

# The Los Angeles Daily Journal

Established in 1888

76 Pages

Los Angeles, California 90054

Wednesday, April 9, 1986

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## 'Mini-Trials' Can Benefit Lawyer and Soon-to-Be Grateful Client Alike

Advertisements for "Beatlemania" describe it as "not the real thing, but an incredible simulation." Increasingly, litigators facing expensive trials are proposing *credible* simulations in the form of non-binding "mini-trials." The concept is that by presenting an abbreviated version of the trial to a hired "jury," a retired judge, or a panel of experts, the chances for settlement will increase dramatically.

Mini-trials, however, are not exactly de rigueur in business litigation. The biggest obstacle facing the popularity of the mini-trial is the litigator's tendency to fight, rather than compromise. "Streamlined Litigation," an excellent article by Denver lawyer David D. Leitch in the Summer 1984 issue of *Litigation*, advises a trial attorney to "be a problem-solver first and a litigator second." This advice is especially valid at the trial stage. In the last few months prior to trial, a lawyer's instinct is to fight. The client's interest are not well served by that instinct, however, if, where traditional efforts toward settlement have failed, avenues such as the mini-trial are ignored.

The vast majority of trial counsel have probably not only never participated in a mini-trial, they have also never given the idea any serious thought. That critical first step — simply thinking about the idea in more than a passing fashion — should be taken by all trial attorneys. Further, lawyers should make a practice of discussing the option with clients early in the life of a suit.

The second hurdle facing the popularity of

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### Business Litigation

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the mini-trial is the fear that the procedure will grandly display to an opponent a case's strengths, weaknesses, and strategies. The opponent, of course, will fumble through the abbreviated proceeding, only to resemble Clarence Darrow when it really counts, armed with a look at the opposition's case that could not have been obtained in 20 years of discovery. In this age of pretrial procedures and extensive discovery, however, this fear is rarely valid. Particularly in federal court, if counsel have followed the elaborate rules leading to trial, few surprises will follow.

A third objection to the mini-trial is cost. Shortly before trial, in-house counsel are probably less than happy about recent bills for trial preparation. The idea of spending time and money on a mini-trial — negotiating the ground rules, hiring the "jury" and, finally, holding the proceeding — may seem as sensible as retaining a psychic as a jury consultant. The costs, however, can be miniscule compared to what lies ahead in an otherwise unseizable case.

Final pretrial preparation, the trial itself, post-trial motions, the appeal, collecting on a judgment, and, of course, the inevitable uncertainty of success at every stage, all make the mini-trial stand out as a beacon of hope before a client plunges unto the deep waters of mammoth legal fees.

A final concern trial attorneys and in-

house counsel have about the mini-trial is whether it will substantially enhance the possibility of settlement. Although statistics are scarce on this issue, it is beyond dispute that the mini-trial serves as a catharsis.

In spite of the make-believe setting, clients feel they have had their long-awaited day in court. Strengths and weaknesses are exposed, and unrestricted questioning of jurors helps everyone predict the outcome of a real trial with data and impressions not otherwise available. Further, any lawyer or client who has been through a retrial is familiar with the negative emotions associated with preparing for and taking part in a second trial. To a lesser degree, the mini-trial causes its participants to think of the real thing as a needless rerun, to be avoided by means of settlement.

### Boosting Chance of Success

Perhaps the most powerful spur to settlement the mini-trial offers is that the process tends to convert the dispute into a business, as opposed to a legal matter. As a result, principals on each side are more intimately involved in the settlement process. This advantage is accentuated where, in addition to or in lieu of a hired jury, representatives of each side serve as an "arbitration" panel. Ensuing settlement negotiations, reflecting the involvement and expertise of those representatives, enjoy an increased chance of success.

Lawyers should not begrudge the more substantial role played by their clients in the mini-trial process and resulting settlement talks. Far from making attorneys less vital, by proposing and orchestrating the mini-trial option a corporation's outside counsel can rightfully claim credit for tapping an otherwise hidden settlement resource.

Even if a mini-trial does not produce a settlement, a trial lawyer who pays careful attention to reactions by mini-trial jurors, and who adjusts presentation of the case at the actual trial accordingly, may reap substantial benefits beyond those afforded by quick settlement.

### Advantage of Confidentiality

Another appealing aspect of the mini-trial is the fact that it can be confidential. Unlike court proceedings where, barring unusual orders by the judge, all proceedings are part of the public record, the mini-trial allows sensitive corporate information, and "dirty laundry," to remain private.

There is no consensus as to what types of lawsuits are best suited for mini-trials. Although large, complex cases are thought of as the ideal candidates, in fact a mini-trial should be considered in any case where settlement prospects would expose the principals to a rough idea of what a trial would involve.

The first step for a trial attorney interested in exploring the possibility of a mini-trial is to obtain the "CPR Legal Program Mini-Trial Workbook," a guide published in 1985 by the Center for Public Resources in New York City. The workbook provides case histories, discusses the types of cases for which mini-trials are appropriate, describes a step-by-step outline of a mini-trial, and provides forms of agreement.

The mini-trial is an idea whose time has come. It holds out the promise of settlement and economy, and poses few risks now that trial by ambush is largely a thing of the past. And, it gives litigators the chance to be problem-solvers in a way grateful clients are not likely to forget.