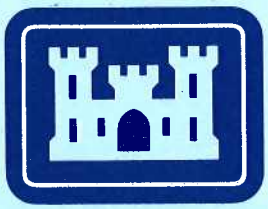

US Army Corps
of Engineers

Pamphlet 1

ALTERNATIVE DISPUTE
RESOLUTION SERIES

THE MINI-TRIAL

April 1989

IWR Pamphlet-89-ADR-P-1

The Corps Commitment to Alternative Dispute Resolution (ADR):

This pamphlet is one in a series of pamphlets describing applications of Alternative Dispute Resolution (ADR). The pamphlet is part of a Corps program to encourage its managers to develop and utilize new ways of resolving disputes. ADR techniques may be used to prevent disputes, resolve them at earlier stages, or settle them prior to formal litigation. ADR is a new field, and additional techniques are being developed all the time. These pamphlets are a means of providing Corps managers with examples of how other managers have employed ADR techniques. The information in this pamphlet is designed to stimulate innovation by Corps managers in the use of ADR techniques.

These pamphlets are produced under the proponency of the U.S. Army Corps of Engineers, Office of Chief Counsel, Lester Edelman, Chief Counsel; and the guidance of the U.S. Army Corps of Engineers Institute for Water Resources, Fort Belvoir, VA, Dr. Jerome Delli Priscoli, Program Manager.

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THE MINI-TRIAL

Alternative Dispute Resolution Series

Pamphlet 1

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The Mini-Trial

This pamphlet describes "the mini-trial," one of a number of alternative dispute resolution techniques which the US Army Corps of Engineers is using in an effort to reduce the number of disputes requiring litigation. The pamphlet describes what the technique is, how it has been used, and then provides guidance on how to go about conducting the mini-trial process.

What is a Mini-Trial?

First of all, a mini-trial isn't a trial. There's no judge nor lengthy procedures. Decisions are reached quickly and made by managers who have managerial and, often, technical skills, not by third parties such as judges. In fact, the mini-trial is a structured form of negotiated settlement. All parties enter into a mini-trial voluntarily, and any party can drop out when it wants to. A mini-trial is successful when there is a mutual agreement.

Here's what a mini-trial might look like:

- Two or more organizations involved in a dispute would agree to use a mini-trial as an alternative to going to court, a contract appeals board, or some other judicial body.

- Each participating organization would designate a senior manager to represent the organization and to make binding commitments on behalf of the organization. Ideally this manager would not have had any substantial previous involvement in the dispute.

- The management representatives and their attorneys would then jointly develop a mini-trial agreement. Since the mini-trial is to help them make decisions, they need to define what they want to happen before and during the mini-trial. This agreement serves as a guide for the entire process, specifying roles, time limits, schedule and the procedures which will be used during the mini-trial itself. The mini-trial agreement also specifies dates when "discovery" - the legal process of collecting evidence - will be concluded, and agreements regarding limits which will be placed on discovery or commitments of the parties to exchange information. While the mini-trial agreement establishes a clear structure, it is also highly flexible, because the management representatives can agree upon whatever procedures will work for them.

- Attorneys for the participating organizations would then go about preparing their case, advocating the position of their organizations. One unique thing about these preparations, though, is that the attorneys know that they will have only a few hours, or at most several days, to present their case. This means they must focus on their best arguments and strongest supporting evidence, presenting those things which will be most persuasive to the management representatives. The amount of time attorneys will have to present the case of their organizations will be specified in the mini-trial agreement.

- Normally the mini-trial agreement will specify that both parties will prepare short position papers outlining their case. These papers will be exchanged at an agreed-upon time before the mini-trial so that management representatives will be able to read them prior to the mini-trial itself.

- At the agreed-upon date, attorneys for the participating organizations will present their cases in front of the management representatives of the organizations. This presentation is referred to in this pamphlet as "the conference." As suggested earlier, these presentations will usually be limited to just a few hours. There may also be a question and answer period following each presentation.

- In many mini-trials, the management representatives are assisted by an impartial neutral advisor. This is optional. If used, the neutral advisor can play different roles, depending on the preferences of the management representatives. The neutral advisor might actually preside over the presentation portion of the mini-trial. Or the neutral advisor might simply advise on points of law or technical matters. Many mini-trial neutral advisors have been retired judges or law professors, who could discuss those arguments they found most impressive, given the law. On other occasions, the neutral advisor has been a technical expert on the subject matter of the dispute, able to advise on standard engineering practice or other technical issues. Any opinions provided by the neutral advisor are just that, advisory. The decisions are made by the management representatives, after the formal mini-trial presentations are over.

- Following the presentations and any questions, the management representatives would then move to another room, without their staffs, and attempt to resolve the dispute. No one is bound to come up with an agreement. But almost always, agreements are reached which effectively resolve the dispute.

- The results of the mini-trial are then documented as carefully as any other negotiated settlement which could be subjected to review by whoever has an interest in whether the negotiated settlement is fair.

- The mini-trial agreement will also include a provision that statements made by participants during the mini-trial can't be used against participants in court if no agreement is reached during the mini-trial. This means that concessions made in the relatively informal mini-trial conference can't be dragged up later on in court.

As you can see, mini-trials are:

■ Voluntary

Nobody is pressured into using a mini-trial. Any organization agreeing to participate in a mini-trial does so because it believes it is advantageous to do so. Any participant can drop out at any time, even during or after the conference.

■ Expedited

Participants commit themselves to an expedited schedule. Issues can't drag on forever. Since time for presentation of their cases will be strictly limited, attorneys must focus on only their best arguments.

■ Non-Judicial

Decisions are made by negotiation between the management representatives. No judges make the decisions for the parties.

■ **Informal**

The conference doesn't have to comply with strict rules for how it should be conducted. Participants can decide what procedures they want to use, what roles people will play, and what issues will or will not be discussed. There is a structure, but it is flexible because the mini-trial can be conducted any way the management representatives feel will get them the information they need to make a good decision.

■ **Confidential**

Since no one knows for sure in advance whether a mini-trial will result in a settlement, everybody wants to protect their ability to go to court if an agreement can't be reached, and not have statements made during a mini-trial conference used against them. Confidentiality alleviates this concern and encourages the parties to make frank comments and concessions during the mini-trial conference.

