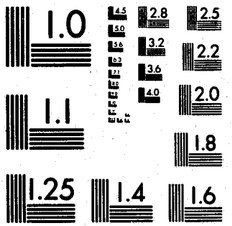
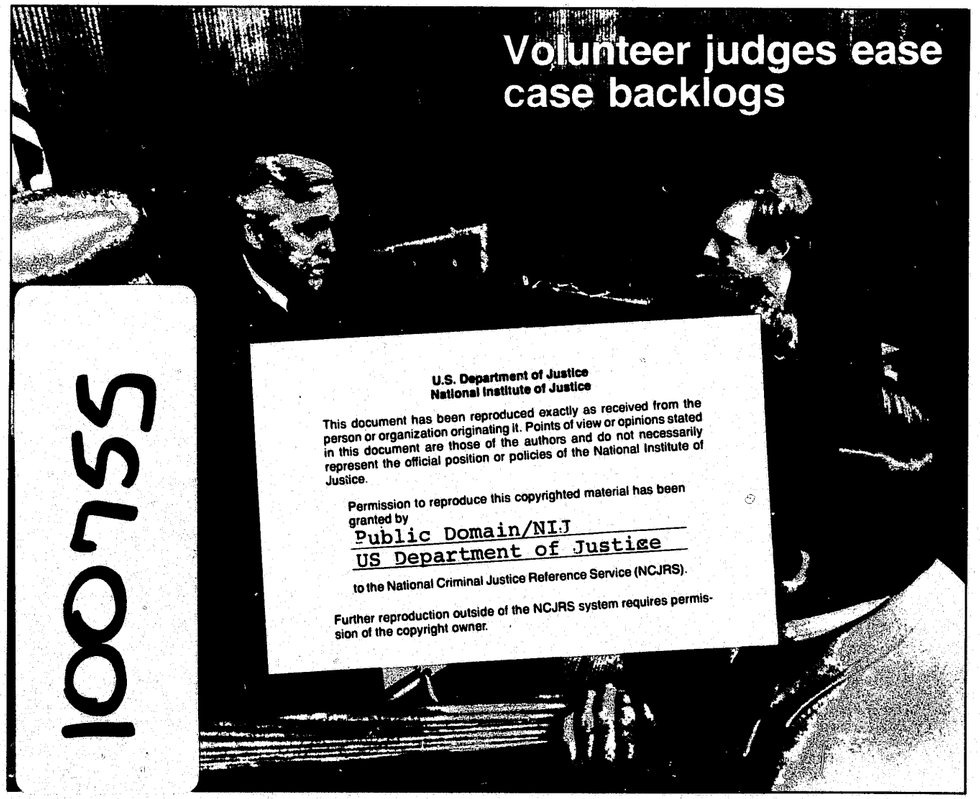


U.S. Department of Justice
National Institute of Justice

NIJ

NIJ Reports

Summaries of recent reports to help you keep up to date with advances in your field of criminal justice



Director's notes

As we begin the last half of the 1980's, we can look back with pride on the progress the National Institute of Justice has made in the last few years. Through research conducted in cooperation with practitioners and scholars, we have brought important information to bear on issues such as drugs and crime, career criminals, the treatment of victims, and public-private partnerships to enhance criminal justice operations.

But if we are to make even greater progress, we must confront existing and emerging problems from the broader perspective of the criminal justice system as an integrated entity. This is a continuing goal of the National Institute of Justice, one that can best be achieved by integrating policy through knowledge and information sharing about what works to reduce the number of victims of crime.

One of the four priorities we have outlined in our Sponsored Research Programs for Fiscal Year 1986* is research to improve the criminal justice system. A key area of inquiry will examine how interactions among criminal justice agencies affect major crime issues. For example, the new research program will explore the strengths and weaknesses of systemwide activities as they affect the identification, prosecution, and handling of serious offenders, the treatment of victims, and the prevention of crime.

