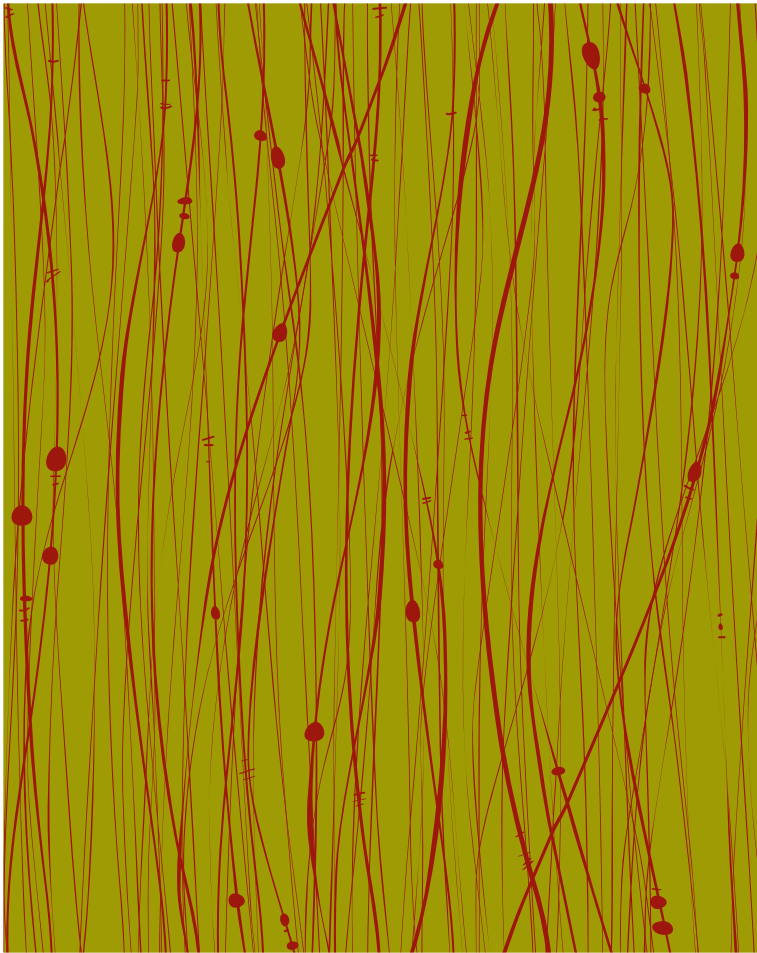




user guide

PLANNED EARLY DISPUTE RESOLUTION

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Parties generally do best when they and their lawyers jointly determine what is needed to resolve a dispute at the earliest reasonable time and in the most efficient manner.

Businesses should tailor their PEDR systems to fit their needs.



PREFACE

In 2011, the American Bar Association Section of Dispute Resolution appointed the Planned Early Dispute Resolution Task Force to promote planned early dispute resolution by lawyers and clients and to take advantage of the services of neutral dispute resolution professionals at the earliest appropriate time.

The Section noted that in an all-too-common pattern in “litigation as usual,” settlement comes only after the lawyers engage in adversarial posturing, the litigation process escalates the original conflict, the parties’ relationship deteriorates, the process takes a long time and a lot of money, and none of the parties is particularly happy with the settlement. Although some lawyers enjoy this process and make a good living from it, many lawyers would prefer to use a more productive and efficient process, but they feel stuck in playing the adversarial “game.”

This User Guide is designed to help parties and lawyers develop and use such a process tailored to the needs of each party. This guide is focused particularly on the needs of businesses, though some of the material can be adapted for lawyers representing other types of clients.



INTRODUCTION

Planned Early Dispute Resolution (PEDR) is a general approach designed to enable parties and their lawyers to resolve disputes as early as reasonably possible.

PEDR is a major change from traditional approaches to dispute resolution for many businesses and their law firms, not merely a shift of procedures. Although some businesses and their lawyers use a comprehensive PEDR approach, probably most do not. As an alternative to litigation-as-usual, it reflects a significant change of mindset as well as procedure. It is based on the premise that parties generally do best when they and their lawyers jointly determine what is needed to resolve a dispute at the earliest reasonable time and in the most efficient manner.

In general, PEDR is designed to satisfy parties’ interests, reduce litigation risks, and save time and money. A comprehensive PEDR system includes:

- General plans for preventing and resolving disputes
- Early warning systems for issues that may lead to disputes
- Identification and monitoring of disputes

- Early case assessments to determine the best way to manage each dispute
- Efficient and effective procedures for handling and resolving disputes

Businesses should tailor their PEDR systems to fit their needs and may adopt some or all of these elements. PEDR is a framework for using a variety of dispute resolution processes, including direct negotiation, standing neutrals, mediation, arbitration, and hybrid processes tailored for particular disputes. If a PEDR process in a specific dispute is not appropriate or does not produce desired results, parties can always use litigation-as-usual, though normally this should be the last resort.

This User Guide provides practical advice for parties and lawyers who want to gain the advantages of PEDR.

Each move in the litigation “chess game” amplifies and reinforces parties’ perceptions of each other.

Although people often like the idea of early dispute resolution in theory, many are afraid to use it in their own situations.



THE BUSINESS CASE FOR PLANNED EARLY DISPUTE RESOLUTION

PROBLEMS HANDLING DISPUTES WITH LITIGATION-AS-USUAL

Although the vast majority of legal disputes are resolved without trial, the traditional litigation process leading to settlement usually is a long slog. In an all too common pattern in litigation-as-usual, settlement comes only after the parties’ lawyers engage in a lot of adversarial posturing, the litigation process entrenches the original conflict, the parties’ relationship continues to deteriorate, the process takes a long time and absorbs party resources, and none of the parties is particularly happy with the settlement. A too-cynical view of the usual process is that a “good result” is when everyone is unhappy.