Why Use a Mini-Trial?

What are the advantages of a mini-trial over more traditional ways of resolving disputes, such as litigation or formal administrative procedures? There are a number of advantages:

■ **Puts the Decision Back in the Hands of Managers**

Typically, disputes are handled by middle level managers. By the time senior managers get involved in a dispute, sides are already polarized. The senior manager is likely to hear only his organization's position. Mini-trials put facts before senior managers. They get to hear all sides of the issue, not just their own, and can take into account the relative strength of their organization's case, the risks involved in proceeding to court, the added costs of a court case, etc. Typically, middle level managers do not have the authority to make these kinds of trade-offs. Senior managers retain the decisionmaking authority, and their decisions can be based upon a complete review of the facts.

■ **Greater Flexibility in Possible Settlements**

Normally managers enjoy greater flexibility in the options they can consider than do judges. Judicial decisions usually require deciding one side is right and the other wrong, resolving the dispute but potentially destroying the business relationship between the parties. Sometimes judges are forced to make decisions based on relatively narrow points of law, such as whether the proper procedures have been followed, rather than the equity of a decision. Neither judges or attorneys can ever know as much as line managers about how the interests of the participants converge, and what creative solutions are possible in which both parties could win. This is not to suggest that managers don't work within limits. In contract claims, for example, Corps managers remain bound by government procurement regulations. The mini-trial provides a structure which respects what the law requires, but gives managers maximum flexibility within these laws.

■ **Protect the Relationship**

Many of the parties involved in disputes with the Corps of Engineers are people with whom the Corps has worked effectively in the past, and would like to work with again in the future. Parties to a dispute might include contractors, suppliers, local governments, even other federal agencies, whose expertise and goodwill the Corps needs to retain. They equally have an interest in maintaining their relationship with the Corps. When disputes are decided by the courts, there is often a breach in the relationship between the parties. Whoever loses is unlikely to want to work with the other party again in the future. But when issues are resolved by negotiated agree-

ments, with both parties thinking they got a fair deal, they also feel good about each other and can rebuild the relationship needed to work together effectively.

■ **Time-Savings**

It is now normal for major disputes to take 1-2 years to get to trial and 3-5 years to get a decision from a judge or judicial panel such as a contract appeals board. In part, this is because court dockets are already crammed. In part it is due to time spent in "discovery" - the formal process of gathering evidence and taking depositions - which precedes a trial. Mini-trials can expedite the discovery process, saving weeks or months. And the mini-trial conference is typically weeks, even months, shorter than a court trial.

In total, years may be saved in reaching a final settlement of the dispute. More important, the participants can decide when they want the mini-trial. If they decided almost immediately to use a mini-trial, the issue might be resolved in just a few months, instead of years.

■ **Cost Savings**

In some cases, time alone costs money. For example, if a settlement would involve payment of interest, the interest costs building up over several more years can add significantly to the cost of the settlement. But mini-trials also save in other ways. One major area of saving is the reduced costs of discovery, (the gathering of legal evidence such as taking depositions or making interrogatories). Since attorneys will have only a short time to present their case, they must focus on the key issues supporting their positions. This not only saves time during the conference itself, but also sharply reduces the amount of evidence which must be gathered before the conference. Also, since time is short, attorneys carefully select and limit the number of witnesses. The other major cost savings is the relatively modest cost of the mini-trial conference versus the cost of a full-blown court case. The costs for attorneys, witnesses, and experts to appear in court, sometimes for several weeks or more, can be very high. A one or two day conference is simply going to cost much less than a court case which goes on for weeks or months.

■ **Protect Management Time**

Full-scale litigation doesn't just involve attorneys. Typically it also involves substantial key manager and consultant time to prepare the case, brief the attorneys, and serve as witnesses. Often both managers and staff must be pulled away from other priority projects to devote full attention to the court case. While the case goes on, they can't do the work they need to carry out the rest of their job. There's no question that a mini-trial does make demands on their time, but significantly less.

Concerns Expressed About Mini-Trials

Every dispute resolution technique has its strengths and weaknesses, and mini-trials are no exception. Some concerns expressed about mini-trials are not, however, well-founded. Here's a list which includes both very real limitations of mini-trials, and concerns expressed by people who have not used the technique:

■ **Not Appropriate for Some Issues**

Mini-trials are not appropriate for some issues, but they are appropriate for many of the disputes with which the Corps deals, which are factual disputes. The Corps of Engineers confines the use of mini-trials to cases where the law is well established, where settlement turns on the facts of the case. A great value of the mini-trial is that it returns to managers the authority to make decisions based on an appraisal of all the risks and impacts to the organization. But some decisions are more appropriate to be made by a judge. Interpretation of a new

law or regulation, for example, would not be an appropriate issue to resolve by using a mini-trial.

■ **Extra Work for Managers**

A mini-trial does take a concentrated commitment of time from a senior manager and attorney. Time will be spent reviewing the mini-trial agreement, getting briefed prior to the mini-trial, participating in the mini-trial conference, and then participating in the negotiations which follow. If the dispute were to go to court, however, the trial will take much more staff time, and it is probable that the time required of the senior manager is also greater. Although broken up into smaller pieces - and therefore easy to forget about - the time a senior manager spends on a court case is often very substantial. However, the time spent in the mini-trial is highly intensive, requiring more time for a short period. One advantage of a mini-trial is that managers have some choice about when they schedule it. With a court case, you typically go to trial whenever the judge is able to schedule the case.

■ **Cost of Preparation**

Some attorneys, particularly attorneys who have not participated in a mini-trial, worry about the costs of preparing for a mini-trial, since they may have to go to court afterwards anyway. Attorneys who have participated in mini-trials say that virtually all the preparation they did for the mini-trial they would have done for the court case anyway, so most of the cost incurred for the mini-trial reduces the cost of the court case. In addition, even when mini-trials don't result in full agreement they often clarify the key issues, or remove some issues. This means that the remaining discovery can be more focused and efficient. Attorneys who've used mini-trials also point out that the mini-trial gives them a chance to test their case, to discover which arguments are persuasive and which are not. This can actually strengthen their ability to present their case in court if they need to.

