6.1 THE MINI-TRIAL

One alternative to the judicial process that enjoyed a wide popularity in the 80s and early 90s in the U.S. as particularly well-suited for resolving large complex business disputes is what is now nick-named the 'mini-trial', a hybrid of nonbinding arbitration followed if need be by mediation.213

Of all the ADR techniques the mini-trial is most closely associated with complex business disputes. Initially developed in a 1977 patent infringement case, Telecredit v. TRW, the mini-trial concept has spread through the corporate world. As noted above, in a typical mini-trial each party gives a summary presentation of its 'best case' to a panel comprised of management representatives with settlement authority from each party214. A neutral third party advisor usually presides over these presentations and may ask questions of the counsel, comment on the arguments, and remark on the importance or admissibility of evidence.

After hearing each party's presentation the management representatives, hopefully with fresh business evaluations of the case's worth, are invited to meet and settle the case. If no settlement is reached, the neutral is usually invited to become a mediator and see whether he can, by explaining how the case 'played' to him and why, and by asking guiding questions in a

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213 The vocabulary of ADR is often confused. In non-binding arbitration the neutral hears a moderately formal presentation of the case and its evidence and arrives at and announces a conclusion which is non-binding; in mediation the neutral facilitates communication between the parties, sometimes through him in shuttle diplomacy, seeking to induce the parties to arrive at their own agreement without himself arriving at or announcing any conclusion of his own. In the hybrid 'mini-trial' the neutral does both in that sequence.

mediation-shuttle diplomacy procedure, precipitate a settlement by the parties without any decision from him.

Armed with an understanding of the strengths and weaknesses of their own case, the opponent's case, and the apparent skills of counsel on both sides, the parties very often settle their case.215 According to one source mini-trials result in prompt settlement in 95% of the cases where they are used,216 but my experience suggests that figure is much too high—at least unless you are shrewd enough to avoid mini-trials in cases involving the several contraindicated factors discussed below.

Of course mini-trials, like private arbitration, also have the advantage of privacy— the evidence is not exposed to the media, to competitors or to regulatory agencies who might look critically at a charitable institution making much money, or whatever.

The mini-trial is particularly advantageous in that it can overcome many barriers that exist in traditional negotiation and refocus the parties and their counsel on the real issues of the case. This point is perhaps best illustrated by the story of how the first large mini-trial, *Telecredit v. TRW*217, was initiated.

According to Professor Green (then representing TRW) the patent infringement case between TRW and Telecredit had (as do so many cases) escalated into gigantic proportions218 and personal animosities. The parties argued motion for sanctions for discovery violations and motions for

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215 E.g., in Telecredit v. TRW, the parties settled within 30 minutes of the close of the mini-trial presentations (multi-million dollars in suit); in Automatic Radio v. Telecredit, the suit was resolved approximately three hours after the mini-trial.


217 Telecredit Inc. v. TRW, Inc. & TRW Data Systems, Inc., C.D. Cal. No. CV 74-1127-RF (1977)

rehearing on sanctions for discovery motions; indeed, the parties argued ‘just about everything, but .... never seemed to be arguing the case’.219 According to Professor Green ‘things had gotten so bad that there was a major disagreement about whether coffee would be provided to the other side while they inspected documents at one side's plant’.220 Out of this disagreement came discussions that eventually led to the mini-trial.

It is almost comical that such an efficient ADR technique developed from a multi-million dollar dispute hinged on a quarter cup of coffee. What is not comical about this case is that quarters of millions of dollars are often spent arguing and deciding unimportant, relatively trivial matters by parties and attorneys who are too timid or unmotivated to attempt an improved form of dispute resolution.

