

Peter W. Benner & John Lande, *How Your Company Can Develop a Planned Early Dispute Resolution System*, 34 ALTERNATIVES TO HIGH COST LITIG. 67 (2016).

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

Last month's article identified elements of the “PEDR” systems and processes. See John Lande and Peter W. Benner, “How Businesses Use Planned Early Dispute Resolution,” 34 *Alternatives* 49 (April 2016). This month's Part 2 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.

In undertaking our study, we wanted to find out why some companies use PEDR systems when most companies apparently do not. This study was designed to help companies learn from this experience and develop PEDR systems tailored to their own needs.

These days, lawyers and business executives have access to a wealth of information and resources about ADR, and they frequently use mediation and arbitration. Most companies do so on a case-by-case basis, however, often at a late stage of a dispute, rather than as a systematic strategy to achieve their business objectives.

Many PEDR systems feature early case assessment processes, individuals charged with overseeing the system, policies about using particular ADR processes, and training of stakeholders. As described in Part 1 last month, there can be no uniform model of PEDR systems because 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.

As obvious as it may seem that PEDR systems offer great value, our study shows that developing such systems often is quite challenging. Proponents face persistent professional, organizational, and cultural barriers that impede changes.

OVERCOMING BARRIERS

We wondered why the concept of innovation seems so attractive in technology and business strategy, but not as much in conflict management.

We found that disputes usually are left to legal departments where often there are minimal incentives to change as long as the departments operate within budget, try to

control outside legal costs, and avoid bad results. In that environment, innovation commonly is not rewarded and does not flourish.

Many stakeholders are comfortable with the status quo and are reluctant to change, especially if they perceive some risk to their professional standing. Top executives generally have other priorities and are reluctant to interfere with the operation of legal departments. General counsel may have little or no litigation background, may be satisfied with litigation as usual, and may not be well-versed in alternative approaches.

Litigators, both within companies and law firms, 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. Transactional lawyers can be reluctant to negotiate tailored dispute resolution clauses because it may raise red flags for the other side about one's motives if the deal breaks down.

Even when companies develop PEDR systems, these systems may be discontinued after the departure of their initial champions.

Pursuing innovation means considering something outside of the usual paradigm. For those interviewed in our study, PEDR usually was initiated as an innovation within the legal department, followed by reaching outside of the department to build support of key stakeholders.

When the general counsel were “on board,” they sought buy-in from the top executives. Those companies also gained the support of rank-and-file inside counsel, especially the litigators, and routinely insisted that outside counsel not over-litigate.

Our study suggests that for PEDR systems to take hold and endure, organizational cultures must shift from instinctive consideration of conflict as a threat, to that of a potential business opportunity. The companies that adopted PEDR systems most effectively did so by making them part of a cultural shift in the way they handle disputes.

That can be a big leap for many stakeholders, which may require incentives for business leaders to take that leap. They also must be assured that they are not subjecting their companies to risks that could have adverse personal and organizational consequences.

Such innovation is hard, requiring significant *68 time and commitment. In the dispute resolution context, innovators assess problems such as inefficiency and damage to relationships. They formulate strategies to transform disputes into potential business opportunities rather than burdens to be handled, risks to be minimized, or cases to win.

Resourceful lawyers guide the legal department to function symbiotically with the business of the organization. They demonstrate to business managers that the legal department is not to be avoided for fear of essentially taking over their jobs. Rather,

“legal” is a resource to collaborate with managers in their efforts to advance the companies' objectives.

Based on these findings of the study, we developed the following recommendations to overcome barriers preventing innovation in dispute management. In the words of the old Apple Computers commercial, innovation requires people to “think different.” Our recommendations require lawyers and executives to think different than the traditional way of handling business disputes.

Because this can be a challenging conceptual hurdle, PEDR systems should include processes addressing the needs of the companies and their stakeholders, incentives to encourage stakeholders to take the leap, and support for change in the culture of disputing.

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Develop Technical Assistance Resources: The CPR Institute, by itself or together with other ADR organizations, could establish a distinct working group to provide technical assistance for business lawyers and executives to develop PEDR systems in their companies. [The CPR Institute publishes *Alternatives* with John Wiley & Sons.]

For example, consultants could help companies adapt CPR's Early Case Assessment Toolkit (available at bit.ly/1LEv0eF) to fit their particular needs. Some retired lawyers who have worked with PEDR systems may have the time, expertise, and interest to be part of such an effort. This assistance could focus on addressing stakeholders' concerns in particular companies.

Such a group might publish guides and toolkits for designing and implementing PEDR systems. In particular, these materials should include success stories as models, as well as suggestions about developing company-specific metrics to demonstrate the benefits of a PEDR system. Development of training modules and conducting trainings would provide that necessary resource without companies having to design and conduct their own training programs.

Encourage Law Firms And Neutrals To Advise Clients About PEDR: A PEDR technical assistance committee could not help all the companies that might develop a PEDR system, so outside counsel and neutral dispute resolution professionals may be needed to fill the gap.

For lawyers in private firms, providing such assistance could be a great opportunity to deepen relationships with clients and encourage continuing business.

Some companies could retain neutrals to help set up a PEDR system. Many dispute resolution professionals have extensive experience designing and managing processes

in particular types of cases and thus may provide substantial value in helping design PEDR systems.

Develop a Clear, Flexible Concept of PEDR: Our study suggests that PEDR experts consider several elements to be essential to successful systems, particularly use of early case assessments and training of relevant personnel.