■ **Is It the Best Possible Deal**

Just because a mini-trial decision is made quicker or cheaper than a trial court decision doesn't automatically make it better, so it is easy to play a "what if" game to argue that the organization would have done better in front of a judge. Managers may even be vulnerable to criticism within their own organization that they "gave away the store." This could happen because only the senior manager has heard the other participants' cases, while people within the organization tend to have heard only one side of the story.

■ **Protection Against Lying**

Because mini-trials are an informal process, without a judge, there is no oath administered and most mini-trials do not include cross-examination. Some people fear that this does not provide protection against fraudulent statements or mistruths. While there can be some risk, just as there is with a court case, attorneys who've used mini-trials feel they usually have sufficient information about the case to protect their client from clearly misleading information. One attorney who has used mini-trials commented: "Everybody wants to use cross-examination, until they've actually seen a mini-trial. Then they realize it is unnecessary."

■ **To Offer to Use a Mini-Trial Says We Have a Weak Case**

Some managers fear that by offering to use any ADR technique, including a mini-trial, you are communicating that your case is weak. As a result, the other side may dig in even more, thinking it can win or negotiate a more favorable settlement. This attitude is becoming less prevalent, and some managers have taken steps to remove this barrier by issuing a policy to offer to use ADR techniques on all disputes before going to court. By making it a policy, they remove any suggestion that offering to use ADR suggests weakness on any particular case.

■ **It's Not Supporting the Field**

The Corps has a long tradition of supporting decisions made in the field. To some, having a senior Corps manager make a decision which alters an earlier decision made in the field violates this tradition. It's one thing if a judge overrules them, but still another if someone from their own organization decides the other guys might have had a point. However, judges do not consider the impact of their decisions on the organization, while senior Corps managers understand how decisions can affect field operations and programs.

To sum up this introduction to the mini-trial, it's important to remember that despite its name, the mini-trial technique is designed to assist managers in making settlement decisions rather than turning decisions over to judges. The settlement negotiations are helped along by the structured, fact-based format of the mini-trial conference. And because the mini-trial is voluntary, it fosters a cooperative spirit among the representatives which can promote settlement of disputes which would otherwise be destined for litigation.

Mini-Trials In Practice

Corps' Experience with Mini-Trials

In its first mini-trial, the Corps of Engineers successfully resolved a contract claim that was pending before the Armed Services Board of Contract Appeals (ASBCA). The mini-trial involved an acceleration claim in the amount of $630,570 by Industrial Contractors, Inc. The principals resolved the claim in less than three days, and the dispute was settled for $380,000. At the mini-trial, the government was represented by the Corps' South Atlantic Division Engineer, while the contractor was represented by its president. The neutral advisor was a retired senior claims court judge from the U.S. Claims Court.

The Corps' second mini-trial involved a dispute arising out of the construction of the Tennessee Tombigbee Waterway. The $55.6 million claim (including interest) involved differing site conditions, and was filed at the Corps of Engineers Board of Contract Appeals by Tenn-Tom Constructors, Inc., a joint venture composed of Morrison-Knudsen, Brown & Root, and Martin K. Eby, Inc. A vice-president for Morrison-Knudsen acted as principal for the joint venture, and the Ohio River Division Engineer represented the government. A law professor, who is an expert on Federal contract law, was the neutral advisor. One interesting aspect of this case is that following a three-day mini-trial conference the senior managers met, but decided that they could not resolve the issue without additional information and scheduled a follow-up one day mini-trial conference two weeks later.

Following this second conference, the principals agreed to settle the claim for $17.2 million, including interest.

After this mini-trial was concluded, the settlement was investigated by the Department of Defense Inspector General. The investigation was initiated because of a "hotline" inquiry about the appropriateness of the settlement. After conducting an extensive review, the Inspector General made a formal report. The Inspector General found that the settlement was in the best interest of the government and concluded that the mini-trial, in certain cases, is an efficient and cost-effective means for settling contract disputes. This conclusion provides a strong validation of the mini-trial as an ADR method for resolving government contract disputes.

The Corps has also recently successfully concluded a mini-trial over financial responsibility for clean-up of a Superfund site, with the Corps acting on behalf of the Department of Defense. In this case, the mini-trial led to a successful resolution of cost-sharing, when other forms of negotiation had been unsuccessful.

Other Corps' uses of mini-trials included:

- Resolution of $105 million of claims arising out of the construction of the King Khalid Military City, Saudi Arabia. This involved some sixty claims which were ultimately settled for $7 million.
- Resolution of claims for $765,000 from construction of a visitor's center at a recreation area. A settlement was reached for $288,000.

- Nine appeals arising from a contract for the repair and modification of tainter gates at Greenup Lock and Dam, on the Ohio River, were settled after a two and one-half day mini-trial. The total amount claimed was $515,000, which was settled for $155,000.

- Seven disputes regarding the construction of the Consolidated Space Operations Center in Colorado were resolved using a mini-trial. The claims, totaling $21.2 million were from the prime contractor and a subcontractor. These claims were settled for $3.7 million.

Experience of Other Government Agencies

Following the Corps' lead, both the Department of the Navy and the Department of Energy have begun to use mini-trials. The Navy has participated in several mini-trials. Two of the mini-trials resulted in negotiated agreements. A third mini-trial succeeded in narrowing the disputed issues, but did not result in a negotiated settlement. Recently, the Navy drafted two additional mini-trial agreements to resolve pending disputes, only to have the parties settle the dispute prior to the actual mini-trial. Apparently whatever psychological/legal barriers were surmounted in deciding to participate in the mini-trial led to an immediate settlement.

Corporate Experience with Mini-Trials

A number of companies have used mini-trials, including Allied Corporation, American Can Company, American Cyanamid, AT&T, Borden, Control Data, Shell Oil, Standard Oil of Indiana, Texaco, TRW, Union Carbide and Xerox. Mini-trials have been used in cases involving breach of contract, antitrust, construction, unfair competition, unjust discharge, proprietary rights, and product liability claims. They've also been used in complex multi-party cases, and international commercial disputes.