The mere process of disputing can compound the original conflict by adding new grievances based on the way that the lawyers and parties interact with each other. If one side perceives that the other side has acted offensively, the offended individual can justify a retaliatory reaction, which can set off a cycle of escalation. Lawyers work hard to advance their clients’

interests by reducing the level of conflict, but sometimes lawyers aggravate conflicts for various reasons, including expectations about their role as vigorous advocates; their desire to maintain clients’ confidence by fighting for them; their training, personalities and habits; and their interest in increasing their fees.

In the litigation process, lawyers and litigants often are subject to cognitive biases and groupthink so that people on each side believe that they are obviously right and the other side is obviously wrong. Each move in the litigation “chess game” amplifies and reinforces parties’ perceptions of each other and the merits of their own case. This leads each side to develop unrealistic expectations that they will “win” in court (even though experienced trial lawyers generally tell their clients that going to trial is “unpredictable” at best). Ironically, even legal “wins” can result in Pyrrhic victories considering the direct and indirect costs of the litigation process, which can exceed the amount in dispute.

THE PRISON OF FEAR TRAPPING PEOPLE INTO LITIGATION-AS-USUAL

Although people often like the idea of early dispute resolution *in theory*, many are afraid to use it in their own situations. There are

many reasons combining to build a “prison of fear” that keeps people trapped in unproductive patterns of litigation-as-usual.

There are numerous reasons for this. Sometimes people worry that even suggesting cooperation with the other side will make them look weak, and possibly encourage the other side to try to take advantage of them. Sometimes people doubt that the other side will negotiate honestly. Lawyers may fear—sometimes quite accurately—that potential clients will not retain them or that clients will worry whether their lawyer will really protect them if the lawyer seems too interested in cooperation with the other side. Parties and lawyers often feel that they can get the best results by starting with an extreme position, and later making concessions as necessary (especially since it is assumed that the other side will do the same). These actions can reinforce fears by the other side and justify adversarial approaches, leading to a cycle of escalating conflict.

Some parties and lawyers may fear that an early negotiation process will force them to resolve their cases “before they are ready.” Under our liberal rules of discovery in litigation, many lawyers are used to collecting as much information as they can and carefully analyzing it over a period of time. So, lawyers may worry that a PEDR process would require them to make hasty and uninformed decisions based on partial

Parties can consider a PEDR process on a case-by-case basis.

PEDR essentially is a risk management system that enables parties to take control of disputes at the earliest possible stage.

information, potentially jeopardizing their clients' interests and exposing them to malpractice liability.

Although lawyers know that most cases will eventually settle—usually after a process that takes too long and costs too much—they often feel powerless to steer their clients toward a more productive path.

WAYS TO ESCAPE FROM THE PRISON OF FEAR

With some planning, parties to a contract can escape from the prison of fear by using a PEDR process. To be most effective, a PEDR process can be included in the parties' business agreement. For example, the agreement can require the parties to flag early issues that may turn into disputes. This gives parties a "safe harbor" to work out issues as soon as they arise so that they can be addressed in the normal course of business. Thus, when a potential dispute arises, the parties need not fear perceptions (either of weakness or aggressiveness) because they are merely following the protocol that they agreed to when embarking on their business relationship.

Even if there is no pre-agreed dispute resolution process, the parties can consider a PEDR process on a case-by-case basis. If a dispute arises, the parties can each perform an early case assessment and assess the likely benefits and risks of using a PEDR or

traditional litigation approach. This should involve a conversation between parties and their lawyers to decide whether to discuss with the other side the possibility of using a PEDR process. For example, when a dispute arises, parties and lawyers can tell their counterparts that they routinely consider PEDR whenever it might be appropriate. To be successful, a PEDR process requires both sides to cooperate, and if the other side is not willing to take reasonable positions, one should not undertake a PEDR process. Thus, PEDR is not always appropriate, and one should use a traditional approach (possibly including mediation or arbitration at some point) if a PEDR process does not seem worth the effort.

Normally, there should be little risk in using PEDR. Parties typically exchange only information that is legally discoverable, at least at first. If the process proceeds well and the parties develop some trust, they can provide additional information sufficient to enable them to make informed decisions about resolving the dispute. Likewise, by mutually defining the issues and exchanging information about those issues, they can begin their negotiations in a "zone of reasonableness" as contrasted with taking extreme positions that are likely to exacerbate the dispute.

To make the system work optimally, parties and their lawyers may also consider alternative fee arrangements to align

interests in particular cases. For example, lawyers can be rewarded for using a PEDR process through fee arrangements providing premiums for early resolution achieving their clients' goals early in the process. If lawyers keep their clients well informed about the process and engage them in major decisions, the clients will have no reason to consider making malpractice claims.

THE BUSINESS "VALUE ADDED" IN PEDR

PEDR essentially is a risk management system that enables parties to take control of disputes at the earliest possible stage instead of merely reacting to actions by the other side and the courts. With their lawyers' help, counterparties can jointly design a procedure tailored to satisfy their interests. By proactively managing disputes from the outset, parties can preserve business relationships and reputations, minimize the diversion of attention from business activities, reduce the time and expense of litigation, reduce litigation risks, and achieve their highest priorities.

PEDR involves a set of flexible approaches for handling disputes, so there is no single protocol for every case.

Both business leadership and legal counsel should participate in the analysis . . .



DEVELOPING A PEDR SYSTEM

This section summarizes steps in developing a PEDR process for dispute management. PEDR involves a set of flexible approaches for handling disputes, so there is no single protocol for every case. It can be used to anticipate possible future disputes as well as to handle disputes as they arise. The following are generic descriptions, but there are many variations. PEDR processes do not necessarily include all the elements described below.

ASSESSING THE BUSINESS'S DISPUTE HISTORY

To analyze whether and how a business would benefit by developing its own PEDR system, it should begin by conducting a comprehensive review of how it has managed disputes during a specified period in the past. This analysis would help senior management determine the need for particular types of resolution systems for different categories of disputes, as well as how to structure the processes to make them most effective in advancing its overall business strategy. Both business leadership

and legal counsel should participate in the analysis and decision making about any changes in the dispute resolution systems.

