

# CORNELL HR REVIEW

## Understanding ADR

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This essay provides a concrete understanding of Alternative Dispute Resolution (ADR) by analyzing Owen Fiss' article *Against Settlement*. Additionally, this essay provides insight regarding the role that the Human Resources (HR) function plays in the context of the dispute resolution process. Part I begins by introducing the concept of ADR. Part II provides an overview of Fiss' overarching argument presented in *Against Settlement*. Part III expands on Part II by discussing the three components that make up Fiss' argument. Part IV concludes by addressing the importance of understanding conflict management and dispute resolution from the perspective of HR professionals.

### **I. Introduction to ADR and implications for the HR function**

Alternative Dispute Resolution (ADR) is an important mechanism that has gained attention over the last several years. As explained by authors Colvin, Klass and Mahony, "ADR encompasses a range of procedures, such as mediation, arbitration, ombudspersons, and peer review, that provide an alternative mechanism for resolving disputes and conflicts, both in the workplace and in other settings" (p. 103). ADR, a modern dispute resolution mechanism, typically results in "settlement" between the disputing parties or what has been described by some as a "gentler art for reconciliation and accommodation" (Fiss, 1984). This dispute resolution mechanism joins, and often replaces, the more traditional dispute resolution mechanism called litigation. Litigation is different from ADR in that it typically results in an outcome of "judgment." Historically, litigation has been the primary dispute resolution mechanism of choice among businesses in the U.S.

### **II. An Overview of Fiss' Argument**

In *Against Settlement* Fiss takes the stance that settlement, which is often the outcome of ADR, undermines the goal of the court and by extension the procedures embedded within the court, such as trial and judgment, and its ultimate goal which is to provide justice for both parties involved in a dispute (Fiss, 1984). He believes that there is an overly optimistic and basic view of ADR that oversimplifies the function of the court and thereby masks the questionable, problematic premise of ADR (Fiss, 1984). Fiss states:

Supporters of ADR act as if courts arose to resolve disputes between neighbors who had reached an impasse and turned to a stranger for help. Courts are seen as an institutionalization of the stranger and adjudication is viewed as the process by which the stranger exercises power. The very fact that the neighbors have turned to someone else to resolve their dispute signifies a break down in their social relations; the advocates of ADR acknowledge this, but hope that the neighbors will be able to reach an agreement before the stranger renders judgment.

Settlement is that agreement. It is a truce more than reconciliation, but it seems preferable to judgment because it rests on consent of both parties and avoids the cost of lengthy trial (p. 2, 1984).

This is Fiss' general argument presented in *Against Settlement*, which is supported by three key components that will be discussed in the next section.

### **III. Specific Components**

#### **A. Component One**

The first key point supporting Fiss' general argument is related to the idea that when disputes are resolved by the use of ADR, financial inequalities may exist between the disputing parties. This can impact each party's available resources (Fiss, 1984). It is likely that the party that is not as financially stable will be negatively impacted. For example, "Resources influence the quality of presentation which in turn has an important bearing on who wins and the terms of victory" (Fiss, 1984, p.3). Judgment, unlike settlement, can lessen the impact of inequalities with the "guiding preference of a judge" (Fiss, 1984, p.3). Fiss explains, "He [the judge] can for example, supplement the parties' presentations by asking questions, calling his own witnesses, and inviting other persons and institutions to participate as amici" (Fiss, 1984, p. 3). Fiss states that ADR and settlement do not have this same opportunity and therefore must accept inequalities of wealth "as an integral and legitimate component of the process" (Fiss, 1984, p. 3).

Fiss is correct in pointing out this key difference, which does in fact exist. On the surface this appears to be a convincing argument, but I question the strength of this argument. The court system is open to the public and its goal is to make sure all parties are treated fairly (Lecture, February 2014). On the other hand, ADR occurs behind closed doors, which may prevent fair treatment for both parties. We must however ask the most obvious question: "How often do judges go out of their way to employ measures to lessen the impact of distributional inequalities?" Retired Illinois Appellate Court Justice Frossard provides her insight and states the following in answering this question: "Whether disputes are resolved in court or by way of ADR, inequities can occur. While I agree with Fiss, that the public nature of the trial process and the ability of the judge to supplement the process to equalize inequities may make the trial process fairer than settlement, I also question the strength of the argument. Under certain circumstances, ADR can provide a very fair setting in which to resolve contested cases. It is really the decision-makers and their commitment to fairness that dictates whether either process will achieve just results" (M., Frossard, Personal Communication, March 11, 2014).

#### **B. Component Two**

The second point made by Fiss, in support of his argument, is the idea that there is an absence of authoritative consent when ADR is the method chosen to resolve disputes (Fiss, 1984, p.4). Fiss explains that "those who speak on behalf of the individual or organization play a key role in disputed cases. An individual speaks for himself or herself

and should be bound by the rules he or she creates” (p.4). However, “In many situations, individuals are ensnared in contractual relations that impair their autonomy” (p. 3). Organizations typically choose an individual to speak on their behalf in the dispute resolution process and are “designed to facilitate transactions between the organizations and outsiders” (p.3). They do not ensure that members agree with their decisions (p.3). Additionally, conflicts of interest can exist when ADR is used (p.3).