This systemwide emphasis, together with our other research priorities—controlling the serious offender, aiding victims of crime, and enhancing community crime prevention—will create the impetus in 1986 for sound research that can produce insights and knowledge that can be integrated into policy and practice.

The past several years have seen a growing spirit of respect and cooperation between researchers and practitioners. We can see this in important projects such as the Minneapolis Domestic Violence Experiment, in which police and researchers joined together to produce significant and policy-relevant findings on appropriate police responses to spouse assault.

Other evidence is apparent in a new book, *Police Leadership in America—Crisis and Opportunity*, edited by William Geller of the American Bar Foundation. This book assesses the "state of the art" of American police leadership. The volume presents law enforcement leaders in dialog and debate with leading scholars, illustrating the contribution that practitioners and scholars, pulling together, can make in resolving pressing public safety problems. It is a valuable resource for all who want to be a part of those solutions.

This month's feature article highlights yet another form of cooperation that is benefiting courts faced with overloaded dockets. Many States are finding that it makes good sense to use lawyers as temporary judges or in other quasi-judicial roles, as a way of temporarily supplementing permanent judicial resources.

The article, by Alex B. Aikman of the National Center for State Courts, explains the ways in which lawyers are serving as judicial adjuncts and describes Institute-sponsored research that is assessing the impact of the volunteer lawyers in easing judicial burdens.

In 1986, we look forward to continued progress in providing useful information to practitioners and policymakers through research. On behalf of the National Institute of Justice, I wish all our colleagues in the criminal justice community a happy and productive New Year.

James K. Stewart
Director
National Institute of Justice

*To order Sponsored Research Programs FY 1986, order no. 36 on the back cover.

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Contents

Volunteer lawyer-judges bolster court resources

by Alex B. Aikman

The widening gap between expanding workloads and available judicial resources is creating serious problems in many courts. Nationwide, in the 6 years from 1977 to 1983, civil case filings increased 20 percent, criminal filings 23 percent, and appeals 30 percent (excluding States that created intermediate courts of appeal).[1] Between 1977 and 1981, however, the number of trial court judges increased only 7 percent and the number of appellate judges only 15 percent.[2]

Traditionally, the most common response to concern about case delay and increasing volume has been to increase the number of judges. In a period of fiscal restraint, however, the Nation's courts are faced with tight budgets. There has been little room in public budgets to support increases in judicial resources proportionate to the growth in caseloads.

Supplementing judicial resources

How can courts develop resources to ease backlogs and delay without greatly increasing costs? A number of jurisdictions have used lawyers—on a *pro bono* or limited compensation basis—to supplement existing judicial resources. These "judicial adjuncts" perform a variety of roles in court, from those of arbitrator and facilitator of settlement to *pro tempore* judges.

Judicial adjuncts are not full-time employees of the courts. They are lawyers who assist courts on a temporary basis while maintaining an active law practice. They continue to be regarded as attorneys rather than full-time judicial officers.

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The bar has a long tradition of assisting courts when the need arises, either on a *pro bono* basis or for minimal compensation. Although much of the assistance in the past has been in the form of providing legal representation for indigent criminal defendants, it also has included service in a judicial or quasi-judicial role.

The use of judicial adjuncts has not been well documented or evaluated, however. Many courts do not permit the use of lawyers to supplement judicial resources; when they do, such use frequently is informal. A more systematic use of lawyers as a supplemental resource might significantly reduce backlogs and delays.

To examine this possibility, the National Institute of Justice has funded a project conducted by the National Center for State Courts. The project has three goals: (1) to document the extent and types of use of lawyers by courts to supplement judicial resources; (2) to develop, in conjunction with a broadly representative advisory board, guidelines for the establishment and operation of programs using lawyers as judicial adjuncts; and (3) to design experimental judicial adjunct programs and evaluate their impact on courts and litigants.

The first two goals were achieved with the 1984 publication of *Guidelines for the Use of Lawyers To Supplement Judicial Resources*. The *Guidelines* report was prepared by the National Center's Advisory Board on the Use of Volunteer Lawyers as Supplemental Judicial Resources, chaired by then-Chief Justice of Connecticut John Speziale.

