

# RESEARCH ON ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

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Alternative dispute resolution (ADR) encompasses a range of procedures, such as mediation, arbitration, ombudspersons, and peer review, that provide alternative mechanisms for resolving disputes and conflicts, both in the workplace and in other settings. In the field of employment relations, recent years have seen a growing number and diversity of ADR procedures used, particularly in nonunion workplaces and in resolving employment law disputes (Ewing 1989; Feuille and Delaney 1992; Feuille and Chachere 1995; Colvin 2003a). Much of the past research on ADR has focused on the general question of what the most effective technique is for resolving conflicts. The assumption behind much of this research is that the primary goal of dispute resolution is simply the efficiency of resolution and that this is a goal shared by all parties. But dispute resolution does not occur in a vacuum, separated from other aspects of work and employment relations. Indeed, one of the initial questions to be addressed in evaluating ADR procedures is what they are an “alternative” to. Evaluating the impact of ADR procedures depends in large measure on how one evaluates the process that ADR is replacing. Furthermore, recent research is increasingly recognizing that ADR procedures can have a number of different outcomes for and impacts on different parties to a dispute. The impact of ADR procedures may be evaluated very differently for employers versus employees, but also for employees directly involved in disputes versus other employees in the same workplace.

We begin this chapter by reviewing the major developments that have led to the importance of and controversies over ADR in employment relations. Then we examine the distribution of ADR procedures and the determinants of their adoption. Next we look at the research on determinants and consequences of employee use of ADR, as well as the consequences for those employees’ firms. Lastly, we address the growing body of research on decision making within ADR systems.

## **Developments within ADR: Why Should We Care?**

A number of factors make ADR procedures of particular importance in contemporary American employment relations. The first of these is the limited extent of due process protections in the American workplace. The basic legal principle governing employment in the United States is “employment at will,” which provides that an employer may fire an employee for good reason, bad reason, or no reason at all (Dunford and Devine 1998; Wheeler, Klaas, and Mahony 2004). Although partly tempered by the extensive body of employment discrimination law and more limited state-court exceptions, employment at will continues to be the governing legal principle for the vast majority of workplace disputes in the United States (Wheeler, Klaas, and Mahony 2004). In contrast to many European and other industrialized countries, there is no system of labor courts or employment tribunals to which an employee can turn for recourse in the event of a routine complaint of unfair treatment in the workplace that does not involve an allegation of discrimination.

At one time, it was plausible to think that the system of grievance procedures and labor arbitration based on collective agreements developed in the unionized setting would provide the general mode of workplace dispute resolution in the United States (Kerr et al. 1960). In the 1950s heyday of the New Deal industrial relations system, with around a third of the workforce unionized, it may have seemed reasonable to assume that the unionized workplace labor grievance-arbitration system would eventually spread to govern most workplaces and most disputes. However, with the decline of union representation to 12.5% of the workforce by 2005 (U.S. Bureau of Labor Statistics 2006), it is clear that, while important for this segment of the workforce, the labor grievance-arbitration system is not providing a general mechanism for resolving workplace conflicts. For this reason, the

adoption of ADR procedures in nonunion workplaces, where the majority of employees are located, becomes especially important. For researchers, a key question is the degree to which nonunion ADR procedures can or do provide some degree of alternative to the grievance-arbitration procedures of the unionized workplace.

Perhaps surprisingly, given the employment-at-will principle, the second major factor driving developments in ADR is the growth and impact of employment litigation. Although American employment law is built around exceptions to employment at will, in the areas where exceptions exist, particularly for employment discrimination, legal disputes are characterized by a high intensity and resulting major impacts on employment relations (Colvin 2006).

Employment litigation in the United States can be viewed as a high- risk, high-stakes system of dispute resolution. The steps required for an employee to establish a valid legal claim are in many respects daunting, yet they hold a chance of yielding a substantial award against the employer. An employee seeking to make a legal claim against an employer must first ensure that the dispute involves one of the categories of discrimination that can be the subject of legal claims. Research on grievance procedures that allow both discrimination- and nondiscrimination-based grievances suggests that at most only 5% to 10% of workplace disputes involve discrimination (Lewin 1987), indicating that most employee claims will not pass even the first legal hurdle. Second, the litigation process itself is long and uncertain, with many employee claims being dismissed on preliminary motions before trial. Although each year more than 60,000 discrimination complaints are filed with the Equal Employment Opportunity Commission (EEOC) and more than 20,000 claims of employment discrimination in the courts, the total number of awards in the federal courts between 1994 and 2000 was only 1,298 (Eisenberg and Schlanger 2003; Clermont and Schwab 2004). In a study of how employment

discrimination plaintiffs fare in the federal courts, Clermont and Schwab (2004) describe a “litigation pyramid” in which such plaintiffs are more likely than non-employment-case plaintiffs to have their cases dismissed based on a preliminary motion before trial, less likely to win at trial, and more likely to have judgments in their favor overturned on appeal. The average employee claim takes an average of 709 days to get to trial, some two and a half years (Eisenberg and Hill 2003). However, among employees who are successful, awards are substantial; in a segment of cases they have been very large, running into the millions of dollars. In a study of employment-discrimination verdicts in the federal courts between 1994 and 2000, Eisenberg and Schlanger (2003) found a median award of \$110,000 but a mean award of \$301,000, reflecting the strongly skewed distribution of awards, with a minority of very large ones inflating the mean figure.

Taken together these elements suggest a system that presents substantial barriers to success for an employee litigant, yet offers a small chance of obtaining a very large award. Conversely, for an employer, the system may seem to involve fighting off a large number of unmeritorious claims, in the sense that many are ultimately dismissed, yet require substantial legal expenses to obtain those dismissals (Estreicher 2001). In addition, the employer runs the ongoing risk of being subject to one of the few very large litigation verdicts, which may be expensive and attract negative publicity. From this perspective, ADR procedures that hold out the possibility of a simpler, faster, and cheaper mechanism for resolving potential legal claims, with the added benefit of avoiding negative publicity, hold very substantial attractions for employers (Stone 1999; Colvin 2001; Wheeler, Klaas, and Mahony 2004). For the employee, ADR that involves less time and expense in resolving a claim, particularly in the more typical cases where a mega-verdict is unlikely, could also hold significant attractions (Colvin 2001; Estreicher 2001). However, although the time, expense, and uncertainties in employment litigation

create incentives for both employers and employees to favor the development of ADR, the two groups will not necessarily desire the same type of alternative. This became evident in the storm of controversy and disputes in the 1990s surrounding the development of employment arbitration as an ADR alternative to litigation.

The primary impetus for developing employment arbitration as an alternative to litigation came from a shift within the legal system itself. During the 1980s the Supreme Court in a series of cases reversed a longstanding skepticism among the courts toward using arbitration to resolve statutory claims (Stone 1999). These developments occurred outside the employment area and involved acceptance of the arbitrability of claims based on statutes in such areas as antitrust, RICO, and securities law. For employment law, the key extension of these decisions came in the 1991 case of *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20 (1991), where the Supreme Court for the first time held that a claim based on an employment statute, in this case the Age Discrimination in Employment Act, could be subject to arbitration. For employers, the *Gilmer* decision held out the possibility of adopting employment arbitration procedures that would replace the uncertainties and risks of large jury awards, with a simpler, faster procedure in which professional arbitrators would be unlikely to render mega-verdicts with large punitive and compensatory damage components (Colvin 2001; Estreicher 2001). Over the course of the 1990s, large numbers of employers began requiring employees, as a mandatory term and condition of employment, to enter into arbitration agreements covering any potential legal claim against the employer (Colvin 2004c).

For many employee advocates, the spread of mandatory employment arbitration was a disturbing development that threatened to undercut the protections contained in employment discrimination law (Stone 1996, 1999; Zack 1999). Criticism focused particularly on the combination in

employment arbitration of the procedures being introduced as mandatory conditions of employment at the sole initiative of the employer; the resulting ability of the employer to determine the rules under which arbitration would occur, including the presence or absence of due process protections; and the role of the employer as a repeat player in arbitration against the one-time player individual employee (Bingham 1995, 1996, 1997). In a colorful analogy, Stone (1996) compared the new mandatory agreements to the old “yellow-dog” contracts through which employers in the early 20th century sought to bar employees from joining unions.

After a series of lower court decisions addressing the implications of the *Gilmer* decision, in 2001 the case of *Circuit City v. Adams*, 532 U.S. 105 (2001) resolved remaining doubts concerning the enforceability of arbitration agreements within employment contracts in favor of arbitrability. This reaffirmation of the enforceability of mandatory arbitration agreements and the absence of congressional action to reverse the Supreme Court decisions in this area have shifted the debate toward what standards for due process in the procedures should be required for arbitration agreements to be enforced (Leroy and Feuille 2003; Colvin 2004a; Wheeler, Klaas, and Mahony 2004). The courts have indicated a growing willingness to decline to enforce agreements lacking due process protections, based on the doctrine of unconscionability (Leroy and Feuille 2003). There have also been efforts in the professional dispute resolution community to establish due process standards for employment arbitration. In 1995 a coalition of groups, including the National Academy of Arbitrators, the American Arbitration Association, the American Bar Association, the American Civil Liberties Union, the Federal Mediation and Conciliation Service, the National Employment Lawyers Association, and the Society of Professionals in Dispute Resolution, developed a due process protocol setting out minimum standards for fairness in employment arbitration procedures (Dunlop and Zack 1997; Zack 1999).

Although employers are not required to follow the protocol, the American Arbitration Association, a major arbitration service provider, indicated that it would follow the provisions in arbitrations that it administers (Wheeler, Klaas, and Mahony 2004). Enforcement of mandatory employment arbitration procedures continues to be among the most controversial issues in the ADR field. Empirical research has an important role to play in the debates. Later in this chapter we examine the growing body of empirical research on the extent, operation, and impact of employment arbitration procedures.

