

Mini-Trial Dispute Resolution

Case history of how mini-trial was used to solve complex issues and avoid costly litigation

BY ROBERT H. GORSKE*

In April of 1982, American Can Company brought suit in a Federal District Court in Milwaukee against Wisconsin Electric Power Company. It claimed damages of \$41 million for breach of contract. Wisconsin Electric responded with a counterclaim for \$20 million. In September 1983, after some months of very unusual negotiations, the principal feature of which was a mini-trial, all claims in the case were settled.

It is that process of negotiation I am here to describe to you. I also want to tell you about the kinds of questions that have arisen about the process, what my own point of view is about those questions and how the process might fit into your own kind of work, licensing.

The Wisconsin Electric-American Can mini-trial has attracted considerable national attention since its settlement last September.

A week after the settlement, I presented a paper in New York to the Legal Committee of the Edison Electric Institute about the case. Shortly after that presentation, the Center for Public Resources (CPR) in New York reprinted the paper in its newsletter "Alternatives," published by Harcourt Brace Jovanovich.

In November 1983, the *Legal Times* magazine published a feature article describing our case in detail.

In his 1983 year end report on the federal judiciary, Chief Justice Warren Burger of the Supreme Court of the United States referred to our case as "an impressive example of the success of the mini-trial."

On February 23, 1984, CPR presented awards for "significant practical achievement" in the use of innovative alternative dispute mechanisms to Wisconsin Electric and American Can in recognition of our success in using the mini-trial process.

Numerous articles, for example, in the *Wall Street Journal*, *Duns Business Review* and the *National Law Journal* recently have cited our case to show that alternative dispute resolution can work.

Not least significantly, Bill Ellis, Deputy General Counsel of American Can, and I were given a tongue-in-cheek year-end award by the *American Lawyer* magazine in its January 1984, issue for "the gutsiest performance by inside counsel" for our roles in the case.

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Why is it that this fairly conventional commercial dispute should attract so much interest?

The answer, I think, must lie in the growing belief of the public that the present system of litigation in the United States has become too pervasive, too complex and too expensive and that something has to be done about it. Alternative dispute resolution and the mini-trial provide at least a glimmer of hope for improvement.

To help you get a better understanding of the dynamics of the mini-trial process and how it worked in our case, I will tell you some of the details of the lawsuit.

You will recall that one of the effects of the Arab oil embargo in 1973-74 was a great desire to develop fuels to substitute for gas and oil, which were becoming increasingly scarce and more expensive. There was then considerable enthusiasm for the idea that municipal refuse could be used, with proper treatment, as a substitute fuel. American Can Company developed a process to do just that.

Convert to Fuel

In 1975, American Can agreed to take the City of Milwaukee's garbage and to convert it into a fuel. At the same time, American Can contracted with Wisconsin Electric Power Company for the utility to take the fuel, to mix it with coal and to burn it under boilers at the utility's then most modern coal burning equipment. Under the agreement Wisconsin Electric would pay American Can for the fuel at a rate equal to the cost of coal with the same heat content. In turn, American Can would pay Wisconsin Electric for all of its additional costs (including costs of modification of facilities) involved in burning the fuel.

Unfortunately, Wisconsin Electric was beset with multitudinous operating difficulties. There was much slagging in the boilers (some of which had to be removed by employees using shotguns inside the boilers), there was equipment breakdown, there was considerable air and water pollution, there was much down time on the units and, finally, the utility was cited by the Environmental Protection Agency for a violation of the Clean Air Act. The result was that Wisconsin Electric decided to stop burning the fuel. American Can took the position that this was a breach of contract.

Fruitless Negotiation

Negotiations between the parties to resolve the problem were fruitless. In April 1982, the suit was commenced, with American Can Company taking the position that its entire project had been made worthless by the utility's failure to burn the fuel and that considerable loss of profit was involved. Wisconsin Electric respond-

ed with a counterclaim alleging, among other things, that severe damage had been done to the generating units by burning the fuel.

The case began as a typical case does which involves a lot of money and a very complex set of facts. The case was highly technical and promised to be extremely expensive and time consuming to prepare and to present. The parties at one point told the court that some 75 trial days would be required. Both parties were reconciled to a long and arduous piece of litigation.

