

Winter 1995

## Avoiding Litigation with the Mini-Trial: The Corporate Bottom Line As Dispute Resolution Techniue

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### Recommended Citation

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# **Avoiding Litigation With The Mini-Trial: The Corporate Bottom Line As Dispute Resolution Technique**

DOUGLAS A. HENDERSON\*

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## I. INTRODUCTION

Often characterized as a taste of legal combat,<sup>1</sup> the mini-trial is a carefully structured, private settlement negotiation where counsel for opposing parties present condensed versions of their cases in the presence of senior executives from each side who possess the ultimate authority to settle the dispute.<sup>2</sup> After the presentation, the senior executives meet and discuss settlement prospects without attorneys present. Typically, an impartial third-party advisor participates in the mini-trial, assisting in negotiations and, if necessary, offering nonbinding conclusions regarding the probable outcome of the dispute.<sup>3</sup>

For those potentially interested in the technique, however, the usefulness and effectiveness of the mini-trial as a practical dispute resolution technique remain unclear.<sup>4</sup> This Article seeks to resolve some of the questions about

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1. Ronald L. Olson, *Dispute Resolution: An Alternative for Large Case Litigation*, LITIG., Winter 1980, at 22, 59.

2. The classic mini-trial description is given by Eric D. Green et al., *Settling Large Case Litigation: An Alternative Approach*, 11 LOY. L.A. L. REV. 493, 501-06 (1978). Other useful descriptions include Eric D. Green, *Growth of the Mini-Trial*, LITIG., Fall 1982, at 12, 12 [hereinafter *Growth of the Mini-Trial*]; James F. Davis & Lynne J. Omlie, *Mini-Trials: The Courtroom in the Boardroom*, 21 WILLAMETTE L. REV. 531, 531-32 (1985); and Robert H. Gorske, *Why Mini-Trials Work*, 8 CORP. COUNSEL'S Q. 28 (1992).

3. Whether a third-party mini-trial adviser should participate in the mini-trial remains a central issue in mini-trial practice and procedure. See Lawrence J. Fox, *Mini-Trials*, LITIG., Summer 1993, at 36, 41; Davis & Omlie, *supra* note 2, at 541 ("The parties should also consider whether they want to use a neutral advisor and what the neutral advisor's role should be.").

4. See JAMES F. HENRY & JETHRO K. LIEBERMAN, *THE MANAGER'S GUIDE TO RESOLVING*

mini-trial effectiveness by examining the results of a recent American Bar Association-sponsored survey that canvassed attitudes and experiences of construction lawyers who used the mini-trial to settle disputes.<sup>5</sup> The first Part of this Article reviews essential elements of the mini-trial, explores its theoretical foundations, and categorizes a range of dispute types considered by previous commentators to be appropriate for the mini-trial. After a summary of general results from the ABA survey, the second Part presents empirical results of how previous descriptions on the mini-trial correspond with mini-trial experiences. This Part focuses on how mini-trial experience affects the successful use of the technique.<sup>6</sup> By taking such an approach, this Article attempts to replace general descriptions, the staple of most reports to date, with an empirical study of mini-trial application.

## II. AVOIDING LITIGATION: THE MINI-TRIAL AS DISPUTE RESOLUTION TECHNIQUE

The mini-trial is a relative newcomer among dispute resolution techniques, especially when compared with the long history of binding arbitration; as a formal technique of conflict management, the mini-trial first was used to settle a "bitter and complex" patent infringement case in 1977.<sup>7</sup> Since then, mini-trials have been used to resolve disputes in a broad range of areas, including patent infringement,<sup>8</sup> communications satellites,<sup>9</sup> breach of contract,<sup>10</sup>

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LEGAL DISPUTES 48 (1985) (hereinafter *MANAGER'S GUIDE*); Annie Billings, Note, *The Mini-Trial: Misunderstanding and Miscommunication May Short-Circuit Its Effective Use in Settlements*, 1990 J. DISP. RESOL. 417 (1990); Michael F. Hoellering, *The Mini-Trial*, ARB. J., Dec. 1982, at 48, 48; Timothy Kratz, Comment, *Alternative Dispute Resolution in Complex Litigation*, 57 U. MO. KAN. CITY L. REV. 839, 853 (1987).

5. The ABA survey also examined mediation, summary jury trial, and nonbinding arbitration. For a critical evaluation of the results for these dispute resolution techniques, see Thomas J. Stipanowich & Douglas A. Henderson, *Settling Construction Disputes by Mediation, Mini-Trial and Other Processes—The ABA Forum Survey*, THE CONSTRUCTION LAW., Apr. 1992, at 6. For results of a previous ABA survey on binding arbitration, see Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 453-77 (1988).

6. In examining optimum mini-trial circumstances, comparisons must be made with other dispute resolution techniques such as mediation, arbitration (binding and non-binding), and summary jury trials. This paper, however, concentrates exclusively on the mini-trial.

7. *Growth of the Mini-Trial*, *supra* note 2, at 12.

8. See, e.g., Roger Borovoy & Paul Janicke, *The Minitrial Approach to Resolving Patent Disputes*, 11 AM. PAT. L. ASS'N Q. J. 258 (1983).

9. See, e.g., Philip J. Harter, *Points on a Continuum: Dispute Resolution Procedures and the Administrative Process*, 1 ADMIN. L.J. 141, 199 (1987).

10. See, e.g., Robert H. Gorske, *Alternative Dispute Resolution: The Mini-Trial*, WIS. B. BULL., Feb. 1985, at 21, 22; Douglas M. Parker & Phillip L. Radoff, *The Mini-Hearing: An Alternative to Protracted Litigation of Factually Complex Disputes*, 38 BUS. LAW. 35, 37-38 (1982).

international trade,<sup>11</sup> antitrust,<sup>12</sup> utility planning,<sup>13</sup> high technology,<sup>14</sup> waterway construction,<sup>15</sup> and government contracts.<sup>16</sup> For some, the mini-trial remains the “method of choice” for dispute resolution.<sup>17</sup>

### A. Understanding Common Elements and Procedure of Mini-Trial

“Typical” mini-trial procedures and processes are described in several places.<sup>18</sup> Drawing on prior experience and previous summaries of the technique, Professors Lieberman and Henry suggest that mini-trials share many of the following characteristics:<sup>19</sup>

- almost always, the parties negotiate procedural rules to govern the mini-trial;<sup>20</sup>
- by agreement, preparation time is short for the mini-trial—typically from six weeks to three months—and discovery is limited;
- the hearing itself is brief—usually no more than two days;
- often, a neutral third party conducts the mini-trial hearing;<sup>21</sup>

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11. See, e.g., Leo Kanowitz, *Using the Mini-Trial in U.S.-Japan Business Disputes*, 39 MERCER L. REV. 641 (1988).

12. See, e.g., James F. Henry, *Mini-Trials: An Alternative to Litigation*, 1 NEGOTIATION J. 13, 14-15 (1985).

13. See, e.g., Jon T. Anderson & G.W. Snipes, *Stretching the Concept of Mini-trials: The Case of Bechtel and the Corps of Engineers*, THE CONSTRUCTION LAW., Apr. 1989, at 3.

14. See, e.g., Thomas J. Klitgaard & William E. Mussman, III, *High Technology Disputes: The Minitrial as the Emerging Solution*, 8 SANTA CLARA COMPUTER AND HIGH TECH. L.J. 1 (1992).

15. See, e.g., Harter, *supra* note 9, at 204.

16. See, e.g., Eldon H. Crowell & Charles Pou, Jr., *Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques*, 49 MD. L. REV. 183, 202-07 (1990); Eldon H. Crowell et al., *Applying Alternative Dispute Resolution to Contract Claims*, 1 ADMIN. L.J. 553 (1987).

