CHAPTER 9

The Use of Minitrials in Mineral Disputes

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Synopsis

§ 9.01. Introduction.

The litigation of mineral disputes frequently turns on the interpretation of contracts, leases, deeds, or agreements that are sometimes (a) ancient, (b) ambiguous, (c) arcane, or (d) all of the above. When the interpretation of these disputes are presented to a busy trial judge with little experience in mineral law, or worse, to a jury with no experience in the area, the results can be unpredictable.

The risks of litigating a complex commercial case are not unique to mineral law. Those risks are magnified, however, because the precedential impact of the interpretation of a particular contract, lease, deed, or agreement can be devastating in the mineral law area where the same form or provision may appear in thousands of instances. For example, the resolution of a relatively minor (in dollar terms) dispute between a natural gas producer and pipeline company can have a huge impact if the pipeline company has nearly identical contracts with all of its producers.

Despite the risks of litigation, good-faith disputes concerning the proper interpretation of contracts or other documents are bound to arise. A party wishing to resolve a dispute privately without the risk of creating adverse precedent has a variety of alternative dispute resolution techniques to consider. Mediation offers a non-binding, private method of facilitating settlement but does not offer any framework for discovery or the presentation of evidence. Commercial arbitration provides a means for a binding, private resolution of the dispute, but some parties fear that arbitrators are unwilling to decide legal issues definitively and will usually compromise the result instead.

One alternative dispute resolution technique that may be well-suited to mineral law disputes is the judicially-supervised minitrial. In this Chapter, the minitrial will be examined as an alternative dispute resolution technique with particular emphasis on its mechanics.

[1]--What is a Minitrial?

As used in this Chapter, a minitrial is a judicially-supervised, non-binding proceeding where counsel for parties in a pending dispute conduct limited discovery and then present a summary of their case before the judge and representatives of each party. That summary can include live testimony, summaries of testimony, exhibits, and whatever else is needed to convey the essence of the parties' positions in a summary fashion. After the summary presentations are completed, the judge gives his or her impressions of the relative strengths and weaknesses of the parties' positions and meets with them in an attempt to settle the case. If the case does not settle, discovery is completed and the case proceeds to trial.

[2]--Purpose of Minitrial.

The purpose of a minitrial is to reach a mutually tolerable business resolution of a dispute without creating judicial precedent and without incurring the full costs of a trial. The minitrial is particularly effective in commercial disputes typically found in the mineral law area where legal issues (as opposed to credibility or

emotional issues) predominate. The rationale behind the concept is that, where two parties have a good-faith dispute as to the interpretation of a contract, settlement may not be possible until each party gains an understanding of the other's position and a preview as to how their respective cases would appear at trial and be viewed by an impartial judge.

The minitrial format is not right for all disputes. Where factual or emotional issues predominate, at least one party is likely to insist on a jury trial. Likewise, if a client wants a definitive, judicial resolution of a contract issue, the minitrial is not appropriate. The minitrial is not designed to name an outright winner; it is designed to facilitate a business solution of a legal problem.

§ 9.02. Advantages and Disadvantages of Minitrials.

Like any dispute resolution technique, the minitrial has its peculiar advantages and disadvantages when compared to traditional litigation.

[1]--Advantages of Minitrial.

[a]--Savings of Legal Fees and Expenses.

The primary advantage of the minitrial is that it allows the parties to get a preview of their trial position, and a judge's reaction to that position, without incurring the costs of full-blown discovery and trial. When the minitrial results in settlement, the parties resolve their dispute faster and less expensively than if resolved in traditional litigation.

The two primary areas for savings of legal fees and expenses are discovery and trial. In the minitrial, discovery is greatly restricted. For example, depositions in a typical complex commercial case can drone on for days, with every conceivable question being asked (maybe more than once!). In preparation for a minitrial, however, the same deposition may be taken in a couple hours. If the minitrial does not result in a settlement, the parties can take more complete depositions. If the case does settle, however, the savings in deposition time alone can be substantial. Likewise, substantial savings in document review and production can be realized. In traditional litigation, the review and production of documents can be a painstaking and costly process. In the minitrial, however, the summary nature of the presentation requires the parties to concentrate on the key documents and issues only.