Although there cannot be a uniform model of PEDR considering the particular circumstances of each company, experts (such as a technical assistance committee described above) could develop a set of general principles and elements of PEDR systems as “best practices” that could be adapted by individual companies based on their particular needs.

Use Methods of Dispute System Design: Development of PEDR systems fundamentally is a matter of dispute system design. “DSD” involves (1) collecting data about the company's dispute resolution experience, (2) eliciting views of stakeholders in the company about their interests, objectives, and values, (3) designing the system to satisfy stakeholders' interests, (4) developing materials and providing training for stakeholders, (5) regularly analyzing the operation of the system, and (6) proposing any refinements needed to improve the system and address any problems.

This process should be devised to facilitate achievement of business goals. Stakeholders identify what they find most troublesome about the way disputes currently are handled, and the system is designed to address those concerns.

The User Guide of the ABA's Planned Early Dispute Resolution Task Force outlines a DSD process for developing business PEDR systems. (Download available at bit.ly/1VPkc2M.)

Designate PEDR Counsel To Coordinate the Systems: Our study confirmed the importance of having an individual responsible for overseeing the planning and operation of a PEDR system, who might be called a “PEDR counsel.”

*69 Typically, the PEDR counsel is an inside counsel with litigation oversight responsibility who manages the DSD process described above. In a PEDR system, this individual's responsibilities extend beyond simply managing the use of ADR. PEDR counsel also are responsible for overseeing the design and implementation of the overall system as well as integration of the system in the companies' business operations.

Create Incentives To Use PEDR: Since organizations and individuals typically respond to incentives, PEDR system designers should consider what incentives their businesses might include in the system. Incentives can operate at both the organizational and individual level.

At the organizational level, top executives could be encouraged to buy into PEDR systems that satisfy their particular interests. Virtually all companies welcome reduction of the time and cost of disputing, which can harm company performance. The companies' interests can be addressed by regular measurement of these variables to demonstrate the value of a PEDR system.

Businesses typically are concerned about their relationships with a wide range of stakeholders including customers, suppliers, competitors, regulators, and employees. Companies can adapt innovations like Monsanto Co.'s "relationship model" to handle problems at the earliest possible stage.

Business leaders may have other interests beyond cost reduction and achieving better outcomes in disputes, such as protection of privacy, protection of reputations, greater control of disputes, 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 (with companies generally now exercising increased control over the outside counsel). Monitoring these variables can reinforce the continuing use of PEDR systems by demonstrating that they contribute to achievement of key business goals.

Annual reports can discuss the PEDR efforts, as well as explain the program itself. Once quantified and publicized, positive results can help build support for the program within the company ranks by creating enthusiasm among shareholders. Details in an annual report could help enhance the company's general public perception and enhance the company's market value.

Companies can create incentives for individuals to follow the letter and spirit of PEDR policies. For example, companies can consider advancement of PEDR-related policies in performance reviews and setting compensation of inside counsel. Companies also can give awards or other recognition to inside lawyers who are particularly effective in advancing their companies' goals through the use of their PEDR systems.

Companies can create incentives for outside law firms to adhere to PEDR policies in several ways. One company requires its law firms to perform an early case assessment for a fixed fee, which is based on the amount at stake and other factors. Some companies use alternative fee arrangements designed to achieve the companies' goals with monitoring that protects against sacrificing the quality of work. Firms that regularly achieve PEDR goals can be rewarded with engagement to handle additional matters in the future. Law firms that do not follow the PEDR program may get fewer assignments.

Plan for PEDR To Survive the Departure of Initial Champions: Since PEDR systems often depend on the leadership of a particular general counsel or other champion within a company, it is vital to plan collaboratively within an evolving culture for the continuation of the program after the departure of key champions.

Make PEDR a Valued Part of the Business Culture: To have the greatest enduring impact, PEDR systems should become an intrinsic part of companies' business strategy, mindset and culture and not merely a set of procedures for handling disputes. When PEDR is part of companies' culture, people can deal more successfully with problems to advance their companies' interests. As one lawyer put it, his company's PEDR system simply is "a better way to do business."

Cultures within businesses affect companies' receptivity to innovation in their dispute management system. Companies that are open to innovation and whose leaders are not tied to a traditional "default to litigation" approach will be more receptive to adopting PEDR systems. Those companies are more likely to invest the time and effort needed to make the systems successful.

Our study suggests that companies can gain great benefits from adopting PEDR systems instead of a traditional zero-sum, high-cost approach to disputes and litigation.

Although this sounds simple in theory, we found that in practice, often there are significant hurdles to overcome. It is hard to "think different." Innovative lawyers and executives need to persevere in dealing with barriers inhibiting development of the best approach for their companies. Our study suggests that businesses that do so can accrue significant gains that are well worth the investment. By studying companies that have done so, we have identified strategies that make successful adoption more likely.

While individuals can help their own companies to develop PEDR systems, the success of this innovation depends, at least in part, on the leadership of organizations like the CPR Institute and the concerted effort of companies within particular industries. CPR's Corporate Early Case Assessment Toolkit is a solid foundation for promoting use of PEDR systems. CPR can continue its tradition of leadership by building on this foundation.

Sidebar

'Think Different'

The innovation: Planned early dispute resolution.

The challenge: Change itself. What incentives do companies' departments need to address disputes earlier and more effectively?

The suggestions: Build resources, establish a clear concept, and provide leadership with program support from top management for inside development as well as for outside counsel.

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