[1] Bureau of Justice Statistics *Bulletin*, "Case Filings in State Courts, 1983." October 1984.

[2] National Court Statistics Project. National Center for State Courts, *State Court Organization 1982* (unpublished draft).

The report noted that use of judicial adjuncts by courts generally falls into six categories, based on the amount of judicial or quasi-judicial authority exercised.

1. Alternative dispute resolution mechanisms. Judicial adjuncts may serve in court-annexed arbitration or mediation programs. In most courts, parties in civil cases involving less than a defined dollar amount must participate in an arbitration or mediation hearing presided over by a lawyer before they may proceed to trial before a judge or jury. Most of these cases accept the arbitrator's award or the mediated result, and plaintiffs do not insist on a trial before a judge or jury.

2. Settlement conferences. Typically, settlement conferences are mandated by the court for some or all civil cases and are conducted before a lawyer, a team of lawyers, or two lawyers and a judge. The lawyers usually have expertise in the general subject areas of the lawsuit in question. The settlement conferences are used to provide the parties and their counsel with an assessment by a disinterested third-party of how much the case is "worth" for settlement purposes (not always the same as how much a judge or jury would award if there were a trial). The hope is that these conferences will encourage parties to settle their dispute without going to trial.

3. Quasi-judges. Although the terminology can differ, these are usually known as referees, factfinders, or masters. The majority are granted power to compel testimony, hold hearings, and make recommended findings of fact and law to the supervising judge, who then enters a formal order or a final judgment, as appropriate.

4. Commissioners or magistrates. They are empowered to perform limited judicial duties, such as signing warrants and subpoenas, setting bail, hearing arraignments, and presiding over preliminary hearings, nonjury misdemeanor cases, traffic infractions, and small claims cases. Typically, they serve part time for an indefinite term.

5. *Pro tempore* trial judges. These judicial adjuncts are given full judicial powers on a temporary basis. They may hear and decide any case, although usually in courts of general jurisdiction they sit only in civil cases. Their rulings are as appealable as those of any other judge of the court. This classification includes lawyers who serve as substitute judges while a regular judge is absent and those who routinely supplement existing judicial resources in an effort to reduce backlog. Their tenure is more limited than that of commissioners or magistrates. In most jurisdictions, their term of service is limited either to the time a regular judge is sick or unavailable or to a specified number of months.

6. *Pro tem* judges on the appellate bench. They serve as full-fledged members of the appellate court for hearing and deciding one or more cases and draft their share of opinions for the court. Currently only Arizona authorizes the general use of *pro tem* judges on an intermediate appellate court, but several other States allow temporary appointments by the governor when an appellate judge is disqualified.

The Advisory Board drafted nine guidelines for the use of judicial adjuncts, based on its review of experience in jurisdictions using lawyers in this capacity. The guidelines balance the traditional concern for safeguarding the integrity of the judicial system and the opportunity presented by judicial adjunct programs to improve courts' performance. The guidelines addressed these topics:

- Establishing judicial adjunct programs
- The scope of adjunct programs
- Selection of adjuncts
- Orientation and training
- Party consent to appearance before a judicial adjunct
- Ethical considerations in using adjuncts
- Compensation
- Provision of facilities and other resources to judicial adjuncts.


THE ARIZONA REPUBLIC

Most-wanted list: Court needs temporar

Crowded courts turn lawyers into judges

U.S. Judge Seeks Lawyer's Panel to Reduce Caseload

The Board recommended the guidelines because of the variety of practices found in jurisdictions using judicial adjuncts. Some programs need and use a large number of lawyers: arbitration programs, for example. In such instances, there are only a few general criteria for selection, almost no screening, and very little training. In other programs, especially when the lawyers' decisions will dispose of the case, entry criteria and screening are more rigorous, but training still may be minimal or nonexistent. Some variety in selection, training, and use is appropriate, but the guidelines can help courts to structure the use of judicial adjuncts to a greater degree and to maximize their value.

