5.

5. The minitrial's underlying premise is that the parties can resolve the matter themselves when adequately apprised of the facts. James F. Davis and Lynne Omlie, *Mini-Trials: The Courtroom In The Boardroom*, 21 WILLAMETTE L. REV. 531, 532 (1985).

6. The minitrial also has been used to address international trade disputes. See, e.g., Leo Kanowitz, *Using the Mini-Trial in U.S.-Japan Business Disputes*, 39 MERCER L. REV. 641, 647-648 (1988), as well as local disputes between companies overseas, Sir Laurence Street, *Dispute Resolution in the Asia/Pacific Region - Proactive Sites & Centers - Australia*, PROC. ASIA/PAC. CENTER FOR RESOL. INT'L BUS. DISP., Sept. 21, 1990, at 12; P.T. Cavanaugh, *The Mini-Trial: A New Zealand Experiment In Pre-Trial Dispute Resolution*, N.Z. L.J., Jan. 1989, at 23; Belinda Cheney, *Commercial Disputes: The Mini-Trial Option*, 19 VICTORIA U. WELLINGTON L. REV. 153, 175-176 (1989).

portant to the future growth of the parties. Minitrial solutions are often better for the stronger party because they provide more than a judgment on a limited point such as a narrow factual or legal issue, and at the same time better for the weaker party because they still provide a chance to preserve its business. Obviously, the weaker party will find a minitrial attractive where it recognizes that the alternative could be a costly disaster before an independent tribunal, where the outcome would depend to a large extent on how much it could spend to defend itself and on its ability to survive a protracted litigation and still market its products.⁷

If the underlying dispute involves performance of a technology-based obligation, or protection of technology, the parties are more likely to support a minitrial agreement than an outsider's decision. The parties will have created the result, and understand its technical terms, rather than being confronted with a Solomon-like, but perhaps unworkable decision forced upon them by outsiders.⁸ Also, each party's employees will have a greater incentive to implement the minitrial decision, because the employees will not wish in this type of technology dispute resolution to frustrate the clear business goals of senior management.

Minitrial proceedings generally tend to preserve the business relationship between the parties. By hearing the other party's position, and recognizing the possible validity of at least some opposing contentions, the principals have an incentive to work together, which builds rather than destroys high technology business relationships.⁹

Indeed, the face-to-face negotiations often develop senior-level personal relationships which help to eliminate future technology disputes, or at least to surface and address these disputes at an early stage before they become acrimonious.¹⁰ On the other hand, while

7. C.J. Joseph Morris, N.D. Okla., Observations at the First Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, in 100 F.R.D. 499, 520, 522 (1983); John H. Wilkinson, *ADR is Increasingly Effective, Averts Litigation in Many Cases*, NAT'L L.J., Apr. 4, 1988, at 22; John R. Allison, *Five Ways to Keep Disputes Out of Court*, HARV. BUS. REV., Jan.-Feb. 1990, at 166, 177.

8. While one of the aggrieved biblical mothers might have been willing to have the baby split, no one asked the baby how he or she felt about Solomon's solution.

9. The minitrial converts a legal dispute back to a business problem. Lewis D. Barr, *Whose Dispute Is This Anyway?: The Propriety of the Mini-Trial In Promoting Corporate Dispute Resolution*, 1987 J. DISP. RESOL. 133, 137-138, (1987). See also *The Corporate Dispute Resolution Institute*, 18 LAW. BRIEF, May 15, 1988, at 1, 4.

10. See Laurie A. Rich, *Alternative Dispute Resolution - Opening Doors to Settlement*, CHEMICAL WK., Aug. 4, 1985, at 28. Business between the parties may even increase. Ted Gest, *Soaring Legal Costs: Even Lawyers Are Worried*, U.S. NEWS & WORLD REP., Aug. 13, 1984, at 30.

a party might accept out of desperation a suggested mediation or conciliation result, the relationship may suffer. The minitrial invites the parties to reason together, and thus appreciate each other's thought processes. There is no outsider "second guessing" prior business judgments.

The minitrial senior executives, rather than the attorneys, control the ultimate "tone" of the minitrial proceeding. The executive cannot easily divorce himself from his attorney's conduct—as distinguished from an arbitration or trial, where the parties are not directly responsible for the conduct of their attorneys, but leave it up to an arbitrator or judge to control the proceedings and to determine what conduct is appropriate. At trial, the goals of the opposing attorneys are to win, in other words, to take maximum advantage of the facts, of each other and the situation, rather than to lay the foundation for a later harmonious, if possible, relationship. In a minitrial, each senior executive has to be concerned with the tone of his or her company's presentation, because this tone will affect the unavoidable emotional context of, and resulting inter-personal commitment to, any enduring settlement.

