LegalTimes WEEK OF AUGUST 16, 2004 • VOL. XXVII, NO. 33

Long Before Those Tempers Flare

Alternative dispute resolution, frequently discounted by general counsel, deserves a second look.

BY ROBERT F. COPPLE

Alternative dispute resolution is the single best litigation management tool available to businesses. When I was the ADR coordinator at Motorola, I made ADR a central element of our litigation strategy. This approach not only reduced costs and business disruption caused by prolonged litigation, but also resulted in many early settlements.

Although ADR has been around for years and has proven its efficacy, I continue to meet many in-house counsel who are unfamiliar with these techniques or reject ADR offhand as somehow a waste of time or a bad idea.

The reality is that most commercial litigation must be viewed as a part of the cost of doing business. The goal is to reduce that cost to a level that achieves the business strategy without hurting the company's health. Recently, a number of previously "scorch the earth" corporations (which try to wear down the opposition with aggressive and expensive litigation tactics) such as Microsoft have dramatically shifted their focus to ADR.

Before we go any further, let's take a look at what we mean by alternative dispute resolution. ADR is really a suite of individual techniques, all designed to assist warring parties in quickly and efficiently ending disputes. Most typically, ADR involves enlisting a neutral third party to help resolve the dispute through a narrowly tailored private mini-trial (arbitration), or through somewhat structured negotiations facilitated by an expert mediator (mediation).

The benefits are enormous. For instance, an arbitrated settlement can be 25 to 50 percent cheaper than a court trial, and leads to a much quicker resolution, as long as the parties agree to narrow the arbitration scope and limit the amount of discovery before presenting the case to the arbitrator. The result is that the parties put the matter behind them and focus on their core business objectives faster, less painfully, and, usually, with a greatly reduced sense of animosity.

Mediation is entirely different, but it's still a cost-effective and attractive process. I have been involved in a number of mediations that not only saved a strained business relationship between, say, a manufacturer and a supplier, but also actually resulted in commitments to expand the volume of business between them. In attempting to achieve settlement, the mediator will work to soften the individual parties' resolution by focusing on their weaknesses and the risks they may face by going to trial. Good mediators also look for common interests between the parties.

CONFIDENTIALITY

Another key benefit is that ADR provides the in-house litigator with a host of private forums as opposed to the traditional public courtroom. The attraction here is that if a matter is particularly sensitive or involves confidential information, the proceedings are behind "closed doors." I have used ADR to avoid taking the risk that a particular dispute, if handled through the public courts, might confuse or disrupt a related high-profile case, or create the potential for copycat cases.

For example, in multiparty cases, such as toxic tort actions, there are often disputes among the defendants about how liability and the cost of any judgment should be allocated among them. When there is a related dispute that cannot wait for the resolution of the primary litigation, such as in the case of the cleanup of a Superfund site that is the source for the toxic tort suit, arbitration gives them a confidential forum where they can fight out the costs without publicly revealing arguments or evidence that could be used by the toxic tort plaintiffs.

Confidentiality is an even greater advantage in an intellectual property dispute, whether it involves trade secrets or the legal

validity of a patent important to a broader licensing program. For example, when there is a threat to the validity of the plaintiff's patent, if the dispute goes to trial and the patent is found to be invalid, it has no further value. However, if an arbitrator determines a patent is invalid, there is no binding effect. The unsuccessful plaintiff is still free to use the patent in licensing negotiations with others.

Myths and Misconceptions

Despite the fact that ADR has been used for years, there are a number of persistent negative but unfounded perceptions.

Some in-house attorneys fear that the mere suggestion of ADR will be viewed as a lack of resolve. But they need to think of the alternative: Litigation is expensive, uncertain, and risky.

Another often-heard concern is that ADR will provide the opposing side with "free discovery." Since all forms of ADR require that the parties enter the process ready to persuade each other and the neutral of the strength of their cases, the parties must present, perhaps in an abbreviated form, their strongest arguments and evidence. But this happens in litigation these days as well: Under modern discovery rules, which require virtually complete disclosure of all evidence and legal arguments before trial, the days of "litigation by ambush" are over. Therefore, any minor loss of the element of surprise is outweighed by the potential for a cost-effective and early resolution.

