Alternative Dispute Resolution: Meeting the Legal Needs of the 1980s

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I. INTRODUCTION

American corporations are no longer tolerating the high costs of litigation, which include billings for outside counsel estimated at thirty-eight billion dollars nationwide. Moreover, the burden of protracted litigation impedes the regular conduct of business. These lawsuits often result in the dissolution of long-term, important business relationships. Years of delay in the courts and time-consuming discovery practices divert management time, drain company resources, and lead to lost market opportunities. Prolonged litigation involving a product in a highly technical field may make the product obsolete before its introduction into the market, even if such litigation is successful.

Corporations frequently face massive personal injury disputes that the courts are ill-equipped to handle. Toxic tort and environmental waste disputes present highly complex scientific, financial, and public problems that are not expeditiously, fairly, or effectively resolved by the "I win, you lose" litigation process. Plus, the costs of these lawsuits are prohibitive.

The compelling need for quicker, less expensive, and more effective means for managing and resolving disputes has changed corporate expectations regarding legal services. Recent attention to the expansion of corporate legal departments, dramatic reforms in the billing practices of major law firms, and increased interest in preventive practices all confirm that high legal costs will no longer be tolerated. As Walter P. Wristen, former Chief Executive Officer of Citibank, recently noted, "The ancient rules of economics will drive corporate users to find other avenues of dispute resolution."

More than 200 lawyers from major corporations and law firms have joined the Center for Public Resources (CPR) Legal Program to develop cost-effective methods to prevent, manage, and resolve disputes. These alternative dispute resolution practices have gone beyond conventional uses of negotiation, mediation, and arbitration. The practices incorporate new procedures with traditional business problem solving methods to yield better results than conventional dispute resolution techniques.

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II. THE CORPORATE MINI-TRIAL

One procedure, known as the corporate mini-trial, is an effective mix of adversary, mediation, and negotiation techniques that has successfully resolved many protracted corporate disputes in a matter of weeks. The mini-trial is a nonbinding settlement procedure structured to convert a legal dispute into a business problem. Lawyers make abbreviated presentations exposing the strengths and weaknesses of the case to business executives from both sides, rather than to a judge or jury. These summaries are often heard by a neutral advisor, who may be a retired judge or an authority on the technical issues in the case. The neutral advisor presides at the hearing and may offer suggestions and opinions. After the attorneys for each party present their case, the business executives meet in private to negotiate an agreement. This meeting frequently resembles a practical business deal rather than a legal settlement.

The procedure is effective because it educates business executives about each party's perceptions of the case. For the first time, they have the necessary information to make a clear assessment of the risks and costs of going to trial. With this information — and knowledge of their own objectives — executives are better equipped to negotiate a settlement.

The mini-trial has worked in a wide range of disputes, including a multi-million dollar contract case between Wisconsin Electric Power and American Can Company; a major construction problem at Control Data; an action brought by a key employee against Union Carbide; a six-sided construction dispute involving Standard Oil Company of Indiana; a major lawsuit against the Insurance Company of North America concerning a $10 million liability claim; a theft-of-trade secrets case brought by Gillette; a multi-million dollar, highly technical controversy involving performance standards in a NASA satellite system built by TRW for Space-Com; a 10-year contract dispute between Shell and Allied Corporation; and a $200 million antitrust breach of contract claim by Borden against Texaco. The mini-trial has proven to be a highly adaptable and flexible procedure. It can be tailored to suit a range of issues from the most complex and technical matters to simple breach of contract disputes involving small sums of money.

It is difficult to generalize about cases that lend themselves to a mini-trial because the utility of this relatively new process has not yet been fully explored. However, a few characteristics do emerge regarding the suitability of cases for a mini-trial. The first

characteristic is that both parties must genuinely desire early resolution of the dispute. They cannot intend later litigation as a tactic to further their objectives. Parties who have maintained and wish to continue an amicable business relationship are likely to use a mini-trial to avoid the time and expense of protracted litigation. Second, top management must be educated about the mini-trial process and understand their responsibilities in the process. Finally, cases involving mixed questions of law and fact are most successfully resolved with the mini-trial.

A. *The Borden-Texaco Mini-Trial*

The successful resolution of the Borden-Texaco dispute demonstrates the pragmatic advantages inherent in the corporate mini-trial. Borden's claim arose out of a natural gas contract in Louisiana. The company filed a complaint against Texaco in May 1980, in the Federal District Court for the Southern District of Ohio. The case was so complex that Texaco had produced 300,000 documents after completing only 30 percent of its discovery. Attorneys estimated that discovery would continue for years. The parties made a sincere effort to settle the dispute, but they attained no final agreement. After spending more than two years in litigation, attorneys attempted a mini-trial in 1982. The parties resolved their dispute in three weeks using a solution they had never considered during pre-litigation negotiations.

