Whose Dispute Is this Anyway: The Propriety of the Mini-Trial in Promoting Corporate Dispute Resolution

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Market forces are leading corporate executives to examine the use of alternative dispute resolution mechanisms (ADRM)s to avoid the rising costs and delays of litigation and ad hoc settlement processes in resolving corporate disputes. In particular, corporate leaders have embraced the mini-trial, a settlement enhancement mechanism, as an efficient, satisfactory means forpromoting dispute resolution. In the mini-trial process, participants present their case out of court in a concise, abbreviated manner before a neutral observer and authorized executives of the parties to the dispute. The latter utilize the information gained through the mini-trial to determine and pursue their interests in negotiations which follow the mini-trial.

Mini-trials have been successfully employed to settle a $27 million products liability claim brought by Automatic Radio, Inc. against TRW, Inc. for the alleged improper design and manufacture of a radio component purchased by Automatic Radio; a contract dispute between NASA, Space Communications Co. and TRW, Inc. centering on performance standards for a satellite system.

1. Ad hoc settlement practices have not proven fully satisfactory in resolving corporate disputes. The mini-trial is an attractive alternative to traditional settlement. See Edwards, Alternative Dispute Resolution: Panacea or Anathema?, 99 HARV. L. REV. 668, 670 n.9 (1986).
3. Management’s Perspective, Vol. 2, No. 11 ALTERNATIVES TO THE HIGH COST OF LITIGATION 1, 6 (Nov. 1984) [hereinafter ALTERNATIVES].
4. The privately conducted mini-trial is not to be confused with a court ordered summary jury trial. The summary jury trial consists of a half-day proceeding presided over by a judge or magistrate, in which attorneys are each given an hour to summarize their case to a six-member jury. Introduction of evidence is limited, and witnesses are excluded from the proceedings. Afterward, the judge provides a short explanation of the law, and the jurors deliberate and either present a consensus verdict or reveal their individual views. The verdict is purely advisory unless the parties agree to be bound, the main purpose being to provide the parties with an insight into how a jury would view the case. Moukad, CPR Working Taxonomy of Alternative Legal Processes: Part IV, Vol. 1, No. 12 ALTERNATIVES 7 (July 1983).

133
and involving questions of computer capabilities and orbital mechanics; toxic tort claims brought against Union Carbide Corporation; and a $200 million breach of contract and antitrust suit between Texaco and Borden.

Mini-trial advocates laud the many advantages the mini-trial has over litigation and other ADRMs in meeting the special needs of corporate parties in resolving their disputes. Former Chief Justice Burger has commented on the public benefits of ADRMs, such as the mini-trial, where there are unsavory prospects for complex, protracted corporate litigation.

Although the popularity of the mini-trial for resolving certain corporate disputes has been established, its propriety in meeting the needs of the public

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7. Union Carbide Uses Mini-Trial to Settle 19 Toxic Tort Cases, Vol. 1, No. 5 ALTERNATIVES 1, 3 (May 1983).

8. Texaco-Borden Antitrust Mini-Trial Sets the Record, Vol. 1, No. 3 ALTERNATIVES 1, 2 (Mar. 1983) [hereinafter Texaco-Borden].


10. Chief Justice Burger: Reflection on ADR, Vol. 3, No. 10 ALTERNATIVES 5 (Oct. 1985). The article is an excerpt from his 1985 speech to the Minnesota State Bar Association and the American Bar Association in which then Chief Justice Burger noted, "[P]rotected [commercial] cases not only deny parties the benefit of a speedy resolution to their conflict, but they also enlarge the costs, tensions and delays facing all other litigants waiting for access to court." Id.

11. A 1986 survey of 19 attorneys and one former judge who had participated in mini-trials revealed that 24 out of the 28 mini-trials they were involved in ended in final settlement and that 16 of the 19 attorneys interviewed were pleased with the mini-trial outcomes and enthusiastic about utilizing mini-trials again. The *Effectiveness of the Mini-Trial in Resolving Complex Commercial Disputes: A Survey*, 1986 A.B.A. Section of Litigation, Subcommittee on Alternative Means of Dispute Resolution of the Commission on Corporate Counsel. The mini-trial's popularity manifests itself not only in the private sector, but also in the Western District of Michigan where U.S. District Court Judge Richard Enslen has devised court rules which provide for the employment of a mini-hearing in an attempt to settle a dispute. Rule 44 provides:

(a) General—By stipulation of the parties with approval of the Court, on motion by a party with notice to opposing parties, or on the Court's own motion, a case may be selected for a summary jury trial or a mini-hearing.

(b) Summary jury trial— . . .