17. Reba Page & Frederick J. Lees, *Roles of Participants in the Mini-Trial*, 18 PUB. CONT. L.J. 54, 56 (1988) (describing the mini-trial as “the ADR method of choice for many governmental agencies, including the Corps of Engineers” (citations omitted)).

18. See generally MANAGER’S GUIDE, *supra* note 4, at 48-56; Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 427-28 (1986) [hereinafter *Lessons*]; Kratz, *supra* note 4, at 851-53.

19. *Lessons*, *supra* note 18, at 427-428; see also Lester Edelman & Frank Carr, *The Mini-Trial: An Alternative Dispute Resolution Procedure*, ARB. J., Mar. 1987, at 7, 9-12 (describing the Corps of Engineers’ approach to the mini-trial).

20. Parties may adopt mini-trial procedures such as those described in ERICA FINE, CPR LEGAL PROGRAM MINI-TRIAL WORKBOOK (1985). The model procedures prepared by the Center for Public Resources also may be used. See Davis & Omlie, *supra* note 2, at 537-48; Fox, *supra* note 3; Charles J. Kall et al., *The Private Mini-Trial: Sample Form of Agreement*, 14 COLO. LAW. 1794 (1985) (providing forms of agreement for mini-trial); Page & Lees, *supra* note 17, at 71-75 (providing copy of mini-trial agreement).

21. See *supra* note 3.

- in the presence of both sides, lawyers present their “best case” in an hour or a few hours, with little time to detour into other issues;
- the case is presented to senior representatives of the parties who have immediate authority to settle; no judge or jury is present during the process;
- immediately after the hearing, the party representatives meet without counsel to negotiate a settlement;
- if the party representatives cannot reach a settlement, the neutral advisor may render an advisory opinion on how a judge might rule if the case were to go to court; and,
- proceedings are confidential; generally, the parties agree not to disclose details of the mini-trial to any outsider.

Since a hallmark of the mini-trial is flexibility, all of the elements may not be present in every mini-trial.

*B. Theoretical Underpinnings of the Mini-Trial:  
The Authority To Settle As Its Strength*

Unlike mediation, which is based on the theory that an impartial third party might assist the parties in dispute resolution, the theory of a mini-trial is that parties can resolve a dispute themselves if litigant representatives with the authority to settle are educated about the strengths and weaknesses of each side’s case.<sup>22</sup> By combining selected characteristics of adjudication with negotiation, the mini-trial, like other techniques of dispute resolution, succeeds by “narrowing the dispute, promoting a dialogue on the merits of the case rather than just dollar values. . . .”<sup>23</sup> According to one authority,

The mini-trial encourages each party to assert and defend his strength. The corporate managers not only are allowed to observe the presentations, but are forced—in a dynamic, face-to-face setting—to assess the relative strength of each side and to deal with it before the advisor opines.”<sup>24</sup>

Thus, the mini-trial is not a practice ground for judicial experience, but a structured negotiation process among corporate equals.<sup>25</sup>

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22. Davis & Omlie, *supra* note 2, at 532.

23. *Growth of the Mini-Trial*, *supra* note 2, at 12.

24. Olson, *supra* note 1, at 24; see also Lewis D. Barr, Comment, *Whose Dispute Is This Anyway? The Propriety of the Mini-Trial in Promoting Corporate Dispute Resolution*, 1987 MO. J. DISP. RESOL. 133, 141 (“The mini-trial forces corporate attorneys to halt their pre-trial maneuvering and to focus on the issues at the heart of the dispute.”) (citing Green et al., *supra* note 2, at 508).

25. Crowell et al., *supra* note 16, at 556 (calling the term mini-trial a misnomer); Fox, *supra* note 3, at 36 (stating that the term mini-trial is misleading); Kratz, *supra* note 4, at 850 (“The

The presence of senior executives with the power and desire to settle the dispute is, by definition, essential to the success of the mini-trial process.<sup>26</sup> It is because of this top management participation that the mini-trial becomes “an extra-judicial procedure which converts a legal dispute from a ‘court-centered’ problem to a ‘businessman-centered’ problem. The mini-trial puts resolution of a business legal dispute back into the hands of the businessman litigants.”<sup>27</sup> By blending these two approaches—the legal and the corporate—the mini-trial provides business managers the opportunity “to use their developed skills—assessing risk and negotiating—to resolve the dispute. . . . [It] places a premium on brevity and relevancy. Each counsel must be able to find the ‘jugular,’ for there is no time to identify, to depose and to cross-index every ‘capillary.’”<sup>28</sup> As one expert described the process, “the kind of lawyerly hairsplitting, namecalling, and pettifogging that might delight courtroom regulars would leave the business executives to whom mini-trials are presented singularly unamused.”<sup>29</sup>

The idea in a mini-trial is to “put as much information as possible on the table, and let the professional decisionmakers judge the value of that information.”<sup>30</sup> The downside is that parties might reveal litigation strategy if the mini-trial ultimately fails. But, as one business law professor concluded, because the executives negotiating the settlement in a mini-trial often do not have attorneys present, they are not limited by legal remedies “based on the assumption that litigation is a zero-sum game;”<sup>31</sup> the executives can, as a result, develop creative, mutually beneficial solutions.<sup>32</sup> The mini-trial seems to work when other alternatives to litigation have fallen short because those who make final decisions participate in resolving the dispute—a novel concept in modern-day, large-scale litigation.

### *C. Understanding Where and When Mini-Trial Works Well And Where and When It Falls Short*

Given these theoretical advantages, under which situations does the mini-trial work well and under which situations does it fail? A few commentators

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mini-trial does not test to see how a jury would react; rather, the focus is on the parties’ evaluation of their case.”).

26. Edelman & Carr, *supra* note 19, at 9; See Crowell et al., *supra* note 16, at 558.

27. Davis & Omlie, *supra* note 2, at 531-32.

28. Olson, *supra* note 1, at 24.

29. Lessons, *supra* note 18, at 428.

30. Crowell et al., *supra* note 16, at 558.

31. G.J. Siedel, *The Use of Mini-Trials to Resolve Construction Disputes*, in CONSTRUCTION CONFLICT MANAGEMENT AND RESOLUTION 354, 356-57 (Peter Fenn & Rod Gameson eds., 1992).

32. *Id.*

have addressed these questions generally,<sup>33</sup> but virtually none of them has offered specific evidence regarding application of the technique.<sup>34</sup> To date, analysis of the mini-trial has proceeded largely on the basis of anecdote and limited case reports.<sup>35</sup> Most analysts summarize the technique, then identify when the mini-trial should or should not work.<sup>36</sup> Traditional wisdom holds that mini-trials work well only in certain circumstances.<sup>37</sup>

Some analysts suggest that the mini-trial works best in “large” disputes.<sup>38</sup> Most observers have not suggested that the mini-trial should be

33. Useful observations are provided in MICHAEL T. CALLAHAN, ET AL., *ARBITRATION OF CONSTRUCTION DISPUTES* § 11.13 (1990) (reviewing advantages of mini-trial); Barr, *supra* note 24, at 138-39; Edelman & Carr, *supra* note 19, at 11-12; Fox, *supra* note 3, at 36-37; Hoellering, *supra* note 4, at 49; Kanowitz, *supra* note 11, at 646-47; Page & Lees, *supra* note 17; W. David Pantle & C. Brad Peterson, *The Private Mini-Trial: Another Settlement Technique*, 14 COLO. LAW. 990 (1985); and Ronald L. Solove, *Alternative Means to Resolve Corporate Disputes: A Survey*, 91 COM. L. J. 133, 140 (1986).

