104 Anatomy of a Successful Mediation

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Philip M. Armstrong is principal counsel for litigation and alternative dispute resolution at Georgia-Pacific Corporation headquartered in Atlanta. He has been with Georgia-Pacific for many years, having previously served as associate general counsel for the company's pulp and paper division and division counsel for the company's building products division.

He is a member of the ABA, the Georgia and Kentucky Bar Associations, and the Atlanta Bar Association; he has served as section chair of the alternative dispute resolution (ADR) section of the Atlanta Bar Association, is vice-chair and chair-elect of the ADR section of the State Bar of Georgia, was recently elected to the council of the ABA section of dispute resolution, and is a member of the executive committee for the CPR International Institute for Conflict Prevention and Resolution. In addition, Mr. Armstrong is an adjunct professor (teaching dispute resolution) at the law schools of Georgia State University and Emory University respectively, both in Atlanta, and has been named in Academic Key's who's who in law education. Pro bono activities include the ADR peer mediation committee of the Atlanta Bar Association (training peer mediators at the middle school level in Atlanta schools), the ABA ADR mentoring program, and the "wills on wheels" program of the Atlanta Volunteer Lawyers Foundation. Mr. Armstrong serves on the board of directors for GPC Credit Association and the board of trustees for the University of the Cumberlands in Williamsburg, Kentucky.

He received his B.S. degree from University of the Cumberlands and his J.D. degree from the University of Kentucky.

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Paul J. Hall is a partner in the San Francisco office of Nixon Peabody LLP and co-chair of its national class action practice team. His practice spans the full range of complex commercial litigation, with particular emphasis on class actions involving financial institutions, labor cases, and unfair competition.

Mr. Hall's trial experience includes lender liability, unfair competition, labor, corporate acquisitions, trade secrets, tax, administrative law, inverse condemnation, real estate, and construction cases. His appellate work includes Union Bank of California, N.A. v. Superior Court, 130 Cal. App. 4th 378 (2005); Hirsch v. Bank of America, N.A., et al, 107 Cal. App. 4th 708 (2003)(representing Union Bank of California); International Mortgage Co. v. Butler, 177 Cal.App.3d 806 (1986); and Southern California Financial Corp. v. United States of America, 634 F.2d 521 (1980).

Mr. Hall is a member of the State Bar of California. Mr. Hall has served as a regent of the University of California, as president of the Boalt Hall Alumni Association, and as president of the University of California, Santa Cruz Alumni Association. He has published and lectured extensively concerning arbitration and mediation, class actions, accountants' liability, directors' and officers' liability, and lender liability cases.

Mr. Hall is a graduate of the University of California, Santa Cruz, A.B., with highest honors and the Boalt Hall School of Law, University of California, J.D.

Honorable Edward A. Infante

Honorable Edward A. Infante is a former Magistrate Judge of the U.S. District Court, Southern District of California, and a Chief Magistrate Judge of the U.S. District Court, Northern District of California. He is currently a full-time mediator at JAMS, the nation's leading private ADR provider. Judge Infante's dispute resolution experience comes from more than 25 years of judicial experience. He has particular expertise in mediating complex business disputes, including class actions, intellectual property, securities, employment, insurance, and antitrust cases.

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

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BY PHILLIP M. ARMSTRONG

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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 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.

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.

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; (8) 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.

November / December 1998

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

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, 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.

Georgia-Pacific's Model ADR Contract Clauses

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]

5. 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.

1. 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.

Sidebar 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(r) Dispute Resolution Directory (1996). (For information on the directory, search www.martindale.com/products/dispute_res.html).

1. 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).

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 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.

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 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.

1. 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.

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SETTLEMENT STRATEGY OVERVIEW

- Early case evaluation on merits and damages
- Early settlement best if both sides are realistic
- Identify key target areas and pressure points
- Aggressive, focused defense helps settlement
- Attorneys' fees drive an increasing wedge
- Know when to hold and when to fold
- Procrastination is expensive

EARLY CASE EVALUATION

- Identify key legal and factual issues
- Electronic discovery—do it early, do it right
- Early witness interviews and *witness quality*
- Declarations on merits and class certification
- Retain experts early—both merits and damages
- Determine probable liability or defenses
- Quantify potential and likely damages
- Evaluate policy changes

EVALUATE INSURANCE—YOURS AND YOUR OPPONENT'S

- Prompt tender
- Evaluate exclusions, coverage often difficult
- Defense rights often broader than coverage
- Defense valuable independent of coverage
- Evaluate retaliatory non-renewal risk
- Control the defense
- Retain policyholder's counsel

EXPERTS

- Do work early—big impact on settlement
- Real knowledge—beware obvious hired guns
- Professors or practitioners are often best
- Establish subject beyond common knowledge
- Daubert test
- Speak as academic – avoid legal conclusions
- Reality: the expert tells your story

PRESSURE POINTS PROMPT NEGOTIATIONS

- Early if both sides knowledgeable and realistic
- Motion to dismiss
- Class certification
- Summary judgment
- Pretrial conference
- The courthouse steps
- Motion for new trial or appeal

BUSINESS GOALS OF SETTLEMENT

- Risk management
- Only money?
- Issue of principle and/or floodgates problem?
- Transaction costs compared to amount at issue
- Executive time and other internal costs
- Business opportunity costs, marketplace position
- Financial timing issues—fiscal year, reporting

COST-EFFECTIVE OVERALL RESULT

- Win/loss chances
- Likely damages
- Likely opt-in/out percentages (in class action)
- Likely transaction costs: defense and plaintiffs' attorneys' fees, costs, experts, executive time
- Attorneys' fees shift by contract or statute?
- Effect on business, publicity, share price
- Be result-oriented, not academic

MEDIATION BRIEF

- One central theme
- Ethos
- Witness quality—on each side
- Address your problems and explain them
- Critically analyze *remedies*
- Roadmap to mutual advantages

AT THE MEDIATION

- Robust position on the merits
- Insurance coverage, persuasion and risk
- The theory of mutual advantage
- *Listen* for what the other side needs
- Trust the mediator but know your boundaries
- Prepare terms sheet in advance; modify as necessary
- Parties and counsel sign terms sheet at mediation