While legal and due process issues are important reasons to focus on developments in ADR, it should also be recognized that dispute resolution and workplace conflict management have potential implications for organizational performance. The impact of conflict and dispute resolution on organizational performance was notably demonstrated in a series of studies in the 1980s that showed a strong link between high levels of grievances and intense workplace conflict in unionized plants and poor levels of performance (Katz, Kochan, and Gobeille 1983; Katz, Kochan, and Weber 1985; Norsworthy and Zabala 1985; Ichniowski 1986). The studies focused primarily on the relationship between grievance rates and performance outcomes in unionized workplaces. Cutcher- Gershenfeld (1991) subsequently extended the analysis of the relationship between dispute resolution and organizational performance by including other aspects of conflict resolution. In particular, he found that both less-frequent conflicts and faster resolution of grievances at earlier, more informal stages were associated with higher performing, transformed patterns of workplace industrial relations. In studies of the relationship between human resource and industrial relations practices and organizational performance, both Arthur (1992) and Huselid (1995) similarly proposed aspects of grievance procedures as features of high- performance work systems. In each of these studies, however, the measures of dispute resolution proposed as forming an element of high-performance



work systems were based on either the extent of access to or use of formal grievance procedures, in contrast to the idea in the previous studies that within formal grievance procedures more informal resolution of conflict is associated with better performance. Although these studies feature contrasting approaches to conceptualizing the relevant elements of dispute resolution, they all reinforce the importance of considering how dispute resolution procedures and activity affect organizational performance.

### **What Are Firms Doing with ADR?**

When describing ADR procedures in the workplace it is first necessary to distinguish between union and nonunion workplaces. Grievance procedures in unionized workplaces have a distinctive history, structure, and role in labor relations as the primary mechanism for resolving disputes about the application of labor contracts (Lewin and Peterson 1988). By contrast, nonunion procedures are introduced at the initiative and discretion of employers, and their structures and roles vary widely with the different reasons for their adoption and the preferences and choices of management.

#### **Union ADR Procedures**

The system of labor arbitration for resolving disputes in unionized workplaces is in some respects itself an ADR procedure. Labor arbitration provides an alternative to industrial conflict, particularly strikes, as a mechanism to resolve disputes. This role is a primary justification in labor law for the strong deferral of the courts to arbitration procedures in resolving disputes in unionized workplaces. At the same time, labor arbitration is an alternative to the courts for resolving workplace disputes concerning the application of labor contracts (Stone 1981). However, while labor arbitration was developed as a flexible alternative procedure to industrial action and the courts, over time it has

itself developed into a well-established, standardized set of procedures. Resulting concerns about the growing formalization, cost, and slow pace of modern labor arbitration have led to the expansion of ADR procedures developed as alternatives to traditional grievance and arbitration procedures in unionized workplaces (Feuille 1999).

The two most commonly used ADR procedures in unionized workplaces are expedited arbitration and grievance mediation. Expedited arbitration involves using simplified, less formal arbitration procedures directed at ensuring faster, less costly resolution of grievances (Zalusky 1976). The types of rule changes used in expedited arbitration include shorter, strictly enforced time limits for filing grievances; simplified presentation rules for arbitration hearings, such as limitations to written submissions; limitations on the length of arbitration hearings; use of a single arbitrator rather than a panel of arbitrators; time limits for the arbitrator to render a decision; and simplified decisions, such as a simple acceptance or rejection of the grievance.

Whereas expedited arbitration represents a simplified form of standard labor arbitration, grievance mediation provides a more genuine alternative to traditional procedures, with a mediation step being included before arbitration occurs (Feuille 1999). In an important study supporting the effectiveness of grievance mediation as an ADR procedure, Ury, Brett, and Goldberg (1988) examined the impact of grievance mediation in a coal mining workplace that was experiencing very high grievance levels and an inability to resolve grievances prior to arbitration. The introduction of grievance mediation in this setting led to a sharp increase in the resolution of grievances prior to arbitration, reducing the time and cost of grievance resolution, as well as improving the workplace relationship between the union and the employer. However, there is a paradox; although studies have shown strong positive impacts of grievance mediation, only around 3% of labor contracts include a step for it

(Feuille 1999). Feuille argues that the explanation is that grievance mediation is a relatively fragile and limited process that works only where both parties are committed to it, whereas management in particular often prefers arbitration as a way to pressure unions to drop marginal grievances and as a more robust mechanism for ensuring resolution of difficult grievances.

Although expedited arbitration and grievance mediation are important ADR procedures in unionized settings, arguably more striking is the relative uniformity and continuity of labor arbitration and grievance procedures (Eaton and Keefe 1999). Grievance procedures culminating in labor arbitration and relatively similar in structure are found in almost all unionized workplaces and have changed relatively little in form or role over the last half-century—a statement that could not be made about many other aspects of labor relations. By contrast, when we turn to ADR procedures in nonunion workplaces, the most striking features are the variation and diversity in procedures and the high degree of change over time.

### **Nonunion ADR Procedures**

A series of surveys over the last two decades suggest that half or more of organizations have some type of formal dispute resolution procedure for nonunion employees (Berenbeim 1980; Delaney, Lewin, and Ichniowski 1989; Edelman 1990; Feuille and Chachere 1995; Colvin 2003a; Lewin 2004, 2005). Modern ADR procedures in nonunion workplaces come in a variety of forms and structures. One broad differentiation is those where the ADR actor or decision maker determines a resolution of a dispute involving an employee and those where the ADR actor facilitates the resolution of the dispute. Arbitration is a classic determination-based ADR procedure, whereas mediation is a classic facilitation-based ADR procedure. Arbitration and mediation procedures are both found among ADR procedures in

nonunion workplaces, but a number of additional types of determination and facilitation procedures are also employed.

*Determination procedures.* Determination-type procedures vary widely in their formality, due process protections, and decision makers. The most basic determination procedures involve employee appeal of complaints or grievances to a higher-level manager or managers, who then render a decision. The employee is typically instructed whom to initially direct the complaint to and whom the decision can be appealed to if the employee remains dissatisfied. These procedures may involve a number of steps, but in many, and likely most, nonunion procedures an individual higher-level manager is the final decision maker to whom the employee can appeal (Lewin 1993, 2005; Feuille and Chachere 1995). An obvious due process limitation of determination procedures is the lack of neutrality of the decision maker. Procedures that appeal to higher management can vary widely in their impact depending on the effort and attention managers put into their operation. In some basic “open door” procedures, employees are simply invited to bring their complaint to any manager, whose door will be “open” and who will attempt to resolve the problem (Feuille and Delaney 1992; Wheeler, Klaas, and Mahony 2004). Such procedures are obviously highly dependent on the goodwill of the individual manager contacted, and in some instances they may be so lacking in structure that they are little more than an informal procedure. Other determination procedures include those at IBM (which evolved out of an early open door procedure), where active investigation of disputes by higher-level management is directed from the CEO's office and involves substantial commitment of resources and rapid response to employee complaints (Ewing 1989). An important variation on the appeal to higher management procedures is the use of management appeal boards (Feuille and Chachere 1995). A panel of managers, typically three relatively senior executives, hears and decides employee complaints. An appeal board

represents a more formalized approach to hearing and resolving disputes, involving substantially increased commitment of company resources in terms of the time of the executives on the board.

The most important recent innovation in determination-type procedures is the use of nonmanagerial decision makers. One type of procedure in this category is peer review panels, in which a majority of the panel that hears and decides employee complaints about unfair treatment in the workplace are employee peers of the grievant instead of managers (Cooper, Nolan, and Bales 2000; Colvin 2003a, 2003b, 2004a). Some review panels do exist where peer employees are a minority and managers the majority of panel members, but it appears that more procedures have a majority of employees (Feuille and Chachere 1995). Peer review panels got their initial impetus from a widely publicized model developed at a GE plant in the 1970s, where three peer employees and two managers sat on a panel to resolve grievances (Ewing 1989; Grote and Wimberly 1993). Over the 1980s and 1990s, peer review panels were adopted by increasing numbers of companies. In their 1992 survey of nonunion grievance procedures, Feuille and Chachere (1995) found that 5.1% of firms surveyed had either majority or minority peer review panel procedures. In a 1998 survey of telecommunications companies, Colvin (2003a) found that 15.9% had peer review panel procedures. The higher incidence of peer review procedures in Colvin's study may partly reflect the more frequent adoption of these procedures as union substitution devices in an industry where there are relatively high levels of unionization and active organizing campaigns (Colvin 2003a).

Employment arbitration is the second major type of determination procedure involving nonmanagerial decision makers. As discussed earlier, employment arbitration received a major impetus from the Supreme Court's *Gilmer* decision in 1991, holding that claims based on employment statutes could be subject to arbitration agreements. Evidence indicates that adoption of employment

arbitration procedures for nonunion employees spread rapidly following the Gilmer decision. In Feuille and Chacheres survey conducted in 1992, only 2.1% of respondent firms had adopted employment arbitration procedures (Feuille and Chachere 1995). By contrast, a 1995 survey by the Government Accountability Office found that 9.9% of companies subject to federal contractor reporting requirements had adopted employment arbitration procedures (General Accounting Office 1995). Further supporting the trend of growth, Colvin's 1998 survey of establishments in the telecommunications industry found that 16.3% had adopted employment arbitration procedures. A later 2003 survey of telecommunications industry establishments with a larger sample size, also conducted by Colvin, found a similar though slightly lower 14.1% incidence rate for employment arbitration procedures (Colvin 2004c).