34. For example, in a review of several empirical studies of dispute resolution, John Esser identified no evaluation—quantitative or qualitative—of the mini-trial. John P. Esser, *Evaluations of Dispute Processing: We Do Not Know What We Think and We Do Not Think What We Know*, 66 DENVER U.L. REV. 499, 523-24 (1989); see also Barr, *supra* note 24, at 145 (“[E]mpirical data needs to be gathered.”); Harry T. Edwards, *Hopes and Fears for Alternative Dispute Resolution*, 21 WILLAMETTE L. REV. 425, 441 (“[W]e must increase our efforts to gather and analyze statistical data concerning the functioning and effectiveness of different dispute resolution mechanisms.”); Kratz, *supra* note 4, at 853; *Lessons*, *supra* note 18, at 438 (“We therefore need a typology of disputes to help determine which kinds of cases are amenable to ADR and which should be left to the traditional devices of adjudication.”).

35. See Hoellering, *supra* note 4, at 50; Kratz, *supra* note 4, at 853-56. The most detailed evaluation of the mini-trial is presented in ABA SUBCOMMITTEE ON ALTERNATE MEANS OF DISPUTE RESOLUTION, COMMITTEE ON CORPORATE COUNSEL, *THE EFFECTIVENESS OF THE MINI-TRIAL IN RESOLVING COMPLEX COMMERCIAL DISPUTES: A SURVEY* (1986) (qualitatively reviewing 19 mini-trial experiences) [hereinafter ABA MINI-TRIAL EVALUATION].

36. See, e.g., MANAGER’S GUIDE, *supra* note 4, at 48-56.

37. ABA MINI-TRIAL EVALUATION, *supra* note 35, at 37 (“Although, theoretically, any dispute might be suitable for resolution by way of a mini-trial, historically certain kinds of cases have been considered particularly suitable for mini-trial treatment.”); Barr, *supra* note 24, at 138 (noting that a mini-trial’s suitability and form depend on the substantive nature of dispute, disputant’s motives, and nature of business relationship). *Contra* Elizabeth M. Tannon, *Implementing a Successful Minitrial*, KY. BENCH & B., Winter 1988, at 12 (“[V]irtually every commercial dispute has mini-trial potential.”).

38. E.g., ABA MINI-TRIAL EVALUATION, *supra* note 35, at 40 (purporting that mini-trial is commonly considered more attractive in cases involving larger dollar amounts because savings to parties are by comparison more significant in big cases); Edelman & Carr, *supra* note 19, at 11 (“[C]laims involving small sums of money will usually not be attractive candidates for the process.”); Fox, *supra* note 3, at 36 (“It depends, to begin with, on the size of the matter.”); Green et al., *supra* note 2, at 493 (arguing that a mini-trial is a procedure for settling large case litigation); Olson, *supra* note 1, at 22 (“[M]ini-trials can ... be tailored to fit most large-scale disputes.”). One source suggests that typically only disputes involving more than \$250,000 should be the subject of mini-trials because only disputes of that size justify the expense of consuming at least a full day’s time of high-level company executives and personnel. Harter,



employed in “smaller” disputes, which is surprising, considering the typical mini-trial amounts in controversy are unknown.<sup>39</sup>

A second dimension of size is the number of parties involved in a dispute. Some scholars claim that mini-trials are more successful in disputes that involve only two parties<sup>40</sup> or two business entities.<sup>41</sup> The reasoning must be that more than two senior management executives would have difficulty agreeing on a settlement. Other writers, however, suggest that the involvement of multiple parties should present few difficulties for a mini-trial.<sup>42</sup>

Another frequent assumption in the literature is that mini-trials work best where disputes involve mixed questions of law and fact and the outcome is in doubt.<sup>43</sup> Taking a similar approach, others presume that mini-trials are less appropriate for resolving novel legal questions,<sup>44</sup> pure questions of law,<sup>45</sup>

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*supra* note 9, at 198 (citing 44 Fed. Cont. Rep. (BNA) 591 (Sept. 23, 1985)). *But see* Henry, *supra* note 12, at 14 (arguing that the mini-trial lends itself to resolving both small and very large disputes).

39. According to one source,

Whether or not the mini-trial is suitable for disputes involving substantially smaller amounts, however, has yet to be shown, since almost all mini-trials have involved sums in excess of \$100,000 (sic) and familiarity with the mini-trial format still remains largely the monopoly of a relatively small number of attorneys and corporate clients.

ABA MINI-TRIAL EVALUATION, *supra* note 35, at 40. However, one researcher concluded that “the process is equally successful when amounts much smaller (or larger) are in dispute.” Siedel, *supra* note 31, at 359. *See also* *Growth of the Mini-Trial*, *supra* note 2, at 17 (“[T]he mini-trial has been successfully employed in the regulatory process for small cases.”).

40. *E.g.*, Solove, *supra* note 33, at 140; Tannon, *supra* note 37, at 13.

41. Hoellering, *supra* note 4, at 49.

42. Siedel, *supra* note 31, at 358 (arguing that “a multiplicity of parties does not impede the success of the [mini-trial] process”).

43. *See, e.g.*, ABA MINI-TRIAL EVALUATION, *supra* note 35, at 38 (“Theoretically, this is because such cases are not ‘clear winners.’”); Barr, *supra* note 24, at 138 (“[T]he mini-trial is an appropriate mechanism in cases involving complex questions of law and fact.”); Davis & Omlie, *supra* note 2, at 534 (“[B]usiness disputes raising mixed questions of law and fact . . . are good candidates for mini-trials.”); Harter, *supra* note 9, at 198 (“The mini-trial technique lends itself well to cases involving . . . mixed questions of law and fact.”) (citing 44 Fed. Cont. Rep. (BNA) 591 (Sept. 23, 1985)).

44. *See, e.g.*, Crowell et al., *supra* note 16, at 559 (“Cases involving unsettled areas of law are not appropriate for minitrial.”); Davis & Omlie, *supra* note 2, at 535 (positing that if a case presents novel legal questions, “there may be no choice but to take the case to trial”); Edelman & Carr, *supra* note 19, at 11 (stating that appropriate cases should include clear legal rules); Hoellering, *supra* note 4, at 49 (noting that those with mini-trial experience do not recommend the technique for novel questions of law); Page & Lees, *supra* note 17, at 59 (citing *Alternative Dispute Resolution: Mini-Trials*, ENGINEERING CIRCULAR (U. S. Army Corps of Engineers), Sept. 23, 1985).

45. *See, e.g.*, Fox, *supra* note 3, at 37 (“If the case involves pure questions of law, the parties might be better served simply by having the court render a summary judgment on the contested issues.”); *Growth of the Mini-Trial*, *supra* note 2, at 17 (arguing that issues of law will

constitutional problems,<sup>46</sup> or situations where precedent is critical.<sup>47</sup> However, Professors Henry and Lieberman, early proponents of mini-trials, conclude that mini-trials still are too new to discount their effectiveness in resolving disputes that primarily involve questions of law.<sup>48</sup> A number of scholars suggest that disputes involving numerous factual disputes requiring detailed discovery are not appropriate for mini-trial.<sup>49</sup> At the same time, others report that “very factual, technical-oriented cases work well in mini-trials.”<sup>50</sup> At best, any conclusions on a mini-trial’s appropriateness in mixed questions of fact and law remain contradictory.