The following outline provides a roadmap for conducting a dispute history assessment. First, analysts should develop parameters and collect data, including the following steps:

- Establishing a timeframe. Factors such as the size and longevity of the business as well as any substantial recent changes (such as mergers, downsizing, or changes in operations) will dictate the appropriate timeframe
- Summarizing disputes that required a lawsuit, mediation, arbitration, or other formal ADR process
- Gathering information regarding disputes involving primary relationships that do not involve a formal dispute resolution process but required significant involvement of senior staff

The analysis should focus on general patterns involving factors such as:

- Category of counterparties (e.g., partners, investors, customers, vendors, employees)
- Frequency of disputes
- Sources of disputes (e.g., particular business policy or operation)

- Dispute resolution process used (e.g., negotiation, mediation, arbitration, trial)
- Liabilities incurred, recoveries received, and/or other outcomes
- Indirect outcomes (e.g., gain or loss of business opportunities, effect on business reputation and relationships, policy revision)
- Length of processes
- Legal fees and other direct litigation costs
- Diversion of management and employee time to focus on disputes
- Costs and benefits of dispute resolution processes used

The assessment should also include input from internal stakeholders about the dispute resolution processes used. This might include questions about the business' overall approach to resolution processes, the effectiveness of particular elements of past practices, and possible changes that could enhance the process and outcomes.

This analysis should help decision makers to evaluate the effectiveness (or lack of effectiveness) of dispute resolution processes used and decide what processes to use in the future. Comparing outcomes for different types of disputes enables leaders to decide if particular processes seem

When a business is first notified of an issue, it should conduct an early case assessment (ECA).

In major cases, conducting a careful ECA is a smart investment that can lead to better understanding of the issues in dispute, the potential outcomes, and the most efficient path to resolve the dispute.

appropriate for certain types of disputes or should be used generally throughout the entire organization.

DEVELOPING AN EARLY CASE ASSESSMENT PROCESS TAILORED TO THE BUSINESS

After a business has analyzed its history of disputes and use of dispute resolution processes, it can establish a process for assessing the best way to handle future disputes tailored to fit its particular needs. When a business is first notified of an issue, it should conduct an early case assessment (ECA). This may be done by a responsible executive, the business's legal department, and/or its outside law firm. In an ECA, one identifies the party's most important business interests in the matter, obtains key information to evaluate the case, analyzes the other side's perspective, analyzes legal and other risks, develops a dispute resolution strategy and preliminary settlement value or range, and is prepared to arbitrate or litigate if necessary. The depth of analysis will generally vary depending on the amount at stake. In relatively small cases, the analysis is relatively brief. In major cases, conducting a careful ECA is a smart investment that can lead to better understanding of the issues in dispute, the potential outcomes, and the most efficient path to resolve the dispute.

Based on a business's dispute history assessment, it may develop one or more forms to collect information and structure the ECA process. An ECA form might call for information about the following elements:

THE DISPUTE

- Nature of issues
- Estimated best, worst, and most likely outcomes at trial
- Business goals and interests in this case
- Counterparty's goals and interests in the case
- Value of relationship with counterparty
- Likelihood of recurrence with the counterparty or other parties
- Impact of case on business
 - Financial cost
 - Use of human resources
 - Operations
 - Reputation
- Whether the claim is insured

THE DISPUTE RESOLUTION STRATEGY

- Timeframe, including any critical deadlines

- Key information, including expert opinions, needed to evaluate case
- Potential for optimal outcome through direct negotiation
- Potential for optimal outcome through other dispute resolution processes
- Projected costs and time required for most likely dispute resolution processes

Businesses may want to develop more detailed ECA procedures for their cases. For example, CPR (the International Institute for Conflict Prevention and Resolution) has developed an excellent ECA Toolkit, including a more detailed model form, which is available at <http://www.cpradr.org/Resources/ADRTools/EarlyCaseAssessmentGuidelines.aspx>.

UNDERSTANDING NEGOTIATION PROCESSES

Negotiation plays an important part in the resolution of most disputes. It is often assumed that the parties will attempt negotiation as a first step in any dispute. Sometimes parties are so angry at each other that they do not negotiate, believing that it would be pointless. It is becoming more common in some industries that parties incorporate negotiation as a specific step in their written dispute resolution agreements or operational procedures.

Parties can put in place a PEDR protocol before disputes arise so that they can deal with disputes promptly after they arise.

The CPR pledge states: “Our company pledges to commit its resources to manage and resolve disputes through negotiation, mediation and other ADR processes when appropriate, with a view to establishing and practicing global, sustainable dispute management and resolution processes.”

Parties can handle issues more effectively if their key employees have a good understanding of negotiation principles and techniques. Often, supervisors, project managers, and other front-line employees want to solve problems quickly but do not know how to negotiate effectively.

Employees should understand the two generally-recognized types of negotiation: interest-based negotiation and position-based negotiation. Interest-based negotiation focuses on the parties’ end goals, including non-monetary interests such as preserving reputations, business relationships and developing new business opportunities. In interest-based negotiation, the parties discuss their interests and look for options that satisfy the interests of both parties.

In contrast, position-based negotiation is oriented to establishing that the other party is wrong and does not deserve what it demands. It is based on an assumption that the only possible solutions are zero-sum, so that one party’s gain is necessarily the other party’s loss. In position-based negotiation, each party takes extreme positions to protect its interests. This process reinforces an adversarial dynamic and makes it harder to communicate candidly and resolve disputes. Position-based negotiation is appropriate when one or more party is not willing to consider the other parties’ interests or is untrustworthy. The process often is inefficient, both in

terms of the time and money invested in the dispute resolution process, and the loss of opportunities to create joint gains. Thus parties should train their employees to consider interest-based negotiation whenever it might be appropriate.