(c) Mini-hearing—A mini-hearing is an abbreviated proceeding in which attorneys for corporate parties present their positions to the parties' senior officials to attempt to settle the dispute. The parties may fashion the procedure which they feel is appropriate. On proper motion, however, the court may prescribe certain procedures and time limits (citation omitted).

Judge Enslen's comments on this mini-hearing rule appear in SJT, "Mediation", and *Mini-Trials in Federal Court: An Interview with Judge Richard A. Enslen,*
MINI-TRIAL

and in ensuring "justice" has not. Without specifically focusing on the mini-trial, alternative dispute resolution critics have questioned the legitimacy of ADRM results and charged them with everything from playing on inequalities of wealth to thwarting the role of the courts in effectualizing public values. This comment addresses these criticisms in evaluating the propriety of mini-trials for promoting corporate dispute resolution.

This comment is divided into five parts. Part I examines the nature of the mini-trial—its unique and attractive features. Part II inquires into the mini-trial's suitability for resolving certain types of disputes. Part III describes how the mini-trial meets the needs of corporate parties to a dispute while benefiting the public. Part IV addresses the validity of general ADRM criticism as applied to the mini-trial. Finally, Part V offers a conclusion on the propriety of the mini-trial for resolving corporate disputes.

I. THE NATURE OF THE MINI-TRIAL

The mini-trial was born of necessity to resolve a dispute concerning infringement of a computer terminal patent. Frustrated by two and one-half years and $500,000 spent on discovery alone, counsel for one of the parties proposed an accelerated non-binding hearing before party executives and a neutral observer. The hearing was designed to clarify the key issues in dispute for the executives, thereby facilitating settlement in negotiations that were to immediately follow the mini-trial. The framework of the mini-trial included two weeks of accelerated discovery, exchange of information to be used in the hearing, presentation of condensed briefs to the neutral observer, and identification of all mini-trial participants. The mini-trial itself lasted two days and following negotiations resulted in settlement of the dispute.

Vol. 2, No. 10 ALTERNATIVES 4, 8 (Oct. 1984). A recent amendment to the Federal Rules of Civil Procedure directs the court to discuss possible uses of extra-judicial procedures (such as the mini-trial) at the pre-trial conference. Advisory committee notes specifically refer to the mini-trial. FED. R. CIV. P. 16(c)(7).


13. Fiss, Against Settlement, 93 YALE L.J. 1073 (1984). Professor Fiss' virulent opposition to the encouragement of ADRM use may stem from his misconception that alternative dispute resolution proponents, "make no effort to distinguish between different types of cases. . . . They lump all cases together." Id. at 1089.


15. Id.


The success of the first mini-trial has been repeated in resolving disputes on issues ranging from cost overruns on a government construction contract to a corporate director's fiduciary duty. The adaptability of the mini-trial stems from its flexibility in responding to various types of disputes. Its flexibility in turn stems from it being a dispute resolution hybrid. A chief aspect of adjudication present in the mini-trial is the parties' presentation of arguments and evidence for the case, but the goal of the mini-trial is a negotiated settlement. Parties agree to mini-trial procedure and select a third party to oversee the process as in arbitration. They aim for a mutually satisfactory agreement, like that sought in mediation and negotiation, instead of one necessarily consistent with the law.

There are several key features found in the mini-trial which reflect its hybrid nature and lead to its success. These features are as follows:

(1) Parties voluntarily agree to conduct the mini-trial with the understanding that they can terminate the process at any time. The power to terminate not only allows the parties to comfortably pursue the resolution of their dispute in a mini-trial forum, but to efficiently leave that forum as soon as they are ready for negotiations.

(2) Parties reach an agreement concerning the procedure and format of the mini-trial. This should include the rights and obligations of the parties in the process, the time-frame allotted the parties for the preparation and presentation of their case, the extent of the neutral observer's participation, and legal matters such as the confidentiality of the proceedings and the legal effects of the mini-trial on later proceedings. This procedural agreement is designed to establish a base of trust between the parties which they can build upon as the process ensues.

