6-11-2015

PLANNING IS CRITICALLY IMPORTANT FOR EARLY DISPUTE RESOLUTION

John Lande

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JUNE 11, 2015 | JOHN LANDE | 7 COMMENTS

This post stimulated a conversation with Peter Benner about planned early dispute resolution (PEDR), beginning with the exchange of comments below. There are six additional posts in this conversation. At the end of each post, there is a link to the next post in the conversation. _____

Early mediation is a waste of time.

This was a refrain I heard several months ago at a meeting of lawyers representing large corporations.

Indeed, attempts to settle cases early in litigation are wasteful — if the lawyers haven't properly prepared and planned the process. (References to lawyers in this post generally include the parties.)

On the other hand, it is also wasteful if lawyers wait until virtually all discovery is completed and they are ready to try the cases.

Part of the problem is confusion about the meaning of "early." Some people think that "early" means that lawyers should try to resolve the ultimate issues right after all the parties have appeared in litigation.

I think of "early" as a shorthand for "earliest appropriate time."

To be ready to settle at the earliest appropriate time, lawyers should diligently and promptly learn the parties' interests and the critical facts, reasonably anticipate the likely decision if the case would go to trial, and consider possible agreements that might satisfy both parties' interests.

Lawyers need to do some factual investigation before they are ready to negotiate. But they don't need to complete all the discovery required for trial.

Lawyers often get trapped in what I call a "prison of fear" causing them to procrastinate about settlement for many understandable reasons.

They often can, however, escape from this prison if they try.

The Courts Can Help

It really helps when the courts support and encourage planned early dispute resolution.

Toward that end, the American College of Trial Lawyers Task Force on Discovery and Civil Justice and the Institute for the Advancement of the American Legal System recently released a report including 24 principles to "lay the foundation for achieving fundamental improvement of our system to help ensure that no one is shut out due to a lengthy and expensive process."

The report is entitled, "Reforming Our Civil Justice System: A Report on Progress & Promise."

Many of the principles in the report emphasize the importance of planned early dispute resolution, including the following.

> Principle 4: Unless requested earlier by any party, a Case Management Conference should be held as soon as practicable after the appearance of all parties.
>
> Principle 6: Cooperation and communication between counsel is critical to the speedy, effective, and inexpensive resolution of disputes in our civil justice system. Counsel should be required to confer and communicate early in order to resolve potential disputes, and the court should be available to resolve disputes in a timely manner, if necessary.
>
> Principle 7: All issues to be tried should be identified early.
>
> Principle 8: When appropriate, the court should raise the possibility of mediation or other form of alternative dispute resolution early in the case. The court should have the discretion to order mediation, other form of dispute resolution, or other form of streamlined procedures at the appropriate time, unless all parties agree otherwise.
>
> Principle 15: Shortly after the commencement of litigation, each party should produce all known and reasonably available non-privileged, non-work-product documents and things that support or contradict specifically pleaded factual allegations.

Principle 17: There should be early disclosure of prospective trial witnesses.

Helping Parties Deal with Problems in the First Instance

Of course, the parties themselves can prevent some problems and resolve them when they do arise.

The Planned Early Dispute Resolution Task Force of the ABA Section of Dispute Resolution developed materials to help businesses plan for dispute prevention and resolution.

In particular, we published a practical user guide for business parties (and lawyers), which I co-authored with Kurt L. Dettman and Catherine E. Shanks. This guide was co-sponsored by AAA, CPR, and JAMS.

Lawyers' Role

Lawyers play an important gatekeeping role, shepherding clients in various directions as they handle disputes.

As I show in my book (and related articles), lawyers who use planned early dispute resolution techniques can get good results for clients and make a good living.

Lawyers often negotiate resolutions without using neutral DR professionals.

Of course, an important lawyering skill is knowing when and how to engage neutrals to advance their cases.

The Big Picture

Courts, parties, and lawyers all can take initiative to plan for early dispute resolution so that it is productive and not a waste of time.

They are most likely to be successful when they are all moving in the same direction.

But even when not everyone is initially "on board," even one or two of these groups can make a big contribution to good, early DR.

Click here for the next post in this series.

