ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT: RECENT DEVELOPMENTS

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ABSTRACT

This article describes trends over the past two decades in employer application of alternative dispute resolution (ADR) procedures to the settlement of workplace disputes. Employers often adopt such procedures to reduce the time and expense associated with increased numbers of employee-initiated complaints and lawsuits, and the procedures may also serve other important business purposes. The article examines shortcomings of the ADR approach, as well as developing standards for ADR use. The author considers the potential of the broader, dispute-resolution-systems approach advocated by some ADR specialists and assesses the significance of an organization's culture for the design and successful use of ADR.

DEVELOPMENT OF EMPLOYMENT ADR

For well over sixty years, employment ADR in the United States has been best characterized by collective bargaining between unions and employers. Not only are wages, hours, and working conditions negotiated, but disputes relating to them are handled through a grievance-arbitration process that is well-defined and included in nearly all collective bargaining agreements. The process is legally protected, arbitrator decisions are binding and generally not subject to review by the courts. Increasingly, however, this system has applied to a smaller and smaller proportion of the workforce, as union representation of workers has waned. Last year, for the first time in years, the number of union members in the workforce increased (slightly) to 16.48 million, or 13.9 percent of the workforce. Unions also represent another 1.7 million workers who are not members [1]. Put another way,

almost 85 percent of the U.S. workforce is not afforded the protection of a union contract or a collectively bargained grievance-arbitration process. No comparable system exists in the nonunion sector, though there has been a proliferation of various complaint resolution systems and more widespread use of one or more ADR methods in recent years.

Historically, while some firms may have used mediation or negotiation in dealing with employee complaints, few developed formal dispute resolution procedures. In some cases, nonunion firms implemented employee representation (company unions) plans as a way of avoiding union organization of their employees. These plans included grievance-type procedures, but were fraught with weaknesses and generally not effective in addressing employee concerns [2, p. 188]. A notable exception to this pattern is the Northrup Corporation, which implemented a formal grievance procedure with arbitration for its workforce in 1946.

A 1979 study of nonunion complaint resolution systems in use at larger employers (100 or more employees) found the majority relied upon a "chain-of-command" system (address complaints to the supervisor, and then upper-level management), and another 20 percent to 25 percent also included an "open door" policy. Only 10 percent to 15 percent had a more formal system, and an even smaller number had any form of a "fair procedure" system. Among the latter were IBM, Citibank, Xerox, Bank America, and Control Data [3, pp. 4-5].

While the use of ADR in the workplace continued to expand over the next decade, its development in the 1990s was most dramatic. A study published by the U.S. General Accounting Office in 1995 reported that "almost all employers of 100 or more use one or more ADR approaches" for resolving discrimination complaints; negotiation and factfinding were the most commonly used procedures, while mediation and arbitration conducted by an outside party were least common [4, p. 3, 7]. More recently, Cornell University researchers conducted a study of ADR use for all types of business disputes among the 1000 largest U.S. corporations; they found that while "nearly all U.S. corporations have some experience with the basic ADR processes of arbitration and mediation" relatively few have "extensive experience with ADR or have tried to use it as a general mechanism for dispute resolution" [5, p. 14]. In this study, more corporations (79%) had used mediation for settling employment disputes than any type of dispute (but followed closely by commercial/contract disputes), while 62 percent had utilized arbitration in an employment dispute (second only to commercial/contract disputes). Most of those surveyed expected their firm's use of ADR to expand in the future. In the past five years, such companies as Prudential, Philip Morris, TRW, and Alcoa have adopted fairly extensive ADR procedures for employment-related disputes, and other employers have added features to their existing procedures. It is not unusual for the newer ADR policies to include a variety of procedures such ombudspersons, mediation, arbitration (often limited to a narrow range of issues, such as dismissal), peer review committees,

nonretaliation assurances, and even financial assistance to employees to partially cover legal, mediation, and arbitration fees. The use of outside mediators and arbitrators provided through the American Arbitration Association or some other organization is not uncommon.