POSSIBLE ELEMENTS FOR PEDR SYSTEMS

PRE-DISPUTE PLANNING

Parties can put in place a PEDR protocol before disputes arise so that they can deal with disputes promptly after they arise. For example, within a business, PEDR processes can enable employees to raise and resolve issues promptly through an ombudsperson or other informal processes without necessarily engaging lawyers. For issues between a business and other parties, PEDR may involve designing a general procedure that includes early notice, structured negotiation process, and an internal issue resolution ladder for higher levels of the organizations to be involved, if and when needed. A process may also include designating in advance a neutral (or panel of neutrals) to handle designated issues promptly. Such pre-planned processes can include partnering, a process to obtain an advisory opinion,

or early mediation. While many contracts have dispute resolution clauses providing for later mediation or arbitration, these procedures do not necessarily provide for early dispute resolution and the processes can stretch out over long periods and cost more than necessary. By definition, PEDR processes are designed to resolve issues as promptly as possible.

DISPUTE RESOLUTION PLEDGES AND CONTRACT CLAUSES

To encourage use of PEDR processes, many businesses have signed a pledge to use ADR processes when appropriate and develop a regular dispute resolution system. The CPR pledge states: “Our company pledges to commit its resources to manage and resolve disputes through negotiation, mediation and other ADR processes when appropriate, with a view to establishing and practicing global, sustainable dispute management and resolution processes.” When businesses adopt this policy, they can influence the attitudes and behavior of their inside counsel, other employees, and outside law firms as well as the parties and lawyers with whom they have disputes. In particular, it can cause parties and lawyers to seriously consider their choice of dispute resolution options and use ADR processes in appropriate cases. For this policy to be effective, businesses must periodically

Teams may meet periodically to provide updates on ongoing disputes, critique processes, and build skills.

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publicize their commitment to it and train their employees in using procedures implementing the policy.

Parties often use provisions in contracts establishing procedures, such as issue resolution ladders, negotiation, mediation, and/or arbitration, to deal with disputes arising from the contracts. Unlike a general ADR pledge, these contract provisions apply to disputes between specific parties and generally are legally enforceable. These arrangements for mediation and arbitration clauses are quite different from each other because parties in negotiation and mediation are not required to reach agreement, whereas binding arbitration produces enforceable awards. Some contracts include “step” provisions that establish a series of steps, such as first using negotiation and/or mediation, and then arbitration if the parties do not resolve the matter in negotiation or mediation.

Contract provisions for dispute resolution vary greatly, and it is important to consider the provisions carefully so that they are tailored to the dispute history assessment factors discussed above. Some contracts adopt dispute resolution rules established by various organizations, particularly for arbitration. Adopting such rules avoids the need to “re-invent the wheel,” though the rules can have significant effects on cost, timing, and procedural convenience, so

it is important to consider how well such rules would work for particular business relationships.

Some contract provisions designate a specific neutral dispute resolution professional who is “on call” to help resolve problems in the performance of the contract. This arrangement enables parties to get mediation, advice, and/or decisions while the contract is being performed instead of waiting until afterward to apportion losses. Parties can establish a more elaborate process, involving “dispute review boards,” where one or more neutrals regularly monitor the performance of the contract, issue advisory opinions, and make determinations as necessary.

PARTNERING AND USE OF DISPUTE MANAGEMENT TEAMS

When two or more entities engage in ongoing operations that are likely to generate some disputes, they can benefit by developing mechanisms to recognize and manage disputes promptly as they arise. This “partnering” process is widely used in major construction projects with multiple entities performing inter-related tasks over an extended period of time. This process can promote an organizational culture that keeps people focused on the business implications of disputes, reduce the

tendency to blame others, and resolve issues so that they do not mushroom into much larger adversarial disputes.

Partnering generally begins with joint planning between the parties to develop procedures and relationships for handling problems as they arise. The procedures often involve immediate consultation between the parties and referral up the chain of command under specified circumstances (e.g., situations involving significant business issues, specified dollar values, or inability to resolve the issue within specified time periods). The process may involve a workshop for key individuals in each organization to review the procedures, clarify ambiguities, strengthen relationships, and develop a cooperative culture. The workshop typically occurs at the outset of the project, and may include training in communication and dispute resolution techniques.

“Dispute management teams” are distinct from partnering. These may take one of two forms: either a purely internal work group within a single party or a team consisting of equal counterparts from each co-party. Both serve the same goal of applying collective knowledge to anticipate possible problems and improve the resolution process. Participants in these teams may include department heads, human resource representatives, and lawyers from the respective legal departments. The teams may meet periodically to provide updates

Businesses can take greater responsibility for handling their disputes by having their executives participate actively in the ECA.

In using timelines to ensure movement of the dispute through the PEDR process, the team gathers facts, identifies potential risks and rewards, reviews resolution options, and considers the resources required for the resolution process.

on ongoing disputes, critique processes, and build skills. The teams may also serve as advisors or trainers to support mid- and lower-level employees to reinforce the goals of collaboration and prompt resolution.

By having the teams provide dispute management training and support as a regular business system, rather than merely responding to problems, organizations can build a cadre of capable first-level dispute resolvers, thus minimizing the number of disputes that reach the higher levels within the organizations. This can also lead to a more open and trusting workplace that can increase productivity, retention of employees, and innovation.

POST-DISPUTE PROCESSES

CONDUCTING AN EARLY CASE ASSESSMENT

Soon after a dispute arises, a party should normally conduct an early case assessment (ECA) process following general ECA procedures. In an ECA, the party and its lawyer identify the most important business interests in the matter, obtain key information to evaluate the case, analyze the other side's perspective, analyze legal and other risks, develop a dispute resolution strategy and preliminary settlement value or range, and prepare to arbitrate or litigate only if necessary.