In November 1982, about seven months after the lawsuit started, Bill Ellis, American Can's Deputy General Counsel, read a piece in the *New York Times* about a firm in Washington, D.C., called EnDispute. EnDispute specializes in "dispute resolution and conflict management."

EnDispute had been recently organized by Jonathan Marks and Eric Green, former partners of the Los Angeles litigation law firm of Munger, Tolles and Rickershauser. While with the Munger firm, Marks and Green had participated in a successful patent-related mini-trial between TRW Corporation and Telecredit. They were so impressed with the result of that process that they later decided to form a firm to market the idea of alternative dispute resolution for profit. Bill Ellis thought that EnDispute might be able to help in our case and so he asked Jonathan Marks to look into the matter.

Our first knowledge of what was going on came in the form of a letter from Mr. Marks telling us that he was writing at the request of American Can to ask whether we would be interested in having a joint review of the case to see whether some sort of alternative dispute resolution might work out. He sent along copies of a number of newspaper and magazine articles about his firm and the concepts he was proposing.

After some consideration, we wrote back and said that we were indeed interested in exploring the matter further.

Conference Call

This was followed by a conference call among Messrs. Marks and Ellis and me. During this discussion we agreed that American Can and Wisconsin Electric would retain EnDispute jointly and would share the costs equally. The first step would be for the parties to furnish EnDispute with a set of materials to provide some background about the case. This would be followed by meetings between EnDispute and each of the parties separately to see what the issues were thought to be and how the parties viewed the strengths and weaknesses of their respective cases. This would be followed by EnDispute's provision of a written analysis of the situation with some suggestions about what alternative methods might be appropriate.

Mr. Ellis and I were able to agree quickly on a list of items to be furnished. Trial counsel were also asked to submit brief summaries of the issues and the arguments supporting the respective positions.

We then had our separate meetings with EnDispute. In these meetings, each of which took most of a day, the parties presented EnDispute with the factual and legal arguments in favor of their positions and discussed the alternative dispute resolution process. In discussions

subsequent to settlement of the case, Jonathan Marks told me that the difference between the parties' lawyers' assessments of their respective cases was wide indeed.

Following these meetings, EnDispute provided each party with a written analysis (not at all involving any of the merits of the case). EnDispute suggested consideration of three options: mediation, use of an outside expert and a mini-trial, and suggested that the parties focus their attention on the third option, the mini-trial.

The kind of mini-trial proposed by EnDispute would involve a highly condensed presentation by each of the parties of its factual and legal arguments (through whatever mixture they would each choose of witnesses, documents, physical exhibits or direct lawyer summaries) to a panel. The panel would be composed of a top management representative of each party (with full authority to act) joined by a neutral advisor.

The neutral advisor was to be a trial lawyer or a former judge who would be in a position to assess convincingly the parties' respective chances for success in the lawsuit.

In addition to its description of the mini-trial process, EnDispute provided the parties with a draft of a mini-trial agreement and a proposed schedule for the mini-trial process. EnDispute also provided several extensive lists of potential neutral advisors from all over the country.

Expedited Discovery

The draft agreement provided for expedited discovery by the parties, a pre-mini-trial exchange of position papers and proposed exhibits and a provision on confidentiality to assure that none of the mini-trial activities would prejudice the pending litigation. Using this draft as a basis for discussions, the parties quickly worked out the details of a mini-trial agreement.

Beyond the things I have already mentioned, the agreement called for an expedited document production schedule and provided for one month of deposition activity. The parties agreed not to exceed 70 hours of depositions on each side and also agreed that if there were any hang-ups in the discovery process, EnDispute would be consulted for advice. The parties also agreed on the mini-trial schedule itself and to ask the trial court to suspend all litigation activities pending conclusion of the mini-trial process.

With the assistance of EnDispute the parties selected fromer U.S. District Judge Harold R. Tyler, Jr. of the New York law firm of Patterson, Belknap, Webb & Tyler. Judge Tyler's background was pertinent and he proved to be an excellent choice.