Additionally, the senior executives will tend to treat the efficacy of the dispute resolution as a clear test of their job performance, and thus view the dispute differently than an arbitrator or judge. The executives will take into account institutional pressures to develop a reasonable solution, because the executives will know that eventually they may be forced to explain to a president or board why the dispute was not settled—particularly if there is a later significant adverse litigation result or disproportionate legal costs.¹¹

If the minitrial fails to produce a settlement, the minitrial process nonetheless is a significant step toward later negotiation because it exposes the facts to senior management. Further, from a financial accounting standpoint, the minitrial also may create pressures to settle. The disclosure of the facts may clarify the claim's loss potential and thus the need to consider establishing reserves in future financial reports against potential losses.¹² This will tend to

11. It is estimated that 95% of all minitrials eventually result in settlement. Wilkinson, *supra* note 4; Barr, *supra* note 9 at 141. "[T]wo large cases that had been scheduled for mini-trials were settled even before the procedure could be used. Working on the mini-trial agreements got the parties talking about the dispute," he [chief Navy trial attorney] said." *Few Contractors Using Dispute Resolution Process to Resolve Small Claims, Navy Says*, Daily Rep. for Executives (BNA) No. 192, at A-6 (October 4, 1988).

12. The possible reserves will require an estimate of the claim's eventual dollar exposure.

help management understand the ultimate business risks of the dispute.

Nonetheless, settlement is generally possible only when the parties are satisfied, to a reasonable extent, that they understand their case.¹³ A minitrial forces the parties to focus on the issues. The parties to a minitrial will usually recognize that 60% to 80% of the facts can generally be known or roughly determined from their own files or their organization's experience in the marketplace.¹⁴ Thus, the parties at an early stage can evaluate the economics of attempting to obtain the other 20% to 40% of the evidence. The costs of further discovery will often encourage settlement.

Finally, the minitrial has the other usual benefits of alternative dispute resolution techniques, such as confidentiality, informality and speed.¹⁵

CRITICISMS

Occasional criticisms of minitrials provide perspective:

1. Some view the non-binding structure of a minitrial as a disadvantage.¹⁶ However, this feature is precisely what makes the minitrial effective. The minitrial allows the parties to resolve the dispute without risking a potential loss of self respect. It allows them to negotiate in an atmosphere where each party can attempt to satisfy its own business interests. Often a party can reach an acceptable business conclusion without having to form a judgment on the merits of any particular individual's conduct. This permits the parties to focus on the business problem, rather than on the people. Also, the possibility that the other side may withdraw at any time if it becomes uncomfortable tends to induce each party to negotiate fairly and in good faith.

2. Some worry that legally untrained executives will be left at the mercy of clever attorneys.¹⁷ However, the minitrial focuses on

13. Minitrials provide the parties with helpful litigation risk analysis data. See James F. Davis, *Resolving Patent Disputes Using Arbitration and Minitrial*, 65 J. PAT. OFF. SOC'Y 275, 283 (1983); Stephen D. Solomon, *Contempt of Court, INC.*, Oct. 1989, at 106, 108.

14. Compare a proceeding for a preliminary injunction, where approximately 70-75% of the basic case is developed within a few weeks after filing the complaint and the remaining 25-30% is developed between the preliminary injunction hearing and trial—often without significantly changing the result.

15. See, e.g., Gerald Sobel, *Abbreviating Complex Civil Cases*, in *ADR AND THE COURTS: A MANUAL FOR JUDGES AND LAWYERS* 193 (Erika S. Fine, ed., 1987). See also Hart, *supra* note 2, at 123.

16. *Panelists Discuss Ways to Expand Use of ADR*, 51 Fed. Cont. Rep. (BNA) 788, 789 (May 1, 1989).

17. See e.g., Arnold et al., *supra* note 2, at 36.

facts, not polemics. The senior executives generally will have prospered, and survived, in the business world through their ability to see through to the core business issues, and to disregard career inhibiting hyperbole. Further, the executives who hear the evidence will frequently have some personal knowledge of the facts, which will impose some boundaries on what the attorneys can say and still hope to remain believable.¹⁸

3. Others argue that the minitrial provides the potential litigation opponent with an evidentiary preview, thus permitting it later to eliminate its own weaknesses or exploit the other side's deficiencies.¹⁹ However, this argument reaches every advanced factual disclosure in modern discovery. In today's litigation, with extensive and for the most part exhaustive pretrial discovery in the high technology area and detailed pretrial statements, there is little chance that secrets will exist at trial—thus reducing, if not entirely eliminating, the spectral disadvantage of early minitrial disclosure.