7 THOUGHTS ON "PLANNING IS CRITICALLY IMPORTANT FOR EARLY DISPUTE RESOLUTION"

Peter Benner

JULY 7, 2015 AT 6:31 PM

You raise questions, John, that are at the heart of the matter in terms of how to make progress toward greater adoption of PEDR. Notwithstanding the fact that the value, in both monetary and intangible ways, can be so great, pure reason and persuasion, as you say, have proven not to be enough.

From my experience, pursuit of PEDR approaches within companies has depended on someone in a position of authority who understands and believes in the benefits to her/his company. There are examples of large companies that have adopted early dispute resolution initiatives (taking the CPR pledge seriously) under the leadership of either an in-house attorney for a businessperson who has the insight and determination to introduce the necessary steps to take resolution processes in a direction different from default to litigation guided by in-house and/or outside counsel. When that person moves on, inside or outside the organization, without someone to step in who has a like mindset, the company's commitment to those alternative options wanes or dissipates altogether. For that reason, studying businesses or law firms that have pursued a PEDR approach may not yield much insight.

Real institutionalization of PEDR practices requires a cultural or paradigmatic, not just personnel, shift. The question (even from a non-skeptic) becomes: "Well, OK, sounds intriguing, but is that even possible, and, if so, how?" I am not alone in feeling that progress of this sort in fact must be possible because the value can be so great, although systemic change is very tough to achieve because of the forces and cultural conditions described in earlier posts.

Then, how? The Cialdini principles of influence you site are helpful and well put. There are similar principles akin to the Gladwell Tipping Point process, or perhaps even more pertinent, the Made to Stick model of the Heath brothers, who are the authors of a couple of really good books on effecting institutional and systemic change. A summary chart of the Made to Stick "SUCCESs" (acronym for the elements) model is on their website: http://heathbrothers.com/download/mts-made-to-stick-model.pdf.

The S in the model is for "stories", using storytelling as a means of creating emotional attachment. Here's a very brief story that "sticks" with me and informs my view of all of this because I lived it—and now live to regret it.

Toward the end of my law practice, I was involved on behalf of my firm in representing a Fortune 100 corporation that changed the terms of its relationship with franchisees, 50 or so of whom filed suit for damages they claimed from the unilateral change in the business model. The franchisees were emotionally tied to the former model because it provided for direct, monthly cash subsidies from the franchisor. The new model eliminated the direct subsidies and required the franchisees to be more enterprising in growing revenue, which enabled them to achieve a stronger bottom line. The fact was that virtually all of the franchisees had no damages (as demonstrated by our accountant expert witnesses), since their net profits increased after the change. Yet the franchisees were adamant in pursuing the case, as was our client. A jury ultimately rendered a multi-million dollar verdict against the franchisor. The verdict was appealed, and the case made it all the way to the US Supreme Court (I was gone by then!), which ruled substantially in favor of the franchisor, after eight years of draining litigation and millions of dollars in fees and expenses. In retrospect (20/20 hindsight?), a much better result, even for the eventually "victorious" franchisor, clearly could have been obtained had counsel, and most importantly the parties, undertaken a process of direct engagement at the outset of the dispute.

The franchisor had misjudged how vehemently the franchisees would react to the change in the business model, and the franchisees viewed the action as just another example of bullying by a big corporation (a version the jury surely bought into). So, the parties dug in for the long haul. I am absolutely convinced that had I sat down with our client and urged (at personal risk referred to in an earlier post) that we take a step back and review what each side was trying to accomplish, planning out a strategy for how to engage constructively with the franchisees, rather than reacting defensively and aggressively, we could have found a business solution that would have been more favorable to all concerned (well, maybe not the lawyers) than protracted, divisive and ultimately inconclusive litigation.

While this is a prime example of lost opportunity for failure of engage in some form of PEDR, it's important to stress that the idea of taking stock through some early alternative to "default to litigation" will not be the best approach for all cases. The core value of PEDR is the shift in outlook and willingness to explore in depth perspectives that are of NO RISK (because there is no commitment to pursue them and you can always preserve your litigation position), that will in all likelihood give a disputant a better idea of how to most effectively to define and reach its underlying objective, and, in many instances, will

lead to favorable resolution earlier in the case than would have occurred otherwise, at far less cost and overall risk.