An ECA may be conducted by a party or its lawyer, though in either case, the process usually involves some consultation between them. Although lawyers often conduct an ECA, using this guide may encourage some businesses to take the lead, in collaboration with their lawyers.

Businesses can take greater responsibility for handling their disputes by having their executives participate actively in the ECA, or even lead it, instead of merely "handing off" disputes to their lawyers as the exclusive dispute resolvers. The potential long-range benefits include clearer communication between client and counsel, and increased ability to identify and address problems before they escalate. The hands-on experience of conducting the ECA also enables businesses to better prioritize their business interests and consider solutions that lawyers might not think of. By gaining greater insight into the risk assessment and legal analysis in the ECA process, businesses may want to take a more active role in negotiation with the other party. This can lessen the adversarial nature of the resolution process, expedite the resolution, and help maintain or improve the business relationship.

Based on an ECA, the party and its lawyer determine what form of negotiation is appropriate. In general, parties should start with an assumption that negotiation is appropriate unless there are significant factors indicating to the contrary.

Negotiation could be directed by business executives or by lawyers. The process might involve the services of neutral dispute resolution professionals.

EARLY JOINT CASE MANAGEMENT BY BUSINESS EXECUTIVES

When disputes do arise, business executives should take the initiative to resolve them promptly. If the parties have engaged in the pre-dispute planning, the improved skills, relationships, and culture can lead to better, faster, and cheaper resolutions of the disputes. Having a dispute resolution team in place before disputes arise allows for a seamless transition to dispute resolution. When a dispute meets the criteria for engaging the team, the team can assemble immediately to assess the problem. If the parties have not developed such teams before the dispute arises, they can do so after it does.

In using timelines to ensure movement of the dispute through the PEDR process, the team gathers facts, identifies potential risks and rewards, reviews resolution options, and considers the resources required for the resolution process. If the dispute requires a period of time to resolve, the team can manage the dispute resolution process and coach each side's internal decision makers if appropriate. This may take the form of daily check-in meetings with other senior level advisors who are not directly involved

Lawyers can agree to informally exchange limited information that is central to the case.

The parties may want to retain a joint neutral expert to assist with negotiation.

in the negotiation process. Such advisors can serve as sounding boards, or act as surrogate mediators. These internal dispute resolution teams may be much better equipped to analyze issues and suggest solutions than external mediators.

The dispute resolution process would build on, and possibly refine, any pre-existing dispute resolution agreements such as by filling in any procedural gaps or eliminating unnecessary steps. For instance, if the agreement calls for mediation followed by arbitration, pursuant to specified rules, the team could create additional pre-mediation / arbitration steps, set different timelines than in the rules, decide on a process for selecting neutrals (or actually select particular neutrals), consider whether to start the processes simultaneously or in phases, or establish procedures for exchanging information. The team could identify areas of agreement so that it could focus efficiently on key disputed issues. In the optimal situation, both parties would conduct their internal reviews and proceed to jointly plan the process without waiting for the directive of an arbitrator or court to “meet and confer.”

EARLY CASE MANAGEMENT BY LAWYERS

When lawyers are engaged to manage a dispute resolution process, they can set the stage for negotiation at the earliest appropriate time. They should begin with an early case assessment, possibly building on one conducted by their clients. If a client decides that negotiation led by its lawyer seems appropriate, the lawyer can manage the process to efficiently accomplish the client’s goals.

Typically, parties need to exchange some information to evaluate a matter sufficiently to negotiate intelligently. In most cases, parties can make good business decisions with much less information than lawyers normally collect through legal discovery processes. Thus, lawyers can agree to informally exchange limited information that is central to the case – and that would be provided in any event during discovery if the case would be fully litigated. Lawyers may also need to obtain experts’ analysis to negotiate effectively. While each party may want to retain separate experts, the parties may want to retain a joint neutral expert to assist with negotiation.

After laying the groundwork for negotiation, lawyers can arrange for the actual negotiations and prepare clients to negotiate effectively. This may include developing a written agreement to negotiate that includes a process and timeline for the

negotiation. Parties may also want to retain a third party neutral to help manage the process and resolve difficult issues.

Some parties may want to use “settlement counsel” instead of, or in addition, to litigation counsel. In the traditional model, a party uses a single lawyer (or law firm) for the entire matter, including any negotiation. Alternatively, a party may engage settlement counsel only for negotiation. Using settlement counsel signals a party’s serious interest in negotiation and can lead to an efficient process satisfying the party’s interests. The party may simultaneously engage separate litigation counsel to be prepared to litigate if necessary – and signal the party’s willingness to litigate if the parties do not reach an acceptable settlement within a reasonable time. When a party engages settlement and litigation counsel simultaneously, they need to coordinate their actions.

The dispute resolution process works best when lawyers for each party have good relationships with their clients and counterparties’ counsel. Thus, at the outset, lawyers should have a thorough discussion with their clients about the full range of the clients’ interests in the matter, including but not limited to their financial and business relationship goals. Lawyers generally would also benefit by getting to know their counterparts personally. If lawyers have good working relationships,

Neutrals can help parties overcome barriers to reaching an ultimate agreement.

It is important to tailor the process to the particular disputes.

they are more likely to resolve challenging issues that often arise in the course of a case.

USING THIRD PARTY NEUTRALS

When appropriate, parties may use neutral facilitators, fact finders, evaluators, mediators, and/or arbitrators to advance the process. Although parties' lawyers often can handle a dispute resolution process adequately without such services, having third-party assistance can provide great benefits. Merely having a neutral professional in the process can reduce adversarial tensions and reassure parties about the fairness of the process. Neutrals can handle procedural issues such as managing exchange of information, planning meetings, arranging logistics, arranging participation of experts, helping prepare lawyers (and, through them, the parties) to be most effective, and arranging for pre-drafting of settlement agreement provisions. In addition, neutrals can help parties overcome barriers to reaching an ultimate agreement, possibly by providing neutral analysis of the issues (which can range from informal feedback to a formal, but non-binding, recommendation for resolution). By using such professionals, the parties can reduce -- and share -- case management costs.