Nearly 500 companies or major law firms are members of the Center for Public Resources, Inc. (CPR), a non-profit organization which advocates the use of ADR techniques in the corporate world. A recent study of 114 companies by CPR looked at which ADR techniques were being most frequently used by companies. The mini-trial (39% of the cases) was by far the most frequently used technique, used more than twice as often as mediation (17%) and private arbitration (12%), the other techniques in the top three on the list.

Planning for a Mini-Trial

How do you actually go about initiating and conducting a mini-trial? This section provides guidance on the specifics of preparing for and conducting a mini-trial.

The basic steps in conducting a mini-trial are:

1) Determine whether a mini-trial is appropriate for a particular dispute.
2) Obtain any needed Corps management commitments.
3) Approach the other parties to get their agreement to participate.
4) Select management representatives for each organization.
5) Select a neutral advisor.
6) Develop a mini-trial agreement.
7) Complete "discovery," as defined in the mini-trial agreement.
8) Exchange position papers.
9) Hold a preliminary meeting between the neutral advisor and the management representatives.
10) Conduct the mini-trial conference.
11) Conduct negotiations following the conference.
12) Document any agreements reached.

Further information on each of these steps is provided below:

When is a Mini-Trial Appropriate

The first criteria for a mini-trial, of course, is that both (or all) sides agree to use a mini-trial. But before suggesting the use of a mini-trial to other parties to a dispute, there will always first be an internal process of consultation and analysis to determine whether a mini-trial is appropriate for a particular dispute. This is normally done before any discussion with the other party, so that they don't feel an offer was made, then withdrawn.

The Corps believes that managers should make decisions about how to resolve disputes, so there is no "dispute resolution staff" held responsible for identifying disputes where a mini-trial is appropriate. The idea that a mini-trial might be effective could start with a district counsel; a district engineer; a reviewer at Division or OCE; or a manager in engineering, construction and operations, contracts, regulatory - wherever disputes occur. Of course, a contractor could also suggest a mini-trial. Typically the first step is to discuss the idea with others at a local level, so that you know enough about the dispute to make an analysis as to whether a mini-trial fits this particular situation.

The first level of analysis is very practical: Does this dispute justify the time and expense of a mini-trial? Although mini-trials are much less expensive than a full court case, or a case before the Board of Contract

Appeals, there are still costs. If the dispute is quite small, the costs of the mini-trial might exceed the benefits to the government. In the contracts area, there are expedited procedures at the boards of contract appeals for disputes under a certain small dollar amount.

Once you've decided that the size and importance of the dispute would justify consideration of a mini-trial, you need to look at whether this is a dispute about what the law means, or whether it is a dispute about the facts of a case - what happened to whom. It is Corps policy not to use mini-trials to resolve issues that do not have clear legal precedent already established. However, since the vast majority of cases involve factual rather than legal disputes, only a small number of cases will be affected. If in doubt, District or Division Counsel will be able to provide guidance to Corps managers on which issues may involve purely legal disputes.

The other circumstance where mini-trials are not appropriate is in disputes where the only alternative is to declare one side or the other completely right, the sort of thing a judge does in issuing a summary judgment. Because mini-trials are essentially a negotiation process, it is unreasonable to think that you can negotiate an agreement in which either side completely capitulates.

Who Decides to Propose a Mini-Trial

After discussions at a local level, it is necessary to obtain approval from the appropriate Corps manager before proposing the use of a mini-trial to the other party. In the case of a dispute over a contract, for example, this could be the Contracting Officer, or the Division Engineer. For a dispute over a Defense Environmental Restoration Program Superfund site, officials in the Department of Defense also may need to be consulted. The point is that for the mini-trial to work, representatives must be able to commit their organizations to any agreements reached. There is no point in proposing a mini-trial to another party unless the manager in the Corps who can make such commitments agrees to the mini-trial. This does not automatically mean that the person who has this authority when a mini-trial is proposed has to be the Corps management representative. The binding authority to resolve a dispute might be delegated or transferred to another qualified senior manager.

Proposing a Mini-Trial to the Other Party

There are two questions to ask in determining how to propose the use of a mini-trial to another party. When in the course of a dispute is it appropriate to propose a mini-trial? Who should make the contact with the other party?

One answer to the question of when to propose a mini-trial is: whenever you think the other parties will be receptive. But the Corps' experience with mini-trials suggests that mini-trials are more effective after the basic facts have been gathered, and the issues defined. On the other hand, if a major purpose of mini-trials is to save time and legal expense, there is less benefit from a mini-trial in waiting until a significant percentage of the legal cost has already been incurred. The most effective time for proposing a mini-trial seems to be just before the contracting officer reaches a final decision or, if already in court, early in the process of "discovery," but before there are significant litigation costs.

Most often, the suggestion to use a mini-trial comes from attorneys representing the

parties. But in some cases, a senior Corps' manager, such as a district engineer or division engineer, may want to contact a senior executive for the other party to suggest a mini-trial. There is always a certain appeal in having a senior executive from one organization suggest to a senior executive of another that: "We're practical people used to making hard decisions, and we should be able to resolve this thing."

One of the main problems in getting a commitment from another party - especially if the other party is not familiar with mini-trials - is providing enough information about mini-trials to the other party so that they are comfortable that it is a fair and equitable forum. If they are not familiar with mini-trials, they may fear it gives the Corps some advantage, or they may feel uncomfortable simply because they have not done it before. One way to start might be to give them this pamphlet. Or you might provide them with some of the other resource materials described in the bibliography. When disputes are going to be resolved in a contest where there will be a winner and a loser, there may be some advantage if your opponent knows less about the process than you do. But in any dispute resolution process where the emphasis is on achieving a mutual agreement - such as in a mini-trial - then the process is more likely to be a success if both sides become skilled in the use of the process. For the process to work, the other party needs to be comfortable with the mini-trial process, and understand as much as possible about how it works. Also, by being forthcoming with any assistance you can, you're helping to build the atmosphere which could contribute to an agreement.

Selecting the Management Representatives

The senior management people who will represent each organization are normally selected before the mini-trial agreement is developed. This is done so that they can participate in developing the agreement. While the mini-trial is a structured negotiation process, there is considerable latitude in how the mini-trial is conducted. The management representatives need to ensure that the procedures described in the agreement will serve their needs.

