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GEORGIA-PACIFIC'S ADR PROGRAM: A CRITICAL REVIEW AFTER 10 YEARS

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An assessment of a Fortune-500 company's 10-year old ADR program, including a look at the costs saved through the program.

In 1998, the American Corporate Counsel Association published an article I wrote summarizing Georgia-Pacific's[1] entry into the world of alternative dispute resolution (ADR).[2] After a decade of ADR experience (January 2005 marked the 10th anniversary of Georgia-Pacific's program), it seems appropriate to critically review that program to determine how it has fared over this period, how it changed (if at all), what improvements were made (if any), and what have we learned and can impart to other institutions from our experience. In short, as the person responsible for developing Georgia-Pacific's ADR program, I felt the need to take stock, to stand back and ask where we are after nearly a decade of experience using ADR.

The earlier article was written when the company's ADR program was in its infancy. At the time, Georgia-Pacific was one of the first Fortune 500 companies to establish a formal ADR program. The article contrasted how Georgia-Pacific historically managed disputes—i.e., hiring outside counsel, commencing a lawsuit, embarking on discovery, and then often settling shortly before trial—with a new, presumably less adversarial, more problem-solving approach, one that evaluated cases early and, when appropriate, used mediation or some other ADR process to resolve the dispute.[3] I noted in the 1998 article that "with few exceptions, Georgia-Pacific tries to resolve a matter in the first 60 to 90 days, well before discovery is underway."[4] The article provided an estimate of the savings generated from the ADR program during its first few years.

Georgia-Pacific's program is no longer in its infancy. After a decade of use and hundreds of negotiations, mediations and arbitrations later, the company can reasonably assess the impact of ADR on the company's management of disputes. The assessment discussed below reviews costs and other aspects of having an ADR program for 10 years, including the need for management support and training of Law Department personnel.

1. Cost Savings. The cost savings which were significant in the beginning of the ADR program remain so today. The chart below shows our estimates of the dollars saved due to the ADR program from calendar years 1995 through 2004.[5] In brief, it reflects that the ADR program has saved Georgia Pacific several million dollars since its inception.

Georgia-Pacific

Summary of ADR Savings 1995 through 2004

YEAR	NO. OF CASES	ESTIMATED SAVINGS
1995	13	$1 Million
1996	26	$1.5 Million
1997	84	$6.5 Million
1998	110	$6 Million
1999	94	$2.5 Million
2000	68	$4.25 Million
2001	43	$2.97 Million
2002	44	$2.3 Million
2003	36	$2.35 Million
2004	77	$3.41 Million

The ADR program started small in 1995, the first full year of operation. Cases handled in the program increased significantly from 1997 through 2000,[6] levelled off during 2001-2003, and then showed a significant bump in 2004.

2. Need for Management Support. Georgia-Pacific obtained the support of top management for the ADR program at the beginning. Indeed, the program could not have gotten off the ground without it. Although the support was there at the beginning, and the ADR program has been successful from a financial point of view, it is still necessary to keep that support and have top management "buy in" to the program. Why? Management changes. New business managers must be regularly educated on the benefits of ADR and existing managers must be periodically reminded of why ADR works and why it is good for the company.

3. Training. Likewise, new lawyers in the law department must be trained on both the process and benefits of ADR. True, most law schools now offer ADR courses, but they are seldom part of the required curriculum. ADR practitioners routinely express surprise at how often they face an opposing counsel with little or no ADR experience.

4. Contract Clauses. Ten years of ADR experience has changed the way Georgia-Pacific addresses dispute resolution in its commercial contracts. In the 1998 article, the company used three multi-step clauses, all of which included arbitration. Today we often use a simpler three-step clause (see sidebar on page 21) that ends in mediation. With some exceptions, the company's current view is that if it cannot reach a settlement with an adversary using the steps provided in the ADR clause, it prefers to keep its options open.[7]