Attorneys for Texaco and Borden agreed to a mini-trial because there were benefits for both in a settlement. Both sides knew, however, that the intense emotional positions and the amount of money involved necessitated that business executives rather than attorneys settle the dispute. Texaco and Borden each suggested that executive vice presidents from their respective companies participate in the mini-trial. This recommendation indicated a willingness by each party to find a solution using the process.

The rules for the Borden-Texaco mini-trial were simple. First, each party would present its case to executive vice presidents from Borden and Texaco. Second, the arguments would be heard at a neutral location. Third, each company's attorney would have one hour, plus time for rebuttal, to make a presentation. The attorneys could present evidence, including live testimony. Fourth, the executives could have advisors other than lawyers. For example, senior operations and financial experts from the companies could be present to provide technical advice. No neutral advisor was used during the Borden-Texaco mini-trial, since the trial date was fast

approaching and the attorneys felt that it would take too long to educate a neutral about the facts of the case.

The three and a half hour mini-trial hearing went smoothly, though private discussions between Texaco and Borden executives lagged. The executives stubbornly upheld their respective positions. Despite their continuing conflicts, the parties remained in contact by phone, and within three weeks reached what both parties described as a "win-win" settlement. Under the terms of the Borden-Texaco agreement the companies renegotiated another gas supply contract. This contract had not been an issue in the original case. The parties also created a new arrangement for transporting Texaco gas to Borden facilities at prices favorable to Borden. The resulting contracts enabled both Borden and Texaco to claim victory. Resolving this dispute required specialized business knowledge and technical expertise that only the companies' business executives could provide — not a judge or outside counsel.

The ability of the Borden and Texaco lawyers to present strong, concise statements about the hazards of litigation was crucial to the mini-trial's success. Although the executives were convinced of their respective positions, the lawyers gave them important insights into the potential for negative results if the case proceeded to trial. By providing parties with a balanced view of the dispute, the mini-trial process forced the business executives to devise a creative solution that enhanced their business objectives.

B. *The Role of Neutrals in the Mini-Trial*

Neutral advisors contribute to the mini-trial's success. The neutral's reputation and expertise can greatly enhance the prospects for fast, efficient settlement. For example, the role of former federal judge Harold Tyler, Jr. in the complex American Can-Wisconsin Electric case, was vital to its resolution by a mini-trial. The imprimatur of a prominent neutral advisor helped to alleviate concerns of unfairness. At times Tyler told both sides what they had to hear, though it was not what they wanted to hear. In the negotiations following the mini-trial presentations, Tyler questioned the parties about various arguments and offered his opinion on how a court might rule if the case went to trial.

Neutral advisors can play a variety of roles in the mini-trial. They may be used to help approach an adversary about the advisability of the process; assist with designing the procedural rules; or resolve pre-mini-trial discovery disputes. The neutral may also act as an expert fact finder; moderate the oral information

exchange; ask clarifying questions during the proceeding; prepare minutes; issue a written or oral advisory opinion on the likely court outcome; or assess the strengths and weaknesses of the case for the business executives.

C. *Benefits of the Mini-Trial*

The success of the Borden-Texaco mini-trial is not unique. Proponents agree that the mini-trial can produce extraordinary benefits with a minimum investment of time and money. The costs of a mini-trial are estimated to be ten percent of ordinary litigation. The Borden-Texaco mini-trial, for example, produced substantial savings in legal fees.

The mini-trial can greatly reduce the time spent on a lawsuit. For instance, the mini-trial used to resolve Control Data's complex multi-party construction suit lasted five hours, and the disputants reached a settlement an hour and a half later. Likewise, Shell and Allied Corporation settled ten years of ongoing litigation almost immediately after their mini-trial. And a seven year old lawsuit against the Insurance Company of North America was settled two hours after the mini-trial hearing. Although executives involved in a mini-trial must spend time studying the facts, circumstances, and documents of the case, they expend less time than if the case had gone to trial or was settled after years of discovery.

A further benefit of the mini-trial is the degree of confidentiality not found in formal litigation. The proceeding is held in private. A mistake or a dispute with an important business partner will not be publicized, trade secrets will not be revealed, and consumers will not hear unfavorable information about a company's products. In addition, the standard mini-trial agreement has a confidentiality clause which states that the hearing is inadmissible as evidence in a trial. Ultimately, the solutions constructed by business executives are often more pragmatic and supportive of business objectives than those reached in traditional settlements or issued by the courts. The result serves to preserve business relationships.

Even if a mini-trial fails, the time has been well spent. The procedure promotes communication between adversaries, places the parties in a settlement environment, and provides a balanced understanding of the case. Consequently, the chances of settling the dispute are measurably improved.

The flexible mini-trial format allows parties to design the process best suited to their particular problem. Lawyers can shorten or lengthen their presentations, the neutral advisor can participate

or be eliminated from the process, and the parties can negotiate privately or in the advisor's presence. The proceeding may last a day or take place over a longer time period-whichever suits the parties. The nonbinding aspects of the mini-trial also make it more attractive than binding arbitration, which results in a decision that cannot be challenged or appealed.

