

John Lande & Peter W. Benner, *How Businesses Use Planned Early Dispute Resolution*, 34 ALTERNATIVES TO HIGH COST LITIG. 49 (2016).

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This is the first part of a two-part article summarizing the results of a study about why and how some businesses use “planned early dispute resolution” systems.

This month's article identifies elements of the “PEDR” systems and processes. The second part next month offers recommendations for businesses--and especially their inside counsel--for developing robust and sustainable PEDR systems in their companies.

The study will be published in 13 *Univ. of St. Thomas Law Journal* (2017) (for more information, see <http://ir.stthomas.edu/ustlj/>), and is now available at bit.ly/1Qu9H0o.

One might assume that using a PEDR system should be a no-brainer for businesses that regularly litigate. Litigation undermines many business interests such as efficiency, protection of reputations and relationships, control of disputing and business operations generally, and risk management, among others.

One also might expect that because of these interests, most business leaders would direct their legal departments to implement PEDR systems.

Moreover, to advance the companies' interests and gain favor with the C-Suite, general counsel presumably would take the initiative to develop such systems and direct their staff and outside counsel to faithfully use a PEDR system. Inside counsel would readily comply because of the directives from their bosses. Outside counsel would comply out of concern for losing business to competitor law firms.

Although these assumptions seem plausible, our recent study shows that they all are problematic. Indeed, despite strong interests in using some form of PEDR, many--perhaps most--businesses have not changed their litigation-as-usual approach.

PEDR is a general approach designed to enable parties and their lawyers to resolve disputes favorably and with reduced cost as early as reasonably possible. It involves strategic planning for preventing conflict and handling disputes in the early stages of conflict, rather than dealing with disputes ad hoc as they arise.

The International Institute for Conflict Prevention and Resolution, which publishes this newsletter, has been a leader in promoting PEDR systems. Indeed, some businesses represented in the CPR Institute have operated PEDR systems for decades.

Twenty years ago, Catherine Cronin-Harris, then a CPR vice president, published “Mainstreaming: Systematizing Corporate Use of ADR,” 59 *Albany Law Review* 847

(1996), in which she chronicled the use of ADR by numerous corporations and argued that businesses were at the “threshold” of a third phase of systematizing business disputing.

The three stages were “(1) the ad hoc stage, characterized by idiosyncratic ADR use; (2) the strategy deployment stage, characterized by *54 establishment of tools to encourage ADR; and (3) the systems design stage, characterized by retooling of existing ADR strategies to integrate ADR use into the business and maximize its benefits.”

She wrote that the system design phase emphasizes “(1) greater synthesis between the attorneys and business managers; (2) greater involvement of corporate dispute participants in prevention, as well as resolution, of disputes; (3) more effective ADR incentives with outside counsel and claimants; (4) fine tuning and earlier use of interest-based ADR procedures; and (5) industry-wide collaboration in ADR encouragement.”

Businesses have not systemized their ADR use as much as one might have expected given their self-interest in doing so.

But some businesses have done so. This article summarizes the results of an empirical study analyzing why some businesses have adopted PEDR systems. It is based on 15 in-depth interviews of lawyers, all but one of whom are or have been inside counsel of large corporations that have developed PEDR systems. One interview was of a lawyer who has advised 15 to 20 clients in developing PEDR systems.

SYSTEMS ELEMENTS

There is no uniform model of PEDR systems.

Each company's system is a function of its line(s) of business, history of disputing, resources, business philosophy and culture, and the interests and actions of key stakeholders, among other factors.

Even so, it is possible to make some generalizations based on our interviews.

Early case assessment is the heart of the process. It is important to distinguish between early *assessment* of cases and early *resolution*.

In a PEDR system, companies routinely assess cases at an early stage but may decide not to pursue early resolution in certain cases. Indeed, the early assessment is critically important in being able to decide how to manage particular cases.

Even if companies decide to vigorously pursue litigation in such cases, this is part of a PEDR system if they make these decisions as part of a regular procedure rather than simply a case-by-case determination.