The length of the minitrial, as opposed to a traditional trial, also results in substantial savings of legal fees and expenses. Trying a complex commercial case necessarily requires a long trial as the parties must prove all of the elements of their case while, at the same time, educating the jury and judge about the facts peculiar to that case. In a mineral dispute involving natural gas production, the parties might take several days of trial time educating the jury and judge as to how gas is produced, transported, and sold. In a minitrial, where the judge will likely only allow each party one day to present its case, this background information will be imparted quickly through summaries of testimony or demonstrative exhibits. Similarly, there is no need to go through lengthy testimony to establish the foundation for admitting exhibits or qualifying expert testimony. Obviously, if the minitrial results in settlement after two or three days of "trial" time instead of the weeks of a traditional trial (with the likely appeal to follow), the legal fee and expense savings can be significant.

[b]--Savings of Internal Time.

A hidden cost of litigation is the amount of time and effort expended by each party's employees in aiding the litigation effort. Especially in complex commercial cases, parties can expect to divert significant time and effort from their business compiling and reviewing documents (both for the case and in response to their opponent's requests) and in answering interrogatories and preparing for depositions. Parties almost always

under-estimate the internal time required by litigation. Because the minitrial is held after only limited and expedited discovery, resolution by minitrial can result in significant savings of internal time.

[c]--Maintenance of Cordial Business Relationship.

In many mineral law disputes, the opposing parties will continue to have an ongoing business relationship after the dispute is resolved. Protracted litigation tends to have an adverse impact on the relationship between opposing parties. What started as a business dispute hardens into a very personal battle that, when over, may have destroyed an otherwise profitable business relationship.

The minitrial can result in a much faster resolution of the dispute and, inasmuch as the minitrial can only be successfully concluded by a mutually acceptable settlement, both parties can walk away without losing. When this happens, it is more likely that the business relationship can be restored.

[d]--Private Resolution of Disputes.

The minitrial allows for private resolution of a dispute with the aid of the court as opposed to the public forum provided by the traditional litigation system.

Civil actions in the traditional litigation system are public affairs. At a minimum, the pleadings, motions, court orders, and trial are open to the public. The public's right of access to the judicial system has been dramatically broadened in the last 20 years and courts are under increasing pressure to open to public scrutiny all pretrial proceedings and even discovery. The risk of a public resolution of a mineral law dispute is that the court's decision will create precedent for similar cases. Even the court's pretrial rulings can create precedent. Thus, the public nature of the action can cause similarly situated parties to bring their own suits.

At least one federal court has held that a judicially supervised minitrial -- although conducted by a judge in a public courtroom -- may be closed to the public because it is more like a settlement conference (traditionally closed to the public) than a trial. In *Cincinnati Gas & Electric v. General Electric Co.*,[(2)] the parties were ordered by the court to participate in a "summary jury trial," which the order required be closed to the public. The media objected to the closed proceedings. On appeal, the Sixth Circuit upheld the closure order, stating that "settlement techniques have historically been closed to the press and public."[(3)] Because the summary jury trial did not seek the *adjudication* of any issue, there was no right of public access. The only difference between the minitrial described in this Chapter and the summary jury trial described in *Cincinnati Gas & Electric* is that, in the minitrial, the judge, not a jury, renders the advisory verdict.

To maximize the private nature of minitrial proceedings, the parties can take several steps. First, the parties should seek a protective order for all discovery materials to the extent allowed by the law in that jurisdiction. Both counsel and the parties should note the strong trend in favor of public access to civil records and proceedings.[(4)] Several states have made it more difficult to obtain protective orders or, if obtained, to keep documents sealed after the case is over.[(5)]

Second, the parties should limit discovery as much as possible because protective orders are not always as protective as the parties wish. The informal sharing of information, as opposed to formal interrogatories and document requests, assures the parties' privacy even in jurisdictions that make discovery open to the public.

