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Why We Still Litigate

Phillip M. Armstrong

The benefits of Alternative Dispute Resolution ("ADR"), particularly mediation, are well documented and often touted. Some of these benefits are: cost savings, confidentiality, preservation of business relationships, finality, better outcomes, and more control. The list goes on, and rightfully so. The Cornell/PERC study\(^1\) and the more recent BTI study\(^2\), among others, have made it clear that corporate America has embraced ADR, particularly mediation, as a preferred means of resolving many disputes. As a long-time member of an in-house law department, I have watched our own management of commercial litigation and claims evolve from a typical "winner takes all" approach to a more creative, problem-solving approach.\(^3\) Instead of immediately drawing the battle lines when a claim or lawsuit is filed, we often analyze the dispute as a business problem to be solved. In short, Georgia-Pacific, like so many companies in the United States, recognizes the benefits of early case assessment, straightforward negotiation (the sooner the better), and ADR as a means to obtain significant cost savings and, frankly, more positive outcomes.\(^4\)

Having said that, the question remains why companies continue to litigate so many cases, often spending enormous sums of money defending or pursuing claims in the face of overwhelming evidence that early case assessment and ADR can yield such positive benefits. This article will explore some of those reasons and ask why organizations so often continue to manage litigation as a win or lose proposition.

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\(^{3}\) The BTI Consulting Group, Benchmarking the Use of Alternative Dispute Resolution in Litigation Management 9-13 (Oct. 2007) (on file with author).


1. **Culture:** Americans hate to lose and love to win. Over ninety-seven million people watched Super Bowl XLII this year, second only to the *M*A*S*H* finale audience.\(^5\) Sports are big business in our country. Almost everyone has a team they support. And the desire to win goes well beyond sports. It is ingrained in our culture, whether it is competition for grades, getting hired for a job, betting on the state lottery or playing a board game. Too often this cultural dynamic undermines the more conciliatory, problem-solving approach which is the hallmark of ADR. Instead of viewing a claim as a problem to be solved, we see it as a battle of wills to be fought. And, as will be more fully explored below, we are willing to take unreasonable risks just to avoid the prospect of losing.

2. **Ego:** Business clients often take the position that despite the economic/benefit analysis supporting early resolution they will not offer the other side any amount of money in settlement. This apparent intransigence is frequently couched in terms of some overriding principle. In my experience, however, the client’s position is many times rooted in ego, i.e., a strong, almost unshakeable belief in the *rightness* of his or her position, so much so that any compromise is out of the question. Can such an approach be in the best interests of the company? Perhaps. Each case is different. But becoming so entrenched in one’s position that creative ideas for resolution are not even considered, much less explored, often leads to the expensive, time-consuming litigation which ADR is designed to avoid. If one’s ego is the primary driver behind a case, the parties are much more likely to resort to some sort of adjudicative proceeding to resolve their dispute—a more reasoned, problem-solving approach is seldom given consideration.

3. **Emotion:** In negotiation, parties often “think they will gain an advantage by attacking the person with whom they are negotiating.”\(^6\) These attacks may be by design or inadvertent (perhaps a poor choice of words), but almost always result in the person being attacked responding in kind rather than focusing on the issues in dispute.\(^7\)

Our civil justice system encourages a process where attacking one’s adversary is the norm rather than the exception. Ask this question: How long after a lawsuit is filed do lawyers and their clients begin to “demonize” their opponent, typically referring to the other side as unreasonable, less than

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7. See generally id. at 47.

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honorable, or perhaps something even less complimentary (hence, the commonly repeated phrase, "sue the bastards")? This demonization of the other side, especially early in the process, makes later discussions focusing on compromise a tough sell. As is often stated, the difficult negotiations are those in which one party becomes "emotionally invested" in the outcome. 8

4. Impact on a stakeholder’s career: Akin to emotional reactions are situations in which one's career or reputation depends, or is perceived to depend, on the outcome of the dispute. Many times in business conflict there is one person, or perhaps a small group of people, with a personal stake in the outcome, i.e., whatever resolution is achieved will potentially have a direct impact on that person’s job, salary or bonus. I have run into this phenomenon many times in my career. In a typical situation, the affected party often would rather litigate the matter than resolve it amicably. In short, they simply get too close to the case. Because it is their neck hanging out they would prefer to litigate and obtain a decision by a court or arbitration panel which, to some extent, “lets them off the hook” in the event of an unfavorable outcome.

5. Cognitive Barriers: Like the loss aversion described above, there are a number of other cognitive barriers which can lead the parties towards litigating rather than negotiating or utilizing ADR. 9 These barriers are rooted in psychology. 10 For example, studies show that lawyers tend to filter out data that conflicts with a hypothesis they have adopted to support their case. 11 Despite hearing from only one party (their client), they lock in a theory of their case based on what they have heard, then screen out data which conflicts with that theory. 12 In so doing, they overlook or give little weight to information which might lead to a more objective analysis of the facts or the strength of their case. 13 This “selective perception” frequently results in making negotiation less attractive, while litigation, and the expectation of winning, becomes more attractive. 14

10. See id. at 6.
11. See id. at 6-7.
12. See id. at 7.
13. See id.
14. See id.
Studies also show that lawyers tend to be overconfident in their ability to assess the value of a case. This "optimistic overconfidence" then gets passed along to business clients who become emboldened and overestimate their chances of winning at trial. Business leaders who have been led to believe they will likely prevail at trial are less willing to consider compromise solutions.