The assumption that a senior executive cynically will use the minitrial to preview the other side's case presupposes a measure of bad faith. In reality, the executive usually is subject to internal pressures from her or his company to find a solution. The need for a solution is the primary selling point for the minitrial. The executive also will have an opportunity to preview her or his case—most often with the recognition that the company perhaps could have done something differently. The exposition should encourage the executive to make a reasonable assessment, if not at the minitrial then at some later date. The caring executive will not want to risk substantial damage to her or his company, or to its reputation in the high technology marketplace, by going forward with litigation when she or he knows that it ultimately might develop that the entire matter could have been terminated earlier, with less cost.

4. Finally, some businesspersons believe that suggesting a minitrial, or any alternative dispute resolution technique, may be treated as a sign of weakness. That view is simply another way of saying that a party should be willing to put up the "ante," to some extent, in the gamble of litigation. A party proposing a minitrial is simply suggesting that the dispute be viewed as a commodity, in terms of a cost-benefit analysis. Thus, the request constitutes an

18. Jethro K. Lieberman & James F. Henry, *Lessons From The Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 428-430 (1986).

19. See Marguerite Millhauser, *Rush to Mediation: Where Is The Bandwagon Going?*, LEGAL TIMES, Aug. 10, 1987, at 16; Michael Pickering, *Litigation Alternatives: Mediation and the Mini-trial*, 60 L. INST. J. 316, 318 (1986).

assertion that a party is not afraid to consider the facts. Most sophisticated businesspersons realize that they do not compromise principles by hearing facts.

BASIC STRUCTURE

Effective minitrials generally have a common structure:

1. *Preparation*

A minitrial requires detailed preparation but not as extensive or intensive as trial or arbitration.²⁰ The attorneys usually will not have the benefit of discovery. They will need to anticipate the other side's factual claims. This may force a more dispassionate view of their own facts. It may also lead to more imaginative lawyering.

Generally, the executives hearing the case will have access to a great segment of the facts through independent day-to-day contacts with their respective company personnel. This will require the attorneys to be more thoughtful, less bound by narrow hearsay rules, and more thorough in marshalling the evidence. It also will require them to be more careful about omitting facts which may have business significance, but which may not satisfy technical evidentiary rules.

Finally, the preparation will need to focus on assessing real, not imagined, damages—at an even earlier stage than the opening salvos of litigation. The parties often will discover that they each lack sufficient records to support a clear damage claim, or that the necessary damage analysis only can be developed through expensive experts. The projected cost of outside experts may itself encourage settlement.

2. *Presentation*

The minitrial usually lasts a short period, typically ranging from three or four hours to one day. The executives may be willing to come back for two or three separate presentations, but the presentations will need to be condensed.²¹

The parties will find it useful to present the evidence in an executive-type briefing. Here, the parties marshal the facts in sum-

20. Minitrials put trial skills on display. Fred Bartlit, *Fred Bartlit on Minitrials*, ALTERNATIVES, June 1985, at 1; John Wilkinson, *An Outside Counsel's ADR Role*, NAT'L L. J., Oct. 3, 1988, at 15.

21. For an excellent description of the focused presentation of complex facts at a minitrial, see Jon T. Anderson & G.W. Snipes, *Stretching the Concept of Mini-Trials: The Case of Bechtel and the Corps of Engineers*, CONSTRUCTION LAW, Apr. 1989, at 3, 4.

mary form through charts, graphs, and written chronologies. On occasion, the parties will present live testimony. More often they will introduce testimony indirectly through a member of their business staff, who summarizes the recollections of company employees. Reading deposition extracts may not be effective, unless the extracts are to the point. This requires careful preparation.²² Businesspersons, rather than attorneys, often conduct the presentations.

The presenter has a strong incentive to be accurate. The senior executive will be upset to learn that her or his side has omitted important facts—the old “bugaboo” of surprise which haunts executive circles. The risk of discovering intentionally omitted facts is relatively high because it is never completely possible to control leakage of information in high technology organizations, and because the technical staffs of the organizations will often seek to assure that the technical facts are accurate, regardless of the ultimate positions of the parties.