18. Army Engineers Succeed in 1st Mini-Trial, Vol. 3, No. 3 Alternatives 3 (March 1985) [hereinafter Army Engineers]. A $630,000 claim was settled in less than twelve hours of negotiations, following a two day mini-trial.
19. The Hybrid Mini-Trials of a New York Lawyer, Vol. 4, No. 6 Alternatives 1, 8 (June 1986). The attorney presenting one side's case at the mini-trial remarked that the total cost of the mini-trial was only a fraction of the expected legal fees of over one million dollars.
21. See Green, supra note 9, at 238-41 for an elaboration on each of these elements.
22. There is a growing movement to codify mini-trial procedures. In 1984, the Zurich, Switzerland Chamber of Commerce published rules for mini-trials.
23. For a thorough discussion of what a mini-trial agreement should entail see Davis & Omlie, supra note 17, at 537-48. An excellent model agreement may be found in Vol. 3, No. 5 Alternatives 8 (May 1985), and a variety of forms to employ in a mini-trial agreement can be found in Corporate Dispute Management (M. Bender 1982) published by the Center for Public Resources, a non-profit New York based organization promoting the use of mini-trials and other ADRMs to solve corporate disputes.
(3) Key documents such as condensed briefs and exhibits are exchanged prior to the mini-trial.

(4) Parties select a neutral observer\(^2\) to oversee the mini-trial procedure and facilitate the mini-trial process by questioning the parties in order to clarify issues and develop the merits of the case. Parties may request that the observer offer his opinion before or after negotiations have begun on the likely outcome of the case if it were to go to trial. His determination, however, is not binding. In effect, the neutral observer plays the role of a mediator who is concerned with accentuating the merits of the case, not creating a settlement. Parties uncertain of their case or simply unwilling to take chances prefer the mini-trial over arbitration because the former is non-binding.\(^2\)

(5) Attorneys for the parties present their best case in a concise fashion. Usually, no more than six hours is allowed for the case in chief, with two hours allowed for rebuttal. The rules of evidence do not apply and as a result, witness examination is informal.

(6) The mini-trial takes place before executives of the representative parties who have the authority to settle the case.

This last feature reveals the underlying goal of the mini-trial: to take the dispute away from the attorneys and clearly present it to the party executives. The executives can utilize the information presented at the mini-trial to make a sound business decision on whether it is in their company's best interest to pursue litigation or to settle the dispute, and if so, how.

The mini-trial process is designed to overcome impediments to successful negotiation caused by personal biases between the parties and their attorneys, shortsighted intransigence of one of the parties, and even good faith disagreements over the likely outcome of a dispute if taken to court.\(^2\) Bias is circumvented by presenting the case to corporate executives with little previous involvement in the suit.\(^2\) Although observers of the competitive corporate world may question that bias is circumvented, the executives present at the mini-trial have not yet committed themselves or their companies in the ne-

\(^2\) A list of well-qualified neutral observers for hire is maintained by the Center for Public Resources. Many neutral observers are former judges and experts in the subject matter of the mini-trial.

\(^2\) Davis & Omlie, supra note 17, at 534. Davis and Omlie contend it is easier for parties to agree to a mini-trial proceeding over binding arbitration because in choosing a neutral observer the parties are looking for someone whose judgment they both respect and trust, not someone who will most likely rule their way.

\(^2\) See S. Goldberg, E. Green & F. Sander, supra note 20, at 272.

\(^2\) A mini-trial was successfully employed to resolve a dispute where one of the parties was a "one-person company." That party agreed to be represented in the mini-trial by three business executives from his community in order to lend objectivity to his determination of whether to settle with the opposing party. See Mini-Trial in Mining Dispute Preserved Good Business Relations, Says N.Y. Lawyer, Vol. 4, No. 8 ALTERNATIVES 3, 23 (Aug. 1986).
Proposing a mini-trial can overcome a party's trepidation at raising the idea of settlement, because the proposition need not be viewed as a sign of weakness. Rather, it can be proposed as a direct challenge to the opposing party to present their best case to the executives and neutral observer. Finally, the mini-trial enables the executives and the attorneys to gain a better understanding of the merits of their case and the likely outcome of the dispute in court. The executives present at the mini-trial are more able to determine the value of pursuing the case than are their respective attorneys who often become committed to their positions in the case. Therefore, one of the parties will most likely be enlightened in the mini-trial process and not be reluctant to pursue settlement in the negotiations following the mini-trial if it is in his company's best interest to settle.

II. SUITABILITY OF THE MINI-TRIAL IN RESOLVING PARTICULAR DISPUTES

The suitability of a mini-trial for resolving a corporate dispute and the form it will take are dependent on several factors, including the substantive nature of the dispute, the disputants' motives, and the nature of their business relationship. First, the mini-trial is an appropriate mechanism in cases involving complex questions of law and fact such as patent law, product liability, unfair competition, antitrust and contract cases. These cases often lead to protracted and very costly litigation.

Conversely, when a dispute centers on legal issues alone, summary judgment in court is the most appropriate means for its resolution. Also, one developer of the mini-trial has suggested the mini-trial may be inappropriate where precedent-setting issues of law and witness credibility are central issues, and where one of the parties has decided to gamble on mini-trial results in his favor.