Generally, the role of judicial adjuncts is confined to civil cases and minor criminal cases. Judicial adjuncts have presided over bail setting and warrant application reviews and received guilty pleas. Some jurisdictions have used judicial adjuncts for drunk driving trials that may involve sentences of incarceration but are less likely to entail any postconviction supervisory issues.

Evaluating use of judicial adjuncts

The National Center is now nearing the end of the demonstration and evaluation phase of the project. Six courts have been testing the use of judicial adjuncts. Two trial courts are using *pro tempore* judges in different types of programs. One appellate court is using *pro tem* judges to dispose of appellate cases. The fourth court is testing a court-annexed arbitration program using attorneys as arbitrators. Courts in another State are using judicial adjuncts as trial court referees. Finally, one court is testing the use of lawyer-and-judge panels for mandatory settlement conferences.

In each site, the National Center for State Courts is collecting substantial statistical information about the cases handled by the experimental programs. In Seattle, the evaluation includes a parallel control group. Control groups were not possible in the other sites, so before-and-after evaluations will be made.

To supplement the quantitative information, project staff have interviewed

judges, judicial adjuncts, and litigating lawyers at each site. The interviews have revealed generally positive reactions to the program. In several sites, interviews have been supplemented by questionnaires directed to these same three groups and to litigants as well. The evaluation also will estimate the costs of the programs.

The National Center expects to publish a full report later this year on what has been learned as a result of these six demonstration projects. The programs are briefly described below, along with some of the general reactions voiced by those involved.

1. Pima County Superior Court (Tucson, Arizona)

In late 1983, the Pima County Superior Court recognized that problems in calendaring cases for trial would result in a logjam in first quarter 1984. Many more civil cases were scheduled for court and jury trials in that period than the court could possibly handle. To alleviate this situation, the court decided to assign approximately 300 civil cases—all the court trials pending for civil cases at the time—to the approximately 50 *pro tem* judges then on its roster.

With additional personnel, the court hoped to calendar and try the remaining jury trial cases on their assigned trial dates. It was anticipated that *pro tem* judges would schedule settlement conferences to handle cases that need not go to trial.

While this special program was in effect, the court continued to use *pro tem* judges for other matters. They presided over civil and criminal jury trials and heard and decided motions in general civil cases and in domestic relations cases.

2. Multnomah County Circuit Court (Portland, Oregon)

The Multnomah County Circuit Court program uses *pro tem* judges to hear and determine all motions for summary judgment in civil cases. In a motion for summary judgment, one side accepts for the sake of the motion that all the facts alleged by the other side are there, but argues that the moving party should win as a matter of law. *Pro tem* judges also determine some motions and sit on some nonjury hearings on domestic relations matters.

The National Center's final evaluation will concentrate on the use of *pro tem* judges to hear and decide summary judgment motions, with a less comprehensive statistical and qualitative evaluation of the domestic relations *pro tem* program.

3. Arizona Court of Appeals, Division One (Phoenix, Arizona)

The Arizona Supreme Court approved the establishment of a judge *pro tem* program for the Court of Appeals in April 1984. The Court of Appeals created a new department of the court composed of panels of one regular judge and two *pro tem* judges.

Attorneys sitting as *pro tem* judges have the qualifications needed to be appointed appellate judges. They also have been previously screened by the court.

The special panels are presided over by the regular judges of the court and hear only civil appeals in which oral argument has been requested. The court has determined that none of the opinions from this special department will be published, and thus none of these cases will set legal precedents.

The goal of the program is to reduce the length of time civil cases are at issue (all the parties' briefs and arguments have been made) and when they are argued.

The *pro tem* judges' preparation for oral argument was uniformly praised by litigating lawyers. Almost no one viewed compensation as required or appropriate for *pro tems* who volunteered in order to help the court and the justice system generally.