There are two basic criteria for selection of the senior managers to represent the organizations:

- **Not Previously Associated with the Issue**

One of the advantages in the participation of senior managers who have not been previously involved in the dispute is that they come to the issue fresh. They aren't already locked into rigid ways of viewing the issue. This advantage is lost, of course, if the senior manager representing the organization is someone who was intimately involved in the issue, particularly if this means he or she will need to defend previous decisions. You want people who can consider the issues without feeling defensive.

While this logic holds true as a general principle, some smaller companies - particularly something like a family-owned company - may have no senior managers who haven't been involved to some extent. Even within the Corps, it may be desirable, depending on the dispute, to involve a senior manager who is familiar with the dispute, so long as he won't end up defending decisions he made earlier.

■ **Able to Bind the Organization**

The mini-trial will work only if both sides know that the senior managers who are present can make decisions which will count. It isn't going to work if the senior managers don't have the authority to bind their organizations. In a contract dispute, the Corps' management representative must have contracting officer authority.

Selecting the Neutral Advisor

A neutral advisor has been used almost every time the Corps has conducted a successful mini-trial, and they have proved valuable. Although it is not mandatory that a neutral advisor be selected, there are distinct advantages in using a neutral advisor. The advantage of early selection of the neutral advisor is that the neutral advisor may be able to assist in developing the agreement. There may still be some suspicion or even hostility between the parties, and suggestions coming from the neutral advisor may be treated with more openness than those coming from the other side. The neutral advisor can also provide a communication link, if communication between the parties becomes difficult. The neutral advisor can encourage the management representatives to take charge of the mini-trial agreement, to make sure it meets their needs.

The exact role of the neutral advisor can be agreed upon beforehand, or it can be covered in the mini-trial agreement. The original idea of the neutral advisor was to introduce both an impartial opinion and an element of mediation into the proceedings. The history of mini-trials suggests that the negotiation period can be rocky, and the neutral advisor may be able to keep the negotiations moving.

Among the roles which the neutral advisor can play are:

- Point out the strengths and weaknesses of each organization's position.
- Advise the management representatives on how a judge might apply the law.
- Help devise new compromises or redefine the issues in ways which lend themselves to resolution.
- Help bring the parties to the table, and help keep them there.
- Chair the conference and help set the proper procedural ambience for negotiation.
- Help the parties clarify the worth of various claims and derive reasonable prices.
- Deflate unreasonable claims and break down entrenched positions.
- Articulate the rationale for a solution, making it easier for both sides to buy-in than if the rationale were proposed by one of them.

As can be seen from this list, there are several aspects to the neutral advisor's role. The neutral advisor can act like a technical expert or consultant. The neutral advisor can act like an arbitrator in a non-binding arbitration, suggesting what a reasonable outcome might be, but with no authority to bind the parties. Finally, the neutral advisor can act like a facilitator or mediator, helping to keep communication open, clarifying positions, and seeking out new compromises. Clearly the role you decide upon will influence your selection of a mini-advisor.

To date, most neutrals have been retired judges, or law professors with special expertise in the issues under discussion. Technical experts have also been used, where man-

agement representatives primarily wanted advice on technical rather than legal issues. In at least one mini-trial, there was a small panel of neutral advisors including an attorney, and two technical experts. Some organizations have also talked of using a mediator as a neutral advisor, putting the emphasis on helping the negotiation process. Since neutral advisors are to be neutral, employees of either of the parties, or anybody else standing to gain from the manner in which the dispute is resolved, cannot be considered.

Among the questions which should be addressed before you decide what kind of neutral advisor you want are:

- Will the neutral advisor assist in developing the mini-trial agreement?
- Will the neutral advisor hold any meetings (formal or informal) between the management representatives prior to the conference?
- Will the neutral advisor preside over the conference?
- What kinds of information do you want from the neutral advisor, and at what point in the conference or negotiation process?
- Do you want the neutral advisor to make recommendations or suggest possible rationales for compromise?
- Will the neutral advisor be present during the negotiations?
- Do you want the neutral advisor to assist with negotiations, or just respond when asked questions?
- Does the neutral advisor play any further role if the initial negotiations are not successful?

The Office of Chief Counsel can provide guidance in selecting an appropriate neutral advisor.

Developing a Mini-Trial Agreement

The mini-trial agreement spells out all the procedures and groundrules which will be followed during the mini-trial. While the attorneys representing each organization will be very involved in developing the mini-trial agreement because it includes a number of procedural issues which affect them very directly, it is important for senior managers to view the mini-trial agreement as serving their purposes. If you're a senior manager, the mini-trial agreement spells out how you want the information to be gathered and presented for you to make a decision. So you need to take an active role in ensuring that the mini-trial agreement contains those procedures you believe will do the best job of getting you the information you'll need in order to negotiate.

Topics to be covered in the mini-trial agreement include:

■ Discovery

Attorneys refer to the process of gathering facts or evidence as "discovery." The purpose of discovery is to find out all the facts the other side has which support its case. It is also designed to ensure there is no surprise evidence. The kind of surprises which used to resolve all the Perry Mason mysteries should not occur in modern litigation. In a mini-trial, the time for discovery is compressed. As a result, it may be necessary to place limits on the number of depositions which will be taken, or the number of interrogatories which attorneys can submit to each other. Responding to discovery requests should not place an undue burden on either party. The agreement might also

include commitments regarding the materials which will be submitted to each other, time schedules for delivery of materials, etc.

■ **Date, Time, and Place**

Setting the date and time of the mini-trial is important because it sets a goal which drives the process. Both parties know how much time they have for discovery and how much time to get their presentations prepared. Time extensions are not permitted except in the most exceptional circumstances.

Ordinarily, the mini-trial is held at a place which is neutral, not clearly identified with either party. This is not an absolute rule, however, as Corps mini-trials have occurred at offices of one of the parties. Comfort is also important. A physical setting can either help both sides be comfortable and more relaxed, or may contribute to a tense atmosphere.