Third, the parties should consider not using a court reporter for the minitrial. If the court's regular court reporter transcribes the proceedings, there is a stronger argument that a public judicial record has been created. Inasmuch as the utility of a transcript of the summary presentation in a subsequent trial is doubtful anyway, the parties should consider not using a court reporter. If the parties insist on having a transcript, they should ask permission to use a private reporting service.

Fourth, if a settlement is reached, the parties should not ask the court to approve the settlement. Although settlements are considered private, they become public if the parties seek court approval. In *Bank of America v. Hotel Rittenhouse Association*,[(6)] a contractor moved to unseal settlement documents from litigation involving a bank and a project developer. Based on the common law right of access to judicial records (rather than the First Amendment), the contractor argued that the public had a right to see what the court had approved. The Third Circuit agreed, noting that the settlement likely would have remained confidential had the parties simply settled and filed a voluntary dismissal under the Federal Rules of Civil Procedure. The Third Circuit held that the interest in promoting settlements did not override the public's right of access:

Having undertaken to utilize the judicial process to interpret the settlement and to enforce it, the parties are no longer entitled to invoke the confidentiality ordinarily accorded settlement agreements. Once a settlement is filed in the district court, it becomes a judicial record, and subject to the access accorded to such records.[(7)]

[2]--Disadvantages of Minitrial.

The primary disadvantage of a minitrial is that it is non-binding. Although less costly than a traditional trial, the minitrial is likely to be more costly and time consuming than mediation. If the minitrial does not result in a settlement, the parties have to resolve their dispute in the traditional system with full discovery, trial, and appeals.

When the minitrial does not result in settlement, the parties must realize that they have tipped their hands by giving their adversary a preview of their case. The opposing party has heard the legal argument, seen key exhibits, and heard and assessed the witnesses. Of course, each party is in the same position if their summary presentations were equally open. Each party must make an informed decision at the outset as to how much of their case should be previewed at the minitrial and how much should be held back should the minitrial not result in settlement.

The use of minitrials is not appropriate where the parties seek to create judicial precedent or where the outcome of the case is dependent upon the jury's reaction to a factual dispute. In these situations, there is no substitute for the jury's assessment of the witnesses' credibility.

[3]--Minitrials Compared to Other Alternative Dispute

Resolution Techniques.

The minitrial also has its own peculiar advantages and disadvantages when compared to other forms of alternative dispute resolution.

Unlike arbitration,[(8)] the minitrial keeps the parties' dispute in the judicial system. Whereas arbitration results in a binding resolution of specific claims by an arbitrator or panel of arbitrators selected by agreement of the parties, the minitrial retains many of the facets of the traditional legal system. Most significantly, a party disappointed with the results of the minitrial will retain its right to have the entire dispute tried in the traditional court system. A party disappointed with the results of the arbitration will have very limited recourse to the courts.

Two frequent criticisms of the arbitration system may lead parties to try a minitrial. First, there is a common perception that arbitrators will usually "split the baby." When contract interpretation issues predominate, the parties may require a judge's perspective as to the most likely legal resolution rather than simply reaching a compromise award. Second, there is a perception that arbitration may not be any cheaper or faster than

traditional litigation.

Without a judge to rein in discovery, an arbitration can drift on aimlessly. The minitrial is designed to settle the case sooner and less expensively.

Mediation, like the minitrial, seeks to reach settlement of a dispute through the use of a neutral third party. In mediation, however, the third party is not a judge, the dispute usually has not yet been filed in court, and the presentations to the mediator are not as formal as the minitrial. The advantage of the minitrial is that, if the case does not settle, the time spent preparing the minitrial and taking discovery will not be lost. The case has already been filed, the pleadings closed and at least some discovery concluded. Thus, unlike mediation, the parties will have a head start on getting their dispute tried.