In a phenomenon known as "reactive devaluation," lawyers and business clients find themselves rejecting offers from the other side simply because it is the other side making the offer. Because the other party is seen as an adversary, they have difficulty trusting anything he or she might say and, subconsciously (and sometimes consciously!), tend to discount any offer they make.

There are other psychological hurdles one must overcome if interest-based outcomes are to be achieved. Knowing these impediments exist and dealing with them can help in negotiation, but they are not easy to overcome. Too often the result becomes a roll-the-dice approach played out in front of a judge or jury.

6. History: Business organizations, which have historically managed conflict by litigating nearly everything that comes in the door, often have a difficult time making the switch to a more conciliatory, problem-solving approach. In my own company, I encountered significant resistance when our ADR program was first initiated. Change is unsettling and many companies continue to litigate, either because they have always done so, or because they have made a conscious decision that it is in their best interests to take all cases to trial.

7. Cases which should be litigated: Another major reason business organizations continue to litigate is because certain cases should be litigated. Every large business organization could furnish a list of those matters that, for various reasons, it prefers to litigate rather than settle through negotiation or use of ADR. The following list is representative, but certainly not all

15. See Dwight Golann, supra note 9, at 7.
16. See id.
17. See id.
18. See id. at 9.
19. See generally id.
20. See id.
22. See generally id. at 46.
23. See generally GERALD R. WILLIAMS & CHARLES B. CRAVER, LEGAL NEGOTIATING. 8-9 (2007) (interesting discussion of which cases should be settled and which should go to trial).
encompassing. Generally, companies tend to litigate rather than employ ADR when:

(a) an important principle is involved, e.g., the credibility of one’s product;
(b) there is a need for legal precedent;
(c) there is a need to send a message to the marketplace;
(d) settlement would open the floodgates to frivolous litigation;
(e) the claim is so large that the “discipline of litigation” is called for; 24
(f) the claim is bogus, e.g., the business organization is in the case solely because of its deep pockets, or perhaps because it made a product in the chain of distribution even though the product had nothing to do with the alleged harm;
(g) the law is heavily weighted in its favor, i.e., it is likely it will win on summary judgment due to an exceptionally strong legal principle in its favor;
(h) senior management is unalterably opposed to settlement;
(i) there are multiple parties such that consensus on settlement will be difficult to achieve.

8. Failure to design a system: The Cornell/PERC and BTI studies, as well as various other studies, clearly show that corporations utilize ADR extensively.25 However, integrated approaches to conflict management, including ADR policy statements, training, early case analysis, and other more structured, systematized approaches designed to institutionalize ADR within the organization are relatively rare.26 The majority of U.S. corporations take an ad hoc, case-by-case approach to ADR, often leaving the decision up to the individual, in-house attorney as to whether or not ADR is appropriate or desirable.27

9. Law schools: Despite the fact that most law schools now include classes on ADR and negotiation, the typical law school curriculum still places far more emphasis on advocacy. In fact, most law schools offer ADR

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24. Examples include large, “bet the company” cases or even litigation where any amount offered in compromise would still be more than the company would be willing to pay.
25. See Stipanowich, supra note 21, at 36-40.
26. See id. at 41.
27. For information on how to design an ADR program in-house, see CATHARINE CRONIN-HARRIS, BUILDING ADR INTO THE CORPORATE LAW DEPARTMENT (1997). See also THOMAS D. CAVENAGH, BUSINESS DISPUTE RESOLUTION BEST PRACTICES, SYSTEM DESIGN AND CASE MANAGEMENT (2000).

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and negotiation as electives rather than part of the core curriculum. Consequently, students are taught to be zealous advocates but receive little guidance on how to be a problem solver.

In truth, all cases are not good candidates for ADR. While ADR and the problem-solving approach have been embraced by U.S. corporations, there remains, and will likely remain, the need or desire to litigate certain disputes. Companies exercise the right to manage their litigation and determine which approach best suits their needs. But those organizations which refuse to even consider the benefits of early case assessment and ADR are likely missing out on an opportunity to not only save the time and expense of protracted litigation, but to arrive at a result far more satisfying to the parties, one easier to enforce, that is confidential, and which potentially preserves a valuable business relationship. Business disputes are here to stay. How we resolve those disputes, however, remains an ever-changing landscape. As organizations focus on litigation management, they would be wise to consider institutionalizing ADR, adopting a systematic approach that utilizes the full panoply of dispute resolution processes available.