On the other hand, some large employers still do not have formal ADR policies in place, and one suspects the prevalence of procedures among smaller employers is much lower than among the larger ones [6]. In the broader context of ADR use, the Cornell study, cited above, identified barriers to mediation adoption, including the unwillingness of the opposing parties to use it, its nonbinding nature, compromised outcomes, the lack of confinement to legal rules, the risks of exposing corporate strategy, and the reluctance of top management to use it. Barriers to the use of arbitration included the unwillingness of the other party to use it, the difficulty of appeal, the lack of confinement to legal rules, the lack of confidence in neutrals, and the reluctance of senior management, among others [5, p. 26]. In other words, the flexibility associated with ADR, often seen one of its virtues, is also viewed as a weakness.

A number of factors are considered to have stimulated employer interests in adopting workplace ADR policies. Foremost among these have been the high number of employee complaints to governmental enforcement agencies and employee lawsuits, and the correspondingly high costs of legal services. Additionally, such actions divert resources and personnel from business goals and invite adverse publicity. On top of the dozens of laws and regulations covering employment issues that already existed by 1990, the Americans with Disabilities Act was passed in that year and, in 1991, Title VII of the Civil Rights Act was amended, making it easier to prove workplace discrimination, providing for jury trials in discrimination cases and compensatory and punitive damages of up to $300,000 in the more egregious cases. Both of these laws encourage the use of ADR for resolving disputes, as does the Administrative Dispute Reform Act (1990), which applies to federal government agencies. Discrimination charges filed with the Equal Employment Opportunity Commission (EEOC) increased from 72,302 in 1992 to 91,189 by 1994, and have exceeded 77,000 every year since then. Tens of thousands of additional charges involving workplace disputes are filed with other federal, state, and local agencies each year. ADR was introduced as a way to divert disputes from the courts and regulatory systems and to resolve them internally.

Additional stimulus was provided by the U.S. Supreme Court's 1991 decision in *Gilmer v. Interstate/Johnson Lane Corporation,* in which it refused to invalidate a standard securities industry agreement signed by the employees that required the arbitration of all disputes with the employer [7]. With this decision, some employers now saw the opportunity to require arbitration for employment disputes, rather than having their employees seek relief through the EEOC or the courts, and began to require employees to sign agreements to arbitrate as conditions of employment [8]. The issues surrounding the use of predispute arbitration

agreements, especially where statutory rights are involved, have proven to be highly controversial, as discussed below. In May of 1999, the Supreme Court granted *certiorari* to *Circuit City Stores v. Adams* [9], which some hope will settle the question of the applicability of the Federal Arbitration Act to employment contracts.

Other reasons for the adoption of employment ADR include 1) flexibility for resolving issues based on interests; 2) ability to give voice to employee concerns so as to correct problems before they result in losses of productivity and turnover; and 3) allowing the parties to maintain control over the dispute resolution process.

With the increased pace in ADR activity, lack of standards for workplace mediation and arbitration in the nonunion sector, and lack of uniform standards for training and qualification or mediators and arbitrators, voices of concern were raised. When it was formed in 1993, the Commission on the Future of Worker-Management Relations, chaired by former U.S. Secretary of Labor John Dunlop, was charged with addressing the question: "What (if anything) should be done to increase the extent to which workplace problems are directly resolved by the parties themselves, rather than through recourse to the state and federal courts and government regulatory bodies?" [10, p. 3]. In its report, issued in late 1994, the commission strongly supported "the expansion and development of alternative workplace dispute resolution mechanisms, including both in-house settlement procedures and voluntary arbitration systems that meet specified standards of fairness" [10, p. 52]. It further proposed quality standards for disputes involving statutory rights that are to be settled by binding arbitration. A U.S. Government Accounting Office (GAO) study, also published in 1995, showed that ADR procedures (particularly those involving arbitration), which were then in place at private sector employers, frequently lacked procedural and legal safeguards [4, pp. 12-14].