The CPR Institute developed a helpful Corporate Early Case Assessment Toolkit, which is available on its website at bit.ly/1LEvOeF.

Effective PEDR systems require at least one individual who is responsible for overseeing the system. One lawyer said that it was important to have one person to “own” the system.

These individuals often are called the “ADR counsel,” though it would be more appropriate to call them “PEDR counsel” considering the range of functions they may perform.

These may include some or all of the following activities:

- (1) helping plan the system,
- (2) consulting with experts in ADR and in other companies,
- (3) assembling information about the company's dispute resolution experience,
- *55 (4) eliciting views of stakeholders in the company about their interests, objectives, and values,
- (5) developing recommendations and criteria for early case assessment and determination of optimal resolution processes to accomplish company objectives,
- (6) developing materials and providing training for stakeholders,
- (7) providing advice to lawyers and clients about handling particular cases,
- (8) periodically reporting on the effects of the system, and
- (9) proposing refinements of the system to make improvements and address any problems.

PEDR systems enable companies to manage disputes in a manner tailored to accomplish their business objectives. Companies differ in their preferences for using negotiation, mediation, arbitration, and other dispute resolution processes and whether to combine them in a stepped procedure. The policies may differ within a company depending on the type of case and relationship with categories of counterparties.

For a PEDR system to work effectively, those involved need to be trained so that they understand how to make it work. This begins with inside and outside litigators, who become oriented to view disputes as part of a business strategy, not just legal contests.

Transactional lawyers may negotiate more sophisticated dispute prevention and resolution clauses. In addition, they are likely to be the first lawyers who are contacted when contract disputes arise, so they should know how to respond effectively.

Business people also must understand how they can play an important and active role in successfully addressing legal disputes. The training of these stakeholders allows them to understand why using a new approach, with their participation, is in their interest, considering that many of them may feel that they are already doing a good job with the status quo.

INITIATION PHASE

In almost all of the examples we studied, inside counsel initiated PEDR systems.

An outside counsel who has assisted many companies in developing PEDR systems said that, in his experience, the legal departments initiated and designed the systems. The business leaders, he said, were “brought along” only at the end.

To initiate a formal PEDR system, one would need the “imprimatur of the general counsel,” which would make top management more open to it.

PEDR systems can evolve gradually and/or be initiated through conscious planning. In some companies, in-house litigators took the initiative to develop these systems. In other companies, the PEDR systems evolved gradually over time and eventually became more formalized.

The latter might be called “Nike PEDR” systems: the lawyers just do it in their own cases, often without advance authorization of their superiors. Over time, their procedures evolved and became more formalized, and the lawyers enlisted support of the general counsel and top business leaders.

One lawyer developed a PEDR system by carefully analyzing the nature and causes of the company's disputes, their contracts, standard operating procedures, and (the lack of) training that could lead to preventable disputes.

She spoke with various people within her company, reviewed documents, evaluated potential liability, and brainstormed possible solutions. She created procedures and materials, including template documents, for business people to handle many problems themselves. She also helped them learn from disputes so that they could avoid future disputes--for example, by correcting inaccurate product specifications.

Lawyers initiating PEDR systems often studied other companies' programs and consulted a range of others for advice. For example, in one company, the legal department convened a team to create a guidebook to help busy commercial lawyers readily develop suitable ADR clauses as well as to help litigators in their department.

They collected ADR clauses from the company's contracts and held a series of “brainstorming teleconferences” with commercial lawyers in their company as well some of their outside counsel.

Another company is in the process of developing a PEDR system to make early assessments about the best way to handle different categories of cases. Those planners consulted with their in-house constituents, academics, mediators and arbitrators, and their outside counsel so that they “didn't reinvent the wheel.”

They also consulted with plaintiffs' attorneys to be sure that they “weren't drinking their own Kool-Aid.” Because of the sensitivity of consulting directly with plaintiffs' attorneys, they had two of their outside counsel contact several plaintiffs' attorneys without identifying their client.