Parties and lawyers generally can gain the maximum benefit from using third-party neutrals by considering whether to use their services as part of the early case management processes described above. It is important to tailor the process to the particular disputes because there are no standard processes. Although one can provide general definitions of the "classic" alternative dispute resolution procedures, mediation and arbitration, there are many variations. For example, in mediation, there are variations in how much work is done before the parties convene, whether and when there will be joint sessions, and what kind of input the mediator will provide. Similarly, in arbitration, there are variations about pre-hearing and hearing procedures. Thus it is important for parties and lawyers to identify the barriers to dispute resolution and plan procedures that are most likely to overcome the barriers efficiently.

If parties are not making sufficient progress in negotiation or mediation, parties may use fact finding (FF) or early neutral evaluation (ENE) to get the process back on track, and avoid arbitration or litigation. In FF and ENE, the parties appoint a neutral third party to help analyze the dispute. In FF, the neutral determines specific underlying events, such as timing, existence of intent, or meaning of communications. In ENE, the neutral evaluates the strengths and weaknesses of the case and each party's likelihood of

success at trial. Depending on the terms of the engagement, the report may include suggestions for managing the case going forward and/or recommendations for resolution.

Parties can set time standards to determine whether to use FF or ENE. For example, the parties can agree to conduct a mandatory negotiation status check ten days from the start of negotiations and agree, in advance, that either party may request the hiring of a fact finder or evaluator, depending on the needs. Parties may set the timeframes based on factors such as the stakes of the case and the negotiating history. Before using an FF or ENE process, parties should agree on the contents of the neutral's report and the consequences of rejection of findings or recommendations.

In planning a dispute resolution process, there is a choice between a single process and a series of "dispute elevation" steps. Choosing only negotiation and/or mediation risks the possibility that the dispute will not be resolved because the parties will not agree. Choosing only arbitration creates risks that the process will be highly adversarial and damage relationships. A process using several steps provides opportunities for negotiation and also guarantees a resolution, but it can add time and expense. If parties use a multi-step process, they should plan so that it operates with smooth transition between steps.

Parties and their lawyers may use alternative legal fee arrangements to create incentives for lawyers to achieve their clients' goals.

ALTERNATIVE LEGAL FEE ARRANGEMENTS ALIGNING CLIENTS' AND LAWYERS' INTERESTS

Parties and their lawyers may use alternative legal fee arrangements to create incentives for lawyers to achieve their clients' goals. Although they may wish to use traditional hourly billing in some cases, parties and their lawyers may find it mutually advantageous to use other arrangements in some cases.

A fee arrangement for a party interested in resolving a matter promptly could provide bonuses for resolving the matter (meeting designated goals) within specified periods. For example, the lawyers might receive a 15% bonus if the matter is resolved in 90 days, a 10% bonus if resolved within 180 days, and a 5% bonus if resolved within 270 days. On the other hand, if the matter is not resolved within certain periods, the fees might be reduced by specified amounts. This is similar to provisions in construction contracts where the owner wants to complete the construction as quickly as possible.

Value billing is another option. There are various ways to structure value billing, though they generally share the feature that the party has some discretion in setting the fee at the end of the case based on the party's satisfaction with the lawyer's

services. One option involves setting a range of fees at the outset and permitting the party to choose an amount within the range. The range may be set in terms of specific dollar amounts or percentages of the lawyer's normal hourly fees. For value billing to work properly, the party and lawyer need to have confidence in each other, typically with an expectation of a possible future relationship. Parties recognize that some lawyers are especially effective, and would not represent parties in future matters if they do not treat the lawyers fairly. Similarly, lawyers would not take the risk of representing parties under a value billing system unless confident that the parties would act fairly and possibly retain the lawyer in future matters.



CONCLUSION

This guide provides an overview of how businesses can anticipate, avoid, and manage business disputes as efficiently and effectively as possible. This is not a single uniform model. Instead, it describes a general planning process to help businesses handle disputes as early as possible. Each business (and when involved in potential or actual disputes, the business's counterparts) should determine what is most desirable in their situation. Analyzing past disputes and dispute resolution processes is important to plan the best procedures for the future. The key is to look at dispute resolution as an aspect of overall risk management to achieve businesses' strategic goals.

APPENDIX A

PLANNED EARLY DISPUTE RESOLUTION TASK FORCE MEMBERS

AMERICAN BAR ASSOCIATION
SECTION OF DISPUTE RESOLUTION
PLANNED EARLY DISPUTE
RESOLUTION TASK FORCE

JOHN LANDE, CHAIR

Isidor Loeb Professor and Senior Fellow,
Center for the Study of Dispute Resolution
University of Missouri School of Law
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PHILLIP M. ARMSTRONG

Former Senior Counsel for ADR and
Litigation
Georgia-Pacific LLC
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Prevention & Resolution
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KURT L. DETTMAN

Principal
Constructive Dispute Resolutions
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JOAN STEARNS JOHNSEN

Arbitrator, Mediator, and Trainer
Boston, MA

F. PETER PHILLIPS

Arbitrator and Mediator
Business Conflict Management LLC
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DONALD R. PHILBIN, JR.

Dispute Resolution Expert
ADR Toolbox
San Antonio, TX

CATHERINE E. SHANKS

Dispute Resolution Professional
Boston, MA

JENNIFER VICTOR

The Victor Firm LLC
Atlanta, GA

EX OFFICIO

DEBORAH MASUCCI

Vice President, Office of Dispute
Resolution
Chartis
Brooklyn, NY

DAVID MOORA

Director
ABA Section of Dispute Resolution
Washington, DC

APPENDIX B

SELECTED RESOURCES

The following is a list of selected resources to help parties and lawyers explore issues related to Planned Early Dispute Resolution. The materials are grouped in the following categories.