*Facilitation procedures.* Two important innovations in nonunion workplaces are mediation and ombudspersons used in facilitation-type procedures (Bingham 2004; Wheeler, Klaas, and Mahony 2004). Mediation as a nonunion ADR procedure received an indirect boost from the expansion of employment arbitration in the wake of the Gilmer decision (Feuille 1999; Wheeler, Klaas, and Mahony 2004). Although arbitration may have advantages for employers compared to litigation, it still can involve substantial expense. Mediation may offer faster, cheaper resolution of disputes, with the added benefit that facilitation of a negotiated settlement of a dispute allows greater likelihood of being able to maintain a successful ongoing employment relationship (General Accounting Office 1997; Bingham 2004; Colvin 2004a). Although much greater attention has been paid to employment arbitration procedures, some evidence suggests increased adoption of mediation procedures used in conjunction with employment arbitration, typically as a prearbitration settlement step (General Accounting Office 1997; Colvin 2004a). Public agencies have also launched major initiatives to encourage mediation of

employment discrimination disputes (Bingham 2004). At the federal level, the EEOC has launched extensive mediation programs (Lipsky, Seeber, and Fincher 2003; Bingham 2004), while at the state level the Massachusetts Human Rights Commission launched a mediation and arbitration program for employment discrimination claims (Kochan, Lautsch, and Bendersky 2002). Mediation has also been adopted by a number of public sector employers as a major component of ADR procedures for resolving employment disputes (General Accounting Office 1997; Bingham 2004).

In contrast to mediation, which generally involves using an external third-party neutral to resolve specific disputes, ombudsperson procedures involve establishing an office or an individual in a standing position in the organization to facilitate conflict resolution (Kolb 1987; Bingham and Chachere 1999; Bingham 2004; Wheeler, Klaas, and Mahony 2004). Ombudspersons can help facilitate the resolution of disputes between individuals in an organization through conciliation and mediation techniques. The role of the ombudsperson as a standing position can bring advantages in greater knowledge of organizational procedures and processes, as well as development of respect from management and employees through successful resolution of conflicts over time. On the other hand, an ombudsperson remains an employee of the organization and does not fulfill the same role as an external third-party neutral mediator or arbitrator (Cooper, Nolan, and Bales 2000). For this reason, a federal circuit court denied an employer's argument that an ombudsperson should receive the same privilege as a mediator against being required to testify in an employment discrimination case (Carman v. McDonnell Douglas, 114 F.3d 790 [8th Cir, 1997]). Systematic evidence is lacking on how widespread ombudsperson offices are.

## **Determinants of Firm Practices**

With the virtual universality of labor arbitration and grievance procedures in unionized workplaces, the incidence of these procedures depends primarily on the extent of union representation. By contrast, given that adoption of ADR procedures in the nonunion workplace is at the discretion of management and, as outlined, various different types of procedures can be adopted, it is important to consider what factors influence the adoption of nonunion ADR procedures. A number of factors, both external and internal, come into play in explaining the adoption of and variation in nonunion ADR procedures. External pressures that may lead to the adoption of procedures include potential threats of union organizing and litigation pressures from the legal system. Internal influences include both general human resource management strategies and more specific conflict management strategies.

### **External Factors**

*Union substitution.* In union substitution strategies, management in a nonunion establishment adopts employment policies similar to those of comparable unionized workplaces to reduce the relative attractiveness of unionization. Given that arguments about workplace justice and unfair treatment have been found to be particularly effective for unions in organizing drives (Bronfenbrenner 1997), management following union substitution strategies has a strong incentive to offer at least a partial substitute for the strong grievance procedures of unionized workplaces. This type of substitution was an important factor in the early development of nonunion ADR procedures. Many of the early procedures were responses to the labor arbitration and grievance procedures becoming common in unionized workplaces from the 1940s onward. A well-known example is the procedure adopted at



Northrop Corporation in the context of substantial union organizing activity in the aircraft industry in the late 1940s, which included arbitration as the final step of a multistep grievance procedure closely paralleling what existed in unionized workplaces (Westin and Felieu 1988).

Although past accounts emphasized the role of union substitution in the development of nonunion ADR procedures (e.g., Berenbeim 1980), more recently some authors have questioned the continued importance of unionization threats given the decline in overall union representation (e.g., Feuille and Delaney 1992). However, the success of union substitution strategies is itself one of the plausible factors behind the decline in unionization rates, suggesting that these strategies could still be in wide use during a period of declining unionization. Research on the impact of union wage increases on nonunion wage setting has also shown that it is possible for union substitution strategies to play an important role even in industries where overall unionization is relatively low and concentrated in certain firms (Taras 1997). In a study specifically examining these effects on the adoption of nonunion ADR procedures, Colvin (2003a) found support for union substitution as a factor in the adoption of procedures in the telecommunications industry. Given that union representation and organizing activity in the United States tend to be concentrated in particular industries, these findings suggest that the role of union substitution in the adoption of nonunion ADR procedures is likely to vary by industry. As a result, rather than leading to uniform adoption of ADR procedures, union substitution is a factor likely to produce substantial variation in the adoption of procedures between different nonunion workplaces, depending on the level of unionization threat.

Union substitution as a motivation is also likely to influence the type of nonunion ADR procedures that organizations adopt. In particular, the development and adoption of peer review panel procedures have been strongly associated with union substitution strategies. Indeed, the prototypical

peer review panel procedure adopted at a GE plant in the late 1970s was introduced directly as part of a union substitution strategy after a series of unsuccessful organizing drives at the plant (Ewing 1989). In a more recent example, the peer review procedure developed at the automotive parts manufacturer TRW was strongly influenced by the continued unionization threat in that industry (Colvin 2004a). More generally, in Colvins study (2003a) of the adoption of nonunion ADR procedures in the telecommunications industry, union substitution was strongly associated with peer review panels, but not with other types of nonunion ADR procedures. Peer review panels offer a particularly useful union substitution tool for employers given that they allow employees to become involved in the process of remedying unfair treatment in the workplace (Colvin 2003a).

*Legal pressures.* Pressures from the legal system are the second major external factor leading to the adoption of nonunion ADR procedures. Among different types of procedures, employment arbitration is currently most strongly associated with litigation avoidance motivations, given the preclusive effect of arbitration agreements on employment law claims recognized by the Supreme Court in *Gilmer* in 1991 (Stone 1999). The likelihood that a company will adopt employment arbitration procedures depends on both its evaluation of the relative advantages of arbitration compared to litigation for resolving employment law claims and its evaluation of the level of litigation threat it is exposed to (Colvin 1999, 2003a). For example, some companies adopted employment arbitration procedures in direct response to increases in levels of litigation by employees, particularly in the wake of the rise in white collar employee downsizing in the early 1990s (Colvin 1999, 2004a). More generally, indicators of greater risk of litigation have been found to be associated with the adoption of employment arbitration procedures (Colvin 2003a).

In addition to the direct effect of the potential for litigation substitution on the development of

employment arbitration, legal pressures may also provide an incentive for adopting other types of nonunion ADR procedures. A substantial body of research by sociologists in the neoinstitutional theory tradition has linked the expansion of employment discrimination laws and the adoption of nonunion grievance procedures by organizations (Edelman 1990; Sutton et al. 1994; Sutton and Dobbin 1996; Edelman, Uggen, and Erlanger 1999; Godard 2002). In explaining the relationships observed in their studies, these scholars emphasize the normative role of models of due process drawn from the legal system that are translated into the design of legalistic grievance procedures (Edelman 1990; Edelman, Abraham, and Erlanger 1992; Edelman, Uggen, and Erlanger 1999). A key component of this argument is the idea that direct or rational responses to the threat of litigation cannot explain the adoption of typical nonunion grievance procedures, since these procedures, unlike the employment arbitration procedures developed following Gilmer, would not bar employees from going to court (Edelman 1990; Sutton et al. 1994; Sutton and Dobbin 1996; Edelman, Uggen, and Erlanger 1999). The problem with this argument is its failure to recognize that even without having a legal effect of barring employees from going to court, nonunion ADR procedures can provide a substantial advantage to employers simply by leading to the resolution of disputes in the workplace that might otherwise provide the basis for a legal claim. A recent study comparing organizations in the United States and Canada found a significantly greater rate of adoption of nonunion grievance procedures in the United States, which was partly explained by greater concerns about litigation threats among the American employers (Colvin 2006).

### **Internal Factors**

*Human resource management strategies.* In contrast to the external pressures of union organizing and litigation, human resource management strategies can provide an internal impetus to

the adoption of nonunion ADR procedures. What are variously described as high- performance, high- involvement, or high-commitment work systems are claimed to enhance organizational performance by increasing employee commitment and involvement in the workplace (Walton 1985; Bailey 1993; Delery and Doty 1996; Ichniowski et al. 1996). Organizational justice theory suggests that nonunion ADR procedures may contribute to the performance of these systems by increasing employee justice perceptions and enhancing commitment to the organization (Sheppard, Lewicki, and Minton 1992; Folger and Cropanzano 1998). In an experimental study, Olson-Buchanan (1996) found that access to a grievance procedure increased employee willingness to continue working for their organization. In studies of high-performance work systems (HPWS), Huselid (1995) found that formal grievance procedures loaded on an HPWS factor, whereas Arthur (1992) postulated but did not find an association between formal grievance procedures and a high-performance cluster of work practices. More recently, a study using data from the Canadian Workplace and Employee Survey found that both the use of self-directed work teams and job rotation and an index of high- commitment practices predicted the presence of nonunion grievance procedures (Colvin 2004b). Among specific types of nonunion ADR procedures, Colvin (2003a) found a significant association between the adoption of self-directed work teams, one of the most characteristic HPWS practices, and the adoption of peer review procedures. Case study evidence suggests that HPWS strategies may also affect the design of specific procedural features, such as including stronger due process protections to avoid employee perceptions that the procedures are ineffective or biased toward management (Colvin 2004a).