The PEDR planners “workshopped” their ideas with some of the people they consulted to get their feedback. This involved distributing complaints they had received and roleplaying how their system might work, which identified issues they had not previously considered.

They are planning to test their system as a pilot program and make any necessary adjustments before rolling it out generally.

One former general counsel initiated the PEDR strategy in her company a few years into her tenure. When she started, the legal department had more of a “litigation orientation.” She took time to establish credibility, and gradually reinforced the approach of taking control of disputes early and looking at them from a business perspective.

BUILDING SUPPORT

Because many people involved in handling business disputes are comfortable with the status quo and are convinced of its effectiveness, they may resist initiatives to change. Thus developers of PEDR systems must build support for these initiatives.

Proponents can identify interests that PEDR systems can satisfy for their business, such as reduction in the time and expense of litigation, achievement of better outcomes, maintenance of business relationships, protection of privacy, protection of reputations, greater control of disputes, *56 reduction of risk, improvement in relationships between inside litigators and business leaders in their company, and improvement in coordination between companies and their outside counsel.

Identification of compelling business interests is a good starting point but it may not be sufficient to motivate people to incorporate PEDR procedures into their activities.

To fully succeed in institutionalizing a PEDR system, proponents must engage all the stakeholders, learn and accommodate their key goals and interests, consider options

that would satisfy them, design the system to satisfy them, and publicize their successes to show that the system works.

Proponents may be successful if they can persuade stakeholders that the systems will help them solve their difficult problems and improve their standing with others in the company.

A former general counsel said that one needs to “bring people along and not get out too far ahead.”

One lawyer said that, when she started to develop the PEDR system in her company, some people were skeptical. She tried to address their (implicit) question, “What’s in it for me?” Rather than imposing a program, she tried to understand her clients’ needs and how a PEDR system could help them improve their own job performance.

Many stakeholders have had negative experiences with litigation. PEDR counsel can help design systems to avoid or minimize the downside of such experiences in the future.

For example, in one company, business leaders felt that disagreements unnecessarily escalated into disputes and that the litigation docket was unwieldy and too expensive. So the PEDR system was designed to prevent management behavior that was likely to lead to disputes and, when disputes arose, to better manage the process for resolution.

The PEDR counsel sought to understand the “root causes” of disputes and develop dispute prevention processes. She said, “It’s not our goal to win litigation. It’s our goal *not to have litigation*”

Lawyers who want to institutionalize PEDR in their companies often need to make the business case to the internal stakeholders using data to demonstrate the economic benefits. Case management systems may produce data on costs, cycle times of disputes, and other factors that may help make the case for PEDR.

In one company, lawyers used data about the financial benefits of PEDR to address skeptics’ concerns. Initially, the lawyers provided charts showing quantitative benefits to get the CEO and others “on board.” They demonstrated that the company avoided having to pay tens of millions of dollars, considering reductions of out-of-pocket and legal costs as well as reductions in liability. After they established credibility within the company, they did not need to continue documenting savings from PEDR.

DATA DROUGHT

When developing a PEDR system, lawyers do not have experience in their own companies to demonstrate the benefits, so this may be a “chicken and egg” process because they do not have data of their own.

Proponents can take advantage of public success stories of well-known companies to demonstrate that PEDR can add value.

Commercial lawyers and those handling various specialties need to understand how litigators can create value for their company. One lawyer said that if litigators provide “vibrant ADR,” their colleagues “get it.” Having good experiences with mediation can change the “climate of the company” for both the legal and business people.

One lawyer said that his company used prominent, highly capable mediators, which had a significant impact on attitudes about ADR within the company.

Since litigators usually are not involved in the negotiation of commercial transactions, it may take some salesmanship with in-house commercial lawyers to get them to understand the value of well-crafted dispute resolution clauses and to enlist the help of litigators when they negotiate commercial deals.

These clauses can be complex, involving such things as limits on discovery, the neutrals' selection process, and internal appellate procedures, as well as procedures to prevent disputes.