During the expedited discovery process Mr. Ellis and I were in frequent contact to try to assure that the process would not be thrown off track by disputes over discovery. All problems were quickly resolved and the discovery process proceeded efficiently.

Before the mini-trial, the parties provided Judge Tyler with several hundred exhibits along with very brief summaries of their respective arguments and positions.

The mini-trial came off on schedule at the end of June 1983. The mini-trial schedule called for two seven-hour days of case presentation by the parties to be followed by final oral argument by counsel. This meant each party had seven hours of presentation time over two days, to

be divided between the basic case and the counterclaims as they wished. The first half-day was American Can's, the second half-day was Wisconsin Electric's. The second day was equally divided between the parties in smaller pieces.

American Can's presentation largely took the form of document presentation and oral summaries by its attorneys while Wisconsin Electric's presentation concentrated more on oral statements of live witnesses. On the third day the parties proceeded directly to final arguments of about 30 minutes on each side.

At this point I must observe that although the basic case and the counterclaim were extremely complex, the neutral advisor and his fellow panel members had by the end of the oral argument period on the third day a complete and unfiltered grasp of what the significant points of the two sides were. Further, all those present (including especially the management people) had better understandings of the arguments of each side and how convincing they were. This kind of result is not easy to achieve in the ordinary litigation experience.

Debate Merits

Over the next day and a half the business representatives on the panel (sometimes joined by Mr. Ellis and myself) met with and without Judge Tyler to debate the merits of the case and possible approaches to settlement. Judge Tyler was quite direct and candid in these discussions in stating his view of the various arguments made by the parties and what he thought the chances of ultimate success were.

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The mini-trial did not result in an immediate settlement agreement, but the discussions between the management representatives did reveal that there was enough flexibility on both sides to make further discussions useful. Over the next several months the parties met on several occasions to explore possible settlement approaches and in the course of this agreed to several extensions of the procedural schedule in the District Court. On September 26, 1983, these discussions culminated in a settlement agreement.

Having been through the process, I have several observations about it you may find of interest:

The kind of mini-trial I have described is a most effective process because (among other things) it provides an opportunity for top-level executives of the contending parties to address a matter in litigation together and at the same time in an intensive examination of the pros and cons of each other's positions. All this is done without the coloration of the trial lawyer's filter, through which the other side's case must otherwise pass in the typical settlement process. Top managers in most corporations are used to making tough decisions and are willing to make them even in complex and difficult cases involving a lot of money if they think the time is right and if they think they have adequate access to the facts. The mini-trial provides this kind of opportunity and emphasizes the decision-making role of the executive management as opposed to the trial counsel.

Another point is that the mini-trial process is also cost effective. If a case is settled, obviously the additional cost of litigation will be saved. But even if the case is not settled, our experience has led us to conclude that a great deal of the cost involved in preparing for and con-

ducting the mini-trial is salvageable in the form of more efficient preparation and trial work later on.

Adaptable

And more to the point of the particular interests of this group, there is no doubt that alternative dispute resolution processes and the mini-trial in particular are especially adaptable to patent-related disputes. Some of the classic success stories in this area, in fact, involve settlement of patent disputes through non-binding mini-trials. (Several of these cases involved TRW Corporation, which I mentioned earlier.) It is easy to see why this should be the case:

—Patent and licensing cases are typically complex and highly technical, with the result that they can be very expensive to prepare for trial, very expensive to try and very unpredictable in outcome especially when presented to a nontechnical court or jury.

—Prompt resolution is often to the advantage of both parties.

—The parties (particularly in licensing situations) have ongoing relationships which can be adversely affected by a hard fought lawsuit.

Thus, not only is it not unusual for patent-related disputes to be settled through mini-trials, it is increasingly common to see some attempt, for example in licensing agreements, to make advance provision for at least a consideration of some kind of alternative dispute resolution approach in the event disputes arise under the agreement. It might take the form of an agreed upon procedure something like the following:

DISPUTE RESOLUTION PROCEDURE

1. If a dispute arises under this Agreement which cannot be resolved by the personnel directly involved, either party may invoke this Dispute Resolution Procedure by giving written notice to the other designating an executive officer with appropriate authority to be its representative in negotiations relating to the dispute.