The minitrial also has an advantage in that the mediator is an active, sitting judge. The parties may more willingly accept the views of an active judge than of another mediator. Likewise, the minitrial's use of a trial format and a courtroom lends more credence to the process.

An alternative dispute resolution technique very similar to the judicially supervised minitrial is the summary jury trial.[(10)] Both are abbreviated trial presentations. However, as the name suggests, the summary jury trial is presented to a jury rather than to a judge alone. The summary jury trial is more appropriate in cases where credibility and emotional issues predominate.

§ 9.03. Minitrials Are Well-Suited to Resolve Mineral Disputes.

Because many mineral disputes involve predominately legal questions (often technical, difficult legal questions) and the parties may tend to fear what a judge or jury unfamiliar with the industry would do, mineral disputes are good candidates for minitrials. Also, because many mineral disputes are between parties with ongoing business relationships, the minitrial can help to minimize damage to the relationship.

Many types of potential mineral disputes are good candidates for resolution by minitrial, including:

(a) Disputes over oil, gas, or coal purchase agreements, requirement contracts, and output contracts;

(b) Antitrust claims, such as access to essential facilities, monopoly, boycotts, or tying arrangements;

(c) Disputes over transportation or storage of minerals; or

(d) Interpretation of leases or ownership disputes.

In many mineral disputes, the minitrial can be most effective in short-cutting costly discovery when the parties agree to share basic data regarding production or sales without the day-to-day involvements of counsel. Direct dissemination of information saves times and money and fosters the cooperative attitude necessary to resolve the dispute. Minitrials are also particularly well-suited to mineral disputes because these disputes frequently involve the interpretation of contracts or documents which may be commonly used in the industry. Settlement by minitrial allows the parties to obtain a judicial reading of the disputed provision without the risk of an adverse precedent.

Minitrials have been successfully used in the regulatory process as well. The Administrative Disputes Resolution Act of 1990[(11)] required all federal agencies to formulate policy for the use of alternative dispute resolution techniques in various regulatory proceedings. Shortly after the passage of the Act, a dispute arose concerning the Trans-Alaska Pipeline System and tariffs filed by the pipeline company. The State of Alaska and shippers contended that corrosion repair costs should not be included in the tariffs because those costs were the result of poor pipeline construction. Rather than engage in administrative proceedings that could

take years, the parties conducted a three-day minitrial before a retired federal judge and reached a settlement.[12]

§ 9.04. Mechanics of the Minitrial.

Many articles written on the use of alternative dispute resolution techniques focus on the theoretical benefits of using those techniques but do not specify how the techniques work. The efficacy of the minitrial depends on the rules and procedures for the minitrial being well-defined and adhered to from the outset.

The following framework is suggested for the conduct of a minitrial.

[1]--How to Start.

The first step is to commit to the minitrial process. This can occur either by agreement or by court order. Although the court certainly would seem to have the *power* to order the use of the minitrial as an alternative dispute resolution technique (as long as the parties retained their right to a traditional trial), the minitrial is less likely to work if the parties are dragged in against their will.

One federal case explored the question of whether the courts had the power to enforce an agreement to conduct a *binding* minitrial.[13] The parties orally had agreed to a five-day minitrial before a retired judge. The minitrial was limited to certain claims and had a ceiling on damages. When one party to the agreement sought to back out, the federal court held that an agreement to a minitrial was different than an agreement to arbitrate (which is enforceable under New York law without a writing).[14] The court also held that it would not assume that a party had waived its right to a jury trial or agreed to personal liability without a clear written agreement to that effect.[15]

Although this Chapter focuses on the judicially-supervised minitrial, the parties could also agree to conduct a minitrial supervised by a retired judge or a mediator. Just as parties can contractually agree, before a dispute arises, to arbitrate any disputes, contracting parties can also agree to a form of minitrial. If this agreement is contemplated, the parties should specify who will conduct the minitrial, how that person will be chosen, the format of the minitrial, limits on discovery, and time limits for each step of the procedure.