One PEDR counsel said that it may take “a substantial proselytizing effort” to persuade transactional lawyers to thoughtfully develop ADR clauses. He said that if the clauses are out of the ordinary, the other side may suspect that you are trying to put them at a disadvantage. Negotiating these clauses involves additional work for the transactional lawyers and so they have to feel that there is a payoff to devoting time and effort to negotiating these terms.

INTEGRATING INTO THE BUSINESS CULTURE

Lawyers in this study emphasized that the process of developing PEDR systems is a “cultural project.”

For example, in one company, key stakeholders came to appreciate that PEDR provides a more sustainable way to deliver value, so it is now part of their business strategy and legal culture. One lawyer said that the primary motivation for developing his company's PEDR system was that it simply is “a better way to do business.”

Adopting a PEDR system is easier when it is consistent with the general business culture, and it helps if the company values systematic processes and measures the performance of its litigation department.

For example, a PEDR system was established in a “learning company” which has a culture of checking assumptions and looking for improved business methods. In another company, the PEDR system was consistent with the company's overall business objectives, which made it easier for the general counsel to move in the direction she devised for the system.

On the other hand, if PEDR is not generally consistent with the business legal culture, companies may not undertake a PEDR strategy unless they have a leader who is a change agent willing to undertake something that may require additional time and effort.

Proponents of PEDR approaches should expect some resistance. There can be some professional risk to company managers or inside counsel if a PEDR strategy is different from the culture in the legal department or the company generally.

These employees may think, “Why push the envelope when you don't have to do so?” One lawyer described “pockets of resistance” in his company which required continuing training and education for people to appreciate the benefits of their system.

Another lawyer said that it was hard to get some litigators in his company to “buy into a new paradigm.” He described “a battle against the old way of doing things” as the litigators were comfortable with the way that things always had been done and were reluctant to change. For example, many litigators want to substantially complete discovery before they feel that cases are “ripe” for negotiation.

*57 It is especially important to transform the mindsets of inside litigators. A former general counsel pressed inside litigators in his company to have a cultural and strategic business orientation--and not merely a “check-the-box” approach in a formalized system

Symbols and language can have an important impact. A lawyer responsible for developing a major PEDR system said that the legal department had to get the message through to lawyers in various ways--almost like advertising, even with things like messages on door magnets.

A former general counsel said that after they had general “buy-in” for a PEDR approach within his company, they renamed the litigation department to add “dispute resolution” to the title of the department and individual lawyers. He said that made a “huge difference.”

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Considering the great potential benefits of PEDR systems, one might expect that most business leaders would insist on using such systems.

Our study, however, shows that adopting and operating effective PEDR systems is surprisingly challenging. Even so, some legal and business leaders have provided the leadership needed to promote these systems, overcoming various barriers.

Our study identifies some of these barriers and the ways that business lawyers and executives have confronted and managed them.

In Part 2 next month, we offer recommendations for businesses and the ADR field to promote effective PEDR systems.

Sidebars:

Getting Ready

The subject: Companies that prepare for disputes.

The method: Planned Early Dispute Resolution involves tailoring a program along business lines that provides a path to resolve conflicts.

The study: The authors' survey finds that despite 'the great potential benefits [,] ... adopting and operating effective PEDR systems is surprisingly challenging.'

Savings Examples

Here are notable examples of planned early dispute resolution programs that resulted in savings to the companies deploying the processes:

- A DuPont study found that "average potential litigation cost savings from use of early mediation ... were \$61,000 per employment litigation matter and \$76,000 per personal injury case. Savings in commercial matters averaged \$350,000."
- General Electric Co.'s PEDR system included an early case assessment program, early warning system, guidance on selection of dispute resolution methods, training, and "after action reviews," which resulted in savings of millions of dollars per year.
- Monsanto Co. previously had substantial litigation with many of its major competitors but now has no litigation with any of them due to relationship-based dispute resolution and conflict avoidance processes. Teams of business representatives and scientists met regularly to identify potential disputes before they became real problems and, with the participation of antitrust lawyers, explore potential collaborations.

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