■ **Participant's Obligation to Present Best Case and Negotiate**

The mini-trial agreement usually contains language in which both parties commit to present their best case and negotiate in good faith. The term "best case" implies that the parties will focus in on those issues which are most important and which they think are the strongest points for their positions. It may also mean that attorneys focus on those issues which count the most in resolving the dispute. In a contractual dispute, for example, most of the dollars may turn on just a few points, so these should be the primary focus of the conference. Negotiation "in good faith" means that both parties will make a determined effort to resolve the issue, not just go through the motions, holding back until they are in front of a judge.

■ **The Role of the Neutral Advisor**

As discussed earlier, the neutral advisor can play a variety of roles, so the role of the neutral advisor is usually spelled out in the mini-trial agreement, and it may be useful to involve the neutral advisor in developing the mini-trial agreement. Past experience shows, however, that the role of the neutral advisor often evolves in response to circumstances and the desires of the management representatives. The mini-trial agreement will spell out both parties' expectation of the neutral advisor at the beginning of the process, but there should be some understanding that this may change over time.

■ **The Name of the Neutral Advisor, (or the Process Which will be Used to Select the Neutral Advisor)**

The mini-trial agreement will state the name of the neutral advisor, assuming that the neutral advisor has been selected prior to completion of the agreement. If the neutral advisor has not been selected prior to completion of the agreement, then the agreement should specify how the neutral advisor will be selected.

■ **The Exchange of Position Papers**

Management representatives usually find position papers very helpful in providing a context for the presentations made during the mini-trial. The mini-trial agreement should specify the length and character of the position papers, and the date at which papers will be exchanged. Normally, position papers are limited to 20-25 pages, both because management representatives are not likely to read longer documents, and because it forces both sides to concentrate on the major issues.

■ **Confidentiality of Statements**

Attorneys are anxious to protect their organization's ability to make a strong case in court, so they are worried that statements made in the mini-trial - such as granting the other side's point on a particular issue or indicating a willingness to compromise - may be used against them if the mini-trial does not result in an agreement and the dis-

pute ends up in court. Typically the mini-trial agreement will specify that all of the statements made during the mini-trial are confidential, and cannot be used in court. The agreement also specifies that the neutral advisor cannot be used as a witness, consultant or expert in the dispute or any related dispute.

■ Allocation of Expenses

Normally all expenses such as the costs of the neutral advisor or the meeting facilities, are paid for on a 50/50 basis by the participants. All costs of preparing and presenting one's case, and the costs of participation by attorneys, witnesses, or management representatives are carried by the individual organizations.

■ Pending Litigation

If there is pending litigation, or the mini-trial comes during an ongoing discovery process, the agreement should specify that both parties are suspending any further litigation or discovery (except that covered by the mini-trial agreement), until after the mini-trial.

■ The Roles of People to be Present During the Mini-Trial

As suggested previously, the mini-trial agreement should specify the role of the management representatives, the neutral advisors, and the attorneys making the presentations for the organizations.

■ The Number of People in the Room

Often a sizeable staff from the organizations will want to attend, so in order to keep an informal atmosphere it may be necessary to limit the number of people in the room. Such limits should be included in the agreement.

■ Schedule/Agenda

One of the most important things in the mini-trial agreement is the schedule and agenda which will be followed during the mini-trial conference. Here is a rather typical mini-trial conference format:

- Other Party's Opening Statement
- Corps' Opening Statement
- Other Party's Presentation
- Corps' Rebuttal
- Questions from management representatives
- Corps' Presentation
- Other Party's Rebuttal
- Questions from management representatives
- Other Party's closing arguments
- Corps' closing arguments
- Open Question Period
- Neutral Advisor's preliminary opinion

Although this is presented as a "typical" conference agenda, there is considerable variation in how the mini-trial conference can be conducted, and senior managers need to satisfy themselves that the procedure will meet their needs. For example, some mini-trials permit cross-examination of witnesses, although most do not. Not all mini-trials include rebuttal periods. There may or may not be a formal question period following each presentation. Questions from management representatives are normally permitted throughout the presentations, so long as these questions are genuine requests for information or clarification and not efforts to challenge an opponent's position. However, attorneys are normally not permitted to interrupt each other's presentations with questions. Most attorneys want to have opening and closing statements, but they are not mandatory.

It is often desirable to have a neutral person - such as the neutral advisor - preside over the conference, as the two attorneys are going to be anxious to present their strongest case, and will vie to make their points as best they can. Some control over the meet-

ing is usually needed, and if a management representative chairs the conference, he may not be seen as neutral.

Because the mini-trial is a relatively new technique, further experimentation with the conference procedure is appropriate before too many rules are made about how the conference should be conducted. Senior managers are encouraged to develop conference formats which will do the best job of getting them the information they need. Above all, the mini-trial is a flexible technique which should be altered where necessary to meet the need of the organization.

■ Termination

Either side may drop out of the mini-trial process, before, during, or after the mini-trial conference. The agreement should specify what notice is required if either party decides to drop out of the process, and what rights and obligations both parties have if this occurs. The termination provision should clearly specify that the language of the mini-trial agreement may not itself become the basis for litigation.

■ Other Procedures the Management Representatives Want

As suggested several times earlier, the mini-trial agreement is the vehicle by which the management representatives create the process which will serve them best. As a result, it is not unusual for procedures other than those outlined above to be included in the agreement.

A sample mini-trial agreement for a contract dispute is provided in Appendix I, although this agreement does not include language on all the issues discussed above. This sample agreement can be tailored for other types of disputes.

■ Complete Discovery

Once the mini-trial agreement has been signed, the attorneys can complete the discovery process, as defined in the agreement. Although the mini-trial process is a voluntary process, with no judicial penalties if agreements are broken, the terms of the agreement should be observed scrupulously. Violations of the agreement during the discovery stage will usually poison the atmosphere between the parties sufficiently to doom the mini-trial to failure.

■ Exchange Position Papers

The parties will then exchange position papers, observing the scope and length requirement specified in the mini-trial agreement, and the schedule for exchange of papers.

■ Preliminary Meeting with Neutral Advisor

Some neutral advisors like to have a meeting, or dinner, attended by both management representatives, prior to the mini-trial conference. The purpose of this meeting is not to discuss the content of the issues, but to get to know each other and discuss the procedures which will be followed. Most of all, the meeting allows these key figures in the mini-trial to begin to get comfortable with each other and the procedure before the mini-trial conference.