3. *Roles of Participants*

The senior executive will recognize that differences in corporate culture and approach can subtly and significantly affect the content of what is being said. Indeed, the executive will often be more critical than a judge or jury of her or his company's presentation. For example, the executive may previously have formed a judgment as to the accuracy of certain types of data, or the quality of work by a particular division. For this reason, the executive can quickly perceive weaknesses in her or his side's positions.²³

Additionally, most senior executives would acknowledge, perhaps grudgingly, that neither side in a dispute is completely right. The minitrial demonstrates this harsh reality at an early stage. Rather than deferring the issue because of the pressing daily business, the senior executive will be motivated to find a solution, or at least to understand why he or she is not willing to settle. The mini-

22. See, e.g., *Practitioners Describe Use of ADR in Antitrust, Patent Controversies, Antitrust & Trade Reg. Rep. (BNA) No. 57*, at 730, 732 (Nov. 23, 1989). In this complex patent dispute, the minitrial witnesses told their stories without interruption. The parties also made written submissions to the panel, including technical papers prepared by experts. *Id.*

23. The executive selected to hear the minitrial should not be the person responsible for the dispute. *Alternative Dispute Resolution Procedures for Government Contract Disputes, Including Use of Minitrials, Settlement Judges, and Negotiations*, 56 U.S.L.W. 2390 (January 19, 1988). It is best if the executive did not participate in any of the underlying events, Davis and Omlie, *supra* note 5, at 541, and is from a higher management level, see Lester Edelman & Frank Carr, *The Mini-Trial: An Alternative Dispute Resolution Procedure?*, ARB. J., Mar. 1987, at 7, 9; *ACUS Urges Agencies, Boards to Foster Use of ADR Techniques in Contract Cases*, 49 Fed. Cont. Rep. (BNA) 5 (Jan. 4, 1988).

trial tends to eliminate the usual impediment to a prompt decision—the lack of time to focus on the problem.

The attorneys may advance aggressive arguments but need to be cautious in doing so. The attorneys will usually try to present evidence that makes economic sense to both parties.²⁴ The parties have occasionally excluded attorneys from the hearing altogether on the belief that their presence may impede open discussion. In other cases, the parties have used the attorneys solely as advisors.²⁵

In some cases, a neutral advisor participates with the senior executives. The neutral advisor discusses the evidence with the executives, evaluating how the evidence might be perceived by a disinterested trier of fact. The neutral advisor does not decide the case, but simply provides input.²⁶

On occasion, the neutral advisor is a retired judge.²⁷ However, the neutral advisor can also be an experienced businessperson, an independent expert, an attorney, or anyone else in whom the parties have confidence, including a potential mediator.

The parties should define the neutral advisor's duties prior to the hearing. For example, the parties may wish the neutral advisor to conduct the proceedings, engage in questioning of the presenters, opine on the admissibility of the evidence, advise on how a judge or jury might react to the evidence, or state what he or she perceives to be the weaknesses on either side.²⁸

The parties are free to decide who else will be present at the minitrial. In high technology disputes, the parties may wish to pro-

24. The attorney will need to recognize that the other side's senior executive is also a *de facto* judge of the dispute and the essential person to be convinced, rather than her or his client. Reba Page and Frederick J. Lees, *Roles of Participants in the Mini-Trial*, PUB. CONT. L.J., Oct. 1988, at 54, 62-63.

25. Some commentators believe that the same attorney should not perform two roles—advisor and presenter—at the minitrial. Page and Lees, *supra* note 24, at 64; Wilkinson, *supra* note 20, at 15. It is preferable not to bring in an attorney solely as an observer because this may suggest that the party is using the proceeding as a subterfuge for discovery.

26. Selection of the neutral seems rarely to be a major problem. Green, *supra* note 2, at 17. See also Arnold et al., *supra* note 2, at 36 (the neutral "serves only as a conference moderator, and not as a judge or factfinder").

27. If the case includes significant legal questions, or if the opposing lawyers are particularly aggressive, it may be desirable to use a judge as the neutral. Marks, *supra* note 3, at 290. Law professors have occasionally served as neutrals. E.g., *Passage of Alternative Dispute Resolution Bill Urged; Technique Resolves Superfund Case for Corps of Engineers*, Daily Rep. for Engineers (BNA) No. 109, at C-1, C-2 (June 7, 1988).

