

THE

# MINITRIAL

## A USER-FRIENDLY MEANS OF ALTERNATIVE DISPUTE RESOLUTION

By Roger Stetter



Mediation, and other forms of alternative dispute resolution (ADR), have been used to resolve wars, prevent riots, avoid strikes and settle many legal disputes.<sup>1</sup> The various forms of ADR provide extremely valuable litigation tools that will enhance, rather than supplant, our adversarial legal system. One ADR method, the minitrial, combines some of the best elements of the adversarial process with traditional negotiation skills.

### What Is a Minitrial?

A minitrial is not reported. It has been defined as a:

private proceeding in which the lawyers for each party make shortened presentations to a neutral third party, often a retired judge or someone with acknowledged expertise in the area of dispute, with clients with settlement authority present.<sup>2</sup>

Its chief characteristic is to use the clients to decide the dispute. After hearing the presentations, which may take a day or longer, management representatives of the client, with full authority to

settle, can negotiate a settlement with the assistance of a neutral third party (*i.e.*, a mediator) who has been accepted by the parties. The mediator should provide the parties with an independent and objective assessment of their positions that will lead to a realistic settlement.

### **Minitrial: Not Necessarily a Last Resort**

In theory, a minitrial might be held at any stage of a legal dispute, even before a lawsuit has been filed. However, most minitrials occur after there has been considerable discovery and motion practice. Frequently, the parties have been frustrated with the cost and delays of the litigation and want to get on with their business. Environmental disputes fit this scenario perfectly. Time-consuming and costly to litigate, they also pose several practical problems for the federal courts and involve risk and uncertainty.<sup>3</sup>

A minitrial was held before U.S. Magistrate Judge Lance Africk in December 1993, after the parties had been engaged in costly litigation for years and the trial had been postponed three times. The case involved alleged environmental liabilities against the former owner of a shipyard and barge cleaning facil-

ity. Handing down the last in a series of rulings on summary judgment motions, Judge Marcel Livaudais expressed dismay with the process. He wrote:

... The sheer numbers and thickness of the legal pleadings, motions, memoranda, and attachments thereto expand the meaning of the phrase "a federal case." The daunting task of reviewing this "hurricane of paperwork" and the resulting realization that much of it accomplishes nothing in terms of expeditious resolution of this litigation, causes one to pause to consider whether in fact that was indeed the intent and desire of these parties in fashioning this relatively simple dispute.

*Trinity Industries, Inc. v. Dixie Carriers, Inc.*, Civ. 90-2349 c/o 92-3767-E (U.S.D.C. E.D. La.), Order and Reasons, dated July 13, 1993.

Both parties were deeply entrenched in their positions and the contours of the dispute were constantly being changed by the assertion of new claims after each successful round of summary judgment motions.<sup>4</sup> Neither party seemed able to settle but both desired an end to litigation. They did agree to have a minitrial.

The minitrial gave each party an equal opportunity to present his best case and to demonstrate the weaknesses in his opponent's case. It also brought the CEOs together, more than 10 years after they had negotiated the underlying deal, and provided them with a "reality check" from a neutral federal magistrate who served as the mediator with the concurrence of the parties. The dispute was settled without further litigation.


### **The Minitrial Agreement**

There is no official procedure for a minitrial. Counsel prepare an agreement that outlines a process for achieving a fair resolution of the dispute. The agreement can be tailored to meet the needs of each case. Typically, opposing counsel make an abbreviated presentation of their best case to the management representatives and the mediator. A mediator is not a judge. The mediator makes no rulings or awards and the minitrial agreement should say so explicitly. The mediator does, however, tell the management representatives what he or she thinks of each party's case on the merits and forecasts the likely outcome of the trial. The mediator can meet in confidence with each management representative, without counsel being present,

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and engage in shuttle diplomacy to facilitate a settlement.

The minitrial agreement in the *Trinity Industries* litigation opens with, "The purpose of the mini-trial is to reach a voluntary settlement of this dispute without further litigation." This is referred to as a "mission statement." It is very important, as it expresses the genuine desire of both parties to resolve the dispute without further expense and delay, an essential element to the success of the minitrial as an alternative to resolving litigation.

### Presentation at the Minitrial

The minitrial is your chance to speak directly to a representative of your opponent who has the authority to resolve the matter, and convince him of the strengths of your client's case and the weaknesses of his. You, therefore, need to make a simple and strong presentation that focuses on the major issues and gives the opposing party's management representative a clear picture of the dispute.

