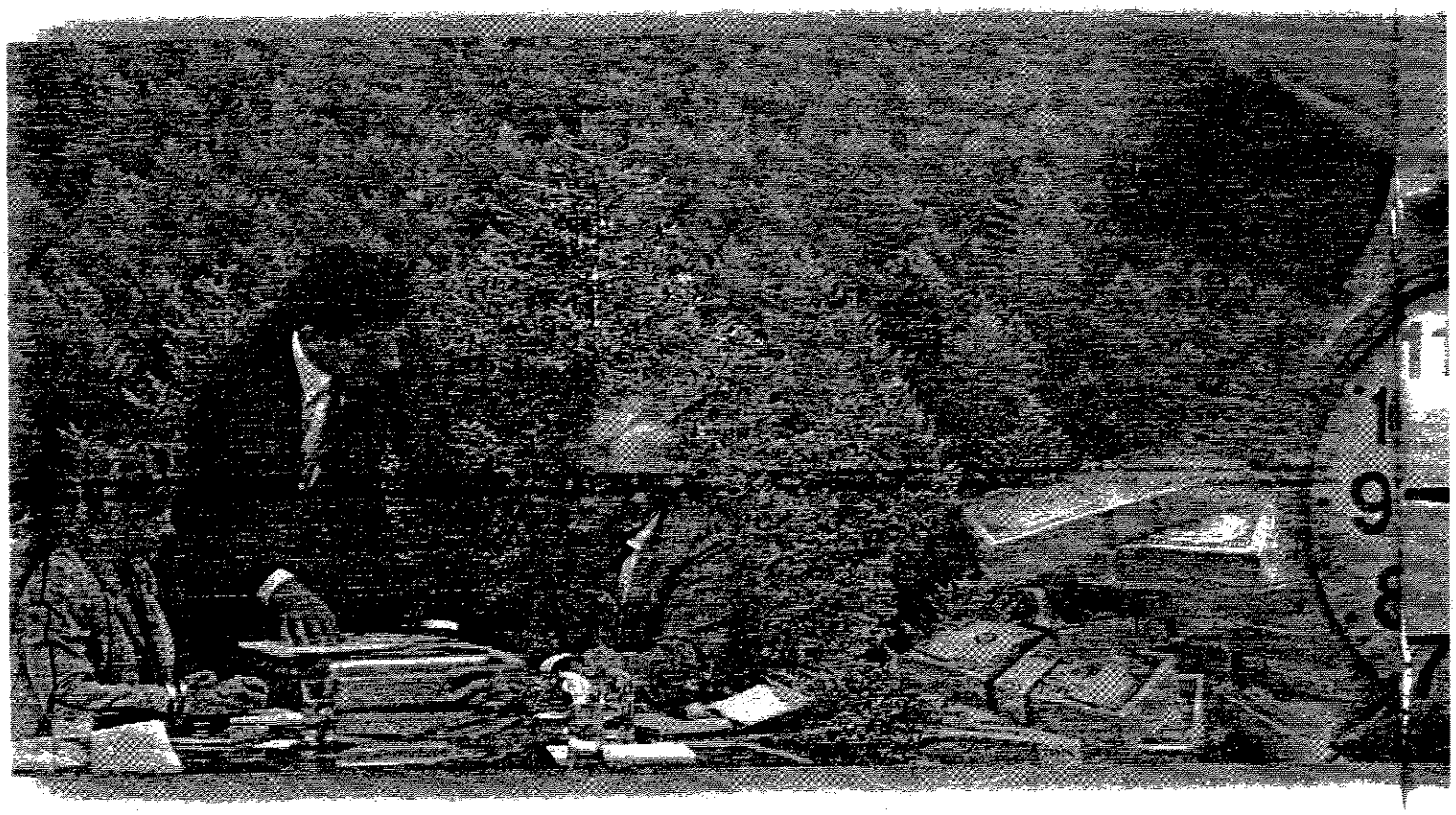
Case Study:



by Phillip M. Armstrong

An aggressive use of alternative dispute resolution (ADR) can save a company endless hours of time and millions of dollars in expenses. Georgia-Pacific Corporation has revamped its litigation management accordingly, and the strategy is paying off. In 1996 the company mediated, arbitrated, or settled through early case evaluation nearly 50 cases with an estimated savings of at least $1.5 million. In 1997 the number of such cases increased to 74 with an estimated $6.5 million in savings. These numbers certainly have ensured management's continued support for the program.