When a dispute centers on witness credibility, conventional wisdom suggests the mini-trial is less effective.<sup>51</sup> According to one analyst, the mini-trial is not particularly appropriate for deciding credibility questions.<sup>52</sup> Taking the opposite view, others reason that “[e]xecutives [participating in a mini-trial]—savvy business managers—are far more sophisticated than the average jury called upon to determine who is lying in a case and who is not.”<sup>53</sup> In these situations, it may be that “executives are probably the best judges of who is lying, not the worst.”<sup>54</sup>

For some, proposing a mini-trial seems tantamount to showing weakness during the litigation process.<sup>55</sup> On this issue, evaluators of the mini-trial suggest that using the technique as a precursor to litigation might prejudice one’s case by prematurely disclosing facts, analysis, strategy, and tactics

be better resolved by summary judgment).

46. See Hoellering, *supra* note 4, at 49.

47. See, e.g., Davis & Omlie, *supra* note 2, at 535; Kanowitz, *supra* note 11, at 646 (citing Eric. D. Green, *The CPR Legal Program Mini-Trial Handbook*, in CORPORATE DISPUTE MANAGEMENT (1982) at MH-19; Olson, *supra* note 1, at 22.

48. MANAGER’S GUIDE, *supra* note 4, at 52.

49. See, e.g., Davis & Omlie, *supra* note 2, at 535 (arguing that conventional litigation may be necessary); Solove, *supra* note 33, at 140 (noting that mini-trials likely will be unsuccessful where factual determinations are based on credibility).

50. See, e.g., CALLAHAN et al., *supra* note 33, at 281 (quoting ENGINEERING NEWS RECORD 12 (U.S. Army Corp of Engineers), Nov. 21, 1985).

51. MANAGER’S GUIDE, *supra* note 4, at 51; see also Davis & Omlie, *supra* note 2, at 534-35; *Growth of the Mini-Trial*, *supra* note 2, at 17; Harter, *supra* note 9, at 198 (citing CENTER FOR PUBLIC RESOURCES, CORPORATE DISPUTE MANAGEMENT 19-20, 54 (1982) and Green et al., *supra* note 2, at 510); Hoellering, *supra* note 4, at 49; Solove, *supra* note 33, at 140.

52. Barr, *supra* note 24, at 139 (suggesting that mini-trial is no more effective a procedure for determining credibility than is adjudication or arbitration).

53. MANAGER’S GUIDE, *supra* note 4, at 51.

54. *Id.*

55. See, e.g., Fox, *supra* note 3, at 37 (“Some lawyers seem to believe that the first party even to mention a mini-trial . . . is exhibiting doubt and weakness.”); Henry, *supra* note 12, at 17 (“Many lawyers are hesitant to suggest this alternative to opposing counsel out of fear that it will be viewed as a sign of weakness.”). Compare Gorske, *supra* note 10, at 23 (“Approaching the other side with a minitrial proposal may be more suggestive of strength than of weakness.”).

normally reserved for the courtroom.<sup>56</sup> One author suggests that when litigation is brought solely for tactical advantage, the mini-trial ultimately will fail.<sup>57</sup>

Most analysts assume that mini-trials are short, lasting two days or less.<sup>58</sup> Proponents of dispute resolution in general and the mini-trial specifically tout this advantage over other forms of dispute resolution, such as arbitration or litigation. From the available literature, however, the typical duration of a mini-trial remains unknown.

Almost all of the literature lists the mini-trial's ability to handle ongoing business relationships as one of its primary advantages.<sup>59</sup> The implicit assumption seems to be that parties with long-standing relationships have more to lose and will be more amenable to settling through a mini-trial.<sup>60</sup> Few sources, however, provide detailed explanations why parties with an established relationship should, theoretically, benefit more from the mini-trial as a dispute resolution technique.

Some researchers suggest that potential antitrust implications<sup>61</sup> or constitutional ramifications<sup>62</sup> may limit mini-trial use. Still others suggest that "equality of resources" for the parties in a mini-trial is more likely to generate a favorable result.<sup>63</sup> Few have addressed whether the success of the mini-trial depends on which party is pressing claims, whether discovery has been completed or what type of remedies are being sought.

#### *D. What We Know About the Mini-Trial and How We Know It*

Even though more than one hundred mini-trials were conducted by 1985,<sup>64</sup> the dispute resolution literature lacks any strong evidence—positive

56. See, e.g., Parker & Radoff, *supra* note 10, at 42.

57. Barr, *supra* note 24, at 139 (citing Green, *Corporate Alternative Dispute Resolution*, 1 OHIO ST. J.D.R. 203, 243 (1986)).

58. See, e.g., ABA MINI-TRIAL EVALUATION, *supra* note 35, at 27-28 (stating that mini-trials "typically last from one to three days"); Crowell et al., *supra* note 16, at 558 ("[T]he actual hearing is informal and typically lasts only a couple of days."); Harter, *supra* note 9, at 193 ("The hearing itself usually lasts no more than two days.").

59. See, e.g., ABA MINI-TRIAL EVALUATION, *supra* note 35, at 39; Barr, *supra* note 24, at 139 (suggesting that mini-trials have served to broaden business relationships); Fox, *supra* note 3, at 37 ("The existence of an ongoing commercial relationship between the parties can facilitate a mini-trial."); Tannon, *supra* note 37, at 13 (stating that parties with an ongoing business relationship are motivated to settle).

60. See, e.g., Tannon, *supra* note 37, at 12.

61. See Billings, *supra* note 4, at 425.

62. Hoellering, *supra* note 4, at 49.

63. See, e.g., Fox, *supra* note 3, at 37.

64. Faye A. Silas, *Mini-Trials Lauded*, A.B.A. J., Jan. 1985, at 25, 25. Between 1977 and 1987, one source estimated 64 mini-trials had been reported publicly with 20 of those concerning

or negative—on the mini-trial's relative strengths and weaknesses in a range of actual disputes.<sup>65</sup> As is often true of relatively new techniques and of dispute resolution techniques in general, while descriptions proliferate, few empirical evaluations of the mini-trial exist. The appropriate role of the mini-trial remains to be determined.<sup>66</sup>

### III. INTERPRETING THE RESULTS FROM THE AMERICAN BAR ASSOCIATION SURVEY

This Section summarizes the ABA Forum on the Construction Industry (Forum) survey results on the use of mini-trial under various circumstances. After this Section, the ABA data are used to determine how well results from the construction field correspond with general descriptions of the mini-trial. A key concern of this study is discerning how experience with the mini-trial affects practitioners' views and attitudes regarding the appropriate use of mini-trial. The comparison here apparently is the first published attempt to reconcile the prevailing literature on mini-trials with empirical data garnered from lawyers who use the technique.

#### *A. Design of the Survey Instrument and Implementation of the Research Plan*

In 1985-86 the ABA Forum on the Construction Industry and the ABA Litigation section co-sponsored a survey on arbitration under the American Arbitration Association (AAA) Construction Industry Arbitration Rules. The survey produced a wealth of valuable information regarding construction arbitration. The arbitration survey received international attention, and played a significant role in the revision of AAA procedures.<sup>67</sup> The success of the arbitration survey inspired the 1990-91 survey of Forum members on mediation, mini-trial, and other settlement-oriented procedures used in construction disputes. The Forum sponsored the survey on the notion that many practitioners lacked sufficient information or experience to make knowledgeable decisions regarding the use of such procedures.<sup>68</sup>

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construction disputes. Siedel, *supra* note 31, at 355.

65. Issues concerning discovery, selection of the mini-trial advisor, use of experts, and presentation format are key considerations in designing and implementing a mini-trial. Except for a general description of these issues, however, this paper does not focus on procedural attributes of mini-trials. For guidance on these issues, see Page & Lees, *supra* note 17, at 61-69.

66. Hoellering, *supra* note 4, at 50 (concluding that arbitrators, academics, jurists, and practitioners need to evaluate the mini-trial's promise).

