Digital Commons
@ LMU and LLS

Loyola Marymount University and Loyola Law School
Digital Commons at Loyola Marymount University and Loyola Law School

Loyola of Los Angeles Law Review

Law Reviews

6-1-1978

Settling Large Case Litigation: An Alternative Approach

Eric D. Green

Jonathan B. Marks

Ronald L. Olson

Recommended Citation
Eric D. Green, Jonathan B. Marks & Ronald L. Olson, *Settling Large Case Litigation: An Alternative Approach*, 11 Loy. L.A. L. Rev. 493 (1978).
Available at: https://digitalcommons.lmu.edu/llr/vol11/iss3/2

This Article is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

SETTLING LARGE CASE LITIGATION: AN ALTERNATE APPROACH†

By Eric D. Green, Jonathan B. Marks** & Ronald L. Olson****

I. INTRODUCTION

Over 50 years ago, Judge Learned Hand told the Bar of New York, "As a litigant, I should dread a lawsuit beyond almost anything else short of sickness and death."[1] Judge Hand's remark is even more true today. The burgeoning costs and demoralizing delays of dispute resolution through formal, legal means are central to the crisis which so many now perceive in the American system of civil justice.[2]

For the individual litigant, efforts are being made to confront and resolve the crisis. By far the largest single cost of litigation is attorney's fees. In this area, the OEO Legal Services Program and the Legal Services Corporation have made significant strides towards providing free counsel to the poorest Americans. Group and prepaid legal service programs have been started to provide legal services to middle-income Americans at affordable prices. In addition, there is growing recognition that less formal mechanisms of dispute resolution may provide the best answer to the problems of expense and delay which beset individual civil litigants in our courts.[3] For example, mandatory arbitration of smaller

† Copyright 1978 by Eric D. Green, Jonathan B. Marks and Ronald L. Olson.

* B.A., 1968 (Brown); J.D., 1972 (Harvard); Associate Professor of Law, Boston University.

** B.A., 1966 (Harvard); J.D., 1972 (Harvard). Member, State Bars of California, District of Columbia and Florida.

*** B.A., 1963 (Drake); J.D., 1966 (Michigan). Chrm., Comm. on Litigation Management and Economics, ABA Section on Litigation. Member, State Bars of California and Wisconsin.

1. L. Hand, *Deficiencies of Trials to Reach the Heart of the Matter*, in 3 LECTURES ON LEGAL TOPICS 89, 105 (Association of the Bar of the City of New York 1926).

2. *E.g.*, Keynote Address by Chief Justice Warren Burger to the National Conference on the Cause of Popular Dissatisfaction with the Administration of Justice (April 7-9, 1976) [hereinafter cited as the Pound Conference], *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, *reprinted in* 70 F.R.D. 83, 92 (1976).

3. *E.g.*, E. JOHNSON, JR., V. KANTOR, & E. SCHWARTZ, OUTSIDE THE COURTS: A SURVEY OF DIVERSION ALTERNATIVES IN CIVIL CASES (1977) [hereinafter cited as JOHNSON]; Burger, *supra* note 2, at 93-96; Olson, *Controlling Litigation Costs: Some Proposals For Reform*, 2 LITIGATION 16 (1976); Address by Frank E.A. Sander to the

civil suits in the federal courts seems inevitable;[4] in Los Angeles, a pilot Neighborhood Justice Center has been set up to resolve minor disputes entirely outside the courts.[5] Interestingly, however, while these and other innovations promise more efficient dispute resolution procedures for individual litigants,[6] very little attention has been devoted to developing alternative dispute resolution mechanisms for the large corporate litigation that consumes hundreds of thousands of dollars in legal costs and hundreds of days in court and lawyer time.[7]

Arbitration stands as almost the only well-developed alternative to full-scale litigation for entities which find themselves embroiled in dis-

---

Pound Conference, *Varieties of Dispute Processing*, *reprinted in* 70 F.R.D. 111, 112-18 (1976); *see, e.g.*, Rosenberg, *Devising Procedures that are Civil to Promote Justice that is Civilized*, 69 MICH. L. REV. 797, 808-19 (1971); Verkuil, *The Ombudsman and the Limits of the Adversary System*, 75 COLUM. L. REV. 845 (1975). *But see, e.g.*, Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC'Y REV. 63 (1974); Felstiner, *Avoidance As Dispute Processing: An Elaboration*, 9 LAW & SOC'Y REV. 695 (1975); *cf.* S. 957, 95th Cong., 1st Sess., 123 CONG. REC. 3795-97 (1977) (authorizing appropriations to aid in the development of inexpensive modes of dispute resolution).

Professor Sander, for example, posits a continuum of possible dispute resolution processes, arranged on a scale of decreasing external involvement: (1) adjudication, including that carried out in courts, arbitrations, and administrative hearings; (2) ombudsmen, fact-finding proceedings and inquiries; (3) mediation and conciliation; (4) negotiation; and (5) avoidance. Sander, *supra* at 114. He suggests that each of the non-court mechanisms should be employed as part of a "flexible and diverse panoply" of processes to resolve a significant proportion of society's disputes. *Id.* at 130-32.

4. Bills mandating arbitration for certain civil cases are pending in Congress. S. 2253, 95th Cong., 1st Sess., 123 CONG. REC. 18068-69 (1977) and H.R. 9778, 95th Cong., 1st Sess., 123 CONG. REC. 11729 (1977) (identical bills). The proposed federal legislation would mandate an experimental test of arbitration in five to eight federal judicial districts, with other districts having an option to follow the same course. In the experimental districts all cases seeking monetary damages of less than $50,000 and with no or only "insubstantial" non-monetary claims would be referred to arbitration soon after they were at issue. After arbitration, either party could opt for a trial de novo, but significant costs would be taxed if the moving party did not obtain a result more favorable than the award. For further details of the federal arbitration proposal, see notes 30-33 *infra*.