Whether the minitrial occurs by order or agreement, the process will work best if the parties work together to agree to the procedures for the minitrial.

[2]--When to Hold the Minitrial.

Because the primary purpose of the minitrial is to save litigation costs, the earlier the minitrial is conducted, the greater the savings. Yet, if the minitrial is held too early in the proceedings, the parties may not have sufficient information to make a meaningful presentation to the court or may suspect that critical information is being withheld.

On balance, some discovery will probably be necessary before the parties can make meaningful presentations. Especially in complex cases, where traditional litigation would require a great deal of discovery, allowing limited discovery gives the parties some assurance that the key facts and documents are known, thus allowing for a more meaningful presentation.

[3]--Discovery Before the Minitrial.

In order to realize the potential cost saving from the use of a minitrial, discovery must be limited and expedited. Either by agreement of the parties or by order of the court, the parties must be restricted in the

amount and type of discovery taken before the minitrial.

The most critical areas of litigation costs in commercial cases are interrogatories, document production, and depositions. For the minitrial to be most effective, the parties must agree or the court must mandate procedures to limit those costs. The following limitations should be considered.

Interrogatories. The numbers and type of interrogatories should be limited. In many jurisdictions, courts are limiting the number of interrogatories in all civil cases. That trend is a recognition of the fact that posing numerous interrogatories, which are likely to be answered by the adversary's counsel, results in attorneys' fees to both parties with little gain in terms of information.

In advance of the minitrial, the parties can agree to limit the interrogatories to a certain number and to certain topics. The most productive uses of interrogatories are to learn: (1) the identity of witnesses with knowledge of particular facts or claims; (2) the identity of expert witnesses, their credentials, and their opinions; (3) the types of damages claimed; and (4) the amount of damages and how the damages are calculated. If the parties cannot agree to these limitations, the court can simply order the exchange of this information and forbid further interrogatories before the minitrial.

Document Production. Any client who has suffered through the document review and production phase of a large commercial case knows all too well that the fees for document production can dwarf the fees incurred in the eventual trial of the dispute. Because of the broad scope of discovery permitted under the Federal Rules of Civil Procedure and in most other jurisdictions, document requests can be very broad. Naturally, one very broad document request begets a very broad document request from the opposing party. Then, both parties must go through the lengthy process of gathering the responsive documents, reviewing them for content and privilege, and producing them. In addition to the legal fees incurred, this process necessarily involves a great deal of time and disruption to the parties' business. In all too many cases, this expensive process does not yield results in proportion to the costs.

In advance of the minitrial, the parties must devise a way to exchange the most meaningful documents without incurring the costs of a full-blown document production. To some extent, the document production in a minitrial would be similar to that suggested in proposed changes to the federal discovery rules -- the parties would have to exchange all the documents that support their claims or defenses.[(16)]

Another way to speed up the exchange of information is to encourage the parties to exchange information informally. For example, in a case between the natural gas producer and a pipeline, the parties should be able to exchange information on production, prices, pressure readings, and similar matters without any involvement by counsel.

Depositions. The minitrial will be most effective as a cost-cutting device only if depositions are limited. On the other hand, some deposition testimony is necessary to assess the claims and prepare for the minitrial.

In advance of the minitrial, the parties should agree to some limits on depositions. Among the possible areas are limiting the number of depositions, limiting the length of depositions (*e.g.*, no more than four hours per deposition or no more than two days total for all depositions), or allowing informal interviews of less critical witnesses in place of depositions.

As important as limiting the amount of discovery is expediting the process. The time it takes to complete discovery is a critical factor in the total cost. It is an immutable law of legal physics that lawyers will expand discovery into the time allotted. The faster discovery closes and a trial is held, the less legal expense to the parties. This fact has been recognized in courts that adopt a "rocket docket" with a short discovery track and a quick trial date. For the minitrial, a "rocket-docket" approach is essential.