Private resolution of the dispute through a mini-trial would set no precedent. It would only be binding as a contract between the parties to a negotiated agreement after the mini-trial. There is cause for concern, however, that corporate parties may choose the mini-trial in order to avoid a public ruling which would force them to rectify wrongs against all of their customers as opposed to a single individual. Although this would be against the public interest in a

28. L. Kanowitz, supra note 14, at 130.
29. Green, supra note 9, at 242. Since the neutral observers chosen to oversee the mini-trial are usually experts in the field of law involved in the dispute, it is unlikely that sound legal guidance is sacrificed in these complex cases in the time and cost efficient mini-trial process.
products liability action, in opting for a mini-trial, the aggrieved party may decide that a quicker satisfaction of his needs is more important than setting precedent for others.

Some mini-trial advocates regard the process as appropriate for resolving disputes which center on issues of credibility, provided there is sufficient opportunity for cross-examination. But in these cases, the mini-trial seems to offer no advantage over adjudication or arbitration with respect to determining credibility (unless the parties regard these forums as risk-laden, too).

Other factors to weigh in determining the suitability of a mini-trial in resolving a corporate dispute are the parties’ motivations and the nature of their business relationship. Where litigation is brought for a tactical advantage, such as the enhancement of discovery, the mini-trial will not likely succeed. Success is also unlikely where delay strongly favors one side.

The existence or desirability of a long-term business relationship between the parties, however, favors effective dispute resolution through use of the mini-trial. The mini-trial has even served to broaden business relationships. For example, in an antitrust and breach of contract case involving Texaco and Borden, the parties resolved the issues in dispute without exchanging cash, renegotiated a gas supply contract not in dispute, and made a new arrangement for the sale of Texaco gas to Borden. Thus, the parties’ steady relationship fostered a win/win determination of the dispute, leaving both parties satisfied.

Finally, the timing of the mini-trial will affect its success. Mini-trials are typically conducted after pre-trial discovery is under way because the issues need to be sufficiently developed in order for the hearing to be meaningful. The more complex the topic, the more discovery will be necessary before the accelerated discovery of the mini-trial. In determining when to propose a mini-trial, Professor Green, a leader in the alternative corporate dispute resolution movement, suggests that parties should base their decision on a cost/benefit analysis of the value of obtaining additional information.

III. Meeting the Parties’ Needs

The mini-trial meets corporate parties’ needs in providing a more efficient dispute resolution process. Costs can be dramatically reduced; delays, which often cause business uncertainty and may lead to competitive disadvantages,
can be shortened; and corporate resources can be devoted to more productive activities than protracted litigation. The need for mutually satisfactory results may also be met by employing the mini-trial. When properly tailored, the mini-trial can be utilized to maintain confidentiality and secrecy in the dispute resolution process. Finally, the mini-trial meets corporate and societal needs by building working relationships and trust.

Although it is difficult to find accurate statistics on the overall costs of corporate disputes, corporations have come to recognize the need for controlling these costs. The mini-trial meets this need by dramatically reducing the costs of resolving a dispute, whether it is terminated by settlement or litigation. In a dispute between Sherwin-Williams and a Chicago company centering on the sale of charcoal-lighter containers, the parties spent a few years and $200,000 on discovery. They turned to a technique similar to a mini-trial as a way to end the costly dispute. Although the dispute was resolved by summary judgment in court rather than settlement, a great amount of legal fees was saved. The merits of the case were so clearly conveyed to the parties that discovery and all other pre-trial positioning in the case ceased.

Beyond meeting the need to control financial costs, the mini-trial conserves personnel resources. Protracted litigation drains management time, energy, and

39. Id. at 214.
40. Xerox corporation is one of many large corporations which has adopted guidelines prepared in 1985 for the American Corporate Counsel Association for practice under the federal rules. The guidelines are to put a check on the adversarial, win at any cost mindset of many corporate counsel by directing them to consider the merits of their cases and costs in pursuing them at every step of the way. Xerox sent a copy of the guidelines to all of its representative counsel accompanied by a letter from president David Kearns which read in part:

The notorious burden of litigation for American business has grown to the point that it can and does have a significantly negative impact upon the financial results of many of our corporations. . . . We cannot lose sight of our system of justice as the pillar supporting our individual rights, but neither can we ignore the threat to that system if our companies do not maintain a competitive position in world markets. Unnecessary cost burdens must be addressed and eliminated.

Xerox: Reining in the Lawyers, Vol. 3, No. 4 ALTERNATIVES 1, 3-4 (April 1985).