28. See Edelman and Carr, *supra* note 23, at 7, 11. The parties should stipulate, at a minimum, that the neutral advisor will be barred from later serving as a trial witness, consultant, or expert for any party in proceedings on the merits. Michael F. Hoellering, *The Mini-Trial*, ARB. J., Dec. 1982, at 48, 50.

vide for the exclusion of other employees, particularly if the dispute involves trade secrets or future technology plans.

MINITRIAL STRUCTURE

The parties can be flexible in organizing the minitrial:

1. *The Minitrial Agreement*

The parties, of course, will need to agree in advance on the minitrial structure. Opinions differ as to whether these agreements should be reduced to writing.²⁹ Many lawyers believe that it is preferable to have informal understandings as to the basics such as duration, order of presentations, and who will participate from each side. This can be accomplished by a telephone call or a short letter.³⁰ Informality generally facilitates the proceeding.

The minitrial is attractive because the parties can set their own guidelines. Indeed, if they cannot agree easily on the guidelines, there may be little hope for a minitrial. The principals sometimes communicate directly, rather than through attorneys, to work out the procedures. There are several model agreements to which the parties can refer.³¹

2. *Discovery of Evidence*

If the parties need discovery before the minitrial, they can address the subject in their agreement.³² The parties often provide for an informal type of information exchange. The exchange is based on mutual trust, with the underlying knowledge that positions will ultimately harden, perhaps beyond repair, if the parties later find at trial that important information was withheld or, perhaps, only disclosed in a misleading manner at the minitrial.

One approach to discovery is to have two separate minitrial proceedings. Each party may initially hear the other side's evidence

29. Larry Lempert, *Two Companies Find Big Promise In Little Trial*, LEGAL TIMES, Oct. 24, 1983, at 48.

30. See, e.g., Tamar Lewin, *Business and the Law, An Alternative to Litigation*, N.Y. TIMES, Mar. 4, 1986, at D2.

31. For discussions of the minitrial agreement, see Davis and Omlie, *supra* note 5, at 542; Edelman and Carr, *supra* note 23, at 7, 12; Hart, *supra* note 2, at 123-4; Pickering, *supra* note 19, at 316, 317; and Tannon, *supra* note 2, at 12.

32. A few commentators argue that minitrials should be deferred until the completion of discovery. See Davis and Omlie, *supra* note 5, at 537; Hart, *supra* note 2, at 133. Some basic discovery focuses the determinative issues. However, the minitrial need not await the completion of all discovery. Davis and Omlie, *supra* note 5, at 538; W. David Pantle & C. Brad Peterson, *The Private Mini-Trial: Another Settlement Technique*, 14 COLO. LAW. 990, 994 (1986).

at one hearing, then come back with additional facts. This procedure requires more time, but ultimately may increase trust and save costs.

3. Confidentiality

As between the parties, the minitrial can be kept confidential.³³ The attorneys should always consider a non-disclosure agreement prior to offering evidence, particularly in technology disputes.

4. Admissions at the Minitrial

Because the minitrial is a "settlement negotiation" within Rule 408 of the Federal Rules of Evidence and similar state rules, admissions made by the parties generally are not admissible at trial, should the dispute not settle.³⁴ However, this exclusion does not apply to minitrial evidence which is otherwise discoverable.

Moreover, the presentations at the minitrial may be discoverable by a third party.³⁵ For example, two companies may have a dispute over ground water contamination. Later an unrelated organization which claims injury may seek to discover the minitrial "presentations." Because the presentations may be incomplete or misleading when taken out of context, the parties to the minitrial should consider requesting the court, if suit is then pending between them, to enter an order that all aspects of the minitrial proceedings be kept confidential as to third parties. The order could be a normal form of protective order, or it could be a court-approved stipulation which incorporates the parties' minitrial agreement.³⁶

33. For an excellent discussion of minitrial confidentiality, see James J. Restivo, Jr. & Debra A. Mangus, *Alternative Dispute Resolution: Confidential Problem-Solving or Every Man's Evidence*, in CPR LEGAL PROGRAM MINI-TRIAL WORKBOOK 61, (Erika S. Fine, ed., 1985); see also Robert H. Gorske, *Alternative Dispute Resolution: the Mini-Trial*, WIS. B. BULL., Feb. 1985, at 21, 22.