The program started in September 1984 and was scheduled to continue through December 1985. However, the court decided to extend it until June 1986.

4. Connecticut Attorney Trial Referee Program

Established to respond to a critical backlog of civil cases in some sites of the Connecticut Superior Court, the Attorney Trial Referee Program focuses on civil nonjury trials, with the aim of benefiting both the civil jury and criminal calendars as well. Generally, trial referees hear cases seeking damages of $15,000 or more that are awaiting a nonjury trial.

As referees, lawyers conduct hearings as if they were regular trials, but they have no authority to enter judgments. They prepare a memorandum of findings and recommend a disposition, which is then referred to a superior court judge. After the referees' findings and recommended disposition are filed, the parties may urge adoption, modification, or rejection of the recommendation of the trial referee.

The judge may conduct a hearing if objections are filed; he or she then renders a judgment and enters it in the record. Once judgment is entered, either party may appeal as if the case had been tried by the court originally. Although provision is made for paying trial referees $20 per hour up to a maximum of $100 per day, very few referees have requested payment.

The National Center's evaluation of the referee program has focused on three sites. One is the medium-sized court in Waterbury. The other two are among the State's largest jurisdictions, New Haven and Bridgeport.

5. Early Disposition Program, King County Superior Court (Seattle, Washington)

During Thanksgiving week in November 1983 and again in that same week in 1984, the King County Superior Court conducted its Early Disposition Program. The principal goals of the program are to reduce the number of cases requiring trial and to settle cases as early in the process as possible. The program involves cases that are ready for jury trial but have not yet received a trial date. The cases are assigned to a panel of one judge and two attorneys for mandatory settlement discussions. Panels were established for commercial cases, medical malpractice cases, personal injury cases, and marriage dissolution cases.

One unique feature of this program is the establishment of a control group,

Characteristics of judicial adjunct programs

Program Characteristics:	Arizona Ct. Appeals	Tucson, AZ	Connecticut	Minneapolis, MN	Portland, OR	Seattle, WA
1. Description of program	*Pro tem* on court of appeals (intermediate appellate court)	*Pro tem* on Pima County Superior Court (trial)	Trial referee (trial)	Court-annexed arbitration (trial)	a) *Pro tem* on circuit court for dispositive summary judgment motions. b) *Pro tem* to hear domestic relations motions.	Settlement conferences (pretrial)
2. Consent requirement						
a) program participation	Consent not required	Consent not required	Consent not required	Participation required	Consent not required	Participation mandatory
b) choice over individual judicial adjunct	Three challenges per side	Challenge available to individual *pro tem*.	Parties may strike one potential referee from list.	Challenge if conflict	Can reschedule hearing for different adjunct if conflict.	No choice in selection of individuals.
3. Scope of program	All civil cases which qualify on clerk's scale	No limits; court divided into civil, criminal, domestic relations, and probate divisions. Lawyers assigned to civil and criminal cases.	Nonjury trials. Assignment of lawyers based on specialization.	All civil cases claiming money damages between $1,250 and $50,000.	All cases as motions are filed.	Oldest civil cases on trial calendar chosen for inclusion. Assignment of lawyers based on specialization. Volunteers also permitted.
4. Compensation	*Pro bono*	*Pro bono*	Semiretired and retired attorneys, $75 per day plus $25 per case for written reports. Active practitioners *pro bono*.	$130 per day	*Pro bono*	*Pro bono*
5. Outcome of judicial adjuncts decision	Normal appellate process applies to decisions. Opinions not published—no precedent set.	*Pro tem*'s decision final. Judgment may be appealed through normal appellate process.	Referee submits findings and recommended disposition to "short calendar" judge.	Parties have right to trial *de novo*. If no appeal within 20 days, arbitrator's decision becomes final and binding.	Binding, subject to normal appellate process.	Settlement panel submits recommendations which are recorded. Not binding on parties. Cases not settled will be given an early trial date.
6. Goals	Reduce backlog and delay.	Reduce backlog and delay.	a) Reduce delay and backlog of civil nonjury trial by increasing available resources. b) Reduce delay and backlog of civil jury trials and criminal trials through reallocation of resources.	Reduce civil case backlog and delay in getting to trial.	Free judges for other activities.	Encourage dispositions by settlement, thus reducing proportion of cases going to trial. This also may shorten period from filing to disposition, thus moving up trial date for other cases.

with cases eligible for the program randomly assigned to the program or to a control group. Control-group cases did not have settlement conferences and went through the system in the usual fashion.