Several states have long had compulsory arbitration programs for certain types of cases. *See, e.g.*, JOHNSON, *supra* note 3, at 39-55; Olson, *supra* note 3, at 17-19; Rosenberg & Schubin, *Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania*, 74 HARV. L. REV. 448 (1961).

5. Bell, *NJC: Concept and Reality*, L.A. LAW., March 1978, at 10; Carlson, *A Local Experiment*, L.A. LAW., March 1978, at 10; *see* D. MCGILLIS & J. MULLEN, NEIGHBORHOOD JUSTICE CENTERS: AN ANALYSIS OF POTENTIAL MODELS (1977).

6. *E.g.*, Aksen, *Arbitration of Automobile Accident Cases*, 1 CONN. L. REV. 70 (1968); Jones & Boyer, *Improving the Quality of Justice in the Marketplace: The Need for Better Consumer Remedies*, 40 GEO. WASH. L. REV. 357 (1972); Comment, *The Medical Malpractice Mediation Panel in the First Judicial Department of New York: An Alternative to Litigation*, 2 HOFSTRA L. REV. 261 (1974).

7. Obviously, there are significant differences between the problems facing corporate and individual litigants. For example, a corporate litigant may be able to pass the costs of

putes which cannot be solved through normal business negotiations.[8] Yet, binding arbitration is often not acceptable to the parties. Convinced of the justness of its cause, a plaintiff may be unwilling to risk the compromise that reputedly so often characterizes arbitration awards; unsure of the nature and extent of its liability, a defendant may be unwilling to give up the protection of full pretrial discovery, strict evidentiary rules and well-defined substantive standards, especially when the damages claimed are in six, seven or more figures.[9] For these and other reasons, many litigants and corporate attorneys approach arbitration "like a lonesome cat in a strange alley."[10]

Moreover, in spite of binding arbitration's often being seen as simply too dangerous, surprisingly little thought has been given to the possibility that efforts at settlement might consist of something more than traditional non-binding negotiations between lawyers or corporate executives in which dollar bargaining is the primary focus. Indeed, the literature of litigation settlement is made up of little other than "how-to-do-it" manuals focusing, for example, on the resolution of personal injury cases.[11]

---

litigation through to the consumer, while the individual litigant normally cannot. Nevertheless, the corporate litigant's ability to pass on such costs is limited by competitive factors. Moreover, to the extent that the outcome of litigation will have an effect on business planning—such as where product development or marketing is threatened by an unfair competition or patent infringement action—delay may be much more costly, indirectly, to the corporate litigant than to the individual.

8. *See generally* M. DOMKE, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION 1-9 (1968); G. GOLDBERG, A LAWYER'S GUIDE TO COMMERCIAL ARBITRATION (1977); S. LAZARUS, J. BRAY, L. CARTER, K. COLLINS, B. GIEDT, R. HOLTON, P. MATTHEWS, & G. WILLARD, RESOLVING BUSINESS DISPUTES—THE POTENTIAL OF COMMERCIAL ARBITRATION 35-40 (1965) [hereinafter cited as LAZARUS].

9. *See, e.g.*, LAZARUS, *supra* note 8, at 43.

10. *Id.* at 32.

11. *See, e.g.*, C. BADWAY & N. SHAYNE, EVALUATION AND SETTLEMENT OF PERSONAL INJURY CASES (1976); H. BAER & A. BRODER, HOW BEST TO PREPARE AND NEGOTIATE CASES FOR SETTLEMENT (1973); P. HERMANN, BETTER SETTLEMENTS THROUGH LEVERAGE (1965); J. ILICH, THE ART AND SKILL OF SUCCESSFUL NEGOTIATION (1973); C. KARRASS, THE NEGOTIATING GAME (1970); C. ROBBINS, ATTORNEY'S MASTER GUIDE TO EXPEDITING TOP-DOLLAR CASE SETTLEMENTS (1975); H. ROSS, SETTLED OUT OF COURT (1970); R. SIMMONS, WINNING BEFORE TRIAL: HOW TO PREPARE CASES FOR THE BEST SETTLEMENT OR TRIAL RESULT (1974). *See generally* H. EDWARDS & J. WHITE, PROBLEMS, READINGS AND MATERIALS ON THE LAWYER AS NEGOTIATOR (1977).

One notable exception is R. COULSON, HOW TO STAY OUT OF COURT (1968) [hereinafter cited as COULSON]. Mr. Coulson sees traditional arbitration as only one of numerous possible alternatives to litigation: "Litigants are not anchored to the court system. They have a right to invent their own procedures, to dismiss the safeguards provided by the courts and to expedite their litigation . . . . [They have an] interest in learning how to improvise new techniques for bringing a controversy to a conclusion." *Id.* at 155.

One innovative suggestion for dealing with problems of congestion, cost and delay has been to establish a private profit-making court system paralleling existing federal and state

Yet merely because the legal difficulties of lower and middle income Americans may constitute more important social problems on most people's scale of values, it is important not to lose sight of the fact that the crisis in American civil justice extends beyond those groups into large case litigation. The problems of large case litigation are ones which affect the quality of civil justice as a whole. The pretrial paper wars and extended trials of many such cases play a significant role in clogging the dockets of our courts, both state and federal. Further, the extraordinary costs of litigating such cases affect not merely the corporations themselves, but, of necessity, their employees and shareholders, and the consumer.