In most mini-trials the purpose of the third party neutral is not to serve as a judge, but to moderate the proceeding and highlight crucial facts and issues to the management's representatives.221 In other words, the neutral's aim, as in mediation, ‘is to reconvert what has become a 'lawyers dispute' into a 'business person's dispute' and through a dialogue between the parties on the merits of the dispute, narrow the area of controversy, dispose of collateral issues, and encourage a fair and equitable settlement.’222

In a 'mini-trial' the neutral, like a mediator, does not normally proffer a binding opinion of the disputed issues; such proceedings are called 'arbitration.'223 In a number of cases, however, the parties have got infected with the spirit of reason and trust for the neutral, and after the close of evidence and argument that the neutral issue a binding decision if the parties fail to reach agreement. For example, in one case handled by our firm,

219 Id. at 515.  
220 Id.  
221 Green, ‘Growth of the Mini-Trial’ Supra note 5  
the parties agreed initially that only a single issue (patent infringement) would be presented to the neutral, and that his opinion on this issue would be non-binding. After the close of evidence, however, the losing party's house counsel acknowledged that there had been a fair hearing and agreed to be bound by the adverse award.

We here see the flexibility of all ADR: at any stage of the proceeding the parties may ask the neutral to take on the role of binding arbitrator or mediator.224

Providing a convenient forum for mixed issues of law and fact, the mini-trial is seen as well suited for resolving patent and other complex business disputes.225

Perhaps most importantly the mini-trial provides the representatives insight into the efforts and resources that will be required to carry the case to trial if there is no settlement.

As with arbitration there are several administrators that will assist the parties in mini-trial proceedings.226 It is believed, however, that most mini-trials are handled ad hoc, i.e., through self-arrangement by the parties.

(1) A moderately formal non-binding-arbitration—like case presentation held in an office, conference room, or borrowed

224 The reverse procedure where a mediator first gets the 'inside story' from each party in a private mediation caucus and serves thereafter as arbitrator is seen by many as awkward or even potentially unfair. But even when the mediator could not precipitate the parties' settlement, he may know there is an overlap by which he can satisfy the essence of both parties' real needs. Running too scared of the problem of mediator turned arbitrator (as I am prone to do), can miss a wonderful settlement opportunity.

Perhaps of equal importance is this: Courts are notoriously erratic in their rulings on discovery motions in patent cases. Why? Because mostly they don't know the patent law, they don't know the technology, and at such motion time they know very little about the case. But what about the patent lawyer who was mediator in a case which did not settle? He knows the basic patent law; he can have been selected also for his experience in the technology; and after he has mediated he is fully informed on the facts of the case. He makes a marvelous special master or other neutral in charge of the discovery.

225 Green, Growth of the Mini-Trial, Supra note 5. But to me, as one experienced as the neutral and counsel in several mini-trials and many mediations and arbitrations. I think there is another hybrid that is better—mediation first followed by 'baseball' or 'last offer' arbitration, discussed briefly in Section 11 D, infra.

226 Examples are the American Arbitration Association, Endispute Inc. of Cambridge, Massachusetts, the senior author of this paper and many others.
court room;
(2) usually made exclusively by counsel;
(3) wherein the evidence usually comes in as affidavit, deposition and documentary evidence presented by counsel (live witness, typically experts only, are only sometimes used);
(4) the presentations are generally made to two groups, first, CEOs or top management type decision makers from each party, and second, one or more neutral third parties;
(5) as in non-binding arbitration, the neutral(s) receive(s) the evidence and arguments, then issue(s) a non-binding opinion;
(6) the parties retire to talk settlement. If they fail to settle the neutral becomes a mediator and attempts to facilitate discussion and induce a settlement between the parties.
(7) the mediation is benefited by the fact that the CEO's have:
   (a) heard the case through the mouth of the adversary;
   (b) seen their own counsel's performance in comparison to that of the adversary;\textsuperscript{227}
   (c) heard how the case 'played' to the neutral, i.e., received a neutral evaluation; and
   (d) had an opportunity generally to evaluate the resources and effort that will be required to carry the case through trial.

\textsuperscript{227}Sometimes the client disagrees with the strategy or style of the presentation giving rise to arguments between client and his counsel, but if so, it is better to get those things ironed out in a mini-trial than leave them not addressed until a final trial.
6.2 SUCCESSFUL USE OF THE MINI-TRIAL

As exemplified in Telecredit v. TRW discussed above, mini-trial procedures are particularly adapted for resolving disputes involving mixed questions of law and fact such as patent infringement disputes. Telecredit is a 1977 case involving complicated factual and legal issues. Settlement discussions had proved fruitless. The parties had taken extensive discovery after the filing of suit, i.e., with aid of judicial process to govern and compel even reluctantly granted discovery. That had cost a mint, but still the parties faced more discovery plus a long and expensive trial and appeal.