A Task Force on Alternative Dispute Resolution in Employment, comprised of representatives of the American Bar Association, American Arbitration Association, Society of Professionals in Dispute Resolution, American Civil Liberties Union, National Employment Lawyers Association, Federal Mediation and Conciliation Service, National Academy of Arbitrators, and the International Ladies' Garment Workers' Union, proposed a "Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship" [8, pp. 90-94]. The task force could not agree on the merit or predispute arbitration agreements for disputes involving statutory rights. The protocol, which was later adopted by dispute resolution services organizations such as the American Arbitration Association and JAMS/Endispute, the Department of Labor and the American Bar Association, among others, provides specific standards for mediation and arbitration agreements, representation of employees, and mediator and arbitrator qualifications, training, and conduct [8, pp. 90-94].

The EEOC published an Alternative Resolution Policy Statement in 1995, which stated what it considered the core principles of ADR use involving discrimination cases under its jurisdiction; it also set forth its guidelines for fairness in ADR: voluntariness, neutrality, confidentiality, and enforceability [11]. It later issued a policy opposing mandatory binding arbitration of employment disputes where it has been imposed as a condition of employment [12] and has issued a report describing "best practices" in ADR utilized at several U.S. corporations [13]. In 1999, the EEOC launched a voluntary mediation program for its field offices nationwide, as a vehicle for resolving charges of discrimination where all parties agree to mediation. Participants in the EEOC mediation program report high levels of satisfaction with the program, particularly the procedural aspects [14], although recently the agency has had to resort to volunteer mediators due to insufficient funding.

Since the mid-1990s, considerable activity has been directed toward establishing and/or upgrading standards for mediation and arbitration procedures. A uniform arbitration act has been adopted by thirty-five states, and a uniform mediation act has been drafted and is currently being revised, based on comments by attorneys and dispute resolution specialists. The American Arbitration Association, which provides arbitrators and mediators under many employer ADR policies, has updated and consolidated its rules and procedures, and issued them as the "National Rules for the Resolution of Employment Disputes" [15]. Committees made up of dispute resolution specialists, attorneys, and others have crafted voluntary guidelines for mediating disputes under the Americans with Disabilities Act [16], for voluntary mediation programs instituted by agencies charged with enforcing workplace rights [17], and "Principles for ADR Provider Organizations" (draft issued in June 2000) [18], among others.

Clearly the field of employment ADR is experiencing rapid change, and it is expected to continue doing so. Due to the relative newness of the developments, not much emphasis has yet been placed on evaluation and research. In 1997, the GAO examined employers' experiences with employment ADR. It found employers had concentrated their efforts on developing and launching their policies, but had devoted limited attention to collecting data useful for evaluating such programs. Typically, employers keep statistics on the number of complaints filed and their disposition. Based on a review of ten large corporations and federal agencies, the GAO noted: "to the extent that data were available, mediation, peer panels, management review boards, and arbitration . . . all appear to contribute to the resolution of workplace disputes. Mediation appeared to be particularly useful, leading to resolution in a high percentage of cases in all but one of the organizations we studied" [19, pp. 3, 26-27]. Lessons employers reported learning included: the importance of top management commitment to the program; importance of involving employees in the development of the program; the advantages of early intervention in a dispute; the necessity of balancing the desire to settle and close cases against the need for fairness; and the potential of the

program to help improve managers' understanding of the roots of conflict in the organization.

Another concern that has been raised is that the ADR process is becoming increasingly "legalized." A recent article on ADR in the *ABA Journal* noted that "Arbitration, mediation and the other ADR mechanisms now entail more rules, more delay and more expense—precisely the headaches that ADR was designed to avoid" [20, p. 63]. Others have questioned whether the emphasis on using ADR solely to avoid litigation misses "the potential for the self-evaluation of why the conflict arose in the first place" [21, p. 264]. The belief that ADR can provide greater benefits to both the organization and its employees than it often does underlies the two perspectives reviewed below—the systems approach, and conflict and organizational culture.