67. See Stipanowich, *supra* note 5, at 453-77.

68. Earlier studies on the mini-trial underscored this lack of information and experience.

The 1990-91 ABA Forum survey included two sections. The first elicited information on lawyers' views about the appropriate use of the mini-trial. Numerous questions in this section elicited lawyer attitudes concerning when and under what circumstances mini-trials were considered appropriate and how lawyers' experiences validated these beliefs, if at all. Also collected in this section was information on the construction bar's dispute resolution experience, attitudes on the strengths and weaknesses of the mini-trial, and attributes of effective mediators. The second part of the survey collected detailed information on experiences with mini-trial. Issues of costs, settlement rates, procedures, and final outcomes were the concerns of this section. Of the 548 survey responses received, sixty-two experiences with the mini-trial were reported.<sup>69</sup> The Forum's study is the most comprehensive collection of detailed mini-trial experiences available.<sup>70</sup>

*B. Explaining Beliefs About ADR Overall  
And The Mini-Trial In Particular:  
Attitudes Toward the Mini-Trial*

*1. Extent of ADR Experience*

Those members of the construction bar with mini-trial experience had an impressive range of other ADR experiences.<sup>71</sup> While most had only one mini-trial experience, just less than half of the respondents had two or more mini-trial experiences,<sup>72</sup> and 56.5 percent of those occurred within two years of the survey.

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69. The other experiences reported were mediation (459 responses), summary by jury trial (20 responses), and others (7 responses).

70. As expected, given a lengthy survey with two sections and relatively few actual mini-trial experiences, more respondents (116) completed Part I on the attitudes toward the mini-trial than completed Part II on actual experiences (62).

71. Attorneys with mini-trial experience indicated the following additional dispute resolution experiences:

TYPE OF ADR	NUMBER OF OTHER EXPERIENCES
Binding Arbitration	57
Mediation	50
Summary Jury Trials	8
Nonbinding Arbitration	21

72. Mini-Trial experience was distributed as follows:

NUMBER OF MINI-TRIAL EXPERIENCES	PERCENT
1	51.6
2	29.0
> 3	19.4

The majority of attorneys responding to the survey embraced the mini-trial as a technique appropriate for dispute resolution in a variety of situations. But when considering the needs of their clients, most were unwilling to recommend the technique across the board. While 22.7 percent would recommend the technique in "all" or "most" cases, for example, the other 77.3 percent would recommend mini-trials only in "some" cases. This result casts doubt on conventional wisdom.<sup>73</sup> The majority indicated that contracts should not require mini-trials before litigation.<sup>74</sup>

## 2. *Participants and Nature of the Dispute*

Of those participating in the survey, 93.5 percent were attorneys for the parties, usually for contractors or owners.<sup>75</sup> Contrary to earlier predictions in the literature, while a majority of mini-trials involved only two parties, nearly half involved three or more parties.<sup>76</sup> Of the total number of mini-trials, 75.8 percent were initiated upon agreement by the parties; the mini-trial was required by contract in only 4.8 percent of the cases and by court order in 19.4 percent of the cases. A lawsuit or arbitration demand usually was filed prior to undertaking the mini-trial, a sequence of events that occurred in 90.3 percent of the cases. The result is consistent with the literature suggesting that the mini-trial is a dispute-resolution technique and not a dispute-prevention technique. Generally, the disputes centered more on construction changes, project delays, and payment, and less on jobsite administration and personal

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73. See *Growth of the Mini-Trial*, *supra* note 2, at 17 (suggesting that attorneys "should at least consider a mini-trial in every case").

74. Those respondents favoring provisions in standardized construction contracts requiring mini-trial before litigation comprised 31.6% of the sample. When large sums of money were involved, however, the percentage of respondents favoring mini-trial provisions in construction contracts increased to 42.1%. The views on whether standardized contracts should require mini-trials before arbitration or litigation did not depend on outcome (i.e., settlement or no settlement) ( $p > .538$ ), amount in controversy ( $p > .114$ ), or the number of parties involved ( $p > .354$ ). Following standard research conventions and using the chi-squared test, a  $p$  value less than .05 indicates that the specific relationship probably did not occur by chance. Conversely a  $p$  value greater than .05 indicates that chance explains the relationship as well as the underlying hypothesis. For this Article, all reported probabilities relate to the chi-squared test.

75. Thirty-five of the 62 respondents (62.5%) represented contractors; 15 (26.8%) represented owners; and 12 (10.7%) represented insurers, sureties, and other parties.

76. According to the respondents, two parties participated in the mini-trial in 54.8% of the cases, while mini-trials with five or more parties were reported in 19.4% of the cases.

injury.<sup>77</sup> The average mini-trial lasted five days.<sup>78</sup>

### 3. Amount in Controversy

The reported amount in controversy for the mini-trials ranged from \$10,000 to \$66 million;<sup>79</sup> the mean amount in controversy was \$9,542,016. The median amount in controversy was \$3 million. Although these amounts appear extraordinarily high, particularly when compared to the amounts in controversy in other dispute resolution techniques, these figures roughly parallel the amounts reported in other studies.<sup>80</sup> Despite the high amount in controversy average, the average mini-trial direct costs were only \$25,168.<sup>81</sup>

### 4. Mini-Trial Procedures

Procedures developed by the parties, themselves, governed the process and implementation of most of the mini-trials. In thirty-eight of the sixty-two experiences (61.3%), the parties developed their own procedures for the mini-trial process. Rules of the court were used in fifteen of the experiences (24.2%). The remainder used CPR rules (4.8%), or AAA mediation and mini-trial rules (3.2 percent each).

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77. Typical problems the mini-trial attempted to resolve were the following:

TYPE OF PROBLEM	PERCENT OF MINI-TRIAL ADDRESSING
Construction changes	62.9
Project delays	61.3
Defective work	58.1
Payment	46.8
Jobsite administration	29.0
Differing site conditions	24.2
Other (accounting, indemnity)	4.8
Personal injury	1.6

78. However, supporting the general view espoused in the literature, the median length of mini-trial proceedings was two days. Nearly 25% took longer than six days. *See e.g.*, Billings, *supra* note 4, at 418 (commenting on a case in which the two parties ostensibly agreed to a five-day mini-trial proceeding); Davis & Omlie, *supra* note 2, at 547 (describing procedure in which mini-trial will last for two days); Kratz, *supra* note 4, at 852 (stating that mini-trials usually last one or two days).

79. Nearly 25% of the reported mini-trial experiences involved amounts greater than \$10 million.

80. For example, one summary of 20 construction mini-trials found that in 12 cases, the claims ranged from \$120,000 to \$66 million and averaged slightly more than \$12 million. Siedel, *supra* note 31, at 359. By 1987, the U.S. Army Corps of Engineers had been involved in five mini-trials; the amounts in controversy for these mini-trials were as follows: \$630,570; \$55.6 million; \$764,783.12; \$515,123; and \$103 million. Crowell et al., *supra* note 16, at 560.

81. Respondents indicated that direct costs ranged from zero to \$250,000, with a median direct cost of \$10,000. Twenty-five percent of the mini-trials cost more than \$25,000.

Discovery was considered appropriate in most cases before the mini-trial: Just less than one-fourth of the respondents (23%) would recommend discovery in all cases before the mini-trial, and just less than one-half (49.2%) would recommend discovery in most cases. Full discovery was frequently allowed,<sup>82</sup> and discovery was considered generally helpful by most (92.5%) of the parties.

### 5. Advisors or Neutrals

Independent organizations or the parties themselves often selected the advisors for the mini-trials. Independent organizations provided the advisors in 21 percent of the cases, and advisors were selected by agreement among the parties in another 21 percent of the cases. However, in 40.3 percent of the experiences, advisors were selected according to other methods.