5. Litigate When Necessary. Since its inception, Georgia-Pacific's ADR program has focused on legitimate claims, i.e., *bona fide* disputes where both parties have a genuine, good-faith belief in the rightness of their position. Conversely, the program did not apply to bogus claims and lawsuits: (1) naming Georgia-Pacific only because it has a deep pocket, (2) where the company's product, even if in the chain of distribution, had no role in the liability or damages alleged, (3) where an overriding principle or precedent is at stake, or (4) where the company believes that the case will open the floodgates to frivolous claims. In short, Georgia-Pacific prefers to defend against these kinds of cases in court, rather than settle, notwithstanding ADR's economic benefits. It also litigates cases where the business manager who is the "client" strongly believes in the rightness of Georgia Pacific's position, despite the fact

that an economic benefit analysis suggests it could be cheaper to settle. Despite its commitment to ADR, Georgia Pacific still litigates more cases than it mediates or arbitrates, a clear indication to potential claimants that the company litigates when appropriate to do so.

6. Settlement Mentality. A concern often expressed by management when starting an ADR program is how such an initiative might be perceived in the marketplace. Thus, when Georgia-Pacific started its ADR program, there was a concern that the company's problem-solving approach, both as to claims it brought as well as defends against, might result in lawsuits "coming out of the woodwork." In fact, Georgia-Pacific's experience was just the opposite. The program did not invite a host of new lawsuits.

Furthermore, because the company is involved in a wide variety of claims, it has not identified any pattern of lawsuits or repeat cases brought with the hope that it will settle.

The fact that Georgia-Pacific litigates the majority of lawsuits against it seems to warn prospective plaintiffs that it will not "roll over" just because a suit is filed.

7. Types of Cases. In the early stages of Georgia-Pacific's ADR program, certain types of claims (notably personal injury actions) were presumed to be poor candidates for ADR. The assumption was that only commercial or contract cases were appropriate for mediation or arbitration. Over the past several years we have learned that ADR is suitable for almost any type case and that no claim should be summarily rejected as unsuitable for ADR. At present, virtually all lawsuits or claims undergo an early case assessment and ADR analysis, often leading to mediation or arbitration or some other ADR process.

8. Types of ADR Processes Used. When Georgia-Pacific started its ADR program, it assumed it would use a wide variety of ADR processes. That turned out to be an erroneous assumption. Georgia-Pacific has tended to use mediation most often, with arbitration a distant second. This is consistent with most Fortune 500 companies. We have used other types of ADR (e.g., summary jury trial, mini-trial, med-arb) very sparingly. This reflects Georgia-Pacific's confidence in the mediation process (a confidence other Fortune 500 companies also seem to share). Though we are not averse to hybrid forms if ADR, we have not yet felt the need to expand in that direction.

9. Selection of a Neutral. In the early stages of Georgia-Pacific's ADR program, the company

Sample Dispute Resolution Clause Used by Georgia Pacific

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, appropriate representatives of each party ("Managers") will meet at least once and will attempt to resolve the matter. The Managers will make every effort to meet as soon as reasonably possible at a mutually agreed time and place.

If the matter has not been resolved within twenty days of their first meeting, the Managers shall refer the matter to Senior Executives who do not have direct responsibility for administration of this Agreement ("Senior Executives"). Thereupon, the Managers shall promptly prepare and exchange memoranda stating (a) the issues in dispute and their respective position, summarizing the evidence and arguments supporting their positions, 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 deem reasonably 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 current model procedural rules of the [CPR Institute for Dispute Resolution.] [American Arbitration Association.]

If the matter has not been resolved pursuant to the aforesaid mediation procedure within thirty days of the commencement of such procedure, or if either party will not participate in a mediation, either party may initiate litigation or otherwise pursue whatever remedies may be available to such party.

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

The procedures specified in this section 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 section. All applicable statutes of limitation shall be tolled while the procedures specified in this section are pending. The parties will take such action, if any, required to effectuate such tolling.

typically selected neutrals from nationally known service providers (e.g., American Arbitration Association, JAMS, the CPR Institute for Conflict Resolution). While the company occasionally will draw from these national service providers, particularly where a contract clause requires that the rules of a specific organization be used, it tends to rely more heavily on recommendations from outside counsel with whom it has forged long-standing relationships. If, for example, the company would like to mediate a case in California, it would seek a recommendation from the outside counsel it uses in Los Angeles or San Francisco and, in most cases, would follow that recommendation. Though it may seem counter-intuitive, Georgia-Pacific has found that agreeing to the other side's choice of a mediator often leads to a successful resolution of the dispute.[8] That decision tends to establish instant credibility with both the mediator as well as the other side.