Like much of corporate America, Georgia-Pacific has learned to handle litigation differently. For years, lawsuits brought against the company took an all too familiar path. After service of process, the case was assigned to a member of the legal department,

Phillip M. Armstrong, "Case Study: Georgia-Pacific's Aggressive Use of Early Case Evaluation and ADR," *ACCA Docket* 16, no. 6 (1998): 42-48.

Georgia-Pacific's Aggressive Use of Early Case Evaluation and ADR

often someone who had little or no training in handling litigation. Typically, the in-house attorney conducted a preliminary factual investigation, then hired outside counsel to defend the suit. The outside counsel would file an answer, initiate discovery, and represent the company until the case was resolved. In almost every instance, 18 to 36 months later, following an expenditure of thousands of dollars in legal fees and related costs, the case settled. Georgia-Pacific's experience reflects that of the majority of American corporations. The fact is, most cases settle.[1]

A shift began, however, when James F. Kelley took over as Georgia-Pacific's senior vice president and general counsel in December of 1993. Analyzing the company's caseload, he realized that Georgia-Pacific entered into settlements for amounts that could have been reasonably estimated much earlier in the process, even before any significant discovery had been undertaken. He deemed it more sensible to settle for that amount (or perhaps even less) early in the process to save the legal fees and costs (including the time of company employees) that would otherwise be incurred in defending the suit.

Phillip M. Armstrong is associate general counsel for ADR and litigation for Georgia-Pacific's legal department.

As part of an ongoing, corporate-wide cost-cutting effort, Kelley incorporated his thinking about early case evaluation into an overhaul of the legal department. Rather than the standard pyramid, Kelley's philosophy was to flatten out his staff and move away from a department in which lawyers manage other lawyers. Attorneys were required to be practitioners, to do more in-house and to become less reliant on outside

continued on page 46

Georgia-Pacific's Model ADR Contract Clauses

A TWO-STEP DISPUTE RESOLUTION CLAUSE

Mediation-Arbitration or Litigation

The parties will attempt in good faith to resolve any controversy or claim arising out of or relating to this Agreement by mediation in accordance with the [Center for Public Resources] [American Arbitration Association] [other named organization] model procedures for mediation of business/commercial disputes.

If the matter has not been resolved pursuant to the aforesaid mediation procedure within _____ days of the commencement of such procedure, or if either party will not participate in a mediation,

[Select one of the following alternatives.]

(i) the controversy shall be settled by arbitration in accordance with the [Center for Public Resources Rules for Non-Administered Arbitration of Business Disputes] [Commercial Arbitration Rules of the American Arbitration Association]. The arbitration shall be governed by the United States Arbitration Act, 9 U.S.C. § 1-16, and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of arbitration shall be _____.

The arbitrator(s) [are] [are not] empowered to award damages in excess of actual damages, including punitive damages.

(ii) either party may initiate litigation [upon_____days' written notice to the other party.]

All deadlines specified in this Article may be extended by mutual agreement.

The procedures specified in this Article shall be the sole and exclusive procedures for the resolution of disputes between the parties arising out of or relating to this Agreement; provided, however, that a party may seek a preliminary injunction or other preliminary judicial relief if in its judgment such action is necessary to avoid irreparable damage. Despite such action the parties will continue to participate in good faith in the procedures specified in this Article. All applicable statutes of limitation shall be tolled while the procedures specified in this Article are pending. The parties will take such action, if any, required to effectuate such tolling.