34. See generally Phillip J. Ritter, *ADR: What About Confidentiality?*, 51 TEX. B.J. 26, 27 (1988); Robert B. McKay, *Ethical Considerations in ADR*, in DONOVAN LEISURE NEWTON & IRVINE ADR PRACTICE BOOK 459, 472-479 (John H. Wilkinson, ed., 1990). If the parties wish to protect themselves against possible later use of minitrial admissions, they should enter into a stipulation expressly stating that the minitrial is part of a "settlement discussion," and that any admissions or concessions will not be introduced by them in other proceedings.

35. McKay suggests that courts might be reluctant to preserve confidentiality to the prejudice of third parties, lest confidentiality deprives the public of its right to "every man's evidence." McKay, *supra* note 34, at 473.

36. See Barr, *supra* note 9, at 134 n.11, for a rule of procedure adopted by the United States District Court, Western District of Michigan, which recognizes minitrial agreements and permits the Court, on motion, to establish minitrial hearing procedures.

5. *Time Limits*

The parties usually set a time limit to complete the minitrial.³⁷ A time limit provides incentive to reach a settlement, or to return the dispute to status quo. If the executives have not reached a solution, the time limit protects them from a "loss of face" in reinstating the litigation.

6. *The Settlement Agreement*

The parties, and their attorneys, will wish to reduce their settlement agreement to writing. The executives who personally met and agreed to the settlement will have opened a dialogue and established a personal relationship which will often enhance later implementation of the settlement, or at least make it more difficult to abandon the spirit of the settlement.

TYPES OF DISPUTES SUITABLE FOR MINITRIALS

Most technology disputes are suitable for a minitrial resolution. However, certain types of disputes, such as class actions, cannot be settled out of court. Additionally, a party may not wish to settle a particular type of technology dispute, as where an organization needs to establish a precedent to protect itself against future claims.

Where the parties are willing to be reasonable and to listen to both sides, the minitrial is very attractive. A pragmatic approach to reducing litigation costs, and expanding the possibilities for a mutually acceptable result, should help to promote the use of minitrials for high technology disputes, particularly where the claims are sophisticated or unduly fact intensive.³⁸

37. Where applicable, the parties should provide that the statute of limitations is tolled during the pendency of the mini-trial or until a specified date.

38. Many lawyers believe that a minitrial is most appropriate where:

- (a) there would possibly be a continuing business relationship between the parties; (Barr, *supra* note 9, at 139)
- (b) the dispute is complex and will absorb extensive legal fees; (Wilkinson, *supra* note 4, at 5)
- (c) there are only a few central and controlling issues, regardless of complexity; (Arnold et al., *supra* note 2, at 34-35)
- (d) the dispute does not turn on witness credibility, i.e., the dispute is technical in nature; (Green, *supra* note 2, at 17)
- (e) there are few parties involved; (Tannon, *supra* note 2, at 13)
- (f) discovery is complete; (Hart, *supra* note 2)
- (g) the parties want to settle (crucial factor). (Davis and Omlie, *supra* note 5, at 535)

THE MINITRIAL CLAUSE

In some instances, the contract draftspersons have replaced the typical arbitration clause with a minitrial clause, i.e., a clause requiring the parties first to submit any dispute under the contract to the chief executive officers of both corporations. This clause further provides that the officers must hear the issues together before either party commences arbitration or litigation.³⁹

The minitrial clause requires imaginative drafting and innovative legal skills. Its inclusion in significant contracts can have a positive, sobering effect upon the parties.⁴⁰ The clause, being part of the bargained-for exchange, is treated as enforceable to the same extent as other contract provisions.⁴¹

MINITRIAL CASE STUDIES

While participants in minitrials in high technology disputes are understandably reluctant to disclose the details of their proceedings because of fear of competitive injury from other sources and because the promulgation of the details may have the same impact on trade secrets in some instances as a public trial, case histories of minitrials in other industries illustrate the basic pattern of minitrials for high technology disputes.

For a more extensive discussion of the types of disputes suitable for a minitrial, see Barr, *supra* note 9, at 136-7.

However, others believe that a minitrial is inappropriate where the issues are primarily legal, or the dispute concerns product liability. Hart, *supra* note 2. See also Harry N. Mazadoorian, *Alternative Dispute Resolution: The Unique Role of Inside Counsel*, AM. CORP. COUNS. ASS'N DOCKET, Winter 1988, at 16, 20-21.

39. FINE, *supra* note 33, at 100-8, contains typical minitrial clauses. See also *A Drafting Checklist for ADR in Contracts*, NAT'L L.J., Feb. 27, 1989, at S7. Additionally, ADR providers such as the American Arbitration Association, CPR, and EnDispute act as minitrial expeditors. They establish procedures and help identify neutral advisors. These organizations offer their services for relatively minimal fees.