Typically, advisors were attorneys or retired judges.<sup>83</sup> Slightly more than ten percent of the time, no advisor was present at the mini-trial.<sup>84</sup> Almost all of the respondents (88.7%) indicated that advisors should be allowed to convey their opinions during the process. In the vast majority (88.9%) of the cases, advisors were, in fact, permitted to express their views of the factual and legal issues to the participants. A variety of methods were

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#### 82. The extent of discovery varied:

EXTENT OF DISCOVERY	PERCENT
Full Discovery	45.2
Document Discovery	33.9
No Discovery	14.5
Depositions	6.5

#### 83. The respondents reported:

ADVISOR'S BACKGROUND	PERCENT
Attorney	54.1
Retired judge	23.0
Contractor	4.8
Design professional	3.2
Professor	1.6
Lay juror	3.2

These results correspond closely to those reported by Siedel, *supra* note 31, at 358 (noting that in 8 of 20 construction mini-trials, retired judges served as neutrals). The last category, lay jurors, is difficult to explain in a mini-trial setting. One potential explanation is that respondents confused a summary jury trial with a mini-trial. Another possibility is that a lay jury was used in place of an advisor to provide an assessment of potential adjudicated outcomes if the management teams in the mini-trial were unsuccessful in settlement discussions.

84. In 12.9% of the cases, no advisor was present; in 71%, only one advisor was present.



used to acquaint advisors with the disputes at issue.<sup>85</sup> No one method dominated the results.

### 6. Subjective Results on Mini-Trial Success

The majority of respondents completing the survey considered the mini-trial experience a success, indicating that the mini-trial led to a “good” or “excellent” result. A significant percentage, however, indicated an unfavorable result from the mini-trial.<sup>86</sup> These views on the mini-trial did not differ significantly depending on the number of parties present in the mini-trial ( $p > .328$ ) or the amount in controversy ( $p > .331$ ).

### 7. Views on Settlement Outcomes

According to the construction bar completing the survey, the mini-trial was moderately successful in resolving disputes. The majority of mini-trials resulted in full settlement, although no settlement was reached in about one-third of the cases.<sup>87</sup> Overall, these settlement rates were somewhat lower than suggested by earlier commentators.<sup>88</sup> When a settlement occurred, a monetary arrangement was the most common outcome. For example, a monetary settlement occurred in 64.5 percent of the cases, an agreement to perform certain work resulted in 4.8 percent of the cases, and employment of

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85. In most of the mini-trials, the parties used the following to acquaint the advisors with the problems at issue:

METHOD	PERCENT
Oral presentation during the mini-trial	87.1
Written memorandum by each party	58.1
Informal joint discussions	35.5
Caucuses	19.7

86. The ABA members completing this section expressed the following views on the mini-trial results:

MINI-TRIAL RESULT	PERCENT
Excellent	33.9
Good	27.4
Fair	24.2
Poor	14.5

87. The results of the mini-trials were as follows:

FINAL RESULT	PERCENT
Settlement	53.2
No Settlement	33.9
Partial Settlement	12.9

See also Crowell & Pou, *supra* note 16, at 207 (“Of the eleven cases that have been ‘mini-tried’ by the government, all but one settled.”).

88. See ABA MINI-TRIAL EVALUATION, *supra* note 35, at 45-46.

third parties to complete the work occurred in 3.2 percent of the cases. In cases in which no settlement occurred, 88.9 percent of the respondents cited an unwillingness to compromise. Only two mini-trial participants identified as significant problems the lack of involvement by third parties or the inability to address key issues.

Interestingly, the parties' subjective evaluation of the mini-trial process (i.e., a respondent's attitude on the overall mini-trial "result") was not significantly related to the outcome in their mini-trial (i.e., settlement or no settlement) ( $p > .656$ ). Although this finding is tentative in light of the relatively small number of cases in the analysis, it supports a widely held view that the mini-trial process itself, aside from the final outcome, may be a sufficient reason to undertake the technique. On this, an early study concluded: "Even when a mini-trial does not aid settlement of a dispute, the money may be well-spent."<sup>89</sup> This result also suggests, as many have in other settings, that the parties base their evaluations on the overall mini-trial process rather than on the end result. If the parties were only interested in final results, the outcomes and evaluations would be closely related. In practice, however, they were not.

*C. A View from the Trenches: What Actual  
Mini-Trial Experiences Suggest About  
Optimal Mini-Trial Conditions*

Along with various descriptive characteristics of the mini-trial, the survey sought insights and information on the circumstances in which the mini-trial would be appropriate or inappropriate.<sup>90</sup> For example, the respondents were asked to respond to the following statement: "Proposing to an opponent that disputes be submitted to mini-trial is likely to be interpreted as a sign of weakness." The respondents had the following options: strongly agree, agree, disagree, strongly disagree. Other questions followed a similar format. This section describes the results—first in the aggregate and then disaggregated by extent of mini-trial experience (a key variable in understanding the success or lack of success of various ADR methods).

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89. Barr, *supra* note 24, at 141.

90. Identification of "optimum" mini-trial conditions can be accomplished in several ways. For example, respondents could be asked to identify, based on their experience, those types of disputes that seemed more appropriate for mini-trial resolution. This was the approach followed in this Article. To go beyond this analysis, views on the appropriateness of the mini-trial were examined in relation to other variables. For example, the appropriateness of the mini-trial for disputes that turn on novel questions of law could be expected to differ according to the amount in controversy. Table 1 includes only those respondents with mini-trial experiences.

*1. Aggregate Views*

A rank ordering of situations in which the mini-trial is considered “highly appropriate” or “appropriate” is presented in Table 1. According to respondents with mini-trial experience, mini-trial is appropriate or highly appropriate under most conditions and situations. The survey results suggest that the mini-trial is appropriate when the parties lack an objective viewpoint, when negotiations are at an impasse, or when the parties seek an ongoing relationship. Contrary to earlier conclusions, the vast majority of respondents indicated that mini-trials also are appropriate when three or more parties are involved, when varied counterclaims are at issue, and when complex technical issues are involved.

TABLE 1:  
MINI-TRIAL SITUATION BY PERCENTAGE OF RESPONDENTS FAVORING ITS USE

POTENTIAL SITUATION	PERCENT INDICATING MINI-TRIAL “APPROPRIATE” OR “HIGHLY APPROPRIATE”
Where parties lack an objective viewpoint	90.3
Unassisted negotiations at an impasse	90.0
Parties seek ongoing relationship	88.3
Parties seek privacy and confidentiality	87.1
Complex, technical issues involved	86.9
Client seeks economical solution	86.9
Client pressing claims	86.4
Frivolous claim involved	86.0
Discovery completed and case ready for trial	85.5
Dispute involves three or more parties	85.2
Client seeks quick resolution of dispute	83.3
Strong emotions and impaired communication	82.3
Client defending claims	81.7
Varied claims, counter and cross claims	77.4
Credibility of witnesses at issue	47.5
No discovery has occurred	35.6
Reason to suspect untrustworthy opponent	35.5
Dispute turns on novel question of law	29.8
Client seeks administrative personnel change	20.4

. In only five situations would the majority of respondents not recommend the mini-trial as appropriate: (1) when a party seeks an administrative personnel change, (2) when the dispute turns on a novel question of law, (3) when an untrustworthy opponent is involved, (4) when no discovery has occurred, and (5) when witness credibility is an issue.

The situation identified by the respondents as least appropriate for using the mini-trial is when the client seeks administrative personnel changes. Such a result might be explained by considering that with the top management required for the mini-trial, the mini-trial is less useful for hammering out small details or small disputes and far more appropriate for sorting out and settling the underlying issues of responsibility or liability.