There are several possible reasons why there has been a dearth of innovative ideas aimed at devising alternate dispute resolution mechanisms for large case litigation. Perhaps the corporate litigation bar should be blamed for a lack of imagination, for an unwillingness to take risks, and for a failure to apply careful cost-benefit analysis to their activities on behalf of their clients. Perhaps corporate managements should be blamed for too often allowing themselves to be insulated from the litigation process, either because they seek to avoid ultimate responsibility or because they mistakenly believe that the complexities of the process are for lawyers only. Perhaps the true culprit is the relative insularity of most American legal education:

> Another barrier to the active participation of lawyers in the creation of new "justice-producing" institutions lies in the structure and content of legal education. Law schools rarely teach the essential skills of negotiation and mediation; rather, their concentration on the dissection of appellate court cases emphasizes the escalation of disputes rather than their prevention or early settlement. . . . The dearth of interdisciplinary study makes it difficult for lawyers to perceive alternative ways of dealing with different types of existing disputes and those likely to arise from emerging technologies.[12]

courts. Person, *Justice, Inc.—A Proposal for a Profit-Making Court*, JURIS DOCTOR, March 1978, at 32, 39. Although the private judges of the National Private Court would function legally as arbitrators, the court would differ from arbitration in that it would follow federal procedure. Thus, litigants would be "able to maintain claims and defenses without running the risk of the unwanted compromises that are expected in binding arbitration." *Id.* at 38.

12. Nader & Singer, *Dispute Resolution*, 51 CAL. ST. B.J. 281, 314-15 (Supp. 1976).

One senior executive recently "branded lawyers as 'Roman Gladiators,' more interested in scoring against opposing counsel than in achieving a quick settlement." Ryan, *Costly Counsel*, Wall St. J., April 13, 1978, at 1, col.1 and 32, col.4. The President of the United States now echoes such sentiments. "By resorting to litigation at the drop of a hat, by regarding the adversary system as an end in itself," President Carter recently said, "we have made justice more cumbersome, more expensive, and less equal than it ought to be." Address by President Jimmy Carter to The Los Angeles County Bar Association, May 4, 1978, *reprinted in* L.A. LAW., June 1978, at 15, 43.

Whatever the reason, the failure of the corporate litigation bar to develop alternate dispute resolution mechanisms is particularly puzzling given another usual characteristic of their corporate clients. Most companies have a firm policy of attempting to avoid litigation by investigating and resolving disputes on a businesslike basis as promptly as possible. They generally "prefer the procedural uncertainties of private settlement techniques to the substantive uncertainties of the courts."[13] It is common, for example, for corporate management faced with a ripening conflict with another company to schedule a meeting at which responsible employees from each company appear and present both sides of the dispute. In such circumstances the business principals of the companies sit as fact-finders and as judges. They may or may not consult counsel.

By contrast, once litigation is initiated such simple and informal attempts at dispute resolution rarely occur. Settlement discussions involving corporate management thereafter generally subordinate debate on substantive issues to a more direct consideration of what it will take to settle the case.

This article rests on the proposition that both the crisis in American civil justice and the interests of corporate clients demand that attorneys involved in large case litigation consider alternate mechanisms aimed at expediting fair settlement of the disputes at issue. After examining in more detail the problems which demand efforts at such solutions, the article describes one novel dispute resolution mechanism created to resolve a typical, complex and costly piece of federal litigation, one which proved successful in the eyes of all concerned. Finally, the article considers more generally the advantages of making an effort to settle a large case by doing more than tossing out an occasional settlement figure.

II. DEMON LITIGATION

Corporate executives and in-house counsel know that it can be disastrous for a company simply to be sued, let alone suffer an adverse judgment. There is no escaping one infallible premise—resolving the dispute will be very costly. Payment will be either to the plaintiff, to defense counsel, or—worst of all—to both. House counsel and management also know that successfully defending a large lawsuit is frequently more costly than simply paying a large settlement to the plaintiff. Indeed, defendants are often convinced that this is the only basis for the suit in the first place.[14]

13. COULSON, *supra* note 11, at 22.
14. *Cf. id.* at 23-24:

The cost of large corporate litigation also has a great impact on plaintiffs. Since the defendant is typically in possession of the money or property that is the subject matter of the dispute and has the use of it during the pendency of the suit, the defendant will often have both reason and the resources to drag out the litigation. A corporation with an unassailable claim and sufficient resources to prosecute fully a court case may find that discovery hurdles placed by the defendant between the summons at the starting line and the judgment at the finish have made the prize not worth the pursuit.

The cost of prosecuting or defending a large corporate lawsuit involving unresolved legal contentions, complex factual issues, many witnesses, and the usual roomfuls of documents may be divided into two basic categories—(1) pretrial discovery and motion costs and (2) trial costs. Discovery and motion costs usually accrue at a slower rate than trial costs, but build up over a longer period of time—often for two, three, or as many as five years.

Reliable figures are hard to come by,[15] especially for pretrial costs of litigation, but one authority estimated in 1975 that the cost to the client of counsel's merely reading and taking notes on the documents produced in a moderately-sized civil litigation—defined as a case involving 10,000 documents of an average of ten pages per document and generating 5000 pages of transcript—is $300,000.[16] This figure did not include the more time-consuming process of searching the documents for combinations of facts and analyzing the assembled data. Allowing for inflation, which affects the legal profession as much as it does industry, these figures would be even higher today.

Indeed, there is a growing feeling among business-oriented attorneys and critical commentators that modern discovery practice, introduced as a great reform, is now more of a problem than a solution. One critic states:

> Coupled with requests for class action treatment, discovery has been perverted into a vehicle for extracting substantial settlements, with

One Wall Street trial lawyer representing a huge chemical company in a controversy with a supplier of crude oil told me how he expected to settle the case: "We intend to enforce our right to examine every document that has any relevance to this transaction. Over 100,000 separate pieces of paper are involved, and we will require every one of them. When our opponents realize how disruptive this case is going to be, they will make an attractive settlement offer. Their company can't afford the expense."