41. Like corporations, the government recognizes the need to control its costs in resolving its disputes with contractors. The U.S. Army Corps of Engineers has developed a mini-trial program and used the mini-trial with success. Army Engineers, supra note 18. In June, 1986, the Justice Department initiated a policy in its Commercial Litigation Branch instructing branch attorneys on mini-trials procedures in order that they might assess case potential for resolution by mini-trial. Justice Department's Commercial Branch Institutes Ambitious Mini-Trial Policy, Vol. 4, No. 12 ALTERNATIVES 3 (Dec. 1986).

42. Modified Mini-Trial Bridges Communications Gap in $2.4 Million Case, Vol. 4, No. 6 ALTERNATIVES 4, 14 (June 1986).
43. Id. at 14.
technical resources, while diverting them from productive activity. This unproductive diversion may even manifest itself in increased prices in the goods and services rendered by a company.

Even when a mini-trial does not aid settlement of a dispute, the money may be well-spent. The benefits of constructing a case may be applied to litigation and the condensed brief can be used as an outline of the trial court brief. Only the costs of developing the mini-trial procedure cannot be justified as a trial expense. Given the mini-trial's successful track record in avoiding future litigation expenses, however, pursuing a mini-trial in appropriate cases seems to be worth the risk of losing some money on working out the mini-trial procedure.

The mini-trial further benefits corporate users by educating their executives about the dispute and restraining their attorneys. The mini-trial forces corporate attorneys to halt their pre-trial maneuvering and to focus on the issues at the heart of the dispute. While checking the lawyers, the mini-trial brings in responsible executives and educates them to make informed decisions about pursuing litigation. For example, in a contract dispute involving NASA, Space Communication Co. and TRW, Inc., after previous settlement talks failed, the parties reached a settlement two days after a mini-trial brought in high-level executives to hear the case.

Although there has been much debate about the monetary savings of utilizing ADRMs in resolving disputes, few commentators have questioned

44. R. Coulson, How to Stay Out of Court 20-21 (2d ed. 1984). See also Harter, Points on a Continuum: Dispute Resolution and the Administrative Process 102 (1986) (unpublished report). This report was prepared for the 1986 Administrative Conference of the United States. Parties to a dispute over a contract involving the development of a satellite system were motivated in part to utilize a mini-trial because they wanted to release key personnel from the litigation so they could turn their energies to the job at hand.
45. R. Coulson, supra note 44, at 20.
46. S. Goldberg, E. Green, & F. Sander, supra note 20, at 277.
47. Id.
48. See Green, Marks & Olson, supra note 9, at 508.
49. Id.
50. Harter, supra note 44, at 104. The disputes, eventually resolved by mini-trial in 1982, were centered on a satellite contract to Spacecom for the production of a tracking and data relay satellite system at an original price of $786 million. TRW was the principal subcontractor for the system. The disputes arose in 1979 after NASA sent two letters of direction to the contractors requesting certain operational capabilities for the system that it believed were covered by the contract. Spacecom and TRW claimed the directives sought work outside the contract which entitled them to additional compensation. Id. at 98-99.
51. For articles asserting the cost-saving advantages of mini-trials over adjudication, see Austin Industries Uses Mini-Trials to Settle Two Construction Cases at Less than 3% of Normal Cost, Vol. 1, No. 11 ALTERNATIVES 1, 4 (Nov. 83); U.S.-German Mini-Trial Settles Distributor's Million Dollar Claim in One Day,
the cost effectiveness of the mini-trial. Corporate counsel and executives attest to the cost efficiency of the mini-trial in resolving complex litigation when choosing it over arbitration and adjudication.

In addition to meeting the parties' needs for efficiency in resolving their disputes, the mini-trial can also satisfy the parties' needs for a mutually satisfactory resolution of their dispute. Exploration of the parties interests may obtain a win/win result. Such a result is nearly impossible to achieve through the adversarial system employed in court where each side has established positions to defend, and the parties' underlying interests are not addressed. In arbitration, the arbitrator may impose a compromise solution which satisfies neither of the parties. TRW participated in its first mini-trial after refusing to submit its dispute with Telecredit to arbitration because the company was uncertain of a satisfactory result in arbitration. In employing the mini-trial, the parties actively participate to formulate a pragmatic solution to their dispute. Since the executives can draw on their work experience and knowledge of their company needs and capabilities, the agreement reached is likely to be more supportive of their respective company's business objectives than would a decision imposed by the court or an arbitrator.

