1985

The Manager's Guide to Resolving Legal Disputes: Better Results Without Litigation (1985)

James F. Henry

Jethro K. Lieberman

The

MANAGER'S GUIDE TO RESOLVING LEGAL DISPUTES

The MANAGER'S GUIDE TO RESOLVING LEGAL DISPUTES

Better Results Without Litigation

James F. Henry &
Jethro K. Lieberman

1817

HARPER & ROW, PUBLISHERS, New York
Cambridge, Philadelphia, San Francisco, London
Mexico City, São Paulo, Singapore, Sydney

FIRST EDITION

Library of Congress Cataloging in Publication Data

Henry, James F., 1930–
The manager's guide to resolving legal disputes.

(Bibliography: p.
Includes index.
1. Dispute resolution (Law)—United States.
2. Negotiation. I. Lieberman, Jethro Koller.
II. Title.
KF9084.H46 1985 347.73'9 84-48606
ISBN 0-06-015449-7 347.3079

85 86 87 88 89 HC 10 9 8 7 6 5 4 3 2 1

CONTENTS

1

TAKING CHARGE OF YOUR DISPUTES

In 1981, officials at the National Aeronautics and Space Administration had a serious problem. A dispute with Space Communications Company and TRW, Inc., over technical issues in a construction contract signed in 1976 threatened to delay the launch of the Tracking and Data Relay Satellite System, an important component of the space shuttle program. The dispute had been brewing for two years and was about to flare into large-scale litigation. A NASA legal team, wedded to its interpretation of events, was ready to take the depositions of forty people. But the suit would have meant a launch delay of more than one year and would have run up other costs associated with the first TDRSS satellite.

At Spacecom and TRW, executives were no less concerned. During the previous year, their lawyers had spent an estimated $1 million in discovery and depositions, and the lawsuit would have cost at least another million.

Then a lawyer at Mudge Rose Guthrie Alexander & Ferdon, Spacecom's outside New York law firm, suggested a simple solution: a minitrial. Rather than go to court, the parties would lay the case before their own managers, and advance their best arguments within the space of a single day. The managers would then know the strengths of their opponent's case and the weaknesses of their own and be motivated to settle, and settle quickly.

So in February 1982, lawyers for NASA, Spacecom, and TRW sat down to present their case before four people: the director of the Goddard Space Flight Center, NASA's associate administrator for tracking and data systems, Spacecom's pres-

ident, and a divisional vice-president of TRW. They listened for five hours and met the next day. Within a week they resolved not only the primary dispute, but also several other matters pending before a NASA appeals board.

This speedy, inexpensive settlement of a fractious, costly lawsuit was neither a miracle nor an aberration. It was an example of *alternative dispute resolution* (*ADR*), a movement characterized by *Business Week* and *The New York Times* as a "quiet revolution" in the way corporations and other institutions are learning to settle disputes without resort to the courtroom.

The fundamental lesson of the NASA-TRW settlement is that practical, businesslike methods exist for managers to resolve disputes quickly, effectively, and economically. These methods will work for any manager who is willing to pitch in and become directly involved in the dispute resolution process. The manager who takes charge and maintains control of corporate disputes will discover that it is possible to reduce the large expenses and the days, weeks, or months of precious executive time eaten up by lawsuits. This book will demonstrate the hows and whys of alternative dispute resolution, which we believe to be one of the most promising developments in American business and legal practice in recent years.

Now known by its shorthand name, ADR, alternative dispute resolution is both a philosophy and a set of simple practices that can be powerful tools for a company or an individual caught in the snares of a quarrel that threatens to grow too big to handle, or of a lawsuit that has taken on a life of its own. ADR's fundamental proposition is quite simple: The CEO, manager, and business executive have a strong role to play in devising and executing a settlement strategy. They must learn to use their *business* skills, the skills of negotiation and the art of compromise, to help settle matters that are all too routinely shunted aside to the legal department or an outside lawyer.

As a discipline, ADR is quite new. It was born in the late

1970s and began to gather attention and excitement only in 1981. It did not become widely known within the bar until 1984. So it is a mere infant as these things go.

But its roots are very old, as old as the predilection of almost every litigant to settle the dispute somewhere short of the courtroom steps. ADR takes seriously the statistic which shows, year in and year out, that more than 90 percent of all civil suits are settled before trial. ADR's major theme is this: If a suit is more than likely to be settled eventually, why not settle it early, before the huge costs of discovery and the major expenses of litigation are incurred, before tempers flare out of control, before positions harden to the detriment of all, before a company's business opportunities are squandered, before executives must spend frantic working hours closeted with a lawyer and a stenographer answering questions at a deposition.

One familiar and established form of ADR is *arbitration,* known in general terms to everyone in business. Many industries use arbitration extensively, and labor relations would not work without it. But in the past twenty years or more, many arbitrations have become every bit as complex and costly as litigation. Although it remains a valuable aid to the resolution of business disputes, arbitration, like litigation, has become a last resort.

ADR seeks to go beyond this process in the search for still speedier and less expensive methods that will offer more options for satisfactory resolution of disputes than the win-lose constraints typical of litigation and arbitration. What these methods are and how you can use them make up the bulk of this book.

These methods include the minitrial, which we will describe in some detail. But for all the excitement it has generated, the minitrial is only one of several methods. In the long run, it is likely that *mediation*—a process so far used mainly in labor disputes and domestic relations cases—will be recognized as the sleeping giant of ADR. Most disputes turn on compro-

misable points, and mediation is ideally designed to foster compromise because it can explore the full range of options open to the disputants.

Still other techniques include the *management* of existing discovery and litigation before it gets to court, *shortcuts* you can use once you are in court, multiparty *collaboration* to establish nonjudicial institutions to resolve disputes that embrace entire industries (as is occurring now in the asbestos lawsuits), more sophisticated and creative uses of *negotiating* (the executive's skill par excellence), and public positions you can take to help foster a climate conducive to the use of ADR by the many rather than the few.

An occasional critic of ADR suggests that dispute resolution outside the courts results in second-class justice. To be sure, an effective lawsuit is more desirable than a failed negotiation, a botched arbitration, or a mediation that leads to further hostilities and no settlement. But the possibility of failure is hardly a reason to forego what promises not second-class justice, but more often justice superior to that achieved by bringing suit. We underscore here that this book is about processes that compare favorably in every way to litigation. This book is designed to show you how you can use these processes to achieve results that far surpass what is possible in the courtroom.

That this can be so is confirmed daily in the international arena. Business executives in Europe, Asia, and elsewhere are understandably wary of making deals with their American counterparts if those deals might land them in American courtrooms. It is no surprise that American-style ADR has awakened international interest: Internationally, ADR (though not by that name) has been practiced for decades, and in some cultures, like those of Japan and China, for centuries. Virtually everything in this book is applicable to the international as well as the domestic arena.

Much of what you are about to read is nothing more than old-fashioned common sense. This ought not to condemn it in

the eyes of those who consider themselves sophisticated. Nothing that is complex is worthwhile if it is not anchored in common sense; much that is highly sophisticated can be built on an edifice of common sense. We believe that ADR has struck a chord and is succeeding precisely because it has gone back to basics, has asked some simple questions, and has constructed some new approaches on a widely shared foundation.

In this complex age, we all can use a few simplicities that work.