Parallel Strategies

One further issue is that companies often don't consider both litigation and ADR in their planning. In fact, I favor a tactic called parallel strategies. As senior litigation counsel for Motorola, I managed a very large litigation portfolio with potential exposure in the hundreds of millions of dollars.

For each new matter, I established parallel litigation and ADR strategies based on the premise that "timing is everything." Of course, the first strategy usually involved an aggressive litigation plan with every intention of going to trial. But the second strategy identified the points in the case that most lent themselves to ADR and, since sometimes it is difficult to get the other side to the bargaining table, the best time to suggest this track.

I always tried to analyze the other side's position to determine when they might be most amenable to negotiation. That point might be shortly after a case is filed and before either side has expended considerable attorney fees. Or, the right time might be just after summary judgment briefing is complete, but before any decision by the court. At this point, both sides risk losing and don't know when the judge might decide. Through this type of planning, I achieved many very favorable settlements at highly discounted values, and usually eliminated most subsequent attorney fees.

Before a Dispute Arises

One of the best places to integrate ADR is before the dispute, with language in the corporation's transactional documents. The inclusion of ADR clauses establishes a process should a dispute arise, and avoids the necessity of later trying to persuade an opposing party to try ADR after tempers have already flared. The CPR Institute for Dispute Resolution, a nonprofit alliance of corporations, law firms, scholars, and public institutions, helps corporations and law firms select the most appropriate ADR clauses.

The Army Corps of Engineers has had great success in limiting litigation by creating a more complex variation of this strategy. The Corps assumed that about 80 percent of its projects would result in some kind of post-construction litigation. In response to that enormous cost, the Corps came up with a strategy that established milestones in its projects. The parties are required to identify and resolve through ADR any disputes that arise at different points rather than fight it out at the end. As a result, the Corps estimates that its litigation has decreased to about 25 percent of its projects.

In the Early Stages

Although "earlier is definitely better," one of the beauties of arbitration and mediation is that you can effectively turn to them even after a dispute has arisen. Yet once tempers flare, it does become more difficult. In fact, the Annenberg Institute has concluded that the longer a complaint or injury goes without resolution, the more crystallized the parties become in their positions and the less likely they are to compromise and amicably resolve the dispute.

One of my cases involved a defect in a large and expensive piece of manufacturing equipment. After months of dealing with the excuses and justifications of the division president, I got the attention of the parent company's general counsel. In our first meeting, he agreed that his company had exposure for the defect. We then quickly moved to mediation and, in two hours, hammered out a deal that provided an alternative to the defective equipment and established a future business relationship.

In-house counsel should evaluate each new dispute or potential dispute with an eye toward the possibility of getting the parties together for an early attempt at resolution before the relationships are irrevocably broken and the battle lines completely drawn.

Litigation is often described as a chess game. The failure to consider ADR as part of the strategy is like giving up a crucial piece at the start. Considering that the business goal is to avoid spending money and disrupting business, the successful in-house counsel will be the one who looks for the best time to play the ADR piece.

The legal economy is evolving. ADR is the wave. Litigation will always be with us. But in the business arena, resolution through trial will continue to evolve into more of a last resort. Lean, fast-paced global businesses no longer have the patience or resources for protracted litigation. While the number of business disputes continues to grow, decisions need to be made quickly. Those who do not catch the ADR wave may drown in an ocean of paperwork, unnecessarily burdening themselves and their clients. It's a distinct disadvantage in the world of business.

Robert F. Copple was senior litigation counsel for the Motorola corporate law department from 1996 to 2003. Now at Lewis and Roca in Phoenix, Ariz., he works in the firm's commercial litigation, intellectual property, and environmental practice groups, as well as serving as an ADR neutral.