THREE-STEP DISPUTE RESOLUTION CLAUSE

Negotiation-Mediation-Arbitration

The parties will attempt in good faith to resolve any controversy or claim arising out of or relating to this Agreement promptly by negotiations between senior executives of the parties who have authority to settle the controversy (and who do not have direct responsibility for administration of this Agreement).

The disputing party shall give the other party written notice of the dispute. Within twenty days after receipt of said notice, the receiving party shall submit to the other a written response. The notice and response shall include (a) a statement of each party's position and a summary of the evidence and arguments supporting its position, and (b) the name and title of the senior executive who will represent that party. The senior executives shall meet for negotiations at a mutually agreed time and place within thirty days of the date of the disputing party's notice and thereafter as often as they reasonably deem necessary to exchange relevant information and to attempt to resolve the dispute.

If the matter has not been resolved within sixty days of the disputing party's notice, or if the party receiving said notice will not meet within thirty days, the parties will attempt in good faith to resolve the controversy or claim by mediation in accordance with the [Center for Public Resources] [American Arbitration Association] [other named organization] model procedures for mediation of business/commercial disputes.

If the matter has not been resolved pursuant to the aforesaid mediation procedure within _____ days of the commencement of such procedure, or if either party will not participate in a mediation,

[Select one of the following alternatives.]

(i) the controversy shall be settled by arbitration in accordance with the [Center for Public Resources Rules for Non-Administered Arbitration of Business Disputes] [Commercial Arbitration Rules of the American Arbitration Association]. The arbitration shall be governed by the United States Arbitration Act, 9 U.S.C. § 1-16, and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of arbitration shall be _____.

The arbitrator(s) [are] [are not] empowered to award damages in excess of actual damages, including punitive damages.

(ii) either party may initiate litigation [upon _____days' written notice to the other party.]

All deadlines specified in this Article may be extended by mutual agreement.

The procedures specified in this Article shall be the sole and exclusive procedures for the resolution of disputes between the parties arising out of or relating to this Agreement; provided, however, that a party may seek a preliminary injunction or other preliminary judicial relief if in its judgment such action is necessary to avoid irreparable damage. Despite such action the parties will continue to participate in good faith in the procedures specified in this Article. All applicable statutes of limitation shall be toiled while the procedures specified in this Article are pending. The parties will take such action, if any, required to effectuate such tolling.

FOUR-STEP DISPUTE RESOLUTION CLAUSE

Two Stage Negotiation-Mediation-Arbitration or Litigation

The parties will attempt in good faith to resolve any controversy or claim arising out of or relating to this Agreement promptly by negotiations between representatives and senior executives of the parties who have authority to settle the controversy.

If a controversy or claim should arise, _____ of Owner [G-P or other] and _____ of _____ [Contractor or other], or their respective successors in the positions they now hold (herein called the "project managers"), will meet at least once and will attempt to resolve the matter. Either project manager may request the other to meet within fourteen days, at a mutually agreed time and place.

If the matter has not been resolved within twenty days of their first meeting, the project managers shall refer the matter to senior executives, who do not have direct responsibility for administration of this Agreement (herein called "the senior executives"). Thereupon, the project managers shall promptly prepare and exchange memoranda stating (a) the issues in dispute and their respective position, summarizing the evidence and arguments supporting their position, and the negotiations which have taken place, and attaching relevant documents, and (b) the name and title of the senior executive who will represent that party. The senior executives shall meet for negotiations at a mutually agreed time and place within fourteen days of the end of the twenty-day period referred to above, and thereafter as often as they reasonably deem necessary to exchange relevant information and to attempt to resolve the dispute.

If the matter has not been resolved within thirty days of the meeting of the senior executives, or if either party will not meet within thirty days of the end of the twenty-day period referred to in the preceding paragraph, the parties will attempt in good faith to resolve the controversy or claim by mediation in accordance with the [Center for Public Resources] [American Arbitration Association] [other named organization] model procedures for mediation of business/commercial disputes.

If the matter has not been resolved pursuant to the aforesaid mediation procedure within _____ days of the commencement of such procedure, or if either party will not participate in a mediation,

[Select one of the following alternatives.]