15. *See* Green, *The Gross Legal Product: How Much Justice Can You Afford?*, in VERDICTS ON LAWYERS 63, 72-75 (1976); Cole, *SCM v. XEROX: Paper Blizzard for 1.8 Billion*, N.Y. Times, June 27, 1977, at 1, col.1 and 32, cols. 4 and 5 (city ed.); Sander, *supra* note 3, at 125-26.

16. Halverson, *Coping with the Fruits of Discovery in the Complex Case—The Systems Approach To Litigation Support*, 44 ANTITRUST L.J. 39, 39-40 n.2 (1975).

> some defendants reluctantly consenting to this extortion in order to avoid years of involvement, enormous expenses and attorneys' fees, and the inordinate drain upon corporate time and energy that is inevitably involved in the defense.[17]

But discovery and other pretrial costs are not the only factors that make suing or being sued, even unjustly, a major economic event for a corporation today. Should the parties not reach a settlement after exhausting themselves in the discovery and pretrial motion phase of the litigation, costs escalate significantly in the immediate pretrial preparation phase, as counsel "staff-up" with experts, associates and paralegals. Costs increase again for the trial itself. In one extreme but not unique case, the SCM antitrust suit against Xerox,[18] the legal costs during trial to SCM and Xerox combined have been conservatively estimated to be $50,000 a day, five days a week, or over $1,000,000 a month. Trial is expected to last five to eight months. The pretrial costs were likely even higher. The two sides took pretrial depositions from a total of 233 potential witnesses. Of course, the stakes are high—SCM seeks $1.8 billion in damages.[19]

Moreover, the tangible costs that show up directly on the income statement under "legal costs" are only a part of the actual costs of large corporate litigation. Management time and energy and technical resources diverted from normal activites to the litigation process are additional overhead items, with no productive possibilities, that increase the cost of goods produced or services rendered. Thus, prospect of an indirect as well as a direct drain on the corporate resources during two to five years of litigation is often a strong incentive for top management to seek some means of informally resolving litigation and getting employees back to productive work, even if it means paying money management feels is not owed.[20]

There is a third party whose interests also must be recognized—the judicial system. Although comprising only a small percentage of cases,

17. Byrnes, *Discovery: Its Uses and Abuses—The Defendants' Perspective*, 44 ANTITRUST L.J. 14, 25 (1975). Further, says Mr. Byrnes:

> The dilemma of defense counsel in attempting to deal with these abuses is aggravated by two significant trends in the judicial handling of discovery problems. The first is the growing reluctance of federal judges to involve themselves in discovery matters and the second is the almost wholesale unwillingness of the courts to employ the sanctions provided for in [F.R. CIV. P.] Rule 37.

Id.

18. For an earlier aspect of this case, see SCM Corp. v. Xerox Corp., 507 F.2d 358 (2d Cir. 1974). An even more striking example is described in Wolfram, *The Antibiotics Class Actions*, 1976 A.B.F. RES. J. 253 (litigation extended over more than two decades).

19. Cole, *supra* note 15, at 41, col. 6.

20. *See, e.g.*, COULSON, *supra* note 11, at 20-21; Kaufman, *Judicial Reform in the Next Century*, 29 STAN. L. REV. 1, 3-4 (1976).

large corporate litigation increasingly consumes a disproportionately large amount of judicial and lawyer resources, contributing to an already severe congestion problem.[21] This problem is assuming crisis proportions in some places as delays run into four or five years and court systems approach the breakdown point.[22]

In the federal system, the district court civil case load continues to show an upward trend, as it has for the last fifteen years. In 1976, 130,597 civil cases were filed in the district courts, compared to 117,320 in 1975 and 59,284 in 1960. This is an increase of 11.3% over 1975 and 120.3% over 1960.[23] An even more disturbing statistic is that of the 136,753 cases pending in the district courts at the close of 1976 (exclusive of land condemnation cases), 9,414 had been pending for more than three years. Moreover, the trend is to greater delay. The percentage of cases pending for more than one, two, and three years in 1976 increased over 1975 by 25.5%, 23.5% and 24.5%, respectively.[24]

The statistics for the federal courts of appeals are similarly alarming. The number of new cases docketed in 1976 showed a 10.5% increase over 1975, and a 281.7% increase over 1962. Altogether, 18,408 cases were filed for appeal in 1976, compared to 4,823 in 1962.[25]

21. *See* Address by Francis R. Kirkham to the Pound Conference, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, *reprinted in* 70 F.R.D. 199 (1976).

22. The *SCM* case, for example, was filed on July 31, 1973. SCM Corp. v. Xerox Corp., 507 F.2d 358, 359 (2d Cir. 1974). Trial began in June, 1977. Cole, *supra* note 15, at 41, col. 6.

23. [1976] ANN. REP. OF THE DIR. OF THE AD. OFF. OF THE UNITED STATES COURTS, *reprinted in* REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 75, 169, table 15 (1976).

Although the district courts have also managed to increase their terminations during this period, they have not been able to keep pace with filings. For example, in 1976 terminations increased only 5.1% over the previous year, falling short of the number of filings by 20,422 cases. As a result, the pending case load at the end of 1976 was 17.1% higher than the pending case load at the end of 1975 and 128.9% higher than the pending case load in 1960. *Id.*

Of course, the figures vary among the districts. In 1976, the District Court for the Southern District of California led all districts by a significant margin with a 143.6% increase in filings over 1975 and a concomitant 113.9% increase in pending cases. The District Court for the Central District of California showed a more moderate 13.1% increase in pending cases from 1975 to 1976, but even this lower figure is disturbing because the pending cases increased while the number of new filings decreased 2.6%. *Id.* at 177, table 18.