The tone of the presentation should be friendly; "tough-guy" talk has no place.<sup>5</sup> However, vigorous advocacy can be important in settling the case advantageously to your client. An effective presentation might call for the use of exhibits, graphs, charts and other forms of demonstrative evidence.

Live testimony should be presented at the minitrial, preferable from fact witnesses who will impress the parties with both their knowledge and honesty. The testimony must be presented succinctly within the stipulated time frame. The rules of evidence do not apply, so one may lead his own witness. Opposing counsel may ask clarifying questions, but spending too much time on cross-examination could be counter-productive. The objective is to tell your client's side of the story clearly and concisely, and, if possible, in a way that is compelling. Each witness must be prepared carefully for the minitrial, just as for any trial.

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Adequate time should be reserved for an opening statement and closing argument. The opening statement should tell the management representatives why the parties are assembled and, if appropriate, provide a brief history of the dispute. The major points of the prosecution or defense should be stated without unnecessary detail or elaboration. It is important to stick to the facts and be totally sincere.

The closing argument, like the final act in any well-directed play, should tie everything together. If all has gone according to plan, the story will have unfolded as you said it would, *i.e.*, the witnesses and evidence will support your client's position on liability and damages. Closing argument is a good time to remind the management representatives why the parties agreed to hold

a minitrial: to reach a just and fair resolution of the dispute without further protracted litigation and legal expense.

A mediation brief (also called a position paper) can be provided to the mediator ahead of time so that he or she has a full understanding of the dispute and of each party's position on liability and damages. If you submit a position paper, keep it short, or you will run the risk that it may not be read carefully, or read at all.

### Capturing the Agreement Reached at the Minitrial

If at all possible, do not leave the minitrial without a written memorandum of understanding (settlement agreement). It is easier to get a signature at the time of the mediation; after that, a party may conveniently forget what is not to his advantage. The mediator can read the terms of the settlement to a court reporter who will prepare a sealed transcript for the parties.

### Conclusion

Faced with the escalating cost of litigation, more companies are turning to minitrials and other forms of ADR. Most clients like the idea of a minitrial because all parties have an equal chance to tell their side of the story without the formality and inconvenience of a trial. Executives like minitrials because they

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retain control of the proceedings, and the outcome is known before anyone is asked to agree. Attorneys like the process because they can continue to be effective advocates for their client by framing the dispute in its proper legal context and presenting their best case in a setting that resembles a trial, without much of the distraction.

Some clients initially may oppose any suggestion of mediation, as they may want to be vindicated and believe it can only be obtained through a public trial. However, once enmeshed in the litigation process, most clients appreciate the chance to settle a legal dispute quickly and value an attorney who suggests ways to relieve the burden and expense of litigation.

#### FOOTNOTES

1. Boyle, "Mediation in the Legal System: New Tricks for an Old Dog," 1991 Def. Couns. J. 514 (Oct. 1991).

2. Dispute Resolution Alternatives Supercourse, *supra*, at 642.

3. Miniberg and Goodbody, "The Superfund Crisis in the Federal Courts: A Case Study," BNA Env't Rep. (5/20/94) at 139-143. See generally, ABA Section of Natural Resources, Energy and Environmental Law, "Making ADR Work for Your Clients in Environmental Disputes" (1994 ABA Annual Meeting).

4. For example, after the court dismissed its claim for breach of environmental warranties under the stock purchase agreement, the plaintiff asserted an alter ego claim against defendant. Trinity Industries, Inc. v. Dixie Carriers, Inc., E.D. La., No. 90-2349-N, 24 Chem. Waste Lit. Rep. 907 (6/24/92).

5. Martin, "Mediation: A Better Way," 41 La. Bar J. 207 (Oct. 1993).

#### ABOUT THE AUTHOR

Roger Stetter received his undergraduate degree, with honors, from Cornell University in 1968 and his law degree in 1971 from the University of Virginia Law School. Before entering private practice in New Orleans, he was a law professor at Louisiana State University and an antitrust litigator for the Wall Street law firm of Mudge Rose, et al. (Lemle & Kelleher, L.L.P., 21st Flr., Pan-American Life Center, 601 Poydras St., New Orleans, La. 70130-6097)



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