SYSTEMS APPROACH

A systems approach to employment ADR, which incorporates a range of procedures and seeks to improve the organization's ability to both prevent and resolve disputes, has gained wider attention in recent years. One of the earliest and still most influential books advocating a systems approach is *Getting Disputes Resolved,* by Ury, Brett, and Goldberg [22]. They argue that "the great advantage of a systems approach is that it addresses not just a single dispute but the ongoing series of disputes that occur in any organization or relationship [22, p. 171]. Their ADR systems design is based on six principles:

1. Put the focus of dispute resolution on interests (rather than rights or power).
2. Provide rights and power loop-backs to negotiation.
3. Provide rights and power backup where interest-based methods fail.
4. Prevention to head off disputes before they arise and postdispute feedback to prevent similar disputes in the future.
5. Arrange procedures in a low-to-high cost sequence.
6. Provide the motivation, skills, and resources necessary to make the procedures work [22, p. 171].

These principles are incorporated into most proposals for ADR systems design today. In 1996, Costantino and Merchant offered an organizational development (OD) approach to ADR systems design [23]. They strongly emphasized the need for stakeholder involvement in all stages of the employment ADR system, from needs analysis to design, implementation, and evaluation, and they opposed "expert"-imposed systems. They also recommended organizational development approaches for relationship building and implementing organizational changes where needed. They maintained that core values of "openness, tolerance of diversity, learning, involvement, appreciation of and management of differences, generation of valid data, and the search for feedback are particularly critical for

successful work with conflict itself and for the systematic management of it in any organization" [23, pp. 19-20].

A similar approach has been proposed by a working group (Track 1 Committee) of the Society of Professionals in Dispute Resolution (SPIDR), which recently released a draft of "Guidelines for the Design of Integrated Conflict Management Systems Within Organizations" [24]. The draft calls for integrated conflict management systems that have:

1. Breadth. They provide options for all types of problems and all people, including employees, supervisors, professionals, and managers.
2. They create a conflict competent culture that welcomes dissent and resolves conflict at the lowest level through direct negotiation.
3. They provide multiple access points.
4. They provide multiple options—both rights-based and interest-based.
5. They provide structures that coordinate and support the multiple access points and multiple options that integrate effective conflict management into the organization's daily operations [24].

Development of the ADR program for the Royal Canadian Mounted Police has been cited as an example of such principles at work. It is unclear at this point whether these principles will be adopted, but they do express current thinking on systems design. In this author's opinion, relatively few organizations are likely to commit themselves to such sweeping efforts, at least in the near future. On the other hand, the beliefs that conflict is inherent within organizations, that organizations can learn from conflict, that multiple ADR procedures are needed, and that stakeholder involvement is essential are more widely accepted today than was the case a decade ago.

ORGANIZATIONAL CULTURE

Employment-related disputes are usually multidimensional, involving various psychological, social, organizational, and often legal dimensions. But they are also cultural in nature. What we recognize as conflict, what we are willing to dispute over, how we conduct that dispute, and what we consider a satisfactory resolution are determined, at least in part, by the organizational culture within which we function. Organizational psychologist Edgar Schein defined organizational culture as

> A pattern of shared basic assumptions that the group learned as it solved its problems of external adaptation and internal integration, that has worked well enough to be considered valid and therefore, to be taught to new members as the correct way to perceive, think, and feel in relation to those problems [25, p. 12].

He elsewhere maintained that these "shared mental models that the members of an organization hold and take for granted" matter "because decisions made without awareness of the operative cultural forces may have implications and undesirable consequences" [26, pp. 3, 21]. ADR policies that are not consistent with organizational norms and values relating to conflict are not likely to be used. Bendersky provided an example of an organization where "culturally, it was expected that successful employees should confront problems with their peers and supervisors on a one-to-one basis. Needing a third party to help resolve conflicts implied an inability to perform an essential job function" [27, p. 309] and, therefore, a reluctance to use the organization's ADR procedures.