To get the parties to agree to limited and expedited discovery, the court has to leave open the possibility for further, non-duplicative discovery if the minitrial does not result in settlement. Even then, however, the minitrial process should have sufficiently narrowed the issues so as to minimize the further discovery costs.

[4]--Pretrial Offers of Proof, Trial Briefs, and Stipulations.

Before the minitrial begins, each party should be required to file a pretrial offer of proof and trial brief. For each issue in dispute, the parties should explain their respective positions as to contract interpretation, calculation of damages, and applicable law. The pretrial offers of proof and trial briefs are necessary to focus the issues and allow the judge to understand the presentations. Because the parties' positions are going to be presented in a matter of days rather than unfolding over several weeks, the judge must know the parties' factual and legal positions at the outset.

In some cases, the judge may order the plaintiff to submit its offer of proof even before discovery begins. In that way, the defendant can tailor its discovery to the specific issues and claims raised, rather than using discovery to define the plaintiff's case. In every case, the plaintiff should be required to set out its damage calculations with precision. The minitrial cannot achieve its goal of settlement if the plaintiff's damage claims are not clearly defined at the earliest possible time.

The parties should make a good faith effort to enter into a written stipulation of uncontested facts that the judge can study before the minitrial begins. Because discovery will have been restricted, it may be prudent to state that the stipulation is for purposes of the minitrial only and cannot be used in the full trial or in other cases. Beside stipulating to uncontested facts, the parties can most help the judge by stating the contested issues of fact and law.

[5]--Presenting the Case.

The actual minitrial closely follows the format of a regular civil trial, except that the parties' cases are presented in summary fashion. The minitrial is usually held in the courtroom with the judge presiding.

In a typical minitrial, each party is given an opportunity to make an opening statement of specified duration. The plaintiff will be given a specified time (*e.g.*, one day) to present its case. After the plaintiff has finished, the defendant will be given a like time period to present its case.

Summary presentations give the parties a chance to be creative. Each party has the option of presenting its case through oral argument, exhibits, live testimony, deposition testimony, or summaries of testimony. Everything should be tailored toward helping the judge to understand the issues in the quickest way. For example, in a case involving several contract interpretation issues, the presentation can be done for each issue by starting with the language of the contract provision followed by a summary of the evidence related to that issue.

Exhibits should be kept to a minimum. The best way to present exhibits is to give the judge a binder with the exhibits grouped by issue. Key provisions of lengthy contract documents should be tabbed to permit easy access. Likewise, critical portions of documents can be highlighted.

Demonstrative exhibits are essential in the minitrial because of the time constraints. A plaintiff can use charts to summarize the calculation of its damages by issue. The defendant can respond with its own charts showing how the resolution of certain issues would affect the damages calculations. If the case warrants the expense, the parties can use animations or simulations. In short, the minitrial allows counsel the chance to present exhibits the way they would in a civil trial if there were no rules of evidence. Naturally, the opposing party can still object to unfair exhibits and point out that those exhibits would not be admissible at

trial. That can be a factor for the judge to consider in determining how the case would likely be decided after a full trial.

Because of the time constraints, live testimony will usually be kept to a minimum. In most cases, the parties would probably want the judge to see and hear at least one party representative, especially if there are credibility disputes. It is also likely that the parties will want their experts to testify. In presenting live testimony, counsel will have to get right to the point. Any necessary introductory information (*e.g.*, the witness's title, how long in that position, educational background) should be simply stated to the judge by counsel. Likewise, counsel can inform the court as to the exact issues or points to which the witness is testifying.

Cross-examination of the live witnesses must be strictly curtailed or else a party can use up its adversary's allotted time through cross-examination. The cross-examination can be limited in time (*e.g.*, no more than 30 minutes) or can be tied to the length of the direct testimony (*e.g.*, no more than one-half of the length of direct).