Views on the mini-trial's success in disputes involving witness credibility were less clear. For example, about half of the respondents indicated that mini-trials are appropriate when witness credibility is the major issue in dispute.<sup>91</sup> Even with the diversity of experiences described here, the results suggest mini-trial experiences vary considerably when novel questions of law are involved.<sup>92</sup> That no clear pattern exists on this issue contradicts those who suggest the technique works well in a few circumstances.

## 2. *Effect of Experience*

The circumstances under which the mini-trial is considered appropriate differ significantly according to the extent of mini-trial experiences of the attorneys completing the survey as shown in Table 2.<sup>93</sup> Generally, the pattern remains consistent for those respondents with mini-trial experience. For instance, the mini-trial is considered "appropriate" or "highly appropriate" when the parties lack an objective viewpoint, when confidentiality is important, and when unassisted negotiations are at an impasse.<sup>94</sup>

The crux of the matter is that those respondents with significant mini-trial experience view the technique as well-adapted to almost any potential dispute. Unlike the aggregate view of the mini-trial's appropriate uses shown in Table 1, respondents with mini-trial experience generally indicate only one instance in which the mini-trial is fundamentally inappropriate: when the client seeks administrative personnel changes.

The impact of mini-trial experience surfaces in a second way in Table 2. Those respondents with one mini-trial experience (compared to those with

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91. See Table 2, *infra*.

92. See Table 2, *infra*.

93. Table 2 includes respondents who completed the "attitudes" section of the survey, but omitted the "actual experiences" section. Even those with no mini-trial experience are represented in the results of Table 2. Missing data will cause slight variations in the results.

94. See discussion *infra* part II. D for a discussion on the appropriateness of a mini-trial in specific dispute situations.

no mini-trial experience) were often less positive, although still generally enthusiastic, in identifying certain circumstances as being appropriate for the mini-trial. This result occurred in seven situations: (1) when parties lack an objective viewpoint, (2) when unassisted negotiations are at an impasse, (3) when parties seek privacy, (4) when clients seek quick resolution of issues, (5), when witness credibility is at issue, (6) when no discovery has occurred, and (7) when clients are defending claims. For these same categories, however, respondents with two or more mini-trial experiences were considerably more enthusiastic about the use of a mini-trial.

TABLE 2: MINI-TRIAL SITUATION, BY PERCENTAGE OF RESPONDENTS FAVORING ITS USE, BY EXTENT OF MINI-TRIAL EXPERIENCE

POTENTIAL SITUATION	PERCENT INDICATING MINI-TRIAL "APPROPRIATE" OR "HIGHLY APPROPRIATE"		
	Extent of Mini-Trial Experience		
	None (n=337)	1 (n=73)	> 2 (n=36)
Where parties lack an objective viewpoint	89.1	88.2	92.3
Unassisted negotiations at an impasse	90.3	87.5	94.9
Parties seek ongoing relationship	89.0	91.7	86.1
Parties seek privacy and confidentiality	87.5	84.5	94.9
Complex, technical issues	75.6	83.6	87.1
Client seeks economical solution	83.8	77.0	89.7
Client pressing claims	82.1	86.8	91.9
Frivolous claim involved	66.4	76.0	86.1
Discovery completed and case ready for trial	78.8	82.2	86.8
Dispute involves three or more parties	73.2	78.2	94.9
Client seeks quick resolution of dispute	84.1	81.7	89.5
Strong emotions and impaired communication	74.1	78.9	84.2
Client defending claims	83.6	82.6	89.2
Varied claims, counter and cross claims	72.7	77.5	89.4
Credibility of witnesses at issue	56.3	52.7	68.5
No discovery has occurred	37.4	30.8	47.3
Reason to suspect untrustworthy opponent	36.7	47.2	48.6
Dispute turns on novel question of law	19.7	31.8	43.2
Client seeks administrative personnel change	22.9	37.9	16.6

An explanation for this might be that the first mini-trial is difficult to assess for the parties, with the participants feeling tentative about the overall dispute outcomes and results. For many, conceivably, the first mini-trial may be more a blur than a bad experience, or, conversely, the first experience may only highlight the marginal successes in a few specific areas. Given some reflection on the mini-trial process, combined with further mini-trial experience, the more experienced respondents might consider the mini-trial to be more appropriate to a wide range of conditions than the respondents with no experience. The results suggest that appreciating the value of the mini-trial procedure takes time. With time, the participants' perception of the technique's applicability to various situations expands.

#### *D. Appropriateness of the Mini-Trial in Specific Dispute Situations*

In this Section, some of the issues identified broadly above are highlighted individually, with reference to the literature discussed earlier. A key question is whether the mini-trial is more effective in some situations than in others, especially when one considers the number of parties involved in the dispute or the amount in controversy. Overall, those respondents with mini-trial experience indicate that the technique is appropriate under most circumstances and in only a few cases does it appear entirely inappropriate.

##### *1. Amount in Controversy.*

The amount in controversy was not related to the final outcome of the mini-trial process ( $p > .267$ ). For example, the small cases (using amount in controversy as a measure) were just as likely to achieve a full settlement or no settlement as were the large cases.<sup>95</sup>

##### *2. Number of Parties*

Contrary to expectations, the construction bar almost uniformly supported using mini-trials in disputes involving three or more parties. Fifty-two out of sixty-one (85.2%) indicated that the mini-trial was appropriate or highly appropriate under these circumstances. Those respondents supporting mini-trial application in disputes with several parties were also impressed with overall mini-trial results. Of those respondents indicating that the mini-trial

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95. This conclusion is drawn from the following:

TYPE OF SETTLEMENT	< \$300K	> \$300K
Full	18	15
Partial	2	6
None	12	9

was appropriate for disputes involving three or more parties, more than one-half (54.1%) indicated that the overall results of the mini-trial were excellent or good. However, the result was not statistically significant ( $p > .412$ ). Whether the amounts in controversy were large or small, the results were consistent: the number of parties involved in the mini-trial affected its success very little.<sup>96</sup>

On this issue, however, attitudes about the mini-trial did not equal results. The appropriateness of the mini-trial for disputes with three or more parties did not depend on the amount in controversy ( $p > .263$ ). Expensive cases involving numerous parties and inexpensive cases involving few parties were considered equally suitable for mini-trials. However, the greater the number of parties involved the fewer the number of full mini-trial settlements.<sup>97</sup> Thus, while the respondents subjectively viewed the mini-trial as appropriate in cases involving several parties, the actual outcomes in the mini-trials were less favorable in these cases. The level of experience also affected the respondents' views on the success of mini-trials in which several parties are involved. For example, almost all of the respondents (94.9%) with two or more mini-trial experiences indicated that when three or more parties are involved, the mini-trial is appropriate or highly appropriate.

3. *Questions of Law or Fact*

Reflecting the views expressed in the ADR literature, the survey results demonstrate that mini-trial participants indicate only moderate agreement on whether the mini-trial works well for novel questions of law. Here the results were somewhat mixed: 64.5 percent indicated that the mini-trial was inappropriate for resolving novel questions of law; however, a few (8.8%) thought the mini-trial was highly appropriate for novel questions of law. Those respondents who settled their cases were no more likely to view the mini-trial as appropriate for novel questions of law than those who did not ( $p > .082$ ). Furthermore, whether the mini-trial was appropriate for novel questions of law was unaffected by the amount in controversy ( $p > .302$ ) or number of parties involved ( $p > .989$ ).

96. In the "Results" section, the respondents indicated the degree to which they were satisfied with mini-trial. The "Outcome" section recorded the proportion of mini-trials resulting in settlement, partial settlement, and no settlement.