Fiss takes the position that judgment and trial resolve conflict more effectively than ADR and settlement. He states that when litigation and therefore judgment are the chosen method, “there is a conceptual and normative distance between what the representatives do and say and what the court eventually decides, because the judge tests those statements and actions against independent procedural and substantive standards” (p.4). In contrast, a settlement is made without “benefit of a full trial and at a time when the judge cannot count on thorough presentations promised by the adversary system. The contending parties have struck a bargain and have every interest in defending the settlement and in convincing the judge that it is in accord with the law” (p.4 & 5).

I agree with Fiss’ argument that there is an absence of authoritative consent with ADR. We must, however, take this one step further and consider what is gained through ADR and the use of settlement when considering the absence of authoritative consent. It is true that when settlement occurs, the parties cannot benefit from a full trial. However, settlement [and ADR] saves time, money and relationships (Singer, 1984, p.11). For example, ADR avoids excessive delays in the courts (Colvin, Lass, Mahony, 2006). On average it takes an employee 709 days to get to trial (p.105). Additionally, ADR reduces the cost of litigation. As stated by Professor Ariel Avgar from the University of Illinois, “Transaction costs are often 2/3 or more of settlement costs” (Lecture at the University of Illinois, March 2014). Furthermore, the relationship can be preserved between the two parties, which is not always the case when litigation and therefore judgment and trial are used (Singer, 1984, p.11).

### **C. Component Three**

The final point Fiss makes to support his argument, is the belief that many disputes are long term and therefore require ongoing involvement of a judge. ADR and settlement are not suitable for ongoing disputes (Lecture at the University of Illinois, March 2014). Fiss supports this by explaining that in an ongoing dispute where settlement was previously used “a party will return to court and ask the judge to modify the decree, either to make it more effective or less stringent. But the judge is at a loss: He has no basis for assessing the request” (Fiss, 1984, p.5). When judgment is used, the judge is involved in both the trial and decision making process. Therefore, the judge understands the dispute from the perspective of both parties and understands the deeper societal implications (p.5). If judgment is used, a judge will not need to “reconstruct a situation at the time the decree was entered” (p.5).

I agree with component three, but we must consider an important factor not mentioned: determining the length of a dispute. Fiss does not explain how the parties involved in the

dispute can decipher whether or not a dispute will be short term or ongoing. To determine the length of a dispute, it is necessary to first consider the underlying desired, end goals of both parties. Each party must ask: “What do I want to achieve in terms of resolving this dispute?” Mark A. Welge is the president of Welge Dispute Solutions and is considered an expert in dealing with disputes. His statement to author Kevin Casey emphasizes the importance of determining the party’s end goal. He states, “If a party needs extraordinary relief, such as a restraining order or an injunction, legal precedent, or just wants retributive justice, these avenues are not available in most ADR processes. The courts are in a better position to provide that kind of relief” (Casey, 2006). Determining the underlying goals reveals whether or not a dispute is ongoing, and whether litigation or ADR is appropriate.

#### **IV. HR Implications**

Fiss remains skeptical of ADR and the settlement process and it is likely that Fiss would always select litigation and judgment over ADR and settlement. Unlike Fiss, I am less skeptical of the use of ADR and settlement and I believe that based on the nature and duration of the conflict, certain situations of conflict are better resolved by litigation and judgment while others are better resolved by ADR and settlement. Disputes that involve important legal principles and fundamental rights should be dealt with by using litigation and judgment (Singer, 1984). For example, disputes involving discrimination or environmental issues should be resolved in court (p.2-3). Determining whether or not a dispute involves important legal principles and fundamental rights is not black and white, given the constant changes of society (Lecture, March 2014). This creates ambiguity in the process of determining whether the nature of a dispute is better addressed through litigation and judgment. Disputes that do not involve important ongoing, legal principles should be dealt with by using ADR and settlement.

It is obvious that there is a level of uncertainty and difficulty in determining the forum in which a dispute should be resolved. Additionally, it is also clear that both litigation and judgment together with ADR and settlement are equally important processes in resolving disputes within organizations. Therefore, both deserve equal consideration when dealing with conflict. What is less readily apparent, however, are the implications that these processes and the topic of dispute resolution have for the HR function and by extension HR professionals.

Research shows that an organization’s human resources strategy directly influences how the organization chooses to deal with conflict. With this responsibility, HR professionals must decide when ADR and settlement or litigation and judgment are more appropriate. On a broader and arguably more significant level, this suggests that decisions related to dispute resolution, directly influenced by HR professionals, may have a direct impact on society—particularly when litigation and judgment are the method chosen to resolve dispute. As stated by Fiss, the benefits of the court system and by extension judgment are directly related to the power that this dispute resolution mechanism has in addressing the inequities of society. However, ADR and settlement do not have the same power that litigation and judgment have in terms of addressing the inequities of society. With that

being said, it is necessary to note how uniquely situated HR professionals are in terms of their responsibility and duty to accurately determine the most appropriate method of dispute resolution. It is critical that HR professionals choose the most appropriate dispute resolution mechanism by not only looking at the issue with solely the interests of the organization in mind, but by also considering the possible deeper societal implications that may result from such a decision. ✎

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