(i) the controversy shall be settled by arbitration in accordance with the [Center for Public Resources Rules for Non-Administered Arbitration of Business Disputes] [Commercial Arbitration Rules of the American Arbitration Association]. The arbitration shall be governed by the United States Arbitration Act, 9 U.S.C. § 1-16, and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of arbitration shall be _____.

The arbitrator(s) [are] [are not] empowered to award damages in excess of actual damages, including punitive damages.

(ii) either party may initiate litigation [upon _____days' written notice to the other party.]

All deadlines specified in this Article may be extended by mutual agreement.

The procedures specified in this Article shall be the sole and exclusive procedures for the resolution of disputes between the parties arising out of or relating to this Agreement; provided, however, that a party may seek a preliminary injunction or other preliminary judicial relief if in its judgment such action is necessary to avoid irreparable damage. Despite such action the parties will continue to participate in good faith in the procedures specified in this Article. All applicable statutes of limitation shall be toiled while the procedures specified in this Article are pending. The parties will take such action, if any, required to effectuate such tolling.

How can other companies learn from the Georgia-Pacific experience? What can they do to institutionalize early case evaluation/ ADR? The following steps are recommended.

1. **Get top management buy-in. The executives in the company must be shown the economic benefits of early case resolution versus a winning-at-all-costs philosophy.**
2. **Start training. Although most lawyers today are at least familiar with ADR, few have had formal training. An interactive training session, complete with role play, is money well spent.**
3. **Start small. Don't try to change the corporate culture too quickly. Begin, perhaps, with a category of cases, such as product liability claims, and then expand.**
4. **Incorporate the practice. Require ADR clauses to be routinely incorporated into your commercial agreements.[1] This provides a mutual, face-saving method of forcing the parties to use alternative means to resolve disputes before the battle lines are drawn.**
5. **Grant authority. Assign someone full-time responsibility for promotion and use of ADR. In-house expertise is essential to any successful program.**
6. **Begin immediately. When the existence of a dispute becomes known, promptly investigate the facts, objectively evaluate the case, and, when appropriate, initiate negotiation or ADR.**
7. **Build a resource library. Treatises and periodicals on alternative dispute resolution are both extensive and readily available.[2]**
8. **Fully litigate cases if necessary. An aggressive program does not mean every case is suitable for ADR. One should screen every case, however, to determine its suitability for early settlement or ADR.[3]**
9. **Measure the results. This can be somewhat tricky because one must necessarily estimate the cost of litigation. Yet most litigators have a sense for what a case will cost and, with some exceptions, can reasonably estimate the outcome. It's not a science, but the ability to properly evaluate a claim in its early stages is key to a successful program.**
10. **Be patient. It takes time to build a successful program and not every ADR experience will be positive. Over time the results will speak for themselves.**

Notes

1. Forms for use in drafting ADR clauses are available from CPR, AAA, and a variety of other sources. For a good article on arbitration clauses, see Robert R. Salman & Suzanne A. Salman, *Points to Ponder for Arbitration Agreements*, 43 PRAC. LAW., 30 (1997).
2. A good starting point is the MARTINDALE-HUBBELL® DISPUTE RESOLUTION DIRECTORY (1996). (For information on the directory, search www.martindale.com/ products/dispute_res.html).
3. One of the better ADR screens available is published by Debevoise & Plimpton, *Evaluating Cases for ADR*, 12 ALTERNATIVES TO THE HIGH COSTS OF LITIGATION 151 (1994).

counsel. Additionally, he required his staff to become actively involved in each case, as opposed to just monitoring the performance of outside counsel, and set up a separate litigation group to manage all the company's lawsuits. Early case evaluation, emphasizing ADR, was mandated for virtually every suit filed against the company.[2] An attorney was added to the litigation group to promote and employ ADR, with special emphasis on early disposition of cases. Additionally, lawyers were required to attend an interactive, two-day training session on ADR. In short, instead of immediately sending lawsuits to outside counsel, Georgia-Pacific's legal staff began to review every file with an eye toward early settlement or ADR. Today, with few exceptions, Georgia-Pacific tries to resolve a matter in the first 60 to 90 days, well before discovery is underway.