The National Center's evaluation is being conducted in cooperation with the State of Washington's Administrative Office of the Courts.

6. Fourth Circuit Court Mandatory Arbitration Program (Minneapolis, Minnesota)

On May 2, 1984, the Minnesota Legislature gave judicial districts the option of establishing a system of mandatory, nonbinding arbitration programs. The judges of the Fourth Judicial Circuit in Minneapolis decided to implement a mandatory arbitration program in that circuit. The Minnesota Supreme Court approved rules submitted by the circuit on February 14, 1985. The arbitration process is mandatory for all cases that fit criteria established by local courts. However, it is nonbinding in the sense that one or both parties could reject the arbitrator's award and proceed to trial before a regular judge as if the arbitration process had never occurred.

The program started on July 1, 1985. Cases referred to arbitration were those seeking only money damages of a specified amount and not involving title to real property, class actions, family law, unlawful detainer, or the right to a new trial. The cases are submitted to arbitration within 75 days of certification by the parties of trial readiness. Other cases may be ordered to arbitration by the chief judge of the circuit or can be submitted voluntarily by the parties.

Arbitrators are chosen from among attorneys residing or practicing in Hennepin County who have been members of the bar for at least 5 years. They must also have applied for designation as arbitrators. They are paid $150 per case in which a hearing is commenced.

To date, the majority of sitting judges, volunteer attorneys, and lawyers trying cases have responded positively to the program.

Preliminary results

Preliminary findings on the use of judicial adjuncts show that use of lawyers in this way can improve the court's ability to serve the public. Judicial adjuncts can reduce case backlogs when used to perform judicial duties or other functions that consume judicial time, or to conduct procedures to resolve cases that would otherwise come before the courts.

Early findings reveal that the quality of decisions rendered by judicial adjuncts has been high, with no apparent diminution in litigants' perceptions of the quality of justice dispensed. The use of *pro tem* judges as part of a guaranteed firm-trial-date program created additional flexibility for allocating judicial resources.

Judicial adjuncts are not a permanent alternative to the creation of needed judgeships or judicial positions. Rather, they serve as supplementary judicial resources available on a standby basis when needed to maintain court schedules, to meet trial guarantees, or to reduce trial and appellate backlogs.

Judges, participants, and defense attorneys involved in various types of judicial adjunct programs have, for the most part, positive and in some instances enthusiastic responses to their use.

The Advisory Board, which originally drafted guidelines for use of judicial adjuncts, concluded that there are philosophical and practical grounds for caution in using judicial adjuncts. These grounds are outweighed, however, by the potential advantages such programs may offer when created with proper safeguards and limitations.

For further information about this project, write Alex B. Aikman, Project Director, "The Use of Lawyers as Supplemental Judicial Resources Project," Western Regional Office, National Center for State Courts, 720 Sacramento Street, Suite 300, San Francisco, CA 94108.

Photo by James H. Pickerell

Volunteer lawyer-judges can serve courts in a variety of capacities, from judges with full authority to judicial adjuncts who handle settlement and arbitration cases.

Minitrials ease corporate litigation burden

The crushing costs of corporate litigation—up to $20 billion per year—are spurring businesses to seek alternatives to court trials. One form of alternative dispute resolution (ADR) that has recently gained prominence is the minitrial—a private, confidential hearing that treats legal disputes as business problems.