One of the attorneys proposed that in an attempt either to narrow the issues or settle the case, each side should present its case in an appeal-like format to senior decision makers in both companies and to a neutral advisor. The role of this advisor was to facilitate the proceedings and, if requested, to give his opinion on the likely outcome if the various issues were presented at trial.

Of course the neutral advisor would at the end of such a proceeding be well informed to assume the further role of mediator of settlement negotiations should the parties so desire, but in the Telecredit case that was apparently not contemplated in the beginning.

The parties apparently had no difficulty in reaching an agreement as to the person to be the neutral advisor—nor have most lawyers experienced in such cases. A former Court of Claims judge was selected. The procedure took several months to organize and only two days to present. Within a half

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228 Goldberg, Green & Sander, Dispute Resolution (1985) p. 275 (stating that experience indicates that mini-trials are best for cases involving complex law/fact questions, e.g., patent, anti-trust and contract cases).
230 As stated elsewhere, the amount of discovery already completed is an important factor in evaluating the likelihood of success of a mini-trial
hour of the completion of the presentations, the parties negotiated a mutually agreeable settlement.

*Automatic Radio v. TRW* came after *Telecredit v. TRW* of 1977. This was a case involving allegations that $27,000,000 worth of radio parts were defective. Discovery was substantially completed pursuant to judicial process and the case was nearly ready for trial. The completion of discovery is highly relevant. No instant settlement by the parties followed, so the neutral advisor stepped in and discussed his views of the potential damages. Then a negotiation framework emerged.

*Another case, Wisconsin Power Co. v. American Can Co.* involved a $41,000,000 claim and a $20,000,000 counterclaim. The dispute concerned the waste material from American's plant to be used as fuel by Wisconsin Power. Economic issues were intertwined with technology. The circumstances of this case rendered it a good candidate for a mini-trial proceeding, following which settlement occurred.

In *Phillips Petroleum v. Hercules, Inc.*, the plaintiff, Phillips, sued the defendant for infringement of a patent on olefinic block copolymers and methods of manufacturer. After the case had been filed in the courthouse and court-controlled discovery was almost complete, the parties agreed to mini-trial the case. The parties exchanged lists of potential neutrals and reached an agreement. The mini-trial was held in a neutral geographical region in front of a panel consisting of two executives from each party and the neutral advisor.

The trial took two days with evidence being presented by counsel, by paper submissions, and by live witnesses. There was no cross-examination—a feature that seems shocking to me. After the presentation the parties negotiated but failed to get anywhere close to an agreement and the
procedure looked like a failure. However, at fairly prompt executive-level meetings over the next several weeks, a settlement was reached.

I have been counsel in several mini-trials, some successful (e.g., *Spectra Physics v. Coherent Inc., lasers*) and have served as mediator, arbitrator or mini-trial neutral in dozens of cases; my conviction is that mini-trials are good idea in many cases though I think I have a better one.231

The federal government reports good results in a mini-trial settlement of a NASA contract for a space shuttle tracking system; the Army Corps of Engineers likewise reports favorable results in its mini-trial proceedings.232

These were all success stories; unfortunately success is not guaranteed. By experiencing both successes and failures (e.g., *Monsanto v. Stauffer, Shell v. Carbide*), you learn about factors compatible with each success and failure.

6.3 SITUATIONS INAPPROPRIATE FOR MINI-TRIAL

There are certain circumstances in which a mini-trial would almost certainly fail to produce settlement.

One of these is where either party or a key figure on one party’s team wants war rather than peace, either overtly or subconsciously. It takes two to make peace out of a controversy, only one to maintain war.