DESCRIPTIONS OF DISPUTE RESOLUTION PROCESSES

- Early Case Assessment / Risk Analysis / Advising Clients
- Settlement Counsel
- Expanded Neutral Roles
- Legal Fees
- Systematic Use of Dispute Resolution Processes
- Applications of PEDR - Companies
- Applications of PEDR - Law Firms
- Organizations and Websites

DESCRIPTIONS OF DISPUTE RESOLUTION PROCESSES

ABA Section of Dispute Resolution, *Guide to Dispute Resolution Processes*, http://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses.html.

American Arbitration Association, *Early Neutral Evaluation: Getting an Expert's Assessment*, <http://www.adr.org/aa/faces/services/disputeavoidanceservices/earlyneutralevaluation>.

American Arbitration Association, *Independent Fact-Finding Services*, <http://www.adr.org/aa/faces/services/disputeavoidanceservices/aaafactfinding>.

American Arbitration Association, *Partnering*, <http://www.adr.org/aaafaces/services/disputeavoidanceservices/partnering>.

CPR, ADR Primer: *An Introduction to ADR Terms and Processes*, <http://www.cpradr.org/Resources/ADRPrimer.aspx>.

JAMS The Resolution Experts, *ADR Spectrum*, <http://www.jamsadr.com/adr-spectrum/>.

The Dispute Resolution Board Foundation, *Dispute Resolution Board Concept*, <http://www.drb.org/Concepts.htm>.

EARLY CASE ASSESSMENT / RISK ANALYSIS / ADVISING CLIENTS

Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, 16 PSYCHOLOGY, PUBLIC POLICY, AND LAW 133 (2010) (summarized in Martha Neil, *Lawyers—Especially Men—May Be Too Optimistic About Case Outcomes*, *Survey Says*, ABA JOURNAL ONLINE (May 11, 2010), available at http://www.abajournal.com/weekly/article/lawyers--especially_men--may_be_too_optimistic_about_case_outcomes_survey_s).

David P. Hoffer, Note, *Decision Analysis as a Mediator's Tool*, 1 HARVARD NEGOTIATION LAW REVIEW 113 (1996).

Kenneth Kressel et al., *A Field Report on the New CPR Mediation Screen*, 21 ALTERNATIVES TO THE HIGH COST OF LITIGATION 133 (2003).

John Lande, *Helping Lawyers Help Clients Make Good Decisions About Dispute Resolution*, DISPUTE RESOLUTION MAGAZINE, Fall 2010, at 14, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1716857.

David M. Madden, *To Sue or Not to Sue: A Hypothetical Case Study in the Use of Decision Trees in Developing Litigation Strategy*, DCBA BRIEF, Nov. 2007, at 16.

Paul Prestia & Harrie Samaras, *Beyond Decision Trees: Determining Aggregate Probabilities of Time, Cost, and Outcomes*, 28 ALTERNATIVES TO THE HIGH COST OF LITIGATION 89 (2010).

Cynthia Raposo & Harrie Samaras, *Early Case Assessment: A Strategic Tool for the Early Resolution and Management of Intellectual Property Cases*, in

ADR ADVOCACY, STRATEGIES, AND PRACTICE FOR INTELLECTUAL PROPERTY CASES (Harrie Samaras, ed., 2013).

Frank E. A. Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 HARVARD NEGOTIATION LAW REVIEW 1 (2006).

Roselle L. Wissler, *Barriers to Attorneys' Discussion and Use of ADR*, 19 OHIO STATE JOURNAL ON DISPUTE RESOLUTION 459 (2004).

Roselle L. Wissler & Bob Dauber, *Leading Horses to Water: The Impact of an ADR "Confer and Report" Rule*, 26 JUSTICE SYSTEM JOURNAL 253 (2005).

SETTLEMENT COUNSEL

Kathy A. Bryan, *Why Should Businesses Hire Settlement Counsel?*, 2008 JOURNAL OF DISPUTE RESOLUTION 195.

William F. Coyne, Jr., *The Case for Settlement Counsel*, 14 OHIO STATE JOURNAL ON DISPUTE RESOLUTION 367 (1999).

John DeGroote, *Settlement Counsel: 10 Free Internet Resources*, <http://www.settlementperspectives.com/2013/04/settlement-counsel-10-free-internet-resources/>.

Jim Golden et al., *The Negotiation Counsel Model: An Empathetic Model for Settling Catastrophic Personal Injury Cases*, 13 HARVARD NEGOTIATION LAW REVIEW 211 (2008).

James E. McGuire, *Why Litigators Should Use Settlement Counsel*, 18 ALTERNATIVES TO THE HIGH COST OF LITIGATION 107 (2000).

EXPANDED NEUTRAL ROLES

Kurt Dettman, *DISPUTE REVIEW BOARDS (DRBs): REAL TIME AVOIDANCE AND RESOLUTION OF DISPUTES* (2010), available at http://www.c-adr.com/uploads/DRBF_Overview_Summary_KDettman__2__1.13.11.pdf.

Kurt L. Dettman & Martin J. Harty, *Mediators as Settlement Process Chaperones: A New Approach To Resolving Complex, Multi-Party Disputes*, THE ADR QUARTERLY (ADR Section of the State Bar of Michigan), July 2008, at 1, available at http://www.c-adr.com/uploads/MichiganBarAssociation_ADR_Newsletter__7-08.pdf.

Kurt Dettman & Eric Kerness, *The Role of Dispute Review Boards in Dispute Prevention*, FORUM (Dispute Resolution Board Foundation), Feb. 2009, at 1, available at http://www.c-adr.com/uploads/DRBF_Forum02-09_DRB_Dispute_Prevention.pdf.

Frank G. Evans, *The ADR Management Agreement: New Conflict Resolution Roles for Texas Lawyers and Mediators*, HOUSTON LAWYER, Sept./Oct. 2007, at 10.