Unlike many litigants, corporate parties to a dispute often wish to maintain their relationship, whether it is based on a supply contract, such as the one enhanced in the Borden-Texaco mini-trial, or a joint venture. The mini-trial can foster business relationships by building trust between the parties to a dispute. Trust, however, is not necessarily required before undertaking a mini-trial. Parties could opt for a mini-trial solely to avoid the high costs of litigation, or parties could choose the mini-trial when fearful of not achieving


52. Former U.S. Court of Claims Trial Judge James F. Davis has remarked that the mutually beneficial result reached in the Borden-Texaco case "[c]ould never have been fashioned by a court." Davis & Omlie, supra note 17, at 533. Former U.S. Attorney General William French Smith has noted that, "[a] workable, mutually beneficial solution was developed [in the NASA case discussed supra note 50 and accompanying text] by involving top management that was superior to any decision that could have been imposed by a third party." W. French Smith, Alternative Means of Dispute Resolution: Practices and Possibilities in the Federal Government, 1984 Mo. J. Disp. Res. 9, 20 (citing Business Saves Big Money with the Mini-Trial, Bus. Wk., Oct. 13, 1980, at 168).

53. Green, Marks, & Olson, supra note 9, at 495.

54. See L. Kanowitz, supra note 14, at 130.


56. See supra note 8 and accompanying text.

a mutually satisfactory result in court. Once undertaken, the mini-trial builds trust as the parties negotiate its format, and the attorneys concentrate on their case, leaving behind the adversarial tactics of the courtroom.\(^\text{58}\)

Whereas court decisions are frequently contested on appeal, there has been no reported litigation concerning settlements following a mini-trial. Instead of devoting more resources to continued litigation, the mini-trial participants move onward with their business dealings. Society benefits from the increased business cooperation as it saves the litigation costs it would have eventually absorbed,\(^\text{59}\) and corporate resources are devoted to corporate productivity.

Another need corporate parties possess is that of business certainty. Prolonged litigation can tie up business planning, especially if the business is a young one. Therefore, the speed of the mini-trial is an attractive alternative to the typical two to six year delay, common in urban areas, for business litigation to reach trial.\(^\text{60}\) This is illustrated in a case involving two companies operating in a ground-floor market, where the uncertainty of litigation—predicted to exceed three years—pushed the companies toward use of the mini-trial.\(^\text{61}\)

Finally, the mini-trial serves corporate parties who prefer to resolve their dispute in a private forum. These parties may wish to prevent damage to their business reputations that a court battle could engender\(^\text{62}\) or seek to keep business strategies and trade secrets out of their competitors’ grasp. Fortunately, commentators have thoroughly discussed the confidentiality aspects of the mini-trial,\(^\text{63}\) so that only a few points need emphasis here. Although there is no case on point concerning the admissibility or discoverability of documents exchanged or statements made at a mini-trial, Rule 408 of the Federal Rules of Evidence should apply since a mini-trial is essentially a structured settlement process.\(^\text{64}\).

Under Rule 408, mini-trial participants should gain the same protection as other litigants who engage in settlement negotiations: statements made in

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58. Id. at 428.
59. See supra note 55.
62. Id. at 1. In a dispute between a publicly traded company and one of its directors, both parties sought the confidentiality of a mini-trial to prevent damage to their respective reputations in the business community.
63. For a detailed discussion on preserving the confidentiality of a mini-trial, see Davis & Omlie, supra note 17, at 543-547; Green, Growth of the Mini-Trial, 9 Litigation 12, 18-19, 59-60 (1982); Restivo & Mangus, Alternative Dispute Resolution: Confidential Problem-Solving Or Every Man’s Evidence?, Vol. 2, No. 5 Alternatives 7 (Special Supp. May 1984); Green, supra note 5, at MH 61-74.
64. Green, Growth of the Mini-Trial, supra note 63, at 18-19, 59-60.
the course of the mini-trial should be inadmissible in any future litigation between the participants and in third party actions unless otherwise discoverable. Professor Green recommends that mini-trial participants refer to Rule 408 in their agreement and expressly include coverage of the neutral observer's opinion since Rule 408 does not refer to statements made by non-parties during settlement negotiations. Currently, only one state arguably affords statutory protection of a neutral observer's comments during the mini-trial. Threat of a breach of contract should keep the participants from violating the confidentiality provided for in the agreement. Still, a confidentiality provision in the mini-trial agreement will not necessarily prevent discovery pursuant to Rule 26(c) of the Federal Rules of Civil Procedure. Professor Green advises mini-trial participants to guard themselves against discovery by seeking a protective order from the court pursuant to Rule 26(c) of the Federal Rules of Civil Procedure. A number of cases have blocked discovery of information deemed confidential by court order.