2. Upon receipt of the notice, the other party shall, within five business days, designate an executive officer with similar authority to be its representative.

3. The designated executive officers shall, following whatever investigation each deems appropriate, promptly enter into discussions concerning the dispute.

4. If the dispute is not resolved as a result of such discussions, either party may request the commencement of good faith negotiations with respect to a procedure for dealing with the dispute through means other than litigation.

5. Upon such request, counsel for the parties shall promptly communicate concerning the following and other related subjects:

a. The mode of further proceeding (for example a formal, non-binding mini-trial before a panel composed of executive officers of each of the parties, with or without an independent neutral chairman or advisor);

b. A procedure and schedule for exchange of documents and other information related to the dispute;

c. Ground rules and a schedule for the conduct of the selected mode of proceeding;

d. Selection and compensation of the neutral chairman or advisor (if any).

6. Following the conclusion of any agreed-upon formal procedure and receipt of the input of the neutral

chairman or advisor (if any), the parties shall continue direct contacts at the executive management level and continue to attempt to resolve the dispute.

7. Either party may terminate the Dispute Resolution procedure at any time may thereafter pursue other available remedies.

Will a process like this guarantee settlement of disputes? Not at all. But experience over long periods of time has led observers of human nature to conclude that if people who are in dispute are kept in contact with each other and if they have continuing discussions about what divides them, the likelihood of their being able to work out a satisfactory solution is enormously increased.

Now, on the various occasions that I have talked with large and small groups of people about our case, a number of questions have repeatedly been asked. I will tell you about some of these and my answers to them:

—Is there anything new about all this?

Not really. The lawyer who has had experience in labor mediation and labor arbitration will feel very comfortable with what is going on, because the mini-trial process combines elements of both mediation and arbitration. But it is not exactly arbitration, because it does not result in a binding award. It is not exactly mediation, because it involves a lengthy and detailed trial-like presentation of the legal and factual arguments of each side. Further, the neutral advisor is not usually expected to be a mediator or go-between, but rather to give the parties the benefit of an independent informed point of view. The process also differs from nonbinding arbitration, in that the neutral advisor in the mini-trial is not looked to for any kind of award at all, but rather his assistance in evaluating the odds of success of each side's claims. What is new about all this is that this kind of process is becoming more popular.

Organizations

—What organizations are active in the alternative dispute resolution field?

I have already talked about EnDispute in some detail. Others in the field include the American Arbitration Association, the Center for Public Resources, and the National Institute for Dispute Resolution.

The American Arbitration Association has been around for a long time and puts most of its emphasis on arbitration, although it has become more active recently in other areas of alternative dispute resolution.

The Center for Public Resources, located in New York City, has a membership of 119 of the largest corporations in the U.S. and 51 major law firms, mostly from New York, Washington, Chicago and San Francisco. CPR's program involves its members in academic and corporate research for the creation of new dispute resolution resources and services. Through these activities, CPR attempts to identify and communicate the best available knowledge on workable methods of better dispute prevention, resolution and management. This involves work not only in the ADR field, but also in the areas of litigation management, dispute prevention and judicial application of alternative dispute resolution approaches. CPR has a judicial panel to assist in dispute resolution. The members of the panel are some of the nation's most eminent lawyers and former judges. The

names on that panel include: Griffin Bell, Kingman Brewster, Warren Christopher, Lloyd Cutler, Shirley Hufstедler, Sol Linowitz, Elliott Richardson, Harold Tyler and Irving Younger.

The National Institute for Dispute Resolution of Washington, D.C., is a private, nonprofit national organization which began operations in 1983 with grants from several major foundations. Most of the institute's activities are in the form of itself making grants for research and other work concerning dispute resolution methods. It attempts to provide visibility and legitimacy to dispute resolution processes and to help assess the increased institutionalization of alternatives to courts for settling disputes between individuals. It is, however, not directly involved in actual dispute resolution.

—Is a third party organization like EnDispute necessary in individual cases?