It is interesting—even important—to note that clients often hire lawyers for their reputation as hard fighting gladiators, unafraid of the adversary or the court. The mood of the employment conference tends to be

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231 In mini-trials the arbitration phase comes first. Arbitration tends to be perhaps less adversarial than court trials, but adversarial nevertheless. A better mood for the settlement is accomplished by classic mediation, and if there is no voluntary settlement, the choice of binding arbitration before the same or a different neutral is surely preferred over court trial in most cases. This 'med-arb' reverse hybrid from the arb-med of the mini-trial, and one which produces a binding result for certain, instead of risking going back to the court trial and appellate process, is discussed in Section 111), infra.

one of militancy or anger at the other party: ‘Sic 'em. Beat the bastards.’ It is easy for the lawyer to accept this gladiator role of the employment. If he approaches his client with suggestions of mediation or settlement, he looks to the client like a wimp afraid of the other guy's lawyer. Before many clients it takes a lot of guts and self-confidence for a lawyer to let himself be seen in a posture of conciliation with the adversary. In addition, a good lawyer tends to have self-confidence; he thinks he can win. For these reasons a trial lawyer may never urge ADR on his client.

Second, hard fact issues residing on the credibility of witnesses are not as likely candidates for mini-trials as are application-of-law legal issues founded on essentially admitted facts. The presentation of flatly contradictory evidence in the mini-trial comes out somewhat distorted. Each party tends to be biased to believe its own side of the contradicted facts and rejects the adversary's view of those facts. There's no chance for decision merely on the significance of essentially un-contradicted facts.

Third, where the risk to either or both parties is great the chance of mini-trial success is low. A good example of this is a case of patent infringement where the net effect of the injunction the plaintiff seeks is to put the defendant out of business. Simply too much at stake. For a mini-trial to have a good chance, each party must be able to live with the result.

One of my efforts at mini-trial as counsel failed primarily because too much money was at stake—about a billion dollar annual market at very high margins. Neither party could accept life-after-loss-of-the-case as a viable possibility. No license could be negotiated in advance of the mini-trial because the economic values the patentee would be giving up were simply too large for the infringer to pay and continue in competition. The effort to resolve the issue by a non-judicial mini-trial failed.
Twice, in major hundred-million dollar sized controversies, I participated in mini-trial type proceedings without an arbitrator or a neutral advisor—and no settlement occurred. In one I had no discovery at all. There was a one-day argument by the outside trial counsel on each side to the chairman of the board, the President and a senior technical man from each party. Each side argued their case for as long as they desired, though targets of something like 2 hours a side were announced. A short plaintiff’s reply was also allowed. The agreement called for Q and A of counsel by either counsel or businessmen after the argument and there were a few questions.

The procedure failed to produce a settlement and a suit was filed and tried. The mini-trial failed because the very large stakes begot bad faith arguments and lack of candor. The absence of a good mediator also did not help, given the acutely adversarial feelings on some points.

However, a valuable purpose was nevertheless served. The effort gave management of each side a more balanced view of the law suit and a better view of the resources needed for this complex case—over 10 million dollars for the litigation. Since the mini-trial was relatively inexpensive, it was felt to have been of value in aiding the client's management of the case even though no settlement resulted. Even if a settlement does not emerge, the time spent in intensive preparation for the mini-trial may be worth more to the client than the same amount of time spent in the less focused period before trial.233

233 See, e.g., Goldberg, Green & Sander, Supra note 18, at 278 (nothing that the intensive preparation for the mini-trial may be worth significantly more to the client than the same time spent less focused). Further they note: [M]ost of the parties who have engaged in mini-trials report that even if the case does not settle after the mini-trial, very little money spent is wasted. This is because, while the mini-trial forces each side to organize rigorously the mass of facts and legal arguments that have been gathered over the many years of discovery and legal maneuvering, this must be done in any event to prepare for trial. Also, the introductory statements that have to be written and exchanged prior to the mini-trial are short versions of what might ultimately be submitted as trial arguments or briefs. 'thus, the procedure demands
Fourth, in some situations, the adversary cannot be trusted; or the adversary is a warrior by personality and is incapable of joint venturing a search for peace. Consider this example from among my experiences:

The businessmen of the adverse party were known to my client and adequately trusted. And I trusted the outside counsel. But the in-house counsel in charge for the adverse party had authored an erroneous opinion to his employer that begot a hundred-million dollar controversy. His opinion and indeed his very career with his employer were inherently under attack. Also (by unhappy coincidence) his personality was inherently to play games with discovery procedures whether or not his career was involved. He suffered a compulsion to prepare for trial combat in lieu of searching for avenues of non-combat.