24. *Id.* at 183, table 21.

25. *Id.* at 153, table 1.

While there was a small increase over 1975 in the number of cases terminated by the courts of appeals, in 1976 cases pending rose by 16.3% over 1975 to a total of 14,110 cases pending on courts of appeals dockets at the end of the year. This is a 494.1% increase over the number of cases pending in 1961. *Id.* at 152, 155, table 2. Breaking the problem down

Given such statistics, it is obvious that either radical reform of the dispute resolution process or a commitment of vastly more resources to the judicial system, or both, are necessary just to keep matters from getting worse than they already are.[26] But private lawyers representing corporate clients increasingly disgruntled with large legal fees cannot wait for long term reform. The corporate litigator must explore every available dispute resolution mechanism that might be advantageous to the client.

III. AN ALTERNATE APPROACH

One such experimental dispute resolution mechanism was successfully developed and implemented last year in a major patent infringement suit between two large corporations in the United States District Court for the Central District of California.[27] The procedure consisted, in essence, of a non-binding "mini-trial" before top corporate management and a privately hired, neutral advisor who had served as a United States Court of Claims trial judge. The entire procedure, which took several months to organize but only two days of presentation time, was conducted outside the judicial system and contained no coercive characteristics. Yet, within one-half hour of the close of the procedure, the parties reached a settlement in principle of what had been a long and bitterly fought lawsuit.

To describe the case briefly, plaintiff held several patents relating to computerized charge-authorization and credit-verification devices. These patents had been licensed to several major manufacturers, but had never been thoroughly tested in litigation. Defendant was a manufacturer of computerized charge and credit authorization devices. Plaintiff contended that defendant's devices utilized plaintiff's patented technology. Defendant in turn denied that it used technology covered by any valid claim of plaintiff's patents, and further alleged that plaintiff's patents were invalid and unenforceable under several traditional patent doctrines. Plaintiff claimed it was entitled to substantial damages for past infringement and to an injunction restraining future infringement. Such injunctive relief would have destroyed a major product line of defendant.

into its most basic components, the number of pending cases per court of appeals judgeship in 1976 averaged 145, an increase of 137.7% over 1966 and 383.3% over 1961. *Id.* at 156, table 3.

26. Professor John H. Barton has projected that if appellate case loads continue to grow to the year 2010 at the rate they have grown in the last decade, we will need 5,000 federal appellate judges to handle the one million federal appellate cases each year, with their decisions reported in more than 1,000 volumes of the Federal Reporter. Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567, 567 (1975).

27. The authors, along with in-house counsel and a patent attorney, represented one of the parties.

Both sides asserted that their respective positions were supported by the opinions of independent experts. As the litigation progressed, these positions hardened. Accusations of bad faith in complying with discovery requests exacerbated feelings which had grown out of a long history of competition between technical and business personnel of the two companies and out of plaintiff's prelitigation efforts to sell defendant a license.

Meanwhile, discovery proceeded apace, sometimes at a furious rate. In an effort to find out precisely how defendant's devices worked and to prove its infringement case, plaintiff pursued an extensive program of document production and inspection, took depositions of many of defendant's employees, and submitted multiple sets of interrogatories and requests for admissions. Defendant commenced extensive discovery in an attempt to force plaintiff to be more precise in its allegations and to obtain evidence for invalidity counterclaims.

This activity did achieve some beneficial results, narrowing considerably the areas in dispute between the parties. But the cost of this discovery, and of the motion practice that accompanied it, was very high.

Moreover, while the case had thus been somewhat simplified, defendant's exposure had not been materially lessened, and the parties' positions on the issues remaining in dispute were 180 degrees apart. Defendant remained convinced that it had not infringed a valid claim of the patents. Plaintiff remained convinced that defendant had knowingly and wilfully infringed its valuable patents. Whenever an attempt was made to discuss a compromise settlement in traditional ways, the discussion foundered on the sharp conflict over the merits of the case. Further, the defendant felt that the amount demanded by plaintiff for a license was unrealistic and indefensible, even assuming some infringement. Plaintiff, however, felt its proposals were eminently reasonable. Further, it had made a considerable investment in the case. Thus, no lower figure was forthcoming.

Some two and one-half years after the complaint had been filed, there was still no trial or pretrial date on the horizon.[28] By then, legal fees for both sides had reached several hundred thousand dollars, and promised to mount at an increasing rate as trial neared. In addition to immediate pretrial preparation, both parties faced the prospect of significant additional discovery, including extensive depositions of the inventors and

28. The slow pace of this case was attributable in part to the judge's illness for several months during this period. Most judges in the Central District try to move their cases faster than this case moved. Nonetheless, delays of this magnitude are not uncommon in large, complex cases.

other technical personnel. Aspects of both parties' ongoing businesses were clouded by uncertainty over the outcome of the suit. Thus, after years of hard litigation, both sides were open to some procedure that could resolve the dispute one way or the other.

Initially, plaintiff proposed binding arbitration. But doubts about the enforceability of arbitration decrees in patent cases,[29] defendant's corporate policy against submitting to arbitration in such situations, and its concern that an arbitration compromise might require it to pay a substantial sum to plaintiff foreclosed that option.

The procedure eventually hammered out consisted of a six-week schedule providing for expedited, limited discovery and the exchange of position papers and exhibits, and culminating in a two-day "Information Exchange." At the Information Exchange each side was to have the opportunity and responsibility to present orally to top management representatives of both companies its "best case" on the issues of infringement, validity, and enforceability. Management was then to assess the theories, strengths and weaknesses of the respective positions and meet together, without counsel, to attempt to resolve the dispute from the new perspective obtained at the Information Exchange.