In a minitrial, executives with the power to bind their organizations sit on a panel with a neutral adviser—usually a retired judge or a technical authority—and hear presentations from attorneys representing each side. The executives then attempt to reach agreement, drawing on the expertise of the adviser as necessary.

Successful minitrials

Three examples illustrate how effective a minitrial can be in reaching mutually agreeable solutions and saving money.

Breach-of-contract case. In 1980, a $200 million antitrust breach-of-contract claim was filed against a major oil company. After 2 years, with less than a third of the information search completed, attorneys suggested a minitrial. A special format was developed in which the litigants presented their cases to the corporate executive vice presidents at a neutral site, and experts had access to technical advice from their corporate staffs. No neutral adviser was used because of time constraints.

The minitrial itself lasted only 3 1/2 hours and initially led to a widening of the gap between the demands of the litigants—but also led to continued discussions. Within 3 weeks, the parties had reached what they described as a win-win settlement involving a solution neither had previously considered. The oil company estimated that it had saved between $4 million and $6 million in legal fees alone.

Atlanta construction lawsuit. In an Atlanta case involving a $6 million lawsuit over the construction of a manufacturing plant, the regional director of the American Arbitration Association suggested arbitration after settlement negotiations had broken down and lawyers predicted that arbitration would require 4 to 7 weeks of hearings. The panel consisted of a senior vice president of the manufacturer's plant operations and the contractor's chief executive, with the neutral adviser being a retired U.S. District Court judge.

The parties' lawyers made opening arguments and presented contract documents; the panelists asked the lawyers for clarification and background information as necessary. Following the initial session, the executives met with the adviser and began to move toward settlement, although no conclusion was reached. However, following the minitrial, the adversaries' executives and their lawyers continued to meet in their respective home offices and finally met once more with the adviser. They left the meeting after signing a memorandum of agreement that satisfied both parties.

Contractor suit. A minitrial involving a suit by a contractor against the U.S. Army Corps of Engineers took 2 days and was followed by a settlement 12 hours later. A formal hearing would have taken weeks, with months before a resolution was reached.

Minitrials have been used not only in disputes between individual corporations but also in cases that involve thousands of litigants, such as consumer product and environmental hazard cases. The various parties develop a process for reaching a solution and devise a method for settling the many claims that result from the case.

Benefits

In addition to the savings in time and money, minitrials have several advantages over court proceedings. First is the business expertise of the managers who make the settlements. Participants believe that the minitrial format allows executives to explore options that constitute sound business decisions—options that would not occur to judges in a regular courtroom.

Another advantage is confidentiality. The minitrial avoids publicity about internal disagreements, unwise business decisions, or trade secrets. This, in turn, preserves consumer confidence.

Finally, as shown by the examples mentioned above, the minitrial creates communication. Even if a solution is not reached immediately, the disputants have begun to talk to each other—the first step in eventual settlement.

Expanding the use of minitrials

Several organizations promote minitrials as an effective business solution. One is the American Arbitration Association, a public-service, nonprofit organization which has been offering dispute settlement services to business executives, employees, trade associations, unions, management, consumers, and others since 1926. Services include arbitration, mediation, democratic elections, and other voluntary settlement procedures. AAA headquarters are at 140 West 51st Street, New York, NY 10020, and regional offices are located in major cities throughout the United States.

Another is the Center for Public Resources, 680 Fifth Avenue, New York, NY 10019. Founded in 1979, CPR is supported by 150 corporate attorneys, 75 law firms, and prominent academic organizations interested in developing alternative dispute resolution options for businesses and public institutions. The program has developed a model minitrial agreement for attorneys and a workbook for litigants. CPR has also founded a judicial panel comprising 60 prominent former judges and legal leaders who can serve as advisors in out-of-court hearings.

This article is one of a continuing series on initiatives and programs in the dispute resolution field. Guest authors are invited to submit articles for consideration. Articles cannot be returned, should not exceed 800 words, and may be edited as necessary. Submit articles to Dispute Resolution Information Center, Box 6000, Rockville, MD 20850.

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