Do you think finding and widely publicizing these kinds of stories, combined with other elements of the SUCCESs model, could make a difference in causing more companies to take a closer look at PEDR?
Click here for the next part in this conversation.

★ John Lande

JUNE 30, 2015 AT 8:05 AM

I wish I felt confident that I knew how to change the dynamics that you describe so well, Peter.

I hope that it helps to provide persuasive analysis and practical tools, though that clearly is insufficient. These decisions to use ADR or PEDR are not purely rational in the sense of being the result of careful cost-benefit calculation for the organizations.

As you describe, there are significant organizational dynamics and incentives for individuals that seem at odds with the organizations' presumed interests.

One theoretical solution is that top leadership would send clear, strong directives to use PEDR and the subordinates would simply follow their directions. I don't know much about the dynamics of top leadership in big businesses and law firms, but my impression is that this isn't a high-priority concern for most of them given other things "on their plates."

Even when they do issue directives, subordinates often have discretion, which is not easily monitored. If subordinates have conflicting incentives, they may ignore the official directives.

I think of the CPR Pledge to use ADR, which was recently updated. I think that it is a great idea – and yet I get the impression that it is mostly ignored in practice.

Indeed, perhaps changes in organizational culture may result from bottom-up (or "middle-up") dynamics in which top leaders largely ratify what their underlings present to them.

I have two thoughts about figuring this out. One is to apply Robert Cialdini's principles of influence, as summarized in a nice short article by Chris Guthrie, Principles of Influence in Negotiation, 87 Marq. L. Rev. 829 (2004).

* Liking – "individuals prefer to comply with requests made by those they know and like"

* Social proof – individuals "view a behavior as correct in a given situation to the degree that we see others performing it"

* Commitment and consistency – "[o]nce we make a choice or take a stand, we will encounter personal and interpersonal pressures to behave consistently with that commitment"

* Reciprocity – one "should try to repay, in kind, what another person has provided us"

* Authority – "individuals feel an obligation to comply with those who are in real or perceived authority positions"

* Scarcity – "opportunities seem more valuable to us when they are less available"

The second idea is to analyze organizations that do use PEDR and figure out what they have done to overcome the common barriers we have been discussing.

Does any of this resonate with your experience? Have you seen any businesses or law firms that have institutionalized a PEDR approach effectively? If so, what do you think were critically-important factors enabling them to do so?

★ John Lande (on behalf of Peter Benner)

JUNE 29, 2015 AT 2:33 PM

The system is acting daft again and won't accept a comment from Peter. So I am posting the following on his behalf.

Companies and law firms that pursue in routine, intentional early dispute resolution strategies quite clearly continue in the minority. The fact that the prevailing approach remains "lawyering up" and assuming an adversarial posture is largely a function of custom, training and, as mentioned before, risk aversion and self-interest.

For lawyers, particularly those without a great deal of practice experience and client influence, one risk of broaching with the client the idea of planning and preparing for constructive engagement with an opponent is to be perceived as not committed to the client's case, or even its business interest. Many individuals within companies have been acculturated with the idea of litigator as gladiator to prove them right. When a client is seeking primarily affirmation and reassurance, a great deal of self-confidence, and indeed selflessness from a financial perspective, is required to explain and promote alter-

natives that "buck the system" (internal and external). The safe approach is to pursue the default path of litigation case development, which follows the all-too-common path of emotional escalation, excessive discovery, exorbitant cost, and ultimate client disillusionment leading to the imperative of settlement two or three years down the line. It can take a lot of savvy, to say nothing of self-assurance, for a litigator to guide an angry or change-averse client in a different direction.

For companies, the reasons for not engaging in planned early resolution opportunities are more complex because the spectrum of sophistication and familiarity with litigation process and pitfalls is wide. The basic cause, as I have seen in my efforts to work with companies to expand options, derives from the nature of corporate organizations. Because they are usually hierarchical, and can be bureaucratic, decisions are made with an aversion for the personal risk that is called for to steer away from "mindless" default to litigation. Outside litigation counsel are viewed as the experts—the "protectors"-and there will be no perceived personal exposure (i.e., second-guessing) in relying on their advice and direction. Initiating the internal process required to consider more creative, business-oriented approaches is stifled by groupthink and other cognitive biases such as confirmation and loss aversion.

