



**US Army Corps
of Engineers**

Pamphlet 1

**ALTERNATIVE DISPUTE
RESOLUTION SERIES**

THE MINI-TRIAL

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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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Alternative Dispute Resolution Series

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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.

The Mini-Trial

- 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 re-

solve 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