IN SHORT, INSTEAD OF IMMEDIATELY SENDING LAWSUITS TO OUTSIDE COUNSEL, GEORGIA-PACIFIC'S LEGAL STAFF BEGAN TO REVIEW EVERY FILE WITH AN EYE TOWARD EARLY SETTLEMENT OR ADR. TODAY, WITH FEW EXCEPTIONS, GEORGIA-PACIFIC TRIES TO RESOLVE A MATTER IN THE FIRST 60 TO 90 DAYS, WELL BEFORE DISCOVERY IS UNDERWAY.

Georgia-Pacific is quick to point out that not every case is suitable for early settlement or ADR. Sometimes an important precedent is at stake. Other times the claim is totally without merit, in which case Georgia-Pacific defends on principle alone. Kelley is willing to go scorched earth when the circumstances call for it, but many suits against the company contain a legitimate claim or involve a business relationship worth preserving.

The company's willingness to enter ADR is not a refusal to litigate. "In the old days," Kelley says, "we might have spent $100,000 [in legal fees and other costs] and taken two or three years to settle a case that probably could have been resolved for

AS KELLEY SAYS, "WE ARE CONSTANTLY REVIEWING OUR LITIGATIONSTRATEGY, BUT EARLY CASE EVALUATION AND ADR SEEM TO BE WORKING. IF YOU PROPERLY EVALUATE A CASE EARLY IN THE PROCESS AND CAN ARRIVE AT A SETTLEMENT THAT IS CONSISTENT WITH THAT EVALUATION, IT'S HARD TO ARGUE WITH THE RESULTS."

half that amount shortly after the suit was filed. We might have felt justified in defending the case, but after it was clear the other side had some legitimate claims, the economics made no sense at all." Like all large corporations, Georgia-Pacific still defends lawsuits and fights grossly inflated or meritless claims. Increasingly, however, it employs early case evaluation, mediation, arbitration, and other ADR techniques with improving results. Kelley doesn't fear that this will open the flood gates to frivolous litigation, particularly if the public perceives a settlement mentality at Georgia-Pacific. He asserts, "We still look very closely at every case. We know which cases are ripe for settlement and which ones are bogus."

It's a new day at Georgia-Pacific with a novel approach to managing litigation. Cases get settled, business relationships are preserved, management spends less time responding to discovery (or otherwise providing factual support for the case), and the company saves money — sometimes big money. Georgia-Pacific is not the first company to recognize the advantages of early settlement or to make extensive use of ADR. But it is among the first Fortune 500 companies to make that philosophy a focal point of its approach to litigation.[3] As Kelley says, "We are constantly reviewing our litigation strategy, but early case evaluation and ADR seem to be working. If you properly evaluate a case early in the process and can arrive at a settlement that is consistent with that evaluation, it's hard to argue with the results." ◻

NOTES

1. The Center for Public Resources Institute for Conflict Resolution (CPR) estimates that 95 percent of all lawsuits settle outside of court.
2. At Georgia-Pacific, early case evaluation leading to a negotiated settlement is treated as if it were a form of ADR, that is, a method of resolving the case short of litigation.
3. In the recent Cornell University study of 1000 of the largest U.S. corporations, nearly 100 percent of those responding to the survey reported trying ADR some of the time but fewer than 20 percent reported that they try to use ADR all of the time (DAVID B. LIPSKY & RONALD L. SEEBER, a joint initiative of Cornell University, The Foundation for the Prevention and Early Resolution of Conflict, and Price Waterhouse LLP, THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN U.S. CORPORATIONS 1997.

Available on ACCA Online℠ are copies of ACCA's ADR InfoPAK℠ (www.acca.com/infopaks/index.html) and sample forms and policies (www.acca.com/legres/ index.html), including Georgia-Pacific's ADR agreement.