40. At least one commentator believes that for an effective alternative dispute resolution clause, including a minitrial clause, a corporation must have a (a) reputation for ethical business practices, (b) commitment to prompt and fair resolution of disputes, and (c) willingness to pursue litigation vigorously if ADR fails. Curtis H. Barnette, *The Importance of Alternative Dispute Resolution: Reducing Litigation Costs as a Corporate Objective*, 53 ANTITRUST L.J. 277, 279 (1984).

41. See *Lightware Technologies v. Corning Glass Works*, 725 F. Supp 198, 200 (S.D. N.Y. 1989) (assumes enforceability of the minitrial agreement, where the agreement is properly authorized and executed); see also John Wilkinson, *Contract Clauses for Nonbinding ADR*, in DONOVAN LEISURE NEWTON & IRVINE ADR PRACTICE BOOK 267, 268-269 (John H. Wilkinson, ed., 1990); John E. Nelson, *Arbitration Today - Some Threshold Issues*, 52 TEX. B.J. 1013 (1989); Joseph T. McLaughlin & Barbara Green, *Alternative Dispute Resolution*, in ALI - ABA COURSE OF STUDY, U.S. - CANADIAN BUSINESS LITIGATION ISSUES: A COMPARATIVE VIEW 41, 64-73 (A.L.I.-A.B.A. Committee on Continuing Prof. Educ. eds., 1988).

We summarize below, and personalize in the participant's own language, helpful reports concerning the structure of minitrials of complex disputes.⁴²

1. *Construction Contract*

Complex litigation was resolved without retaining outside counsel. The plaintiff, a party to a construction contract, brought suit against a manufacturer and a prominent construction company. Shortly after service of the complaint, the manufacturer's general counsel contacted the plaintiff's general counsel and suggested that the parties attempt to resolve the matter outside of litigation. The parties thereafter executed a stand-still agreement tolling the statute of limitations. The plaintiff dismissed the suit without prejudice and the parties agreed to engage in informal discovery and identification of the issues.

After the issues had been fairly well defined, the parties agreed to attempt to resolve the matter through a non-binding minitrial before company executives. The parties entered into an Alternative Dispute Resolution ("ADR") agreement which provided for the designation of high-level corporate executives as their ADR representatives, a pre-proceeding exchange of written materials, a brief oral presentation by counsel to the ADR representatives and a neutral facilitator, and a negotiation session with no counsel present.

The ADR representatives were able to resolve in half a day a dispute which would otherwise have involved extremely expensive formal discovery and a lengthy trial. Although the plaintiff continued to be represented by outside counsel, the manufacturer incurred no outside counsel fees.

2. *Construction Contract (Neutral Advisor)*

This minitrial involved a dispute between a large manufacturing company and a contractor concerning plant construction overruns. Relations between the parties deteriorated to the "not speaking except through counsel" stage. Each side hired extremely aggressive trial attorneys. The situation became tense. However, the parties agreed to make one last effort to resolve the matter outside of litigation.

The plaintiff suggested a minitrial using senior executives from each company, and a former Federal Judge, as a panel to "try out" the case. The president of the construction firm was relatively new

42. Identities of the parties, on request, have been omitted.

and did not closely associate himself with the particular project. Thus, he was a natural "fit" on the panel, as was one of the manufacturing company's vice presidents who knew the project had problems, but had not been closely involved.

Then, each litigator began issuing ultimatums about what had to be done (or not done) by the other side in order for the minitrial to proceed. The plaintiff asked the Judge to issue a "gag order" against the litigators before they caused the minitrial to break down altogether. In response, the Judge sent a letter directing the litigators not to communicate further with each other pending the minitrial session scheduled for two weeks later.

The minitrial took place over two days. After the two executives met and introduced themselves, the attorneys presented statements, some charts, the contracts, plans and specifications. The two executives had dinner together the first night to get to know each other. During the minitrial sessions, the Judge spoke candidly about the persuasiveness of the original contract documents and the many letters, memoranda and change orders that followed, along with the other factors that probably would influence any persons who ultimately might have to decide the case. After the second day, the parties decided that in-house counsel and project managers should meet further to sort out the hundreds of change orders and try to negotiate a settlement. All litigation and preparation for arbitration was put on hold.