It was also agreed to have a mutually selected "neutral advisor" attend the Information Exchange. The advisor was to moderate the proceedings; he was *not*, however, to try to effect a compromise of the dispute. Rather, in the event management did not resolve the dispute in their initial post-Information Exchange discussions, the advisor was to submit a written non-binding opinion discussing the relative strengths and weaknesses of the parties' positions and predicting the likely outcome of trial. Thereafter, management would meet again and try to resolve the dispute with the added spur of the advisor's opinion. It was felt likely that the party against whom the advisor opined would thereafter be willing to make significant concessions. In addition, it was thought that the prospect of the opinion would cause the parties to be more realistic in their evaluations and demands as they discussed settlement immediately after the Information Exchange.

Other aspects of the procedure included:

* Postponement of all pending discovery in the case, except that absolutely necessary to prepare for the Information Exchange, with no waiver of the right to take further discovery should the case not be settled. Partial depositions, for example, could be taken without prejud-

---

29. *See, e.g.*, N.V. Maatshappij Voor Indutriele Waarden v. Smith, 532 F.2d 874 (2d Cir. 1976).

icing the right to take a full deposition of the same person at a later time.[30]

* Provision that, by mutual agreement, any discovery disputes that arose during the six weeks of expedited limited discovery could be submitted to the advisor for his "advice."

* Initial sharing of the fees and expenses of the advisor, but assessment of these fees and costs to the eventual losing party, in the event that a settlement could not be reached and a trial was conducted.[31]

* Stipulation to basic source material to be submitted to the advisor in advance of the Information Exchange.

* Exchange in advance and submission to the advisor of all exhibits to be used at the Information Exchange, as well as short briefs in the form of "introductory statements."

* Opportunity for the advisor to submit written questions to the parties' technical experts prior to the Information Exchange.

* Suspension of the rules of evidence during the Information Exchange.[32]

* Unlimited scope as to the nature of the material offered during each party's presentation period at the Information Exchange. The advisor was authorized to ask clarifying questions, but was explicitly told he was neither to preside like a judge or arbitrator nor to limit the parties' presentations.

* Total insulation of the Information Exchange procedure, and its results, from the court. Reference to the court concerning any aspect of the Information Exchange was forbidden. The written submissions prepared specifically for the Information Exchange and oral statements made during the Information Exchange by the parties were to be inadmissible at trial for any purpose, including impeachment.[33] However, evidence that was otherwise admissible was not to be rendered inadmissible as a result of its use at the Information Exchange.

---

30. *Cf.* S. 2253, 95th Cong., 1st Sess., 123 CONG. REC. 18068-69 (1977). The proposed federal arbitration act would significantly limit discovery. Referral of a case to arbitration could not be delayed more than 120 days after the filing of an answer and arbitration would have to begin 30 days thereafter.

31. *Cf. id.*, providing that if the party demanding a trial de novo after arbitration fails to obtain a judgment more favorable than the arbitration award, it shall be assessed the cost of the arbitration proceeding, plus interest on the arbitration award.

32. *Cf. id.*, providing that the Federal Rules of Evidence may be used as a "guide" to the admissibility of evidence in an arbitration hearing, but that notwithstanding the rules, relevant nonprivileged evidence "may" be admitted.

33. *Cf. id.*, the proposed federal arbitration act would allow testimony given at an arbitration to be used for impeachment at a subsequent trial de novo. However, the act

* Disqualification of the advisor as a trial witness, consultant, or expert for either party. Additionally, the use of his advisory opinion for any purpose in any dispute between the parties was prohibited.

It was agreed that any violation of the last two rules by either party would seriously prejudice the opposing party, be prima facie grounds for a mistrial or disqualification motion, and would entitle the opposing party to full compensation for its share of the advisor's fees and expenses, irrespective of the outcome of any trial.[34]

Even though the procedure contemplated that the presentations were to be directed to management, which would have complete responsibility for any resolution of the dispute, mutual agreement on selection of the advisor was obviously crucial to the procedure's success. It was feared that this would be a major stumbling block. Somewhat surprisingly, however, selection of the advisor was quickly and easily accomplished. Each side proposed two persons as its "nominees." Plaintiff proposed a retired court of claims trial judge with considerable patent law expertise and a distinguished law professor in this field. Defendant proposed two former federal judges. All four nominees were contacted and all four agreed to serve as the advisor if selected. In each case, the nominees' expressed willingness to serve was based in part on a desire to participate in a novel and experimental procedure. Primarily because of his extensive judicial experience in the patent area, the former court of claims trial judge was selected. The choice proved a wise one, as the concentrated nature of the proceeding required someone intimately familiar with both modern technology and a rather technical area of the law.

Plaintiff opened the Information Exchange with four uninterrupted afternoon hours devoted to a presentation of its prima facie infringement case. The next morning, defendant had one and one-half hours to present a reply, which was followed by a one-half hour rebuttal by plaintiff and an hour of an open question and answer exchange on infringement. On the afternoon of the second day, the parties reversed roles. Defendant had

---

also specifies that at the trial de novo, the court shall not admit evidence that there had been an arbitration proceeding. These two apparently conflicting provisions may prove difficult to implement in practice. Moreover, allowing the use at trial of testimony given at an arbitration proceeding even for impeachment may be a disincentive for a party to choose arbitration voluntarily.

34. All the above aspects of the Information Exchange were embodied in an Information Exchange Agreement, which was signed by management and counsel for both parties. Although the parties did not explicitly rely upon anything other than the contractual nature of the Agreement to make it binding, the Federal Rules of Civil Procedure do seem to provide for such agreements. FED. R. CIV. P. 29, relating to stipulations regarding discovery procedure, provides that "the parties may by written stipulation . . . modify the procedures provided by these rules for other methods of discovery . . . ."

four hours to present its invalidity and unenforceability arguments, followed the next morning by plaintiff's reply, defendant's rebuttal, and an open question and answer session.