One important consideration which must be addressed in advance is whether to use a court reporter and what use can be made of any transcripts in future proceedings. If the court's usual reporter is used, the parties may be unwittingly creating a public record. Even if the transcript is not a public record, it is probably best not to have a transcript or to agree that any transcript cannot be used in future proceedings. The goal of the minitrial is to settle the case, not to lay traps for use at trial. If there is a record available for use at trial, the witnesses may be inhibited and the parties too cautious to achieve the desired settlement.

After the summary presentations are complete, the parties can present closing arguments. The judge may decide that closing arguments are not necessary or the judge may wish to question counsel for both parties to clarify the parties' positions.

[6]--The Advisory Verdict and Settlement Negotiations − The

Role of the Judge and the Party Representatives.

After the summary presentations are concluded, the judge advises the parties of how the judge views the relative strengths and weaknesses of their positions. The judge then meets with the parties' representatives to explore settlement.

How the judge communicates the "advisory verdict" depends on the judge's and the parties' preferences. One option is for the judge to announce in open court an advisory verdict as to the likely outcome of each issue. The judge could then meet separately with the parties to discuss settlement. Another option would be to discuss the relative strengths and weaknesses of the parties' positions in separate conferences with each party.

The judge's role in the minitrial process is critical. Although the judge's most important role is to facilitate settlement, the judge cannot do this without demonstrating a thorough knowledge of the issues and the relevant law. The value of the advisory opinion is directly proportional to the parties' confidence that the judge knows the issues and the law. Thus, the judge must be a willing and active participant in the entire minitrial process, from expediting the discovery process, to reviewing the parties' offers of proof and trial briefs, to conducting the minitrial, and, finally, to conducting the settlement negotiations.

Just as critical is the role of the parties' representatives. The minitrial will only work if, from the outset, the parties agree that each will have a representative, with full settlement authority, who will sit through the entire minitrial and participate in the settlement negotiations. The party representatives need not be someone who has personal knowledge of the dispute. In most cases, it is probably preferable that the representatives

not have any personal involvement in the dispute to insure a more dispassionate, businesslike view of the case.

The real advantage of the minitrial is that it gives the parties' decision-makers the chance to see a preview of how the parties' cases look in a trial setting -- how the attorneys perform, how the witnesses look and sound, how the arguments play out -- and then get a judge's reaction to the case without the risk of adverse precedent, all at a fraction of the cost of a trial. To get the full benefit of this preview, the parties must bring to the minitrial a representative committed to the process.

§ 9.05. Further Proceedings if the Minitrial Does Not Result in Settlement.

If the minitrial does not result in settlement, the case proceeds with full discovery and trial.

Even if the minitrial does not result in a settlement immediately, it may lay the groundwork for a future settlement. At the very least, the minitrial should give each party a realistic assessment of the relative strengths and weaknesses of the case. Moreover, none of the work that went into the minitrial should be wasted -- the discovery, trial preparation, offer of proof, and witness preparation should all be useful in preparing for the full trial.

In advance of the minitrials, the parties should discuss with the judge whether, if the case does not settle, the eventual trial will be heard by a jury or another judge. Having sat through the minitrial and expressed opinions on the merits of the case, the judge may be reluctant to continue on the case, especially if the trial is to be non-jury. If the parties know in advance that the judge who hears the minitrial will not preside over a full trial, they may be more willing to participate fully in the minitrial. A middle ground would be to allow the judge who presided over the minitrial to continue for purposes of concluding discovery and pretrial conciliation, but to turn the case over to another judge for trial.

§ 9.06. Conclusion.

Judicially supervised minitrials are likely to be effective in only a small percentage of civil disputes. However, because those cases involve the highest costs of litigation and create a great burden on the judicial system, the minitrial concept can result in a significant saving of time and money for the courts and the parties.

1. * © 1993.

2. 1. Cincinnati Gas & Elec. Co. v. General Elec. Co., 854 F.2d 900 (6th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989).

3. 2. *Id.* at 903.