The negotiations then took nearly a year. The teams rotated their meeting locations between the parties' home offices. The manufacturing company's in-house counsel participated in the negotiations, but not the trial counsel. Finally, the contractor accepted a settlement offer, and the parties asked for one additional meeting with the minitrial panel to conclude the settlement. The memorandum of agreement was signed that day—the third day of the minitrial, ten months after the first two days.

3. *Equipment Purchase Contract*

A purchaser claimed that equipment installed at an out-of-state plant failed the acceptance test. Upon consulting local counsel in the seller's county, the purchaser learned that the case would take at least five years to reach trial. Against its outside counsel's advice, the purchaser then proposed a minitrial. Eventually the parties agreed on the ground rules: a non-binding presentation to senior executives of each side, with no neutral panel member. The executives would be at least two levels higher in the organization

than the personnel directly involved in the dispute. Both senior executives had authority to settle the full range of claims.

The minitrial took place at the purchaser's offices. The purchaser's counsel presented the executives with a binder containing a small number of relevant documents, together with a chronology keyed to the documents. This binder facilitated the presentation and helped the panel understand the events. The result was an agreement whereby the supplier provided a credit against a subsequent purchase in an amount equal to approximately two-thirds of the purchaser's claim. The parties were surprised at the time and effort required of the executives. The executives met briefly after the six-hour presentation, but could not resolve the matter. They continued to write to one another, meet and discuss issues by telephone during the next several weeks. Altogether, each executive spent approximately thirty hours on the dispute after the minitrial was concluded.

This dispute was particularly suited to ADR because the parties had an ongoing supplier-customer relationship. Both parties felt they were right. The real problem was that the parties could not calmly discuss the issues, absent a method to facilitate communication. The minitrial served that function.

4. *Supply Contract*

After reasonable discovery in a lawsuit involving the alleged breach of a long-term supply contract, the supplier proposed a minitrial by the Chief Executive Officers of both companies. The parties headquartered in a hotel in a neutral city and used three meeting rooms, one for the minitrial and the other two for workrooms. Each lawyer made a presentation of approximately two hours, using charts and graphs but no witnesses. The two CEOs questioned the lawyers and discussed the case for a short period.

After each CEO further consulted with his side, both CEOs met by themselves for about two hours. This session was interrupted several times by each CEO going to a separate meeting room to consult with his associates. The CEOs then reached a settlement whereby one corporation paid the other a sum to cancel the long-term contract. The lawyers immediately prepared skeletal settlement papers which were executed by the CEOs. In the next two days the lawyers prepared complete settlement papers, the court approved the settlement, and the money was paid.⁴³

43. Comments by other satisfied minitrial participants provide additional helpful insights:

CONCLUSION

The minitrial provides an imaginative opportunity for resolving technology disputes. It is innovative, plainly less threatening than a trial or arbitration, and, if handled properly, very effective. Thoughtful counsel will appreciate its simplicity. The minitrial is a welcome addition to the compendium of alternative dispute resolution techniques.

Thomas J. Klitgaard
William E. Mussman, III
January 3, 1992

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- (a) Trial counsel usually fear showing their hand or otherwise weakening their case in a minitrial. The more controlled the forum, the more comfortable the litigators feel. But settlement momentum is usually stifled by that element of formality or control. Obviously, in most minitrials tension exists between the need to have candid discussion and disclosure, and the need to protect one's ammunition for a potential later trial. For the minitrial to really work, the parties have to be interested enough in settlement to take risks.

The job falls to in-house counsel to master this balance. The outside trial counsel cannot do it, and the senior executives may not fully understand the risks involved. The in-house counsel has to keep assessing the client's need to settle and the available evidence to induce the other side to settle. Without the corporate attorneys in our case, we would never have had a minitrial.

- (b) The executives in our case were impressed with the process, and kept saying, 'I came here to accomplish something. I'm not used to wasting time. Let's get on with this.' It changed the way all of the legal people in the room behaved. We had busy business people who make big decisions all the time—sitting there, waiting for something pertinent to be said or shown to them. It made us realize that in adversary proceedings, nothing much gets said or done most of the time.
- (c) It took four months from the time there was an agreement to have a minitrial until it was held. During that period our respective staffs worked exceptionally hard, as it was in effect a fast-track trial schedule.

This focused everybody on the real issues, which might have taken another year or two of 'traditional' discovery to identify in as meaningful a manner. As a result, when we got into the minitrial, the issues were understandable and there was a general format from which a settlement could be negotiated.