James P. Groton & Kurt L. Dettman, *How and Why the Standing Neutral Dispute Prevention and Resolution Technique Can Be Applied*, 29 ALTERNATIVES TO THE HIGH COST OF LITIGATION 177 (2011).

John Lande, *How Neutrals Can Provide Early Case Management of Construction Disputes*, JAMS GLOBAL CONSTRUCTION

SOLUTIONS (JAMS) May 2011, at 6, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1856026.

LEGAL FEES

MARK A. ROBERTSON & JAMES A. CALLOWAY, *WINNING ALTERNATIVES TO THE BILLABLE HOUR: STRATEGIES THAT WORK* (Richard C. Reed ed., 3d ed. 2008).

Mark D. Wolf, *Update: How Value Billing Helps Both the Client and the Law Firm*, 28 ALTERNATIVES TO THE HIGH COST OF LITIGATION 1 (2010).

SYSTEMATIC USE OF DISPUTE RESOLUTION PROCESSES

CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS* (1996).

Catherine Cronin-Harris, *Mainstreaming: Systematizing Corporate Use of ADR*, 59 ALBANY LAW REVIEW 847 (1996).

Steven K. Fedder et al., *Can We Resolve Franchise Disputes Faster, Cheaper and Better?* FRANCHISING BUSINESS & LAW ALERT (Law Journal Newsletters), July 2010, at 1.

John Lande, *Getting Good Results for Clients by Building Good Working Relationships with "Opposing Counsel,"* 33 UNIVERSITY OF LA VERNE LAW REVIEW 107 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1968619.

JOHN LANDE, *LAWYERING WITH PLANNED EARLY NEGOTIATION: HOW YOU CAN GET GOOD RESULTS FOR CLIENTS AND MAKE MONEY* (2011).

John Lande, *A Recent Innovation, 'Cooperative' Negotiation, Can Promote Early and Efficient Settlement through Joint Case Management*, 27 ALTERNATIVES TO THE HIGH COST OF LITIGATION 117 (2009).

Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OHIO STATE JOURNAL ON DISPUTE RESOLUTION 1 (1998).

Michael Moffitt, *Pleadings in the Age of Settlement*, 80 INDIANA LAW JOURNAL 727 (2005) (proposal to require potential litigants to confer before filing pleadings).

Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO STATE JOURNAL ON DISPUTE RESOLUTION 831 (1998).

NANCY H. ROGERS ET AL., *DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES* (2013).

HERBERT SMITH, *THE INSIDE TRACK-HOW BLUE-CHIPS ARE USING ADR* 36 (2007), available at <http://www.herbertysmithfreehills.com/-/media/HS/Insights/Guides/PDFs/Alternative%20dispute%20resolution%20-%20the%20inside%20track/1%206398ADRreportD4.pdf>.

William L. Ury et al., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* (1988).

APPLICATIONS OF PEDR - BUSINESSES

Thomas L. Aldrich, *A "Reformed" Litigator Describes a Creative Complex Litigation Management Approach*, 27 ALTERNATIVES TO THE HIGH COST OF LITIGATION 65 (2009).

Phillip M. Armstrong, *Case Study: Georgia-Pacific's Aggressive Use of Early Case Evaluation and ADR*, 16 ACC DOCKET 42 (1998).

Phillip M. Armstrong, *Georgia Pacific's ADR Program: A Critical Review After 10 Years*, DISPUTE RESOLUTION JOURNAL, May-June 2005, at 19.

DAVID DUMAS ET AL., *BRIDGESTONE/FIRESTONE'S NATIONAL SETTLEMENT COUNSEL PROGRAM: A CREATIVE AND INNOVATIVE APPLICATION OF ADR PRINCIPLES IN COMPLEX, MULTI-PARTY AND MULTI-JURISDICTIONAL LITIGATION* (2003).

Dale C. Hetzler, *Superordinate Claims Management: Resolution Focus from Day One*, 21 GEORGIA STATE UNIVERSITY LAW REVIEW 891 (2005).

Dale C. Hetzler et al., *Curing Conflict: A Prescription for ADR in Health Care*, DISPUTE RESOLUTION MAGAZINE, Fall 2004, at 5.

JOHN J. UPCHURCH, *PRE-LITIGATION RESOLUTION OF CLAIMS THROUGH EARLY INTERVENTION / MEDIATION, THE REVOLUTIONIZING LITIGATION MANAGEMENT REPORT* 9 (June 1995).

Elpidio "PD" Villarreal, Jeffrey D. Paquin & Jennifer Boyens Victor, *General Electric's Integrated Conflict Management System: The Prevention, Early Identification and Early Resolution of Disputes*, CONFLICT MANAGEMENT (American Bar Association Litigation Section), Summer 2004, at 6.

APPLICATIONS OF PEDR - LAW FIRMS

GARVEY SCHUBERT BARER, *WIN2* (2007), available at http://www.gsblaw.com/images/cms/file/GSB_Win2_Brochure.pdf (describing "win-squared" early negotiation process law firm uses in employment cases).

Summit Law Group – Seattle law firm that focuses on customer service and uses value billing, <http://www.summitlaw.com/about.htm>.

Valorem Law Group – Chicago-based
“national litigation law firm offering
alternative fee arrangements that work,”
<http://www.valoremlaw.com/>.

ORGANIZATIONS AND WEBSITES

American Bar Association Section of
Dispute Resolution – http://www.americanbar.org/groups/dispute_resolution.html.

American Arbitration Association (AAA) –
<http://www.adr.org/>.

Association of Corporate Counsel
Value Challenge – <http://www.acc.com/valuechallenge/index.cfm>.

Dispute Resolution Board Foundation –
<http://www.drb.org/>.

International Institute for Conflict
Prevention and Resolution (CPR) – <http://www.cpradr.org/Home.aspx>.

JAMS – The Resolution Experts – <http://www.jamsadr.com/>.

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