Recently, ADR specialists have begun to look at the role of organizational culture in conflict and conflict resolution, and its implications for the design of ADR systems. However, compared to the amount of attention that has been placed on national and gender differences in conflict and its resolution (especially negotiation) [28], the study of the relationship between organizational culture and employment-related conflict is in its infancy. In a review of research related to employment ADR, Bingham and Chachere acknowledged that "the culture of a workplace would be an important determinant of success in any dispute resolution intervention" [29, p. 102], but did not cite any specific research on the subject. In *Designing Conflict Management Systems,* Costantino and Merchant emphasized the importance of organizational assessment preliminary to systems design and specifically included the "culture of conflict" as an element of this assessment [23, pp. 98, 106]. They asked "how [does] the organization view conflict and how [does] it make decisions about conflict? Does the organization avoid conflict? Deny it? Fight it? Control it? Is conflict seen as a sign of failure?" [23, p. 98]. In their view, answers to these and other questions are essential in determining whether changes to the conflict resolution system are needed and even whether some form of ADR is appropriate.

Gourlay and Soderquist also recognized the importance of the conflict culture of an organization and explained how they believe it may differ from the more general organization culture [21]. They cited the example of a law firm that values aggressiveness in pursuing litigation, but has a low tolerance in dealing with internal conflict among its staff. Drawing on a German study, they posed four factors to be considered in analyzing the conflict culture of the organization:

1. *Historical perspective*—the "series of concrete events which are consistent with or reinforce beliefs about how conflict should be managed."
2. *Time perspective*—the "parameters created by the work environment which restrict or hamper opportunities for negotiation or conflict resolution."
3. *Proclivity*—the "tendency to deal with conflict in certain ways based on perceptions primarily about interpersonal relationships, whether or not they are reinforced by actual experience."

4. *Philosophy*—the "relationship between the explicit and implicit goals on an organization and the value it places on employees" [21, pp. 270-271].

This provides a framework for developing a description of the conflict within a specific organization. Undoubtedly, much more work needs to be done in this area. We are also beginning to see discussions of how a conflict cultural analysis (also known as an assessment) can be conducted [23, pp. 96-116; 30].

The SPIDR draft, "Guidelines for the Design of Integrated Conflict Management Systems Within Organizations," emphasized the importance of developing *conflict competent cultures*—those that welcome "good faith dissent and resolve conflict at the lowest level through direct negotiation" [24]. The guidelines envision that integrated conflict management systems both require and, at the same time, help develop a conflict-competent culture within an organization.

If they are to have an impact, conflict management systems—including ADR—must be used by those who have a dispute and by the organization. The view taken in this developing body of literature is that they are unlikely to be used unless they embody the underlying values of the organization. There are several implications for the design of ADR systems.

1. It is essential to understand the culture of the organization, including sub-cultures and its conflict culture, as part of the needs assessment. This will be useful in determining whether changes are needed in the handling of conflict and which ADR approaches may be appropriate.

2. Where the culture is supportive of conflict resolution, appropriate processes and procedures need to be developed jointly with the stakeholders. Expert-designed systems should not be simply imposed on the organization. It is important that an alignment exist between the ADR system design and the organizational culture.

3. Where the organizational culture is not supportive of ADR approaches, and where conflict is being handled in ways that are detrimental to the organization's health, organizational development (OD) interventions may be necessary to transform the culture. Disconfirming events—those that demonstrate the inadequacies or failures of the organizational culture—might include a major class-action suit involving sexual harassment or employment discrimination; inability to attract or retain a quality workforce; or events that shock organizational members, such as those involving a scandal. These can serve as warning signs that change is needed. In such situations, deliberate, planned interventions to change the organizational culture will be needed. Schein explained that such transformational change "involves having to unlearn beliefs, attitudes, values and assumptions as well as learning new ones" [26, p. 115]. Methods of organizational development can be used to accomplish the needed transformations, although the process involves a very significant commitment on the part of the organization.