The actual presentations were made primarily by attorneys, with significant participation by the parties' experts, each a noted computer authority. Plaintiff also presented a former employee of one of its licensees, while defendant used one of its scientists to present a technical aspect of its case.

During the presentations each side gained significant new insights into the opposing party's claims. For example, plaintiff presented a new argument during its initial four-hour presentation which it felt anticipated and answered one of defendant's most important invalidity theories. Although defendant had been aware that plaintiff might eventually take such a position, plaintiff's discovery responses, up to the point of the Information Exchange, seemed to defendant to indicate otherwise. Plaintiff's presentation on this issue required defendant's attorneys to re-evaluate a key element of their defense and to restructure significantly their planned presentation for the next day. After an all-night blitz, defense counsel presented a response to plaintiff's new argument that, for the first time in the litigation, sharply pinpointed the parties' precise legal and factual differences on a vital element of the case. Additional discussion and questions from management and the advisor exposed difficulties for plaintiff that prior thereto it had not clearly discerned. Similarly, plaintiff made several other points during its initial presentation and during its rebuttal to defendant's presentation that enabled defendant to appreciate more fully plaintiff's position.

The Information Exchange's question and answer sessions were particularly useful in defining and narrowing each side's contentions. Where difficulties arose, the advisor facilitated the discussion with his questions. Occasionally, the advisor's comments indicated where he felt serious problems existed for each side. This participation was particularly helpful in bringing home to the participants the strengths and weaknesses of their cases.

Immediately after the Information Exchange ended, top management for each side met privately without lawyers. Within one-half hour, they reached an agreement in principle, which became the basis for resolving the dispute. Although the details took several weeks to tie up, the drain on both corporations' treasuries was plugged and a case which had threatened to occupy the time and energy of a federal court for months was terminated without an additional day of court time. This was success by any standard.

IV. SOME GENERAL OBSERVATIONS

For the parties involved, the success of the Information Exchange was testimony enough to its value. For others who may be interested in similar experimentation, however, several additional aspects of the procedure might be pointed out. Every case is different, and what worked in the case discussed might not work at all in another situation. In considering whether to try a procedure like the one described or to create a new model, counsel and clients must consider many variables and make a cost-benefit analysis to determine the best way to proceed. In this analysis the following factors may be relevant.

First, very little of the money expended on the Information Exchange would have been wasted had the proceeding not resulted in a resolution of the dispute. The Information Exchange forced each side rigorously to organize the mass of facts and legal arguments which had been gathered over two and one-half years of discovery and legal maneuvering, just as they would have had to do to prepare the case for pretrial and trial.[35] The "introductory statements" were short versions of what would have been trial briefs, the "oral presentations" were outlines of what would have been trial evidence, and the exhibits were the same as those that would have had to be collected and organized for trial. Thus, the procedure as implemented demanded preparation by counsel and experts which would have been directly useful at trial had the case not been settled.

The only Information Exchange expenditures which were not related to activities which would have had to have been incurred in any case for trial were those relating to the negotiations which led to the Information Exchange and those for the time spent at the Information Exchange itself. For one of the parties, these amounted to approximately 25% of total Information Exchange expenditures. These non-transferable expenditures were the only monies risked by that party's management in carrying out the Information Exchange. Total costs to judgment would have been approximately ten times greater. Because management considered that it was thus risking a relatively small amount of money in order to avoid an

35. Pursuant to FED. R. CIV. P. 16, the United States District Court for the Central District of California has developed and instituted an elaborate mandatory pretrial procedure. C.D. CAL. R. 9. As the rule is implemented by some judges, preparing for and presenting a case at pretrial involves much the same effort as preparing and presenting the Information Exchange. The purpose of such highly developed pretrial procedures is the same as that of the Information Exchange—simplification of issues, avoidance of unnecessary proof and, if possible, disposition of the case without trial. The advantage of an Information Exchange procedure is that it takes place outside of the judicial system. The parties retain complete control over timing, scope, manner of presentation, participants, follow-up procedures, and so forth. The disadvantage is that it is purely voluntary.

otherwise certain expenditure of a great deal more, it viewed the required financial investment as well worth the risk that the procedure might be a flop.

Moreover, since the pending Information Exchange forced counsel to concentrate their efforts within several weeks, rather than over many months or years, there was no need for them to spend preliminary time to reeducate themselves on the case as crises or significant events occurred. The matter as a whole had to be mastered and kept in mind during the entire period. Because of this necessity for organizing the case in a short time, connections between relevant facts, and between facts and legal theories, which might not otherwise have been made until pretrial or trial were made significantly earlier. Had the litigation continued, this would have fostered more focused discovery and pretrial preparation. In sum, had the case not been settled, the intensive time spent by counsel in preparing for the Information Exchange would likely have been worth significantly more to the client than the same amount of less focused time spent during the long pretrial phase of the case.

Apart from the prospects of earlier settlement and of the client's obtaining a better return per dollar in attorney's fees spent, there are other potential advantages for client and attorney alike from an Information Exchange procedure. Significantly, it may provide a means for a client to discipline its attorneys. For example, sometimes where there is little or no pressure coming from the court, defense attorneys approach a case—even an important one—in a relatively relaxed manner. Thus, they may not immediately investigate or organize the factual and legal aspects of the case in a sufficiently thorough manner to appreciate fully the true legal situation and proper settlement posture. In other circumstances, the lack of pressure sometimes leads attorneys into over-litigation, unnecessarily dotting "i's" and crossing "t's" with regard to both discovery and legal research. An attorney's judgment about what is essential may be controlled by the amount of time and associate resources available. In either case, the Information Exchange procedure can serve as a useful management tool, forcing careful and early analysis on the one hand and selective judgment on the other.

