Recognizing and Overcoming Barriers to Implementation of PEDR Systems

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1. Thanks for inviting me.

2. This talk grows out of a study I did with Peter Benner investigating how some companies developed planned early dispute resolution (PEDR) systems. Along the way, we learned a lot about barriers to effective implementation of these systems and ways that companies have overcome those barriers.

    a. You were assigned to read two short articles summarizing the study: John Lande & Peter W. Benner, *How Businesses Use Planned Early Dispute Resolution*, 34 Alternatives to the High Cost of Litigation 49 (2016); Peter W. Benner & John Lande, *How Your Company Can Develop a Planned Early Dispute Resolution System*, 34 Alternatives to the High Cost of Litigation 67 (2016).

    b. If you would like to learn more about the study, you can read the full article, John Lande & Peter W. Benner, *Why and How Businesses Use Planned Early Negotiation*, 13 University of St. Thomas Law Journal (forthcoming).

    c. I know you are working on projects in many different contexts. You can adapt these ideas for contexts other than large businesses.

3. DSD is really important, so it's a good thing for you to study.

    a. Some of you may become neutrals and consultants who can provide DSD services in that role.

    b. Probably more of you will serve as lawyers and you can advise clients using a process involving DSD elements, if not a comprehensive DSD process.

        i. This opportunity may arise after your client suffers a bad loss and wants to prevent similar occurrences in the future.

        ii. Helping clients develop PEDR systems may seem counter-intuitive because it might reduce your firm's future litigation income. BUT it can help cement good long-term relationships with clients who value your knowledge of their organizations.

4. I used to teach DSD to our LLM students at Missouri and it's tempting for DR students and practitioners to think that:

    a. Clients would be very concerned to avoid the risks of unplanned late litigation, e.g., advancing business interests such as efficiency, protection of reputations and relationships, control of disputing and business operations generally, and risk management.

    b. Designing and implementing a dispute system will be simple and obvious.

    c. Stakeholders will share your perspective about the value of PEDR and welcome your recommendations for change.

    d. Organizations are open to innovation and change.

    e. PEDR systems will continue to operate properly and indefinitely with little continuing attention.

5. These are faulty assumptions in many cases.

    a. There is a strong status quo bias, including feeling trapped in a "prison of fear" that inhibits change.

        i. Many lawyers (and some executives) like the adversarial litigation process. It is the work that some lawyers like to do and it can fulfill an organizational interest in having a reputation as tough negotiators. Litigators can be rooted in the status quo as the best option to protect their companies from aggressive opponents and to gain advantage for their clients.

        ii. Stakeholders may feel that the devil they know is better than the devil they don't know.

        iii. Change can be risky. If it ain't broke, don't fix it. And if people do "fix" it and it gets broke even worse, they can be in a heap of trouble.

        iv. The impetus for change in many organizations is a bad experience that leads people to say, "We don't want to do that again." Without such a bad experience, many organizations have no incentive to change.

    b. Individuals have interests different than the organization's interests – or what you might assume the organization's interests to be. For example, instituting a DSD system centralizes power and reduces control by in-the-trenches lawyers, who may resist.

c. Internal organizational politics may affect decisions. This may be based on personal power dynamics, corporate culture, other organizational priorities, limited "bandwidth" for new non-essential initiatives, etc.

d. Higher authorities (e.g., business leaders and the general counsel) may have little experience or interest in litigation procedure and little appetite to get involved and institute a PEDR system.

e. It can be hard to implement decisions. Lower ranking lawyers and outside counsel may not follow the letter or spirit of the program and this can be hard to monitor and control.

f. When PEDR "champions" leave, the programs may be discontinued or wither.

6. General Suggestions

a. Use DSD principles, helping clients to: (1) collect data about the company's dispute resolution experience, (2) elicit views of stakeholders in the company about their interests, objectives, and values, (3) design the system to satisfy stakeholders' interests, (4) develop materials and provide training for stakeholders, (5) regularly analyze the operation of the system, and (6) propose any refinements needed to improve the system and address any problems.

b. It is absolutely essential to learn about the particular organization, e.g., key individuals, history generally, dispute history, values etc. Look at the ABA Section of Dispute Resolution's PEDR User Guide for suggestions about how to do this. This is analogous to lawyers' factfinding investigations, identification of clients' interests, and recommendations in individual cases.

i. In particular, ask stakeholders what problems they experience with the status quo. You are more likely to be successful if you start asking about their complaints and how they might be solved than if you start with your own ideas.

c. Learn who are the key individuals in the organization relevant to PEDR. Identify point-people / champions who can "carry the ball" and secure support from the top leaders.

i. Our study found that PEDR systems usually were initiated by lawyers in the litigation department or the general counsel.

ii. It's also important to identify key top executives, e.g., CFOs.

d. Understand the interests of key stakeholders throughout the organization. For example, business managers may worry that legal department would interfere with their ability to resolve problems themselves. In that situation, they need to believe that the legal department is a resource to help them, not dictate what they should do.

e. Focus attention "upstream" – prevention through regular problem-solving, constructive conflict engagement, and early intervention. These are better ways to handle conflict than "downstream" techniques – litigation as usual, and late and unplanned systems for negotiation and case management.

f. If organizations have periodic disputes with others with whom they have an ongoing relationship, analyze ways of improving relationships generally as a way to prevent future disputes.

g. Help tailor an early case assessment (ECA) system for clients based on their historical disputing experience and that people will actually use. This is a critical element. ECA really is just good lawyering, i.e., what litigators should do in virtually every case to one degree or another. See CPR's ECA toolkit.

h. Create incentives to use PEDR by key stakeholders, e.g., litigation counsel, transactional lawyers, business clients, outside counsel. In particular, consider alternative fee arrangements with outside counsel creating incentives for early, efficient dispute resolution

i. Make PEDR a valued part of the business culture. For people to effectively implement PEDR systems, they must believe in the systems, which is partially a function of whether the systems are valued in the organization.

j. Plan for PEDR to survive the departure of initial champions.