*Conflict management strategies.* Adoption and design of nonunion ADR procedures will also be influenced by the more specific conflict management strategies of management. Lipsky, Seeber, and Fincher (2003) argue that organizations adopt one of three broad categories of conflict management

strategy, which they describe as the “Contend,” “Settle,” and “Prevent” strategies. Whereas organizations adopting a Contend strategy will be unlikely to adopt any type of procedure and simply oppose any claims against them, organizations adopting a Settle strategy will be more open to ADR procedures but will focus on simply resolving specific disputes as they arise. By contrast, organizations following a Prevent strategy will adopt systems that seek to proactively identify sources of conflict and prevent them from turning into costly disputes. A related idea that has gained prominence in the ADR literature is that organizations should develop integrated dispute resolution or conflict management systems (Constantino and Merchant 1996; Bendersky 2003). Advocates of this approach argue that these systems should provide employees with a range of options for resolving conflicts (Bendersky 2003). As with HPWS, conflict management strategies may interact with other factors in the development of nonunion ADR procedures. For example, strong litigation or union organizing pressures may help motivate an organization to follow a Prevent conflict management strategy. Similarly, concern for the effective resolution of employee grievances in an organization following an HPWS strategy may encourage the development of an integrated or complementary dispute resolution system.

### **Why Do Employees Use ADR?**

While employers may differ in why they implement ADR systems, such systems all function to provide employees with some form of voice in the workplace (Colvin 2003a). The voice offered by such systems may well be significant. However, it is important to note that ADR systems are typically used far less often than grievance systems in unionized organizations (Lewin 1990; Feuille and Delaney 1992). This relatively low rate raises questions about what factors encourage and what factors inhibit

individual use of ADR within work organizations.

In examining the determinants of employee use of ADR systems, it is important to note that ADR utilization can take very different forms (Lewin 1987). For example, most ADR systems involve multiple steps, with the first step being relatively informal. Employees with concerns regarding whether they are being treated fairly or in a way that deprives them of their legal or contractual rights are encouraged to first address their concerns with their supervisors. Because of their informal nature, such discussions avoid public accusations regarding wrongdoing and allow for cooperative efforts to resolve concerns or problems. By contrast, later stages in ADR systems often involve appeals to a neutral party, such as a peer review board or an employment arbitrator (Colvin 2003b). At these later stages, the appeal is more formal and inevitably requires that claims be made public. Implied in taking such action is a statement about the perceived need for the intervention by a neutral party (Feuille and Chachere 1995; Bendersky 2003; Colvin 2004a).

We argue here that the determinants of ADR utilization vary with the form of ADR (Arnold and Camevale 1997). Consistent with this argument, Olson-Buchanan and Boswell (2002) found that where the ADR process was more informal, employee loyalty was a more important determinant of usage than when the process was formal. Building upon their findings, we argue that the determinants of usage for the first stage in the ADR process will likely be very different from the determinants of usage at later, more formal stages in the appeal process. We begin by discussing factors likely to encourage or to inhibit use of the first step in the typical ADR system.

### **Initial-Stage Usage**

The initial step in most systems of ADR is informal in nature. Employees are directed to

communicate directly with their supervisors about any concerns they might have regarding how they have been treated by the employer (Lewin 1999; Colvin 2003a). The informal nature of this first step is a critical contextual factor (Sheppard 1984).

Figure 1 displays the likely determinants of ADR usage at the initial step. ADR usage is thought to be directly determined by employee perceptions regarding mistreatment, either by the employee's manager or by the application of organizational policy (Klaas 1989; Boswell and Olson-Buchanan 2004). However, the likelihood of an employee's actually perceiving mistreatment is, in turn, likely to be a function of employee attributes. Whether a decision is viewed as fair, inconsistent with past precedent, or a violation of organizational or legal policy is likely to depend on attitudes about the decision maker (Groth et al. 2002; Mayer and Gavin 2005). Where substantial mistrust exists in the employee-manager relationship, the manager's behavior is likely to be interpreted in light of that mistrust. Conversely, where there is substantial trust in the broader organization, decisions are less likely to be interpreted as violations of implicit or explicit agreements (Jones and George 1998).

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Insert Figure 1 Here

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While trust is likely to reduce the likelihood that an employee would perceive mistreatment, it is also likely that where such mistreatment is perceived, trust is likely to increase use of the ADR system, at least at the initial step. Because of the informal nature of the process at the initial stage, trust between an employee and his or her manager is likely to encourage the open discussion of concerns (Bendersky 2003). Trust is thought to emerge through a reciprocal social exchange process over time. Within that process (Coleman 1990; Jones and George 1998), trust emerges because each

party observes the other demonstrate concern for the needs and interests of the other. As such, trust is likely to lead the employee to conclude that his or her manager will be responsive to the needs and concerns that might be addressed through the use of voice.

However, where the problem addressed is severe, trust is less likely to have an impact on whether an employee uses ADR in response to perceived mistreatment. Where the problem is severe, the employee may see little choice but to pursue the appeal through the various steps in the process as necessary (Arnold and Carnevale 1997). When the consequences of failing to gain satisfactory resolution of the perceived mistreatment outweigh concerns about managerial retribution for exercising voice, trust in the employee-manager relationship is unlikely to affect use of the initial step within the ADR system. It should also be noted that when perceived mistreatment is more severe, feelings of inequity and injustice are more likely to compel some response (Klaas 1989), making ADR usage more likely.

Drawing on the exit-voice-loyalty-neglect perspective (Hirschman 1970), we also suggest that the employees attachment to the organization is likely to affect his or her willingness to use ADR at the initial step. Where levels of attachment are high, exit will not be seen as an attractive alternative. As such, employees are likely to see efforts to effect change within the organization as having greater utility (Freeman and Medoff 1984). This argument is based on the assumption that because of the informal nature of the first stage, employees are less likely to see using ADR as having negative implications for their prospects within the firm. Further, this assertion is consistent with the finding of Cappelli and Chauvin (1991) that grievance activity (in unionized firms) was higher in organizations paying above-market wages. The wages made it less likely that an employee would be able to obtain similar pay elsewhere, reducing the attractiveness of the exit option.



The nature and source of the perceived problem are also likely to play critical roles in determining how employees will respond to perceived mistreatment (Boswell and Olson-Buchanan 2004). Where the source of the mistreatment relates to broader organizational policy, employees are less likely to be reluctant to raise their concerns with their supervisor. Since the supervisor is not responsible for the perceived mistreatment, employees are less likely to be concerned about the supervisor being threatened by ADR use.

A final variable likely to be of importance relates to procedural justice perceptions regarding the ADR system itself (Feuille and Chachere 1995; Blancero and Dyer 1996; Folger and Cropanzano 1998). Even where there is limited trust between the manager and an employee, to the extent that the ADR system is seen as both effective and fair employees are likely to be more willing to use it. While an employee may have doubts about his or her ability to resolve the problem at the initial step, confidence in the overall system may still lead the employee to use that step in response to perceived mistreatment.

### **Later-Stage ADR Usage**

Somewhat different determinants are likely to be relevant to whether employees pursue their concerns in later stages of the ADR process. In most systems, the process becomes more formal as the steps advance (Colvin 2004a). In addition, while some later steps in ADR systems clearly have a problem-solving focus (e.g., mediation), most formal systems culminate in quasi-judicial hearings (e.g., peer review boards or employment arbitration; Colvin 2003b). Further, the decision to use later steps in the process may often be seen as a direct challenge to the supervisor, particularly where the perceived mistreatment involves issues under supervisory control (Lewin 1990; Colvin 2003a, 2003b).

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Insert Figure 2 Here

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Because of these contextual factors, the determinants of usage at later stages of the ADR process are likely to differ from determinants at the initial step. Figure 2 displays a model depicting likely determinants of later-stage ADR use. As can be seen, whether perceived mistreatment leads to ADR usage at subsequent steps is likely to depend on how an employee perceives his or her treatment at earlier ones. These perceptions relate not only to the outcome resulting from the initial step, but also to perceptions regarding whether the employee was provided with sufficient voice at earlier steps. Here, the literatures on both procedural justice and interactional justice are likely to be relevant (Folger and Cropanzano 1998; Greenberg 2006). Beliefs regarding opportunities for voice at earlier steps are likely to be affected by both how earlier steps are structured and what information is shared with employees. Further, the interpersonal treatment when the employee initially raised concerns is also likely to affect perceptions regarding interactional justice and, in turn, perceptions regarding whether there were adequate opportunities to utilize voice mechanisms within the organization (Boroff 1991; Aquino, Galperin, and Bennett 2004).

While organizational attachment again is likely to affect the willingness to use ADR at subsequent stages, we argue here that the impact may be very different than at the initial step. As can be seen in Figure 2, the impact of organizational attachment on the use of later stages of ADR will be affected by the employee's dependency on the hierarchical structure for discretionary rewards. The impact is likely to be negative when the employee is highly dependent. When levels of dependence and organizational attachment are both high, employees are likely to be reluctant to

directly challenge superiors in subsequent steps of the ADR process. Consistent with research showing that grievance activity can affect performance evaluations and other decisions involving some level of managerial discretion (Lewin and Peterson 1988; Klaas and DeNisi 1989), we would argue that employees may well be concerned about the consequences of openly challenging their superiors. While initial steps of ADR are more clearly designed to allow for constructive communication, subsequent steps involve a public challenge to prior decisions (Colvin 2004a). By contrast, the impact of organizational attachment on the use of later stages of ADR is likely to be positive in cases where the level of dependence on the hierarchical structure for discretionary rewards is low. For example, a positive effect is likely in cases where pay is determined more by group or team performance and/or where the individual does not anticipate competing for promotional opportunities.

Another variable likely to be important in predicting use of ADR at later steps relates to social support. In related literature examining who takes legal action against an employer after being terminated, Goldman (2001) found that social support was critical if the terminated employee was to interpret the employer's action as a potential legal violation. Goldman further suggested that social support was additionally critical given the confrontational nature of accusing a former employer of illegal discrimination. We argue that social support is also key at later steps within ADR. The formal nature of the ADR process combined with the necessity of publicly challenging superiors is likely sufficient cause for social support to be a critical component of this model (Groth et al. 2002). The issue of social support also highlights a key institutional difference between unionized grievance systems and ADR processes in nonunion settings. A union and its officers often provide needed social support to those considering action against an employer. Absent a union, social

support must be provided by family, friends, and/or co-workers (Lewin 1987; Feuille and Delaney 1992; Colvin 2004a).