IV. MEETING THE CRITICS AND BENEFITING THE PUBLIC

General criticism leveled at ADRMs and the settlements they facilitate is not applicable to the mini-trial. Behind this assertion lies the conviction that

65. Davis & Omlie, supra note 17, at 543 n.33.
66. Green, supra note 5, at MH 65.
67. Mo. Rev. Stat. §§ 435.012-.470 (1986). Missouri's codification of the Uniform Arbitration Act, Arbitration Chapter 435, was amended in June, 1986, to include a new section covering the inadmissibility of statements made by "conciliator[s]" in setting up or conducting the conciliation. Section 435.014(1) reads as follows:

If all the parties to a dispute agree in writing to submit their dispute to any forum for arbitration, conciliation, or mediation, then no person who serves as arbitrator, conciliator or mediator, nor any agent or employee of that person, shall be subpoenaed or otherwise compelled to disclose any matter disclosed in the process of setting up or conducting the arbitration, conciliation or mediation.

68. Davis & Omlie, supra note 17, at 546.
69. Fed. R. Civ. P. 26(b)(1) permits the discovery of an inadmissible matter if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Yet some courts have barred discovery of settlement negotiation information in order to encourage settlement. See, e.g., Branch v. Phillips Petroleum Co., 638 F.2d 873 (5th Cir. 1981); but see, e.g., Grumman Aerospace Corp. v. Titanium Metals Corp. of America, 91 F.R.D. 84 (E.D.N.Y. 1981); Uinta Oil Refining Co. v. Continental Oil Co., 226 F. Supp. 495 (D. Utah 1964).

70. Green, Growth of the Mini-Trial, supra note 63, at 19. For suggestions of what the proposed order should include, see Davis & Omlie, supra note 17, at 546-47.

71. See Martindell v. ITT Corp., 594 F.2d 291 (2d Cir. 1979); GAF v. Eastman Kodak Co., 415 F. Supp. 129 (S.D.N.Y. 1976) (court blocked non-party discovery of information exchanged by litigants under confidential agreement, treating the agreement as the equivalent of a Rule 26(c) protective order).
the disputes properly submitted for mini-trial resolution are those concerning essentially "private" issues with little effect on the public. Only to the extent that the dispute affects the public can the public claim any interest in the means by which the dispute is resolved. Instead of being disserved by utilization of the mini-trial, it seems that the public actually benefits from the mini-trial's facilitating access to justice, conserving court resources, and helping counter public cynicism of the judicial system.

Although empirical data needs to be gathered, it seems that mini-trial use facilitates access to the courts: the fewer protracted business litigation cases on the docket, the more time there is available for hearing other cases. Judge Edwards of the United States Court of Appeals for the District of Columbia District has noted that introducing ADRMs (such as the mini-trial) would be a more desirable way to deal with the federal court caseload problem than curtailing substantive rights or erecting procedural barriers to deny access.

There is some concern that the utilization of ADRMs could create their own demand and provide little relief for congested courts. But companies are not likely to pursue frivolous claims in a mini-trial since there is no chance of forcing a settlement in the voluntary process; therefore, increased court access seems real.

Every mini-trial leading to a successful settlement conserves public resources which might otherwise have been spent in protracted litigation. One commentator has pointed out the disturbing fact that the public currently subsidizes resolution of corporate disputes in adjudication at the cost of $400 to $600 per hour. The mini-trial relieves the public of this subsidy and enables court time and resources to be devoted to resolving other disputes, including those of true public concern.

Finally, it appears that the mini-trial, in conjunction with other ADRMs, is helping to counter public cynicism toward the traditional legal system's ability to carry out justice. That cynicism is linked to the high price and

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72. Included is the government when it operates like a private party in cases concerning government contracts. Government agencies are assumed to operate in contract cases with agency economic self-interest uppermost in mind, while there is no special role for the agency to play as guardian of public values. The assertion of rights to information under the Freedom of Information Act would prevent a mini-trial from being utilized to cover up possible government inefficiency.

73. ADR critic Richard Abel writes that ADRMs facilitate access to justice by attracting disputes that would have been settled outside the court system if it were not for the reduced workload of the courts due to the ADRMs. Abel, Conservative Conflict and the Reproduction of Capitalism: The Role of Informal Justice, 9 INT'L J. SOC. LAW 245, 257-59 (1981).


delays of adjudication which have "led many Americans to view the legal system as a shell game rather than as a source of justice."76 The mini-trial, along with other ADRMs, reduces the cost and delay of the broader legal system, so that the public's faith in the legal system may be restored.77