From the attorney's perspective, the Information Exchange procedure may have the equally important effect of involving and educating the client. In the end, decisions with regard to settlement and legal expenses must be made by the client's responsible executive. Often, however, attorneys feel that these executives do not devote enough attention to litigation and therefore are unable to make well-informed judgments. Even where corporate in-house counsel is actively involved in a case, it is

important for the outside litigator primarily responsible for the case to be able to deal with a decision-making executive who actually understands the detailed allegations and facts of the case in more than a second-hand manner.

The Information Exchange provides an opportunity for educating an executive to make rational decisions about the litigation. This can pay off in more ways than just settling the case. Even if the Information Exchange does not lead to settlement, it will leave the business principals with a much more accurate understanding of the nature of the dispute and with a greater appreciation of counsel's later attempts to mobilize corporate employees to assist in pursuing or responding to resumed discovery and in preparing for trial. Moreover, the procedure provides the executive with an opportunity to actually see, hear and take the measure of the antagonists in a situation akin to that which will obtain at trial. Thus, for client and attorney alike, the Information Exchange which does not lead to settlement will by its very nature still serve to reduce uncertainty with regard to the other side's position. Especially where an Information Exchange provides an opportunity for free questioning of the other side with regard to its legal and factual arguments, there is a higher likelihood that one will ferret out the other side's "best case" than with traditional discovery techniques.

The Information Exchange described above came at a relatively late stage in the proceedings, after considerable pretrial sparring and discovery. Communication had broken down and compromise through traditional settlement negotiations did not appear possible. Nevertheless, it seemed reasonable to believe that each party was still capable of acting with a minimum of rationality—desiring to resolve the case as favorably as possible, with the least expense and risk, and the least delay. What was crucial to the ultimate resolution was that litigators on both sides, conscious that there remained some remote possibility of creating an avenue of communication, did not simply throw up their hands and begin to gird for trial. Just as important, executives on both sides were willing to risk an untried procedure.

Thus, counsel devised a procedure which combined in a new way features of various well-known dispute resolution mechanisms. For example, the Information Exchange assured a particular form of participation for the parties—the opportunity to present proofs and arguments—which is basic to one scholar's definition of the adjudicatory process.[36] However, unlike adjudication and arbitration, the Information Exchange

36. Fuller, *Collective Bargaining and the Arbitrator*, 1963 WISCONSIN L. REV. 1, 19; *see* Sander, *supra* note 3, at 115.

did not establish a win/lose situation. In this respect, it resembled mediation, conciliation or negotiation. The parties did set their own rules of procedure and select a third party to help resolve the dispute. In these respects the Information Exchange procedure followed an arbitration model; however, unlike an arbitrator, the advisor had no binding decision-making capacity. Yet his very presence—and the ultimate prospect of his advisory opinion—provided a strong incentive to the parties to be both credible and careful in their presentations. In essence, the advisor was akin to a mediator or conciliator, except that his charge was merely to help determine the probable victor at trial rather than also to facilitate compromise.

Had the case been at a different stage or had there been different crucial issues, the structure of the Information Exchange would surely have been different. For example, if the Information Exchange had come earlier in the litigation, before the bulk of discovery, a longer period of expedited, limited pre-Information Exchange discovery might have been necessary. Nevertheless, since reducing discovery costs is a primary incentive for trying such a procedure, it seems advisable to attempt such an approach as early in the case as possible, and to keep even the expedited discovery as limited as possible. Realistically, however, the need for a formalized settlement procedure will rarely be appreciated until after traditional, informal negotiations have failed and discovery and other pretrial proceedings have brought home the realities of the process and sated the initial thirst for litigative combat.

Further, the rather complex procedure described above seems better suited to cases involving mixed questions of law and fact—questions dealing with the legal consequences of a variety of factual circumstances—than with questions solely, or primarily, of law or credibility. Thus, for example, the procedure seems well suited to resolving an antitrust case where the "sticking point" to settlement is the scope and definition of the relevant market, or an unfair competition case where the crucial issue is the propriety of certain disputed business practices. By contrast, where a case turns solely on legal issues, summary judgment procedures are likely to provide a means to resolve it. But where a case primarily turns on factual disputes involving credibility, the kind of Information Exchange procedure described above is not likely to be any more effective in resolving the case than traditional settlement negotiations or arbitration. However, where the factual disputes are technical ones, requiring expert analysis and promising a "battle of the experts" at trial, a modified Information Exchange procedure involving a neutral expert might be the best approach. Thus, in a circumstance where, for

example, the performance of a product is at issue, a joint testing procedure carried out by each side's experts and a neutral expert might well provide sufficient data to foster a settlement through traditional negotiations, without the necessity of also having a full-blown Information Exchange.

V. CONCLUSION

Obviously the concept presented here is not a panacea. By itself it is no cure for the court congestion and delay that plague our formal dispute resolution system, or for the ruinous litigation costs that increasingly concern corporate executives. Even so, the success of this procedure should demonstrate to the corporate litigation bar that successful alternatives to a million dollar litigation can be devised.

If such alternatives are to be developed and implemented, the corporate litigator must be familiar with the features of different dispute resolution mechanisms so that when faced with a situation in which an Information Exchange or some other dispute resolution proceeding seems appropriate, different characteristics can be borrowed from those traditional mechanisms. The end result, like a Dr. Seuss creation, may not be immediately recognizable as anything remotely familiar. But the only appropriate criterion is whether it will work.