This "corporate" mentality is perhaps the greatest impediment to regular adoption of early resolution practices. If outside counsel saw that the client valued, and even rewarded, exploring alternative, productive means of resolution before the case got out of hand, most lawyers would respond accordingly and not take a chance on client disaffection. They might initially resist, raising the specter of the other side taking advantage, but that would dissipate if the client had sufficient internal understanding of and commitment to approaching a dispute as an opportunity for business gain (which won't happen is all cases but is a critical paradigmatic shift) rather than trying to avoid the worst case by outlasting the opponent-and maybe even winning, which might actually occur every other blue moon.

What do you see at the best ways of developing and fostering that internal understanding?

★ John Lande

JUNE 23, 2015 AT 6:56 AM

Thanks, Peter.

The prison of fear you describe is very real. Staying in the prison isn't rational, if one thinks of a careful analysis of risks and benefits. But people in conflict often make decisions based on emotions like fear, which often impairs this kind of analysis. In their

mindset, continuing in the unproductive conflict presumably makes sense from everyone's perspective. They are likely to feel (sometimes accurately) that somebody else is acting unreasonably and they have no choice but to continue.

The puzzle for me is that, although many parties and lawyers are stuck in this prison, some escape relatively quickly and others rarely get stuck in there at all. Some businesses have systems and a culture promoting early, reasonable negotiation. Similarly, some lawyers and law firms routinely use such approaches. But my sense is that this is the minority of companies and law firms.

So the puzzle is why some do and others don't. As a mediator handling these late mediations, you tend to see the "failures" – the people who have languished in the prison for too long – just like surgeons tend to see the sickest of patients.

Do you have any thoughts about why and how the parties and lawyers you don't see late in the process are able to handle their conflicts earlier and, presumably, more constructively?

Peter Benner

JUNE 22, 2015 AT 8:03 PM

My interest, as with many others in the field, comes from my own mediation practice, primarily in business and healthcare, where, time and time again, I have served a mediator of a litigated case after two or three (or more) years of a contentious, very expensive adversary process full of posturing, stonewalling, and even recrimination. Attorneys and clients alike had passed up early opportunities to engage directly around the question of case process, which could have begun a discussion, even parallel to litigation, to narrow the dispute to what really matters to the partiers, creating the opportunity for a much earlier and more favorable resolution. In many cases that could not be more clear. So I decided to focus some of my efforts on engaging with companies to advance the ideas that are expressed in the PEDR Guide and in John's writings on PEN.

It's a complex subject and the barriers are quite high, for reasons that can be confounding. Those include default to an adversary posture so as not to appear weak (the "prison of fear" described in the Guide), as well as deference to litigators to run the show, whose interests served through early resolution are not coextensive with (and can be opposed to) those of the client. While the barriers are high, there is the possibility of positive progress, shifting the paradigm from the burden of a lawsuit to the opportunity presented by a conflict to create value and advance interests that get lost in the fog of litigation. More to follow on making that opportunity real.

★ John Lande

JUNE 13, 2015 AT 2:21 PM

Thanks, Peter.

I became interested in early dispute resolution when I studied collaborative law, where parties and lawyers negotiate from the outset of a matter. I realized that, although negotiating and mediating toward the end of litigated cases are useful for resolving matters, doing so late in the case is less than ideal for many reasons. For example, it takes more time and money than may be necessary, lawyers often feel that they need to do more discovery than necessary, the process itself usually is upsetting for parties, and it risks escalating the adversarial dynamics by creating new issues to fight about in addition to the original conflict.

I know that you have a lot of experience in practice and that you been working to promote early dispute resolution for quite a while. What prompted your interest in these ideas and what have you been doing to promote them?

Peter Benner

JUNE 12, 2015 AT 1:45 PM

This is an excellent integration of the CJ System report and principles into the PEN process–thanks John. The ABA DR Section Task Force that John chaired and that produced the PEDR Guide had reconvened to raise awareness among corporate counsel and companies of these opportunities and has been making good progress. There is still a ways to go for PEN to be adopted and practiced broadly, and spreading the word in posts such as this help keep moving things forward.