While much more work needs to be done in the area of organizational culture and ADR, the approach that is currently developing is valuable inasmuch as it:

1. Directs us to examine the underlying values in an organization.
2. Provides a basic framework for understanding attitudes and behaviors toward conflict—the conflict culture.
3. Stresses the importance of stakeholder involvement in the analytical, design, and implementation stages of ADR.
4. Emphasizes the importance of appropriateness of ADR processes and the need to align these processes with the culture of the organization.
5. Provides methods for transforming organizational cultures.

ASSESSMENT AND CONCLUSIONS

Several points can be made regarding the use of ADR in employment disputes as it has developed over the past decade and as it is currently practiced in the United States.

First, employment ADR use is largely voluntary, inasmuch as it is not imposed by legislation, nor is it included in a contract negotiated with employees. An exception to this lies in individual employment contracts with executives and senior staff, which may include an ADR clause. Employment laws and regulations increasingly encourage employers to adopt ADR methods and, where they are utilized, courts and regulatory agencies may scrutinize them carefully for legal and procedural guarantees if employee statutory rights are involved. At this time considerable variability exists in the type, scope, and structure of ADR procedures, and they are being modified periodically. The ADR system also includes a variety of other organizations, including those that provide dispute resolution services, such as the American Arbitration Association, Jams/Endispute, and others, as well as the professional organizations to which dispute resolvers belong, such as the National Academy of Arbitrators and SPIDR. These organizations also influence practices and standards in the field.

Second, and most obvious, the system is oriented toward resolving individual disputes on a case-by-case basis after they have occurred, but before the issue is disposed of through the courts or a regulatory agency. It is a bit like closing the barn door after the horse has escaped, but before it has completely destroyed the garden. However well the issue in question is settled, there is no built-in process for addressing the underlying conditions that gave rise to the original dispute and thereby preventing recurrence of similar conflicts in the future. In short, the system does not have a preventive focus, nor does it build organizational capabilities for dealing with employee conflict, except perhaps in limited situations, where there is strong external pressure to do so. For example, some employers have undertaken fairly extensive efforts to reduce sexual harassment behavior within the organization, through policies, consciousness-raising, training, discipline, and cultural transformation—motivated by the threat of employee legal action.

Third, unlike in the unionized sector, the ADR policies are developed and implemented unilaterally by management. In the more extreme cases, they have

been imposed on employees as a condition of employment, and it is a *take it or leave* situation. Input on the design or implementation of the system is not solicited from employees. Expert assistance may be provided from legal counsel, human resource specialists, or consultants. With reference to this approach, Costantino and Merchant pointed out that "organizations use interest-based methods of dispute resolution but design them in a rights-based manner: The organization uses ADR but imposes the mechanisms on the disputants without identifying their concerns or preferences and without involving them in the design process" [24, p. 52]. This, they argued, "diminish(es) the incentives to use an imposed system of interest-based resolution methods" [23, p. 52]. Not surprisingly, the Cornell study cited above found "strong evidence that regaining control of the dispute resolution process is an important motivation" to adopting ADR policies [5, p. 19].

Fourth, the systems perspective to ADR and the application of organizational culture concepts to workplace conflict have the potential for greatly improving the ability of organizations to enhance their effectiveness in dealing with the conflicts that eventually can lead to open disputes and undermine organizational effectiveness. The systems approach, in particular, demands a substantial commitment on the part of the organization, both in terms of time and resources, but also to a set of values about employees and their relationship to the organization, which many employers may not be prepared to make. The cultural perspective sensitizes employers to the significance of past experiences and underlying values for the successful introduction of any ADR initiative from the seemingly small steps to the broader systems approach.

Fifth, there is a pressing need for research into, and evaluation of, ADR policies and procedures. Many employers express varying degrees of satisfaction with ADR and keep basic statistics on the numbers of types of disputes processed. However, we still don't know very much about how the ADR process is viewed by employees and disputants; what eventually happens to those who do, and don't, use the system; what procedures work best, and in what circumstances; and the overall impact on the organization [29]. This is understandable, considering the newness of the field, but without research and evaluation, further development of effective ADR approaches will be hampered.

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