

International Institute for Conflict Prevention and Resolution

Advisory Council

Summary of Meeting of November 18, 2015

Debevoise & Plimpton, 919 3rd Avenue, New York, NY

The CPR Advisory Council met on the morning of November 18, 2015, via both in person and telephone. David McLean, Brennan Torregrossa, Kurt Hanson, Peter Rees, Richard Ziegler, Ariel Belen, Lillian Stenfeldt, Drew Olejnik, George Bermann, Claire Gutekunst, Andrew Berman, Erin Gleason, Jay Waks, Paul Bruno, Michael Timmons, Barbara Daniele and Mary Beth Cantrell were in attendance in person.

Steven Antunes, Debra Clements, Todd Carver, Allan Moore, Stephen Marzen, Tom Nathan, Heather Grenier, John-Claude Najar, Alberto Ravell, Richard Rothman, Margot Metzger, Michael Keating, S.I. Strong, John Lande, Steven Greenspan, Donald Trevarthen, Barbara Pollack, Keith Porapaiboon, Nancy Vanderlip, Ethan Evans, Paul Petta, Christina Hollander, Harry Trueheart, Jordan Rosenfeld, Jeffrey Senger, Bennet Picker, Dan Winslow, Ken Jacobs, Alexander Oddy, Al Hilber and Kirke Hasson attended via telephone.

Noah Hanft, Beth Corman, Helena Tavares Erickson, Beth Trent, Olivier Andre, Terri Bartlett, David Burt and Tania Zamorsky were also in attendance.

David McClean opened the meeting, explaining that the agenda included two main topics that CPR hears a lot about from its members—EDR and EU mediation.

Early Dispute Resolution

“EDR is about how to prevent a complaint from being a case, a case from becoming a cause, a cause from becoming a crisis and a crisis from becoming a calamity.”

Beth Trent recounted how Debra Clements asked CPR to come to her company and do a workshop on how to take a generic EDR program and make it work for them and their specific environment (a smaller, privately held company with a relatively small in-house department).

Debra Clements explained that her company’s EDR efforts were motivated by cost control, budgets and outside counsel spend. Milliken didn’t have a very good process for containing at the front end what litigation would be, in terms of time and resources. Debra highly recommended that others invite CPR to their companies as well.

Brennan Torregrossa and Kurt Hanson from Paul Hastings were the formal presenters on EDR at the meeting, discussing what led GE and other companies to think about using it, what the process looks like, and expected and actual benefits.

Kurt Hanson explained that, about 15 years ago, GE wanted to formally prepare a system to evaluate cases and or disputes, to look for weaknesses and strengths, get buy in from the

business folks, and see if it made sense to litigate. Early questions they were asked included whether a formal system was really necessary, and whether it would cost more. In creating their Model EDR Process, who would be on the ADR team was one of the most interesting questions. They didn't just want to have lawyers talking; they wanted to make sure they pulled in the actual clients to drive value. (Beth Trent stressed this is a key element—that EDR is principally a communication tool when it works well, between in-house and outside counsels and business.) One key driver was taking a close look at damages. (Presenters referred to slides)

Because there won't be access to the other sides' witnesses or documents, Kurt explained, you need to make sure the business people understand that it truly is an early assessment. The "softer areas" become very important, talking to business folks about the drivers of business. One of the hardest—but most important—things to do is to give an honest assessment of not only strengths but weaknesses and what you think will happen (put all necessary language around it, disclaimers, that you don't have their witnesses, etc., but take this risk).

Brennan Torregrossa jumped ahead nine years, describing how PD Villareal joined GSK, which had a very diverse range of products and six to seven material investigations or litigations. PD brought with him a "book of plays," like a football coach, consisting of lessons learned and successes earned from GE Shearing. He challenged Kurt to implement the same things at GSK.

Kurt and Brennan reviewed some of the highlights and low lights of their EDR experiences.

Highlights:

Changing a company's mantra

"Culture eats strategy for breakfast." They changed culture by developing and branding "Maximizing Savings through Early Resolution" (MASTER) through a dedicated marketing effort. They now hear lawyers and execs saying they want to "master" that.

"Training the trainer"

Your colleagues can be threatened and offended by your efforts to implement ADR because their job is issue spotting. So train *them*, and let them speak to their businesses and clients. That gets them to embrace it. Create an army, don't bypass it.

Providing Examples

Kurt and Brennan developed core examples from each business that showed what a dispute would have looked like with, and without, the MASTER system. They found some companies that had opened their books and showed they had saved 80% of their litigation budget using ADR and EDR. Another approach is to tie EDR to corporate values. (Erin Gleason Alvares suggested building additional triggers into the process to prompt people to think about it. Beth Trent noted that actual use of the program also drives acceptance.)

Lowlights

Being too litigation focused.

Remember that EDR could be applied to a mere issue, anything you're worried about—not just a case. The presenters would focus on that more, if they could do it again.

Not being prepared for resistance/not understanding motivation

Brennan described that, early on, he didn't quite anticipate the resistance he would get from people who think they issue spot every day, and feel threatened. He suggested asking them what is driving them nuts, about the "grit in the system."

Barbara Daniele described an experience of GE buying a new business that had a large number of collection cases that were incredibly expensive. GE realized that the claims processors were concerned that EDR would give them less to do, possibly leading to layoffs. Once they figured out the motivation (processors previously being rewarded for keeping thousands of cases in their portfolios), GE told the processors they would now be rewarded for another metric—not total value, but dollars collected and speed of collection. They even offered "sales" if people settled in the next fifteen days, got creative. They reduced cases from thousands per collector to hundreds. Different groups of internal people will have different motivations. The business lawyer whose job is issue spotting is the hero, the one who solves the problem. Never make them look foolish and understand their fundamental drivers, Barbara concluded.

Kurt Hansen suggested putting something similar motivation, if your general counsel is willing, into his or her objectives. That general counsel will then be spreading the word.

Questions

Nancy Vanderlip asked if the presenters could comment on complications with insurance companies, who are often happy to move quickly before the case is even formally filed or developed. Brennan says that during the renewal process is when they try to sell the master program to insurers, and that insurance companies are beginning to embrace how EDR might help make insurance more predictable.

A question was posed about concerns about internal publicity. Kurt's response was that if you're afraid of publicity within the company, you'd better be afraid of publicity outside of the company. Which would you rather have?

EAB & European Mediation & ADR Guide

The remainder of the meeting focused on recent work of the EAB, and the recent release of the *European Mediation & ADR Guide*, which assists in-house counsel in the EU as recognizing there are some differences. Olivier Andre, Alex Oddy and Isabelle Robinet-Muguet presented.

The guide offers practical advice on such topics as the structure of a mediation day in London versus NY versus France, when you're in a civil law jurisdiction versus common law. It is meant for both inexperienced and sophisticated counsel.

Noah Hanft closed the meeting by providing an update on CPR activities, stressing CPR's global focus on programming tools and resources. Noah cited the day's EDR presentation as a perfect example of the purpose of the Advisory Council, and stressed that CPR would continue to focus on enhancing CPR's value proposition and promoting the panels of neutrals.

Noah also mentioned CPR's new transactional committee, the Transactional Lawyers Prevention and Dispute Resolution Committee, and asked AC members to designate people to participate. He reported on CPR's continued growth in membership including, on the law firm side, Arnold and Porter and Freshfields. Finally, Noah mentioned the recent attacks on arbitration, and the unique position and responsibility of CPR to drive a coalition to defend.

Beth closed the meeting by stressing that she wants to structure content to member needs, so asked AC members to please send her suggestions for future topics.