Despite the compelling advantages of the mini-trial, some attorneys view the procedure with skepticism. They may be hesitant to suggest this alternative to opposing counsel for fear that it will be considered a sign of weakness. Attorneys may also feel that a mini-trial minimizes their role or threatens their profession. The uninformed often view dispute resolution techniques as attempts to put them out of business. The arguments refuting these perceptions are strong. The mini-trial format requires practitioners with refined adversary skills to convert complex arguments into short and persuasive presentations. These arguments must convince opposing management of the merits of the attorney's case. An attorney's prompt and economical resolution of difficult conflicts, using a mini-trial, demonstrates a responsiveness to client's interests, which could enhance an attorney-client relationship.

Other attorneys resist using a mini-trial for fear that their strategies might be disclosed and later used against them if the case proceeds to trial. Two considerations should temper that concern. A mini-trial will often occur after preliminary discovery has taken place. Therefore, the attorneys have a fairly clear idea of the arguments that the opposition will make, and few surprises should occur. In addition, the parties can agree to a confidentiality clause.

Even in mini-trials in which no settlement is reached, participants agree that the experience is educational. The information gained in the mini-trial process enables attorneys to guide and limit subsequent discovery, thereby reducing costs, and to shape the parameters of any future settlement. In sum, the perceived risks in dispute resolution processes like the mini-trial stem more from a lack of familiarity than from reality.

III. THE CENTER FOR PUBLIC RESOURCES

In order to overcome unfamiliarity and facilitate greater use of dispute resolution procedures, the Center for Public Resources (CPR), with support from Aetna Life and Casualty Company, has developed the Judicial Panel. Comprised of some of the most distinguished lawyers and former judges in the country, the Panel assists attorneys in developing private alternatives to litigation.

Panel members include: Griffin Bell, Lloyd Cutler, Shirley Hufstedler, Philip Tone, Irving Younger, Harold Tyler, Jr., and Simon Rifkin. These individuals are available to assist parties and serve as neutral advisors, mediators, or facilitators in mini-trials and other forms. Help is also available to develop alternative mechanisms best suited to individual needs. Adversarial parties often require the assistance of a neutral advisor not only to adjudicate, but also to approach the opposing side about their willingness to use a mini-trial.

Huge multi-party conflicts like toxic tort and waste disposal suits illustrate the applicability of alternatives and the Judicial Panel format. These cases have similar characteristics that prevent timely and effective court resolution: large numbers of claimants and defendants; wide geographical spread of cases; and long latency periods before diseases emerge. CPR has developed a successful model for resolving these complex issues out of court, which is based upon negotiated settlements. These settlements arose out of litigation brought by more than 23,000 asbestos workers and their families against more than 200 companies involved in the production of asbestos. Harry Wellington, Dean of Yale Law School and member of the CPR Judicial Panel, moderated almost three years of negotiations that led to an agreement for handling these claims.

In October, 1982, CPR was asked by asbestos producers, major insurance companies, and plaintiff's attorneys to help design a process to expedite claims and reduce high legal costs. The parties to this litigation needed a means to expedite payment of claims that totaled approximately $38.2 billion over the next three decades. They also had to resolve disputes among asbestos producers and insurers concerning how much of the compensation would be covered by insurance policies. The magnitude of these claims placed previously secure companies in financial jeopardy.

The disputing parties executed an unprecedented agreement and established the Asbestos Claims Facility to process claims equitably, efficiently, and economically. Currently, fifty major insurers and asbestos producers have subscribed to the facility, which is expected to be operating by early 1986. The facility will attempt to resolve claims through negotiated settlement and a range of dispute resolution procedures that will include mediation and arbitration. If claimants are dissatisfied with the settlement, they will still have the right to a trial. The agreement also has produced a formula for settling numerous insurance coverage

disputes. The agreement's proposed procedures can help resolve disputes regarding nuclear waste, dioxin, formaldehyde, and other toxic substances.

IV. LOOKING TO THE FUTURE

A current CPR research project concerns the best way to use neutral advisors with scientific and technical expertise in the areas of toxic tort and waste disputes. The Center is also examining ways to insure that the confidentiality of private, alternative dispute resolution procedures is protected while developing innovative methods to streamline discovery. Application of dispute resolution techniques by the judiciary has been promising. A number of leading jurists have successfully developed various alternative methods: summary jury trials; mediation programs; and use of special masters. These methods achieve early settlements that enable courts and litigants to save time and money.

To effectively advance the use of dispute resolution processes, training in negotiation strategies, mediation, and arbitration techniques must become a basic part of the law school curriculum. As corporations actively pursue pragmatic options to release them from traditional litigation, attorneys will have to be equipped to meet the market demand for alternatives. The dispute resolution movement is progressing at a swift rate, significantly changing the procedural processes of the American legal system. Continued study of dispute resolution methods must be conducted within the legal community so that concentration upon the most beneficial uses of these methods can be undertaken and effectively promulgated.