■ Conduct the Mini-Trial Conference

The mini-trial conference will follow the agenda shown in the mini-trial agreement, except that it can be changed at any time by mutual agreement of the management representatives. The attorneys are given great leeway in how they make their presentations. They may choose to make the entire presentation themselves, or present experts or witnesses. They may choose to use visuals, slides, exhibits, or even movies. The whole idea is that each attorney gets a chance to make his best case, anyway he wants within the limited time available to him.

Although there is generally great freedom

in the presentations, both attorneys need to be aware that in order for there to be any payment from the government, there must first be a legal basis for any costs, expenses, or injuries which are claimed. This could require the testimony of auditors, or other evidence of actual cost.

■ The Negotiation Process

Once the conference is over, and the management representatives have asked all their questions, the management representatives adjourn to another room to begin negotiations. Depending on the role defined for him, they may be accompanied by the neutral advisor. No other attorneys or staff are normally present for the negotiations. Once in the negotiation room, the management representatives may conduct the negotiations any way they want. Usually the negotiations are relatively informal. Either representative can leave the room to request information of his own staff, or review legal points. If both management representatives decide they want to hear additional presentations on specific points, they can request it.

It is not necessary to resolve the issue in a single session. Some mini-trials have resulted in agreements in principle within 30 minutes, while others have involved several negotiation sessions, spread over several days.

There are skills to negotiation, and the Corps provides training in negotiation skills. The Corps can also provide technical assistance to Corps managers, or even to the other party, on how to structure the negotiation process. As suggested earlier, in negotiation it helps if both people are skilled in the negotiation process.

To date, every time the Corps has used a mini-trial, a negotiated settlement has been reached.

■ Documentation

Frequently the management representatives will develop an agreement in principle, then request the attorneys to prepare more detailed agreements implementing the agreement. This agreement in principle should be put in writing, with copies given to both parties, to be used as guidance by the attorneys. The management representatives' agreement in principle also can be referred to in case there are later questions about the intent of the formal agreement.

Even though the mini-trial results in a mutual agreement, the Corps is still obligated to document the basis for the agreement to the same standards as any other settlement.

Conclusion

Mini-trials are one of a number of promising ADR techniques. Because the field of ADR is new, many techniques are still undergoing refinement and change. Corps managers are encouraged to approach the use of mini-trials with a spirit of innovation. One of the primary advantages of the technique is that it can be structured to serve the needs of the managers who must make the decisions.

Other Resources

Collins, Richard

The Goodyear Mini-Trial: Corps ADR Case Study #1
Institute for Water Resources, Fort Belvoir, VA, 1989

Crowell, Eldon H. and Charles Pou, Jr.

Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation
Administrative Conference of the United States, Washington D.C., January 1988

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The Mini-Trial: An Alternative Dispute Resolution Procedure
The Arbitration Journal, March 1987, Vol. 42, No. 1.

Mini-Trial Practice Guide
Center for Public Resources
New York, N.Y., September 1988

Henry, James F. and Jethro K. Lieberman

The Manager's Guide to Resolving Legal Disputes: Better Results Without Litigation
Harper & Row, New York, 1985

Appendix I: Sample Agreement

MINI-TRIAL AGREEMENT

BETWEEN THE

UNITED STATES ARMY CORPS OF ENGINEERS

AND

_____

(Contractor)

This mini-trial agreement dated this _____ day of _____, 19 ____ is executed by _____, on behalf of the "Corps", and by_____, on behalf of _____, hereinafter referred to as _____(name)_____.

WHEREAS: On the _____ day of _____, 19 ____ , the parties hereto entered into Contract No. _____ for the _____

_____;

WHEREAS, under the Disputes Clause (General Provision No. 4) of that contract, Appellant on _____, 19 ____ filed a claim with the contracting officer alleging _____

_____

_____;

WHEREAS, Appellant certified its claim in accordance with the requirements of the Contract Disputes Act of 1978;

WHEREAS, in a letter dated _____, 19 ____ the contracting officer issued a final decision denying appellant's claim;

WHEREAS, on _____, 19 ____ Appellant appealed the contracting offier's final decision to the _____Board of Contract Appeals where the appeal has been docketed as _(ASBCA) (ENG BCA)_ No. _____;

WHEREAS, the Corps has instituted an Alternative Contract Disputes Resolution Procedure known as a "Mini-Trial', which procedure provides the parties with a voluntary means of attempting to resolve disputes without

the necessity of a lengthy and costly proceeding before a Board of Contract Appeals and without prejudicing such proceeding; and

WHEREAS, the Corps and Appellant have agreed to submit (ASBCA) (ENG BCA) No._____ to a "Mini-Trial".

NOW THEREFORE, subject to the terms and conditions of this "Mini-Trial" agreement, the parties mutually agree as follows:

1. The Corps and Appellant will voluntarily engage in a non-binding mini-trial on the claim of _____ _____ that it is entitled to _____

_____

The mini-trial will be held on _____, 19 ___ at _____.

2. The purpose of this mini-trial is to inform the principal representatives of the position of each party on the claim and the underlying bases of such. It is agreed that each party will have the opportunity and responsibility to present its "best case" on entitlement and quantum.

3. The principal representatives for the purpose of this mini-trial will be _____ _____ for the Corps, and _____ for appellant. The principal representatives have binding authority to settle the dispute. Each party will present its position to the principal representatives through a trial attorney(s). In addition, _____ will attend as a mutually selected "neutral advisor".

4. The role of the neutral advisor is that of an advisor. The neutral advisor will/will not preside at the mini-trial conference. The neutral advisor may ask questions of witnesses only if mutually agreed to by the principal representatives. Upon request by either representative, the neutral advisor will provide comments as to the relative strengths and weakness of that party's position. The neutral advisor willwill not attend the negotiation session with the representatives following the conference.

5. The Government trial attorney will provide the neutral advisor with copies of this agreement and the Rule 4 appeal assembly. Other source materials, statements, exhibits and depositions may be provided to the neutral advisor by the trial attorneys, but only after providing the same materials to the other trial attorney. Neither trial attorney shall conduct ex parte communications with the neutral advisor.