97. The inverse relationship between these variables was statistically significant ( $p < .003$ ):

NUMBER OF PARTIES	FULL SETTLEMENT	PARTIAL SETTLEMENT	NO SETTLEMENT
0 - 2	26	2	6
> 3	7	6	15

In accord with the current legal literature, the overwhelming majority of respondents with no mini-trial experience indicated that novel questions of law were “inappropriate” or “highly inappropriate” situations for the mini-trial.<sup>98</sup> However, contrary to the literature on the subject, 43.2 percent of respondents with mini-trial experience indicated that the mini-trial was appropriate or highly appropriate for novel questions of law.

#### 4. *Witness Credibility*

The results produce no clear consensus on whether witness credibility is a suitable topic for mini-trial. For instance, while 46.8 percent favored the mini-trial to resolve disputes centering on witness credibility, 51.6 percent indicated that the mini-trial was entirely inappropriate for this use. In fact, the lack of consensus on this subject arose regardless of the amount in controversy or number of parties involved ( $p > .223$ ). Amount in controversy was not related to the success of the mini-trial in settling disputes over witness credibility ( $p > .820$ ). In other words, the attorneys who were questioned thought the mini-trial was moderately appropriate for resolving witness credibility questions in disputes involving large or small monetary amounts. Those with considerable mini-trial experience were more favorable of the mini-trial in witness credibility disputes than were respondents without mini-trial experience.<sup>99</sup>

#### 5. *Revelation of Trial Strategy*

Judging from the responses, the mini-trial was not considered unattractive because of the possibility that it might reveal future trial strategy. On this issue, the empirical results are clear. Forty-five of sixty-two (72.6%) indicated that potential revelation of trial strategy was not a disadvantage of the mini-trial. The majority of respondents felt that the mini-trial did not reveal trial strategy to the detriment of the parties, regardless of the number of parties involved ( $p > .184$ ) or the amount in controversy ( $p > .066$ ).<sup>100</sup>

#### 6. *Ongoing Corporate Relationships*

By far, most of the respondents indicated that the mini-trial was “highly appropriate” or “appropriate” for disputes where it was important to

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98. Only 19.7% indicated the mini-trial would be appropriate or highly appropriate for novel questions of law. See *supra* Table 2.

99. See *supra* Table 2.

100. However, although the result was not statistically significant, when smaller monetary amounts were involved (i.e., < \$300,000), nearly twice as many respondents thought revelation of trial strategy was a problem.



maintain a business relationship.<sup>101</sup> Although this result was not related to the number of parties involved ( $p > .327$ ), it differed significantly by the amount in controversy ( $p < .032$ ). As could be anticipated, the mini-trial was considered highly appropriate to maintaining ongoing relationships when large monetary amounts were at stake.

Interestingly, respondents with the most mini-trial experience viewed the mini-trial as less appropriate for maintaining ongoing business relationships than did the respondents with little or no mini-trial experience.<sup>102</sup> It may be that experienced mini-trial participants have learned that, although the mini-trial works reasonably well to preserve ongoing business relationships, the technique is not without limitation in this respect. Alternatively, experienced mini-trial participants may have been exposed to so many varied situations that they appreciate the difficulty of maintaining relationships at all costs.

### *7. Technical Disputes*

According to the survey, the mini-trial seems well suited for disputes involving complex technical issues. For example, only 13.1 percent indicated that the mini-trial was inappropriate for complex technical issues. This result was consistent regardless of the amount in controversy or the number of parties involved; no significant relationship was identified between the appropriateness of the mini-trial in technical disputes and either the amount in controversy ( $p > .481$ ) or the number of parties ( $p > .839$ ).

### *8. Other Situations*

When parties offer to submit a dispute to mini-trial, few individuals with mini-trial experience interpret this act as a sign of weakness. The results are quite clear in this respect: 96.7 percent of those with mini-trial experience indicated that proposing a mini-trial was not a sign of weakness. Only the remaining two of sixty-two (3.3%) indicated that proposing a mini-trial was a sign of weakness. Moreover, those respondents who obtained settlements did not view the mini-trial as a sign of weakness any more than those who did not ( $p > .458$ ). Nor was the amount in controversy related significantly to the view that proposing a mini-trial was (or was not) a sign of weakness ( $p > .195$ ). Whether several or few parties were involved in the dispute, a mini-trial proposal was not identified as a sign of weakness ( $p > .404$ ).

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101. More than four-fifths (88.3%) of the respondents viewed this situation as highly appropriate for the mini-trial.

102. *See supra* Table 2.

Under several other circumstances, the respondents offered strong views on whether the mini-trial was an appropriate dispute resolution technique. Reflecting the views expressed in the ADR literature, those attorneys responding to the survey indicated only moderate agreement on whether the mini-trial works well for novel questions of law. Mini-trials seem well suited when clients desire privacy and confidentiality,<sup>103</sup> when unassisted negotiations remain at an impasse,<sup>104</sup> when clients wish to resolve the dispute quickly,<sup>105</sup> and when clients desire an economical process to resolve disputes.<sup>106</sup> The appropriateness of the mini-trial depends little on whether the client is defending or pressing claims.<sup>107</sup>

### CONCLUSION

Views of the mini-trial as portrayed in the literature generally do not square with the actual experiences of lawyers who have employed the technique. In fact, the literature is replete with descriptions of situations and circumstances in which the mini-trial is either practically unworkable or theoretically inappropriate. As shown by the ABA survey, however, attorneys using the mini-trial embrace its flexibility and routinely apply it to situations previously thought unsound. Few qualifications, practical or theoretical, were identified by those using the technique.

The results also indicate that the mini-trial is not as successful as many commentators earlier suggested. While some commentators estimated settlement rates in the ninety percent range, the results of the survey indicated actual settlement rates of about sixty percent. However, considering the wide range of circumstances in which the mini-trial is applied, a lower settlement rate might be expected. One explanation might be that attorneys are using the technique in areas in which, according to theory, it should not be used. From the survey, it is unclear whether the theoretical limitations ascribed to the mini-trial in the literature are too narrow or whether the breadth of application emphasized by practicing attorneys is too great.

Some of the implications of this research are critical not only for the mini-trial but for dispute resolution in general. According to the respondents in this survey, the mini-trial, although not entirely appropriate for novel questions of law, has some role to play in settling disputes of all types. For

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103. Of the respondents, 87.1% indicated that the mini-trial was appropriate.

104. The mini-trial was appropriate according to 90% of the respondents.

105. Quick resolution of disputes was indicated by 83.3% of the respondents as an advantage.

106. More than one-half (62.3%) of the respondents thought this use of the mini-trial was appropriate, and nearly one-fourth (24.6%) thought this use was highly appropriate.

107. The mini-trial was an appropriate dispute resolution arena for pressing claims, according to 86.4% of respondents. Similarly, 81.7% of the respondents indicated that the mini-trial was appropriate for defending claims.

instance, while nearly all participants seek full settlement in the course of a mini-trial, many seem to be satisfied with less than full settlement or even no settlement. Accordingly, even if the mini-trial does not result in full settlement when applied to a novel question of law, it might nevertheless have fulfilled its purpose by fleshing out the issues, reducing the number of contentious claims, and increasing client confidence.

The wide-ranging applicability documented here underscores the need to re-evaluate the appropriate role of the mini-trial in dispute resolution. Until its application is proven unworkable in specific situations, the attorney interested in employing ADR methods should assume the mini-trial is worth a close first look.<sup>108</sup> For the construction bar, even when the mini-trial provided less than optimal outcomes, including a failure to settle, the mini-trial process still was considered a success in almost every situation. Applying the bottom line has proven to be an effective dispute resolution technique.

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108. *See Growth of the Mini-Trial*, *supra* note 2, at 17 (suggesting consideration of a mini-trial in every case).