The parties had contracted for a full nine months of discovery and mini-trial procedure. But I soon learned that the agreed discovery program had been doomed from the start because this one man could not trustfully and candidly joint venture with his adversary a dispute resolution. His personality in that context was simply too adversarial—which is sometimes exactly what a client wants but which nevertheless is inconsistent with settlement via mini-trial.

If one party is going to sandbag the mini-trial, present misleading or incomplete evidence while using the mini-trial as a source of discovery from his adversary who performs in good faith, the procedure is not only a failure, it is unfair—and this is one of the reasons that trust in the bona fides of both

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preparation by counsel and experts that for the most part will be directly useful at trial if the case does not settle. Id at 277
parties putting settlement at the top of the priority list, is so critical to a successful mini-trial.\textsuperscript{234}

The procedure will rarely, if ever, work if either party or its counsel gives priority to procedural maneuvering, half-candor in discovery and preparation for trial combat—a circumstance that in our 'Rambo' times occurs in perhaps a majority of controversies—instead of a cooperative joint venture in responsible and fair dispute resolution.

So we see, situations do exist that are hostile to the mini-trial procedures.

\textbf{6.4 THE CONTRACT FOR MINI-TRIAL}

It is strongly suggested that the parties reduce their agreement to mini-try a case to writing. As with many arbitration contracts the contract for mini-trial is often its own fairly sophisticated instrument. Many of the issues discussed in connection with arbitration are applicable to contracts for mini-trials; there are, however, a few additional points that should be considered when entering into any mini-trial.

\textbf{6.4.1 Timing of the Mini-Trial}

First, timing in relation to the discovery process. Some have argued in favor of the earliest possible mini-trial in order to avoid increasing expense, animosity and hardening of hearts.\textsuperscript{235} In straight mediation we find settlement rates at very early stages to be essentially as high as at later states. But the success stories in mini-trials have seemed to come from cases where much discovery has been taken under the pressures of judicial process rather

\textsuperscript{234} That case settled a few months after a bench trial, before judgment, but only after the firing of the offending house counsel.

than pursuant to contract. So, the parties should consider when their mini-trial should take place. It is often beneficial to have the mini-trial after judicially controlled discovery is complete. This allows each party to be sure that he is presenting his 'best case', and that he is hearing the 'best case' of his adversary. —Or if not complete after the inventor and designer of the accused infringement have been deposed. Usually that is enough to afford the mini-trial a good chance of success.

Additionally it should be noted that the mini-trial process, unlike binding arbitration or the med-arb hybrid, does not guarantee a final resolution of the process. Further, contractual discovery is typically more limited than that controlled by judiciary under the Federal Rules. A party to a non-binding mini-trial before suit is filed, where additional discovery may be available through filing a case in the courthouse, may see the mini-trial as a guide to where future discovery requests should be aimed.

By scheduling the mini-trial near the close of judicially ordered discovery, the parties can at least be assured of one thing: Regardless of whether the dispute is resolved, it will go to trial on essentially the same evidence that was presented at the mini-trial. This can be extremely important in persuading the management-types that any compromise reached after a mini-trial is made after reviewing the most relevant evidence available.

6.4.2 Magnitude of the Dispute

A second important factor that should be considered by the parties is the magnitude and worth of the dispute. In order for a non-binding mini-trial to be likely to be effective in preventing further litigation, it preferably is a case

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236 See Green et al, ‘Settling Large Case Litigation: An Alternative Approach.’ 11 Loy. L.A.L. Rev. 493 (1978) (‘Realistically, however, the need for formalized settlement procedure will rarely be appreciated until after traditional, informal negotiations have failed and discovery and other pre-trial proceedings have brought home the realities of the process and stoked the initial thirst for litigious combat.