6. The fees and expenses of the neutral advisor shall be borne equally by both parties. Except for the costs of the neutral advisor, all costs incurred by either party in connection with the mini-trial proceedings shall be borne by that party, and shall not be treated as legal costs for apportionment in the event that the dispute is not resolved, and proceeds to a Court or Board determination.

7. Unless completed prior to the execution of this agreement, the parties will enter into a stipulation setting forth a schedule for discovery to be taken and completed _____weeks prior to the mini-trial conference. Discovery taken during the period prior to the mini-trial shall be admissible for all purposes in this litigation, including any subsequent hearing before any Board or competent authority in the event this mini-trial does not result in a resolution of this appeal. It is agreed that the pursuit of discovery during the period prior to the mini-trial shall not restrict either party's ability to take additional discovery at a later date. In particular, it is understood and agreed that partial depositions may be necessary to prepare for the mini-trial. If this matter is not resolved informally as a result of this procedure, more complete depositions of the same individuals may be necessary. In such case the partial depositions taken during this interim period shall in no way foreclose additional depositions of the same individual into the same or additional subject matter for a later hearing date before a Court or Board.

8. No later than _____ weeks prior to commencement of the mini-trial conference, _____ _____ shall submit to the Corps a quantum analysis which identifies the costs associated with the issues that will arise during the conference.

9. The presentations at the mini-trial conference will be informal. The rules of evidence will not apply, and witnesses may provide testimony in the narrative. The principal representatives may ask any question of the witnesses that they deem appropriate.

10. At the mini-trial conference, the trial attorneys have the discretion to structure the presentation as desired. The form of presentation may be through expert witnesses, audio visual aids, demonstrative evidence, depositions and oral argument. The parties agree that stipulations will be utilized to the maximum extent possible. Any complete or partial depositions taken in connection with the litigation in general, or in contemplation of the mini-trial proceedings, may be introduced at the mini-trial as information to assist the principal representatives understanding of the various aspects of the parties' respective positions. The parties may use any type of written material which will further the progress of the mini-trial conference. The parties may, if desired, no later than _____ weeks prior to commencement of the conference, submit to the representative(s) for the opposing side(s), as well as the neutral advisor, a position paper of no more than 25 - 8 1/2 X 11 double spaced pages. No later than _____week(s) prior to commencement of the mini-trial conference, the parties will exchange copies of all documentary evidence proposed for utilization at the conference, inclusive of a listing of all witnesses.

11. The mini-trial conference shall take _____ day(s). The morning's proceedings shall begin at _____a.m. and shall continue until _____ a.m. The afternoon's proceedings shall begin at _____ p.m. and continue until _____ p.m.

A sample two day schedule follows:

MINI-TRIAL CONFERENCE SCHEDULE

Day 1	
8:00 a.m. - 8:30 a.m.	Appellant's opening statement.
8:30 a.m. - 12:00 noon	Appellant's position & case presentation.
12:00 noon - 1:00 p.m.	Lunch*
1:00 p.m. - 2:30 p.m.	Corps' rebuttal.
2:30 p.m. - 4:00 p.m.	Appellant's re-examination.
4:00 p.m. - 5:00 p.m.	Open question & answer period.
Day 2	
8:00 a.m. - 8:30 a.m.	Corps' opening statement.
8:30 a.m. - 12:00 noon	Corps' position & case presentation.
12:00 noon - 1:00 p.m.	Lunch*
1:00 p.m. - 2:30 p.m.	Appellant's rebuttal.
2:30 p.m. - 3:00 p.m.	Corps' re-examination.
3:00 p.m. - 4:30 p.m.	Open question and answer period.
4:30 p.m. - 4:45 p.m.	Appellant's closing argument.
4:45 p.m. - 5:00 p.m.	Corps' closing argument.

* Flexible time period for lunch of a stated duration.

12. Following the conclusion of the mini-trial conference, the principal representatives should meet, or confer, as often as they shall mutually agree might be productive for resolution of the dispute. If the parties are unable to resolve the dispute within _____ days, the mini-trial shall be deemed terminated and the litigation will continue.

13. No transcript or recording shall be made of the mini-trial conference. Except for discovery undertaken in connection with this appeal, all aspects of the mini-trial including, without limitation, all written material prepared specifcally for utilization at the mini-trial, or oral presentations made between or among the parties and/or the advisor at the mini-trial are confidential to all persons, and are inadmissible as evidence, whether

or not for purposes of impeachment, in any pending or future court or Board action which directly or indirectly involves the parties and this matter in dispute. However, if settlement is reached as a result of the mini-trial, any and all information prepared for, and presented at the proceedings may be used to justify and document the subsequent settlement modification.

Furthermore, evidence that is otherwise admissible shall not be rendered inadmissible as a result of its use at the mini-trial.

14. The neutral advisor will be instructed to treat the subject matter of this proceeding as confidential, and refrain from disclosing any of the information exchanged to third parties. The neutral advisor is disqualified as a witness, consultant or expert for either party in this and any other dispute between the parties arising out of performance of Contract No. _____.

15. Each party has the right to terminate the mini-trial at any time for any reason whatsoever.

16. Upon execution of this mini-trial agreement, if mutually deemed advisable by the parties, the Corps and Appellant shall file a joint motion to suspend proceedings of this appeal before the _____ _____ Board of Contract Appeals. The motion shall advise the Board that the suspension is for the purpose of conducting a mini-trial. The Board will be advised as to the time schedule established for completing the mini-trial proceedings.

Dated _____

By _____

Principal representative for Corps

Dated _____

By _____

Principal representative for appellant

_____

Attorney for the Corps

_____

Attorney for Appellant

NOTE: This agreement reflects a mini-trial which involves a neutral advisor. In the event a neutral advisor is not used, you should eliminate all reference to the neutral advisor.

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This study describes the "Mini-Trial", one of a number of Alternative Dispute Resolution (ADR) techniques which the U.S. Army Corps of Engineers is using in an effort to reduce the number of disputes requiring litigation. The study describes what the technique is, how it has been used, and then offers guidance on how to go about conducting mini-trials.

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