As can be seen in Figure 2, the nature and severity of perceived mistreatment are also likely to play an important role in determining employee responses at later ADR steps. For example, where an employee has been terminated, continued employment depends on the outcome of the ADR process (Bemmels 1997). So we would argue that when the perceived mistreatment is more severe, the employee is more likely to use subsequent ADR steps. A final variable identified in Figure 2 relates to procedural justice perceptions. As with decisions about whether to use ADR at the initial step, decisions about whether to use it at subsequent steps are likely to be affected by whether the system is seen as both effective and fair (Blancero and Dyer 1996). Related to this, norms about protecting employees from retaliation for using ADR are likely to be particularly critical.

### **Different Determinants for Different ADR Stages—Does It Matter?**

The models we have discussed for using ADR at both initial and later steps raise interesting issues for organizations. Because of the informal nature of how issues are addressed at the initial step of ADR processes, we argued that factors such as trust in the employee-manager relationship will enhance the likelihood of an employee's using ADR to address perceived mistreatment. This would suggest that the initial stage may well be used to address a wide range of employment issues. It further suggests that where there is an effective employee-manager relationship, ADR may encourage both constructive communication between management and the employee and a sense of employee voice. However, the model presented here for ADR use at initial steps in procedures also raises questions about the voice mechanism being offered when there is a poor relationship

between employee and manager. While we suggest that voice is still likely to be exercised when problems are severe, it is unclear if ADR would provide an effective forum for conflict resolution when trust in the employee-manager relationship is limited and when less severe problems are at issue.

The model we propose for ADR use at later steps in procedures suggests that there may be factors that inhibit ADR usage. Such factors are unlikely to be operative when the employee sees little risk associated with using ADR (e.g., when the employee is seeking to challenge termination) or perceives little dependency on the hierarchical structure for discretionary rewards. Where such conditions are not present, however, the model highlights why later stages of ADR may be less likely to induce the same level of open communication. This argument is premised on two assumptions: later stages in ADR almost inevitably involve a relatively direct and relatively public challenge to employment decisions by managers in the chain of command, and relatively few organizational cultures allow for such direct and public challenges to be viewed as constructive communication.

### **What Are the Consequences of Using an ADR System?**

A critical question regarding ADR systems relates to the consequences for the individual employee of exercising voice through them. Does using an ADR system to address a problem or perceived mistreatment help to repair relationships between an employee and his or her managers? Does the exercise of voice within ADR prevent some of the behavioral consequences that would normally be associated with an employee's perceiving mistreatment? Or does effort by an employee to use systems of justice to change managerial behavior strain the relationship with managers in the organization? Do we observe retribution by managers and increased withdrawal by the employee?

Research examining the consequences for individuals of using ADR is relatively limited. To date, work in this area has emphasized one of two perspectives: the exit-voice-loyalty-neglect model or a model emphasizing managerial retribution in response to the exercise of voice.

### **ADR and the Exit-Voice-Loyalty-Neglect (EVLN) Model**

Freeman and Medoff (1984) argued that differences in turnover between unionized and nonunionized firms might well be attributed to the voice provided by grievance systems required in most collective bargaining agreements. At the time of their seminal work, use of ADR in nonunion firms was more limited, making differences between union and nonunion firms in the access to voice mechanisms more significant. Drawing on the exit-voice literature, then, Freeman and Medoff (1984) argued that in nonunion firms employees would be less likely to see voice as a feasible alternative when conflict emerged in the workplace. In the absence of a viable voice mechanism, turnover would be more likely. By contrast, with collective bargaining the grievance system ensures that employees have an opportunity to exercise voice, reducing the attractiveness of the exit option. Consistent with the exit-voice model, unionization has been found to be associated across a number of settings with reduced turnover, controlling for wages and industry and organizational characteristics (Wilson and Peel 1991; Miller and Mulvey 1991). Further support in the unionized sector for the EVLN model is provided by research showing a relationship between greater strength of the grievance procedure and reduced turnover (Rees 1991).

Because the union-nonunion comparisons provide some evidence to support the EVLN model (Freeman 1980; Freeman and Medoff 1984), one might expect similar results from comparisons between nonunion firms with and without ADR. However, field data on the impact of

ADR have to date produced only limited evidence to support the EVLN perspective. Batt, Colvin, and Keefe (2002) examined the impact of human resource practices and voice mechanisms on quit rates among telecommunications firms. While a marginally significant relationship was found between peer review and turnover, no significant relationship was observed between the use of nonunion arbitration and turnover rates, controlling for other components of high-involvement work systems. In addition, Delery et al. (2000) examined the determinants of quit rates among both union and nonunion trucking firms. One variable examined related to the proportion of employees involved with formal grievance procedures. After controlling for unionization, the grievance variable was not related to quit rates. However, given that the grievance variable may have been capturing employee use of the grievance process (as opposed to access to it), it is not clear whether this finding should be viewed as inconsistent with the EVLN model.

The modest support for the EVLN model in field studies examining ADR raises important questions. In the unionized sector, the collective bargaining structure provides strong institutional support for the grievance process, and it may in fact legitimize grievance behavior (Boroff and Lewin 1997). Is voice exercised in ADR systems viewed by employees as the same as grievance behavior exercised in the unionized sector? Or is there more variation among firms that have ADR in the actual effectiveness of their voice process, thus making it more difficult to examine the impact of effective ADR programs? Or perhaps the effect of ADR programs is tied to other high-involvement practices, thus making it difficult to isolate the contribution of ADR to lower turnover rates (Batt, Colvin, and Keefe 2002).

It is important to stress that the EVLN model does not argue that those who exercise voice are less likely to quit or engage in neglect behaviors than employees who did not exercise voice.

Rather, it argues that an employee who perceives mistreatment is less likely to engage in exit or neglect alternatives if he or she uses the voice option (Boswell and Olson- Buchanan 2004). The exercise of voice may be an indication of workplace difficulties being experienced by an employee; where that is true, employees who exercise voice may actually be more likely to engage in turnover or neglect behaviors than those who do not (Katz, Kochan, and Gobeille 1983; Ichniowski 1986; Cutcher-Gershenfeld 1991). However, the employee who is experiencing some workplace difficulty is thought to be less likely to quit or engage in neglect behavior when he or she pursues the voice option (compared to when that option is not pursued).

Building on earlier work using the EVLN model, Olson-Buchanan and Boswell (2002) examined whether neglect behaviors are affected by use of voice. The more fully developed EVLN model argues that exit and voice are not the only responses to conflict. Employees can engage in a variety of neglect responses (e.g., absenteeism, reduced productivity), and these withdrawal responses can also be affected by the availability of effective voice mechanisms. Boswell and Olson-Buchanan (2004) found that perceived mistreatment, when it was personal in nature, was related to increased neglect responses. Interestingly, they found that whether the employee filed a grievance in response to the perceived mistreatment was not related to whether neglect responses were observed. In addition, in a laboratory study, Olson-Buchanan (1996) found that subjects who filed grievances engaged in more withdrawal behavior than did those who did not file grievances (even though they had access to a grievance system). Interestingly, though, this same study also found that subjects who experienced mistreatment and had access to a grievance system were less likely to exit than subjects who experienced mistreatment but did not have access to a voice mechanism.



While EVLN has received relatively consistent support when examining the impact of voice mechanisms in the unionized sector, the results are more mixed with regard to ADR. These relatively mixed results raise important questions for organizations and for future research. Does the impact of ADR vary with organizational characteristics or the design of the ADR system? What do firms need to do to get the same EVLN effect that is observed in association with unionized grievance procedures? What sort of due process protections are necessary? To what extent does the firm need to legitimize employee use of the ADR process (Klaas and Feldman 1993)?

In addressing such questions, it is important to consider both the nature of the conflict and the nature of the ADR process being used. For example, some ADR systems are designed primarily to function as alternatives to litigation. Employees who believe that their treatment violates a statutory or contractual provision can use the ADR system as an alternative to the legal system (Colvin 2004a). While such systems may well be functional for the organization and/or the employee, it is less clear whether they provide effective opportunities for voice about a wide range of employment issues. To the extent that they provide fewer opportunities for voice, questions might be raised about whether using them would be effective in reducing exit or neglect responses.

It may also be important for researchers to distinguish between the voice effects associated with use of ADR at early stages and at later stages. As noted earlier, the initial stages of ADR tend to be informal, with the focus on communication between employee and manager (Olson-Buchanan and Boswell 2002). Under what conditions does voice exercised in this more informal manner serve as an effective alternative to exit or neglect? Under what conditions does the salutary effect of exercising voice depend on being heard by more objective parties, and under what conditions does this salutary effect actually increase when voice is exercised more informally?

## **Retribution for the Exercise of Voice**

In considering the consequences of exercising voice in an ADR system, it is important to also take note of the negative consequences for an employee that could result from managerial retribution. In studying the consequences of using a nonunion grievance procedure, Lewin (1990) found that filing a grievance was followed by lower performance evaluations as well as other negative outcomes in subsequent years. This finding is consistent with work in the unionized sector that has likewise showed that employees may experience negative consequences from using voice (Klaas and DeNisi 1989; Boroff and Lewin 1997; Lewin and Peterson 1999).

However, it is important to note that a grievance filed by an employee may reflect ongoing disagreement with a manager about how the employee should perform duties and/or how well those duties are being performed (Lewin 1999). In such cases, lower performance evaluations or other negative outcomes following grievance activity may not reflect retribution. If declining performance or behavioral problems ultimately led (because of action taken by management) to grievance activity, lower performance ratings in the subsequent year might be attributed to a continuing decline in performance.