Even though there appear to be public benefits derived from utilization of the mini-trial, there is a need to demonstrate the propriety of the mini-trial in resolving corporate disputes before ADRM critics can be assuaged. This propriety turns on whether the dispute is essentially private or public in nature. Admittedly, it is difficult to discern which disputes are public as opposed to private. Although categorization can be problematic, it is helpful, nevertheless. Judge Edwards has found public law cases to include "constitutional issues, issues surrounding government regulation, and issues of great public concern,"78 whereas Professor Fiss argues they include "cases in which there are significant distributional equalities . . . [and] where there is a genuine social need for an authoritative interpretation of law."79

None of the disputes settled by mini-trials (and discussed herein) fall within these public dispute groupings with the possible exception of the toxic tort and product liability cases. Yet, the mini-trial has a key feature which permits the effectualization of public values in these cases through court resolution if necessary. The mini-trial is non-binding. If an individual or company is dissatisfied with the mini-trial process, he may pursue his rights in the public arena.

One may argue that what is justice for the party who chooses to settle is not justice for the public. But one must recognize, along with Professor Fiss, that denial of parties' rights to settle their disputes would "interfere with their autonomy and distort the adjudicative process."80 Nevertheless, mini-trial use in resolving disputes which have great bearing on the public should not be encouraged. Nor should mini-trials be utilized in order to avoid precedent and public rulings which would force companies to rectify wrongs committed against a large segment of the public.

Beyond these reservations, Professor Fiss' concerns with ADRMs and their ability to facilitate settlement81 have little applicability to the mini-trial. Fiss contends the following problems are intertwined with settlement: "[c]onsent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial

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76. Edwards, supra note 74, at 440. See Lee, supra note 75, at 270.
77. Edwards, supra note 74, at 440.
78. Edwards, supra note 1, at 671. "[S]uch issues of great public concern can be accommodated so long as ADR mechanisms are created as adjuncts to existing judicial or regulatory systems, or if these issues can be relitigated in court after initial resolution pursuant to ADR." Id. at 671-72.
79. Fiss, supra note 13, at 1087.
80. Id. at 1085.
81. See Fiss, supra note 13.
involvement troublesome; and although dockets are trimmed, justice may not be done."

However, parties voluntarily agree to the mini-trial and can accept or reject the neutral observer's findings in deciding whether to settle their case. Mini-trial settlement negotiations are conducted by corporate executives who have the full authority of the parties they represent. Judicial involvement subsequent to successful mini-trial negotiations would not be troublesome since the agreement reached would be enforceable under the law of contracts.

Professor Fiss' fourth contention, that justice may not be done by utilizing ADRMs, is difficult to address because justice is not a recognizable absolute. Fiss believes adjudication is more likely to do justice than the mini-trial, because he sees the court judge as most capable of lessening the impact of resource disparities among parties. However, with access to the court limited by the high cost of litigation, knowledge of a judge's supportive role is little consolation to the potential non-corporate litigant.

In any event, the mini-trial format, by limiting discovery and forcing disputants to limit their case presentations to a day or two, checks any resource disparities that parties might carry into the mini-trial. If participants feel that power disparities effect the outcome of the mini-trial, they are free to refuse settlement and take their case to court. Furthermore, if the state finds that companies are not acting in accordance with the law following a mini-trial, it may pursue public justice in court upon discovery of illegal conduct.

Fears that the use of ADRMs may result in second class justice and stifle the development of the law are not borne out by the mini-trial. The mini-trial is a forum of first choice for those corporate parties that engage in them. If parties are not satisfied with mini-trial results, adjudication remains an option. Certainly, there will always be a sufficient number of corporate disputes unsuitable for mini-trial resolution so that the development of the law will not be stifled.

82. Id. at 1075.
83. Fiss, Out of Eden, 94 YALE L.J. 1669, 1673 (1985). In contrast to Professor Fiss, Professors McThenia and Shaffer write: "We do not believe that law and justice are synonymous. We see the deepest and soundest of ADR advocates as in agreement with us: Justice is not usually something people get from the government. And courts ... are not the only or even the most important places that dispense justice." McThenia & Shaffer, For Reconciliation, 94 YALE L.J. 1660, 1664-65 (1985).
84. Fiss, supra note 13, at 1077.
85. The costs of traditional legal services "weigh most heavily on the poor, and they burden even the middle class, disabling both groups from either pressing their legal rights as plaintiffs or competently defending themselves against wealthy opponents." Edwards, supra note 74, at 437-38.
86. See Edwards, supra note 1, at 679.
V. Conclusion

The mini-trial is an effective, efficient and proper means for resolving corporate disputes of an essentially private nature. It serves both private and public interests in avoiding delayed, expensive and often unsatisfactory dispute resolution through adjudication and traditional settlement means. The mini-trial enables corporate parties to take responsibility for resolving their disputes in accordance with their needs.

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