4. 3. *See generally* K.C. Abbott, "Can You Keep A Secret?," *Pract. Lawyer*, Vol. 36, No. 7, p. 14 (1990).

5. 4. *See* Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 790 (1st Cir. 1988) ("The point of [a] protective order was to promote a fair trial, not to guarantee [the defendant] perpetual secrecy.").

6. 5. Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Ass'n, 800 F.2d 339 (3d Cir. 1986).

7. 6. *Id.* at 345.

8. 7. For a discussion of arbitration proceedings, see D. Hardymon & M. Kuster, "An Overview of Commercial Arbitration," 14 *Eastern Min. L. Inst.* ch. 8 (1993), *supra*, this Volume -- *Ed.*

9. 8. The case against arbitration was forcefully stated by the Eighth Circuit in *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d

743, 751 n.12 (8th Cir. 1986), *cert. denied*, 476 U.S. 1141 (1986):

The present day penchant for arbitration may obscure for many parties who do not have the benefit of hindsight that the arbitration system is an inferior system of justice, structured without due process, rules of evidence, accountability of judgment and rules of law. The mere fact that arbitration is deemed highly successful in labor disputes overlooks the reason for its legitimacy: that it substitutes for labor's right to strike in a quid pro quo exchange with management. No one ever deemed arbitration successful in labor conflicts because of its superior brand of justice.

We write this response not to denigrate the use of arbitration in commercial transactions. We write only to prove notice that where arbitration is contemplated the courts are not equipped to provide the same judicial review given to structured judgments defined by procedural rules and legal principles. Parties should be aware that they get what they bargain for and that arbitration is far different from adjudication. Professor Owen Fiss provides the realism overlooked by many when he writes:

Adjudication is more likely to do justice than conversation, mediation, arbitration, settlement, rent-a-judge, mini-trials, community moots or any other contrivance of ADR, precisely because it vests the power of the state in officials who act as trustees for the public, who are highly visible, and who are committed to reason. What we need at the moment is not another assault on this form of public power, whether from the periphery or the center, or whether inspired by religion or politics, but a renewed appreciation of all that it promises. Fiss, Out of Eden, 94 Yale L.J. 1669, 1673 (1985).

10. 9. The mechanics and the rationale of the summary jury trial are fully discussed in *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 854 F.2d 900 (6th Cir. 1988) and in T.D. Lambros, "The Summary Jury Trial and Other Alternative Methods of Dispute Resolution, A Report to the Judicial Conference of the United States," 103 F.R.D. 461 (1984).

11. 1. Pub. L. No. 101-552, § 104 Stat. 2736 (1990) (codified at 5 U.S.C. §§ 556, 581 – 593; 9 U.S.C. § 10; 28 U.S.C. § 2672; 29 U.S.C. § 173; 31 U.S.C. § 3711; and 41 U.S.C. §§ 605, 607).

12. 2. FERC, in approving the settlement, praised the use of the minitrial process. *Re* Amerada Hess Pipeline Corp., 58 F.E.R.C. ¶ 61,173 (Feb. 19, 1992).

13. 1. See Lightwave Technologies, Inc. v. Corning Glass Works, 725 F. Supp. 198 (S.D. N.Y. 1989).

14. 2. *Id.* at 200.

15. 3. *Id.*

16. 3. The Civil Justice Reform Act of 1990, 28 U.S.C. § 471-482 (Supp. II 1990), commanded the formulation of plans for civil justice expense and delay reduction. The Judicial Conference Committee on Court Administration and Case Management, which has primary oversight responsibility for implementation of the Act, approved by voice vote proposed changes to Fed. R. Civ. P. 26. *See generally* Shartle, "Litigators Voice Numerous Objections to Proposed Discovery Rules Changes," *Inside Litig.* Vol. 6, No. 12. p. 1 (1992). For a discussion of the mechanics of the Judicial Improvements Act, *see* L.S. Mullenix, "The Counter-Reformation in Procedural Justice," 77 *Minn. L. Rev.* 375 (1992).