I am sure that the process could be accomplished without a third party. Our experience, however, leads me to believe that it would often be much more difficult to work out the details of the arrangements and the rules of the game were there not a third party to smooth the negotiations. However, I should point out that CPR has a Corporate Dispute Management Manual published by Matthew Bender which can be very helpful in setting up something without a third party.

—Is a neutral advisor necessary?

Again, I am sure that a mini-trial could very well succeed and indeed has succeeded in cases where the panel is composed entirely of executive management of the contending parties. And this clearly would be the way to go in cases not involving large amounts of money. The right neutral advisor can, however, provide a respectable and credible independent sounding board for the arguments of the parties. It can be very useful for an executive who has been uncritically accepting his counsel's view of the case to be confronted with a respectable neutral's statement that there is another side. Conversely, it can be very helpful for an executive to hear that a neutral person shares the trial counsel's view about the hazards of the case.

—How to trial counsel feel about the process?

In our case the trial counsel for both sides were extremely cooperative and enthusiastic. Some people seem to think that the mini-trial process is inconsistent with the best economic interests of litigation lawyers. The trial counsel in our case showed no signs of any such belief. I do know that in other cases trial counsel has urged the client not to use the mini-trial process. In at least one such case I have heard about, the parties successfully proceeded anyway, using inside lawyers to present their cases.

—Doesn't the process involve "educating the opposition?"

There is, I suppose some danger of this and timing is always an important matter. But modern discovery practice is such that it is highly unlikely that significant facts and arguments will not be uncovered by the other side in the course of trial preparation. Indeed, in many cases the other side needs education and might be expected to view its own case more critically if it had that education.

—Doesn't taking the initiative for ADR indicate weakness?

In our own case, the approach through EnDispute did not lead us to think American Can had doubts about its case. Rather, what it said to us was that American Can shared our point of view that it did not make sense to pour large amounts of time and money down a litigation rathole if there existed any reasonable likelihood that a settlement could be achieved in some other way. Approaching the other side with a mini-trial proposal is, I think, at least as suggestive of strength as it is of weakness.

Pledge

The Center for Public Resources has addressed this very problem: believing that the best time to talk about alternative dispute resolution is before a dispute arises rather than after the parties are in conflict, CPR has proposed a pledge to be executed by the chief executive officers of its member companies. Essentially this pledge says that in the event of a dispute between the signing company and another company which has made a similar statement, the signing company is prepared to explore resolution of a dispute through negotiation or alternative dispute resolution techniques before pursuing full-scale litigation. Of course, this does not imply any obligation to agree on any particular procedure, but only to consider the possibility. The value of something like this is that it provides a basis upon which the subject can be broached without implying any kind of doubts about the strength of one's own case.

—Are all kinds of cases suitable for the mini-trial process?

150 I am convinced that most cases are, especially given the great flexibility of the process. Many cases are clearly not, however. For example, cases in which political issues predominate often must be resolved in a public

litigation setting, since the proceeding often provides the platform for the presentation of political views. Cases setting precedents for the resolution of other pending disputes also, I would think, would typically not be appropriate. Cases which appear to be inappropriate might nevertheless provide an occasion for either or both sides to reconsider their positions.

—Doesn't a mini-trial work only in big cases?

Not necessarily. The process is a very flexible one which can be tailored to suit particular circumstances. While an outside facilitator and a neutral advisor can be very helpful, and even essential in some cases, they are not essential in all cases. The time and expense involved in their use can clearly be foregone in cases too small to justify them. The most essential ingredient in a successful mini-trial is the willingness of the parties to meet directly and to discuss openly and thoroughly the dispute they have.

—Since over 90% of cases are settled anyway, what's the point of a mini-trial?

The advantage of the mini-trial, or some other form of alternative dispute resolution, is that it provides an opportunity for settlement at a much earlier stage in the process. This is where the savings of time and money are involved.

—Why is the process attractive to businessmen?

The attractiveness (and it is attractive) is largely due to the fact that the businessman has a feeling of control and participation which is very difficult to duplicate in an ordinary litigated situation. The situation is much more familiar to him as he deals with litigation in a way which is similar to his dealings in major negotiations of a commercial type.

The process is not for every case, but is one that should certainly be considered in many cases presently pending.