Related to this, Boswell and Olson-Buchanan (2004) found in a study of staff employees in a university that, after controlling for perceived mistreatment, grievance filing behavior did not significantly explain attitudes and intentions relating to neglect or exit responses. This study did not examine the issue of managerial retribution (which would have required an assessment of managerial attitudes, assessments, or behaviors). However, it does raise the more general questions of whether managerial responses following grievance activity reflect continuing deterioration in the employee-manager relationship and whether grievance activity leads to retribution by the manager.

When examining the issue of retribution as a consequence of using ADR, therefore, it is important to consider the nature of the conflict and how ADR is being used. For example, is retribution equally likely when ADR is limited to presenting an employees concerns to his or her manager, as opposed to pursuing ADR at levels above the manager? Further, how does the outcome of ADR use affect managerial behavior toward the employee who has used it? For example, does being overruled by a manager higher up in the chain of command or by a peer review board reduce the likelihood of retribution? Finally, little is known about how tendencies toward retribution might be affected by organizational norms about the legitimacy of using ADR.

### **Consequences for Firms from Using ADR**

As we have discussed, a firm's decision to adopt an ADR system is frequently motivated by several factors. Accordingly, it is appropriate when evaluating ADR systems to consider multiple criteria. In light of the role played by union avoidance or substitution and by litigation avoidance in the motivation to adopt ADR, a suitable criterion for comparison and evaluation is the proportion of occurrences in which they produce rulings favoring the employer versus the employee. Likewise, the consequences of using ADR may be measured in terms of damages awarded. Moreover, the adoption of ADR, and of binding employment arbitration in particular, may significantly affect how an organization is perceived by its current and prospective employees. It is thus appropriate to examine the nature of ADR systems and how they might affect the organization.

### **Win Rates**

Several researchers have examined published arbitration awards and found that the pattern of success for the employer varied considerably. In a recent review, LeRoy and Feuille (2001)

reported a significantly greater incidence of the employer's prevailing in employment arbitration: the employer won in 61.8% of cases and the employee in 20.6%, with split decisions reached in 17.6%. In a study of employment arbitration cases published by the American Arbitration Association, Bingham (1998) reported employers prevailing in 79% of cases where the provisions of an employee handbook were involved. In contrast, when a case involved an individual contract of employment, the incidence of the employers prevailing decreased to 31%.

Using data on employment arbitration awards gathered from multiple sources and covering the period between 1994 and 2001, Wheeler, Klaas, and Mahony (2004) found that overall the employer won 67% of the time. Consistent with Bingham's earlier work, the win rates varied with the nature of the case. Specifically, employers prevailed most often (70%) when the case involved an allegation of statutory discrimination and least often when the case involved an employment contract (44%) or when the burden of proof fell to the employer (40%).

In light of the role that strategies of union avoidance or substitution play in the impetus for ADR adoption, it is appropriate to briefly compare the outcomes of employment arbitration and labor arbitration. Looking only at labor arbitration cases where an employee challenged a termination, Wheeler, Klaas, and Mahony (2004) found that employers lost slightly more than half of the time (52%). In this instance, a loss for the employer is defined by the employee's being reinstated to his or her job, with or without back pay. Similarly, in their review of labor arbitration awards, Dilts and Dietsch (1989) found a near-even split in the aggregate win rates for employers (49.9%) and unions (50.1%). Interestingly, bearing the burden of proof lowered the aggregate win rate for each side down to 43%.

Research on labor arbitration awards reveals that the overall pattern of win rates for the employer varies with the nature of the case (Haber, Karim, and Johnson 1997). Specifically, employers prevailed least often (38.25%) in cases involving conditions of employment, followed by discharge cases (40.01%), then cases involving wages and hours (42.3%), while they were most likely to prevail (60.6%) when the case involved matters of arbitrability or cases involving promotions or demotions (56.9%).

Considering cases adjudicated in either the federal or state courts, the pattern of wins versus losses is confounded by the absence of data concerning those that do not reach a jury. By far the greatest proportion of cases are either settled voluntarily or decided on a motion for summary judgment by a judge. Indeed, one survey (Howard 1995) reported that between 79% and 84% of court cases involving an employment dispute were settled prior to final adjudication. In contrast, this same survey found that the percentage of settlements in employment arbitration cases ranged between 31% and 44%. The lower rate of settlement in arbitration is to be expected, as arbitration is often the final step in a multistep process in which most disputes are resolved at earlier steps (Colvin 2001). In addition to the possibility of settlement, significant numbers of cases are never adjudicated because many disputants are unable to secure legal representation. Indeed, some researchers estimate that employment attorneys agree to represent only 5% of the cases brought to them (Meeker and Dombrink 1993; Howard 1995). Nevertheless, there is a significant body of research examining the outcomes of employment disputes determined by the court system.

Looking at the federal courts, while the evidence from employment cases is somewhat mixed, there is a clear pattern of awards favoring the employer. For example, an examination of federal district court cases involving allegations of discrimination found that employers won 88% of

the time for the period spanning 1996 to 2000 (Wheeler, Klaas, and Mahony 2004). In contrast, earlier studies showed that when a discrimination case went to trial, employers won 76% of the time in 1990 and 64.5% of the time in 1998 (Litras 2000). Thus, when compared to employment arbitration, the pattern of employment trial verdicts appears to be more favorable toward employers.

A significant drawback to relying on comparisons of this nature is that they do not consider the myriad systematic differences in the cases involved. To that end, Bingham and Mesch (2000) compared the decisions reached by labor arbitrators with those of employment arbitrators evaluating the same set of hypothetical cases. It was found that labor arbitrators were more likely to rule in favor of the employee than were employment arbitrators. Using a similar methodology, Wheeler, Klaas, and Mahony (2004) presented a variety of decision makers with an identical series of cases in which an employee was challenging a termination. Specifically, they compared awards favoring the employee across several different types of decision makers evaluating the same 12 cases. As expected, labor arbitrators were the decision makers most likely to rule in favor of the employee, 55% of the time. Human resource managers were second most likely to rule in favor of the employee, 46% of the time. Interestingly, at 45%, peer review panelists were nearly as likely as human resource managers to rule in favor of the employee. Jurors, who each had previously served in a case involving an employment dispute, ruled in favor of the employee just 38% of the time. Employment arbitrators ruled in favor of the employee least often: only 33% of the time when evaluating cases based on a just-cause issue, and 25% of the time when evaluating cases based on statutory claims (Wheeler, Klaas, and Mahony 2004).

Lastly, as an ADR mechanism, peer review systems tend to be well received by both managers and employees. From the perspective of an overall HR strategy, peer review systems tend to enhance employee perceptions of an organizations attractiveness while offering employers the potential to deliver objective and fair decisions (Wilensky and Jones 1994; Payson 1998). While there are only a few empirical investigations of peer review systems, some anecdotal evidence suggests that managers believe peer review panels result in more severe sanctions than had the decision been left up to the individual manager (Cooper, Nolan, and Bales 2000). However, Mahony, Klaas, and Wheeler (2005) found no significant difference between peer review and HR managers in willingness to rule for the employee. One study found that the implementation of peer review significantly reduced employee filings with the Equal Opportunity Commission (Wilensky and Jones 1994). In a comparison of procedures across workplaces, Colvin (2003b) found that among nonunion workplaces the percentage of disciplinary decisions subsequently reversed through grievance appeals was higher for both procedures with peer review panels (9.9% of all disciplinary decisions successfully appealed) and employment arbitration (11.1%) than for other types of nonunion grievance procedures (2.7%). This same study also found a significantly higher rate (17.3%) of successful appeals through grievance procedures in unionized workplaces (Colvin 2003b).

### **Awards**

In addition to examining win-loss rates across different forms of dispute resolution, it is potentially informative to consider the amounts recovered by employees when they do prevail. In a recent survey of employment arbitrator awards, Estreicher (2001) reported a median award of \$52,737 for cases determined prior to adoption of the Due Process Protocol, and \$39,279 thereafter. In that same study, Estreicher references another review of American Arbitration

Association (AAA) cases covering the period 1999 and 2000, which found a median award of \$34,733. In an earlier study, Bingham (1998) found a mean award of \$49,030 in a sample of 91 AAA cases decided during the period 1993 to 1995. As discussed earlier, for the period 1994 to 2000, the median award delivered by a jury in an employment discrimination case was \$110,000 (Eisenberg and Schlanger 2003). While this amount for jury verdicts is substantially higher than the median award estimates for employment arbitrators, it is the possibility for the occasional large— often multimillion dollar—jury verdict that may pose the greater threat to employers and in practice be the more significant differentiator between outcomes from employment arbitration and court cases.

### **Organizational Outcomes**

Considering that many employers adopt ADR processes as part of an overall HR strategy, it is appropriate to evaluate the effects these systems may have on other HR-related issues. To that end, two studies (Richey et al. 2001; Mahony et al. 2005) measured the effects of adopting employment arbitration systems on overall organizational attractiveness. Among potential applicants, the perceived desirability of an organization as a place to work was significantly reduced when the organization had in place a mandatory and binding procedure of employment arbitration (Richey et al. 2001; Mahony et al. 2005). Moreover, giving up the right to sue in employment disputes had a larger negative effect for minority applicants than for nonminority applicants. As both these studies suggest, the presence of mandatory employment arbitration may harm an organization's ability to attract and retain talent. The effects of those decisions become even more salient when the organization is attempting to attract a diverse workforce. The adverse consequences, however, may be mitigated. Indeed, Mahony et al. (2005) found the negative effects of mandatory employment



arbitration are lessened when the procedures include strong due process protocols, similar to those advocated by AAA, or when they include just- cause protections. From the results of these two studies, it is clear that prospective employees are using the features of an organizations ADR system to make overall judgments about the employer.