Conclusion

Years of experience has reinforced Georgia-Pacific's commitment to ADR. It now considers virtually every case a candidate for early case assessment or ADR, not just commercial disputes with other large companies. Over the last 10 years, the ADR program has undergone some modification, but overall it has largely remained intact. The greatest change is that increasingly more cases are reviewed with ADR in mind and ultimately mediated. We have found that all of the oft-quoted benefits of mediation—cost savings, confidentiality, preservation of business relationships, finality and more satisfying results-are real. Our 10-year reassessment indicates that these benefits have all been part of the Georgia-Pacific experience.

One recommendation included in the 1998 article is essential to establishing a successful ADR program. Specifically, from its inception, Georgia-Pacific appointed one person in charge of managing, promoting and advancing the cause of the ADR program within the company. In corporations as well as other institutions, ADR needs someone responsible for encouraging and promoting its use and helping to overcome any lingering bias in favor of litigating every case that comes through the door. The "win at all costs" mind-set will always be found in some members of management and among lawyers as well. Combating this mind-set is a challenge that must be met time and time again.

Fortunately, the problem-solving approach to dispute resolution is finding more and more converts as parties become increasingly enlightened about alternative methods of dispute resolution. It is hoped that Georgia-Pacific's experience will induce other companies, large and small, to embrace the benefits of ADR and influence them to reevaluate their own methods of conflict resolution. ■

ENDNOTES

[1] Georgia-Pacific Corporation is a Fortune 500 consumer and wood products company headquartered in Atlanta, Georgia.

[2] Phillip M. Armstrong, "Case Study: Georgia-Pacific's Aggressive Use of Early Case Evaluation and ADR" 16 (6) *ACCA Docket* 42-48 (1998).

[3] Georgia-Pacific defines ADR as any process designed to resolve disputes early in the process, usually before litigation has been filed and certainly before any formal discovery has been undertaken.

[4] The article also provided 10 steps other companies might consider before starting their own ADR programs. In summary, those steps called for: (1) top management to "buy in" to early dispute resolution; (2) ADR training; (3) starting small, with an identifiable category of case; (4) ADR clauses to be incorporated in company agreements; (5) making one person responsible for the ADR program; (6) commencing early case evaluation immediately after a claim comes in; (7) building an ADR resource library; (8) litigating when necessary; (9) measuring ADR program results; and (10) knowing that building a successful ADR program takes time.

[5] The metrics used by Georgia-Pacific are very conservative. Specifically, the company estimates what it actually spends in attorneys fees, expert fees and court costs as opposed to what it would have spent had the case been litigated. It takes no "credit" for avoided exposure even if it genuinely believes it settled for an amount that would have been less than a verdict had the case been litigated.

[6] The numbers of cases from 1997 through 2000 are somewhat skewed due to the inclusion, at that time, of relatively minor product liability claims ($3,000 or less) arising out of Georgia-Pacific's building products division. After 2000, a decision was made to eliminate those claims from the analysis as not being truly reflective of Georgia-Pacific's ADR experience.

[7] Georgia-Pacific does not always have a choice. The abundance of arbitration clauses in commercial contracts often forces the parties into arbitration. Even though there is an arbitration clause, parties could always agree to mediate first. Fortunately, most large U.S. corporations generally find mediation to be their preferred dispute resolution method. Georgia-Pacific is no different. On occasion, Georgia-Pacific will enter into voluntary arbitration based on the facts and circumstances of a given case.

[8] Georgia-Pacific is not willing to accept the other side's choice of an arbitrator charged with rendering a decision or award affecting the company. In an arbitration proceeding, Georgia-Pacific conducts the usual background checks and satisfies itself that the arbitrator candidate has the the requisite experience, knowledge, impartiality and independence to serve as the decision maker in the case.