237 At least one variation of the med-arb process is of great merit, but that is a topic for another article.
which each side can afford to lose without serious damage to its business. Fights which by their nature are fights unto the death of anyone involved, don't settle. Perhaps one contributing factor to successful government use of mini-trials for settlement, is the fact that the government's existence and their lawyers' employment are never at risk.

Recall that in the Shell v. Intel case we negotiated a license from our client, Shell, to Intel, before the mini-trial to make that can-live-with-a-win-or-a-loss a tangible reality for both parties. That is one of several critical premises without which this non-judicial mini-trial likely would not have worked.

Where a dispute is over really large values, the mediation-first-binding arbitration second takes on comparatively enhanced value by comparison with classic mini-trial for a number of reasons relevant to that process.

6.4.3 Effect of the Mini-Trial on Subsequent or Pending Litigation

Additionally, because the mini-trial does not necessarily result in a final resolution of the case, the parties should include in their contract, provisions that will apply if the case is ever litigated. For example, many include a clause that nothing said in the mini-trial can be used in a subsequent litigation—even for impeachment. Support for such a clause may be found in Federal Rule of Evidence 408. Along the same lines the parties should explicitly recite that the neutral or mediator is disqualified to serve as a trial witness in any capacity. Such a clause is supported by Federal Rule of Evidence 605. Moreover, because most mini-trials occur after a claim has

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238 Fed. R. Evid. 408 [Compromise and offers to Compromise Evidence of (1) Furnishing or ... (2) accepting ... a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.... 1.
239 Fed. R. Evict. 605 Competency of Judge as Witness.
been filed, the mini-trial contract should indicate what is to happen to the pending litigation. For example, the parties may wish to stay the proceedings pending the outcome of the mini-trial. Such issues should be considered by the parties as they may require a motion to the Judge. Given the court’s mandate to facilitate case settlement, it is believed that such motions will nearly always be granted if the requested stay is short and is requested weeks in advance of any trial setting.

6.4.4 Requirements for Party Observers

In order for the proceedings to be effective it is essential that each party's representative have the power and the ability to negotiate and approve a final settlement of the case. To present the mini-trial to representatives who have no real settlement power or inclination, or who is afraid to use the authority he has lest he be criticized when he returns to the office, may be worthless. Thus, the parties may wish specifically to recite that each party's representative must have settlement power over the entire dispute.

Additionally the party's representative should not be called upon to judge the correctness of their own or their superior's conduct. To expect a mid-level manager to negotiate a settlement that may be premised upon a finding that his supervisor had made a gross error, is to ask a lot. Further, to ask a representative to pass judgment on his own actions may make him more stiff, may make settlement more difficult. The party representative preferably should not be directly involved in the disputed matter, but should have enough general knowledge of the party's activities to be effective in negotiating a solution.

The Judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

Finally, the agreement to enter into a mini-trial should be very clear that is an agreement to attempt to compromise—not an agreement to submit to binding arbitration. Agreements to arbitrate are binding and irrevocable. However, the vocabulary of ADR is not uniform and the Federal Arbitration Act does not define 'arbitration,' so the parties to any non-binding arbitration-like procedure should I expressly state that their process is not binding arbitration, lest an overworked court hold it so.

6.5 CONCLUSION

While the mini-trial has its own limits and deficiencies—after all we cannot escape human frailties—a mini-trial and a mediation followed by binding arbitration should both be considered by all parties to large, complex disputes. The United States can ill-afford the present system of courthouse dispute resolution which so unnecessarily takes thousands of the nation's best brains out of the production of wealth and into dispute resolution where the costs in time and money often consume major shares of the disputants and the value of their dispute.

We need more lawyers and clients who are willing to experiment with the search for a better dispute resolution process than is available at the courthouse.

Without resort to such alternate dispute resolution methods we too will find ourselves transformed into modern day versions of the poor children in Charles Dickens' Bleak House, where the litigation over their large inheritance consumed both their lives and the entirety of their fortune.