### **Determinants of Outcomes from ADR**

While it is informative to compare the likelihood of either the employers or the employee s prevailing across dispute resolution forums, the underlying nature of individual cases affords the greatest predictive value. Research has shown that when evaluating employment termination cases, third-party decision makers are often influenced by a host of factors relating to the nature of the alleged offense and the contextual environment in which it occurred (Judge and Martocchio 1996; Vidmar 1998; Devine et al. 2001). This is in large part because decision makers are charged with restoring justice through imposing an appropriate sanction, and when the circumstances dictate they may be motivated to exact retributive justice (Vidmar 2001). That motivation occurs most often when harm is perceived to have occurred as the result of the offending party's deviation from accepted norms and obligations (Vidmar and Miller 1980; Deutsch and Coleman 2000).

Sanctioning decisions are further affected by the attribution process (Wood and Mitchell 1981). Several studies have consistently demonstrated that less-severe sanctions occur when the decision maker attributes the offending behavior to a cause beyond the employee s control (Abbott 1993; Judge and Martocchio 1996). The individual is seen as being less responsible or not responsible for the offense and thereby deserving of less punishment. Whether the terminated employee (the disputant) is appealing to management, a jury, or an arbitrator, he or she actively

and deliberately attempts to alter the decision makers impressions or to counter the presentation of otherwise damaging information.

In the process of managing these impressions, disputants often present extralegal information, including details not related to the merits of the termination. Disputants frequently present extralegal information with the intent of portraying themselves in a positive light or as being somehow less responsible or not responsible for the actions that resulted in their termination. Within the literature, several factors have been identified that affect attributions made by the decision maker (Klaas and Dell'Omo 1997).

### **Work History**

While arbitral norms require that seniority be considered in labor arbitration hearings (Elkouri and Elkouri 1993), no such norms exist for employment disputes in the nonunion sector. Nevertheless, evidence from studies examining the role of extralegal information in employment tribunals suggests that impressions made by the disputant substantially affect the punishment received. In particular, evidence pertaining to the disputant's prior work history and performance, including absenteeism, disciplinary record, and/or seniority, has been found to influence disciplinary decisions across an array of dispute resolution forums, including labor arbitration, jurors, employment arbitration, and peer review (Wasserman and Robinson 1980; Reskin and Visser 1986; Simpson and Martocchio 1997; Eylon, Giacalone, and Pollard 2000; Wheeler, Klaas, and Mahony 2004). A similar bias in decision making has been found among managers and supervisors. For example, several studies of managerial decision makers found consistent evidence of the disputants work history influencing the outcome, with those employees possessing a lengthy record of prior

good performance receiving lesser penalties than those with relatively little tenure or with records of disciplinary infractions (Klaas and Wheeler 1990; Martocchio and Judge 1995; Mahony, Klaas, and Wheeler 2005). Overall, it appears that decision makers are more apt to attribute the cause of the disciplinary incident to factors beyond the disputant's control and to regard the disputant as worthy of rehabilitation when presented with evidence of a positive work record (Simpson and Martocchio 1997). In their comparative study, Wheeler, Klaas, and Mahony (2004) found that for all categories of decision makers, substantial weight was given to presence of a positive work record. Employees with favorable work histories were significantly more likely to receive favorable decisions than those with short or poor work histories, though the effect was weakest where employment arbitrators were the decision makers.

### **Provocation**

Excuse making and justifications are two defensive behaviors intended to neutralize or mitigate the underlying adverse act or its consequences (Scott and Lyman 1968). Individual disputants may attempt to establish that they were indeed provoked by their supervisors (Abrams and Nolan 1985). In so doing, they claim that their poor performance or behavior is the direct result of the behavior or attitudes of another (Scott and Lyman 1968). Several studies have reported more lenient decisions among decision makers when presented with credible evidence in support of this defense. In decisions to reverse or reduce discipline, many labor arbitrators have cited managerial conduct as a contributory factor in the offense for which an employee was terminated (Stone 1969; Jennings and Wolters 1976; Bohlander and Blancero 1996; Lucero and Allen 1998). Klaas and Wheeler (1990) report a similar bias toward greater leniency among managerial decision makers,

resulting in more modest discipline recommendations. Lastly, Wheeler, Klaas, and Mahony (2004) found a similar bias toward leniency among peer panels, jurors, HR managers, and labor arbitrators. Employment arbitrators appeared to give little weight to the employee's conduct being provoked.

### **Allegations of Employer Wrongdoing**

In the absence of an explicit contract of employment, an allegation of discrimination often represents the only viable grounds for challenging a termination in an employment-at-will environment (Bales 1997). As a result, disputants often attempt to influence arbitrators' perceptions of them by claiming to be victims of discrimination. As performance appraisals tend to be subjective, their reliance on supervisory judgment often provides disputants opportunity to allege discriminatory bias in supervisors. While blaming someone else for the discipline predicament is an excuse behavior, the disputant need not deny the underlying poor performance. As with allegations of provocation, the disputant must demonstrate or persuade the arbitrator, through the presentation of evidence, that the negative evaluation of performance was "merely a pretext to effectuate his discriminatory attitudes" (Berrett and Keman 1987:494). Evidence from published employment arbitration cases reveals that the success rate for disputants is modestly higher when brought before an employment arbitrator than when argued in federal courts, but not in state courts (Wheeler, Klaas, and Mahony 2004).

### **Nature of the Offense**

Within the employment arena, termination is commonly viewed as the ultimate employer sanction. The literature on employee discipline and discharge shows that the decision to either reinstate or uphold a termination varies greatly with both the nature of the offense and with the

strength of the evidence presented by the employer. Labor arbitrators, for instance, generally require a higher degree of proof when a grievant is challenging a termination than in cases involving lesser penalties (Elkouri and Elkouri 1993). The influence of the nature of the alleged offense on arbitration decisions is mixed. Labor arbitrators are more likely to reinstate a grievant terminated for dishonesty or poor performance than one terminated for other reasons (Labig, Helburn, and Rodgers 1985). Block and Stieber's review (1987), however, found that the discharge in cases involving poor performance, excessive absenteeism, employee threats or violence, incompetence, or negligence was significantly more likely to be upheld than in cases involving other offenses. While these reviews present contradictory findings, one possible explanation may center on the strength of the evidence presented.

When defending allegations of discriminatory discharge, for example, employers must demonstrate that the motivating factor behind the termination decision was not discriminatory in nature but rather driven by some other factor, such as employee wrongdoing or unsatisfactory work performance. Thus, in a case alleging poor performance, the likelihood of the employers prevailing often depends on the ability to present documented evidence of the poor performance. Alleged offenses such as poor or unsatisfactory work performance are generally easily documented, and the employer's ability to prevail thus may hinge on the strength of the evidence put forth by the employer in an arbitration hearing. Indeed, weak or unsupported evidence of employee wrongdoing is among the most frequently cited factors used to justify a labor arbitrator's decision to reduce or reverse a disciplinary penalty (Karim and Stone 1988; Bohlander and Blancero 1996).

## **Procedural Compliance**

Research on arbitral decision making yields a consistent pattern favoring the employee when evidence is presented of the employer's failing to follow stated procedures in the disciplinary process. Indeed, procedural noncompliance prior to a termination is frequently listed by labor arbitrators as the primary justification for overturning or lessening the penalty (Karim and Stone 1988; Bohlander and Blancero 1996; Lucero and Allen 1998; Simpson and Martocchio 1997). The employee was significantly more likely to prevail when able to demonstrate that the failure of the company to adhere to its stated disciplinary process had an unduly prejudicial effect on the employee's rights (Stone 1969; Karim and Stone 1988).

The weight assigned by labor arbitrators to procedural compliance is to be expected given the prevalence of the just-cause standard for discharge in the unionized sector. A similar pattern is evident, however, in decisions reached by juries, leading Berrett and Keman (1987) to conclude that the courts appear to favor progressive discipline and employee notification of poor performance. In their review of judicial decisions regarding alleged wrongful termination, Dunford and Devine (1998) report that many courts in many states have adopted the position that procedures and policies outlined in an employee handbook may constitute an implied contract, particularly formal grievance procedures. Consequently, failure to follow progressive discipline may constitute a breach of the implied contract of employment. Procedural noncompliance may further negatively influence overall perceptions of organizational justice. Several researchers have found a consistent link between organizational justice perceptions and perceptions about an organization's grievance processes and appeal systems (Conlon 1993; Gordon and Fryxell 1993). Indeed, procedural compliance affects procedural justice perceptions regarding the sanctioning process (Lind and Tyler

1988). Among jurors involved in criminal cases, for example, evidence of procedural noncompliance resulted in reduced sanction decisions (Fleming, Wegener, and Petty 1999).

Klaas, Mahony, and Wheeler (2006) compared the decision-making policies of labor arbitrators with those of employment arbitrators and jurors. While the emphasis placed on procedural noncompliance varied in magnitude across the types of decision makers, there was a consistent increase in the likelihood of reversing a termination when the employer failed to follow stated procedures. Peer panelists, when presented with information that the company violated its own disciplinary procedures, were likewise more inclined to rule in favor of the employee (Wheeler, Klaas, and Mahony 2004). These findings, together with those from the jury decision-making literature, suggest that decision makers, even in the absence of a just cause standard, view procedural noncompliance as grounds for reversal of the termination.

### **Other Mitigating Circumstances**

Disputants who present information concerning a recent traumatic life event do so with the intention of providing an alternative explanation for their poor performance (DeGree and Snyder 1985) or in an effort to garner sympathy from the decision maker. Self-handicapping in this way attempts to externalize the cause for the poor performance by attributing it to factors beyond the disputants control. Empirical evidence from the impression-management literature supports the viability of this protective strategy to influence attributions about performance in evaluative settings (DeGree and Snyder 1985; Hirt, McCrea, and Boris 2003). A large and significant relationship between the presence of adverse personal problems and more lenient disciplinary outcomes was reported by Klaas and Wheeler (1990) in their study of managerial decision makers. In the case of

poor performance, the introduction of evidence attesting to otherwise difficult or adverse personal circumstances—often a specific familial event such as protracted illness or death—is frequently cited by labor arbitrators in justifications for reducing or reversing discipline (Bohlander and Blancero 1996).

## **Conclusion**

With the growth of alternative dispute resolution procedures, there is a danger of viewing ADR as a *sui generis* set of techniques to be examined in isolation from the broader issues of work and employment. From such a technique-based perspective on ADR, one could look at a procedure such as mediation abstracted from the workplace context and what it is serving as an alternative to. By contrast, a central insight of past industrial relations research is the interconnectedness of the range of different processes and activity that occur in work and employment relations (Dunlop 1958; Kochan, Katz, and McKersie 1994). Research on dispute resolution spans perspectives ranging from macro-level concerns about the roles of rising litigation and declining unionization in employment relations to such micro-level concerns as the nature of decision making within procedures and individual employee outcomes. Across this range of perspectives, the literature reviewed here illustrates how dispute resolution is connected to a broad range of issues in employment relations. Two themes running through this chapter help show these connections: the relationship between ADR and human resource management, and the relationship between dispute resolution in union and in nonunion settings.

ADR procedures are both influenced by and operate as part of the human resource management system of the firm. Adoption of ADR procedures is influenced by a firm's HR strategy; for example, firms employing high-performance work practices such as self-managed work teams



are more likely to adopt related ADR procedures, such as peer review panels (Colvin 2003a). Use of ADR procedures by employees is in turn influenced by aspects of the HR system of the workplace (Colvin 2003b, 2004b). At the same time, the operation of ADR procedures will in turn affect other HR outcomes, such as employee loyalty, turnover, and the functioning of disciplinary systems (Boroff and Lewin 1997; Lewin 1999). Perhaps perversely, research indicating the frequency of managerial retaliation against employees who have lodged complaints against them through ADR procedures itself indicates the centrality of dispute resolution processes to relations of power and authority in the workplace (Lewin 1999; Lewin and Peterson 1999).

ADR procedures also need to be understood in relation to what they are serving as alternatives to. There is a particularly strong contrast between unionized and nonunionized workplaces in the area of dispute resolution procedures, yet the relationship between union and nonunion procedures is also important to understanding developments in the ADR area. Nonunion procedures have risen in importance with the secular decline in unionization levels, yet the expansion of nonunion ADR is also partly a response and contributing factor to declining unionization (Colvin 2003a). In evaluating the operation of nonunion ADR procedures, union counterparts continue to serve as a key point of comparison. For example, in understanding the operation of new employment arbitration procedures, comparisons to the decision-making processes of traditional labor arbitrators have proved particularly insightful (Wheeler, Klaas, and Mahony 2004).

Research on dispute resolution and grievance procedures was one of the central topics in past industrial relations research (Lewin and Peterson 1988). The review of the recent literature in this chapter indicates that with the growth of ADR, this continues to be a fertile area for current

researchers. In particular, labor and employment relations research in the ADR area is developing insights that are relevant to such fields as human resource management, law, and organizational behavior. The challenge for future dispute resolution researchers will be to continue to take this broad perspective on ADR procedures and not become confined to a narrow focus on techniques.

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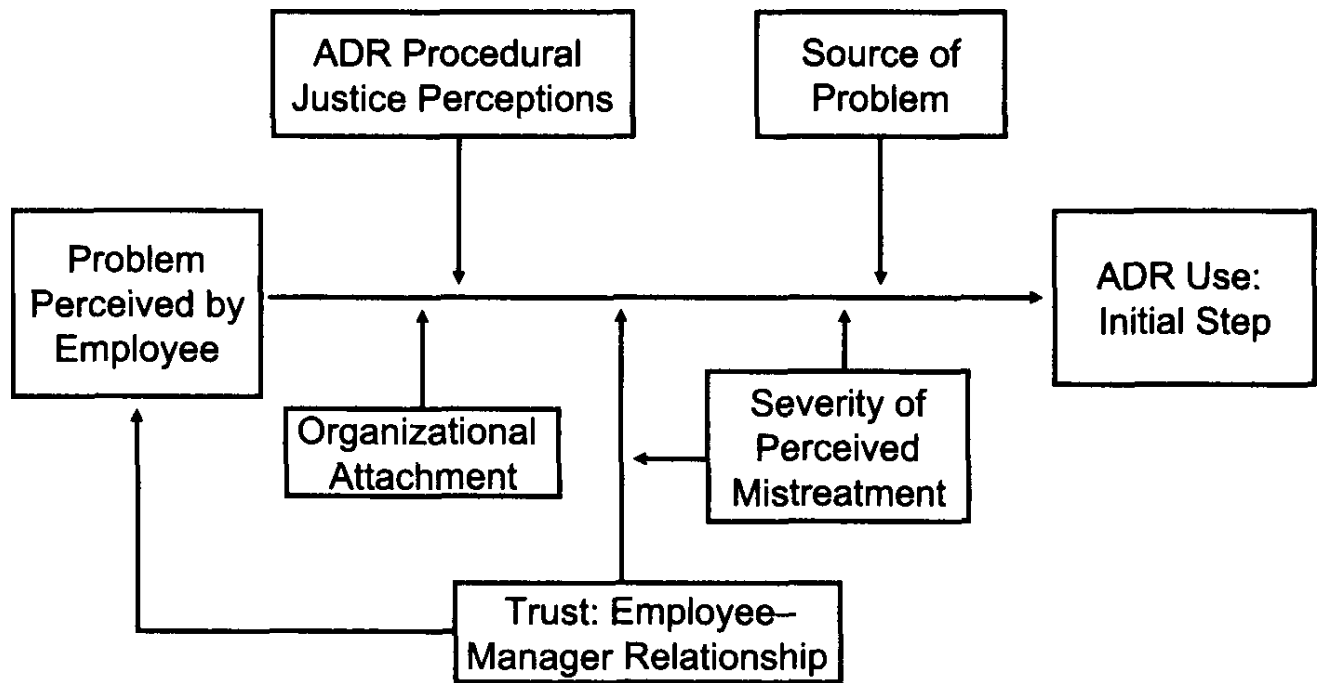


Figure 1: Determinants of Initial-Stage ADR Use

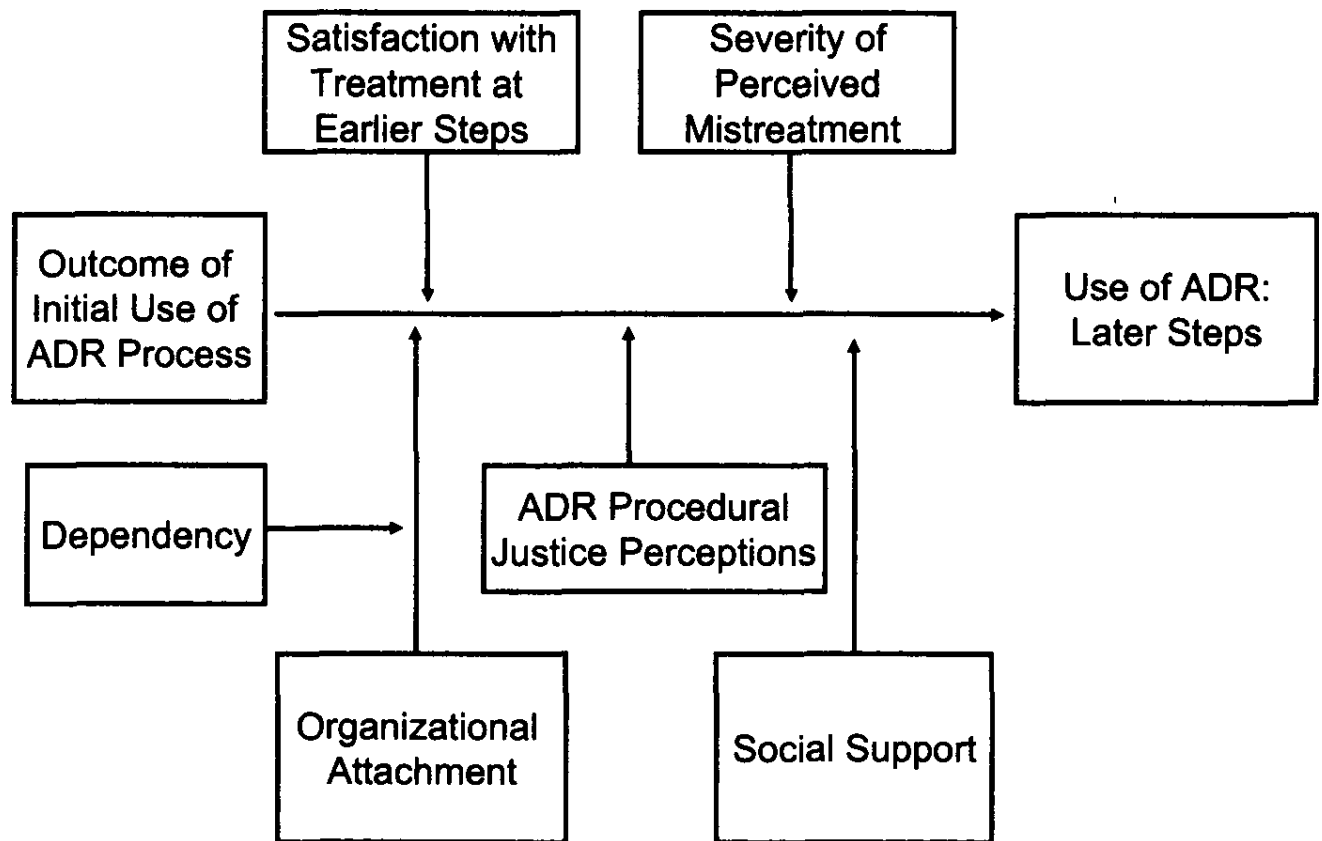


Figure 2: Determinants of Later-Stage ADR Use