Resolving Workplace Conflict:

The Alternative Dispute Resolution Revolution and Some Lessons We Have Learned

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The U.S. industrial relations system has undergone a historic transformation over the past three decades. One of the most significant features of that transformation has been the dramatic rise of alternative dispute resolution (ADR) as a means of addressing workplace conflict. ADR can be defined as the use of arbitration, mediation, and other third-party techniques instead of litigation to resolve workplace disputes. In the view of some experts, the rapid diffusion of ADR in employment relations, especially in the non-union sector, has represented nothing less than a revolution in dispute resolution. The ADR revolution has spread to many other types of disputes, including family, consumer, construction, and financial disputes. In many ways, transferring the resolution of workplace disputes from public to private forums constitutes the de facto privatization of the American system of justice.

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Explaining the Rise in ADR

In employment relations, researchers agree that two principal factors have led to the emergence of ADR. The first was the growth in the statutory regulation of U.S. labor markets, particularly in the 1960s and 1970s, which stemmed in large part from the electorate's desire to protect the individual rights of American workers. The growth in regulation resulted in a significant increase in the number of litigated employment disputes. The burden in cost and time these cases represented for both the court system and employers motivated the search for alternative methods of resolving these disputes.

The second factor was the erosion of union membership, which had the effect of depriving both employers and employees of proven methods of resolving workplace disputes. Although many employers reveled in the decline of the labor movement—and some did their best to accelerate it—they also discovered that a union-free workplace is not free of conflict. A growing number of employers coped with employment disputes by developing their own means of handling them, relying heavily on arbitration and mediation. The American court system, facing crowded dockets, has been eager to delegate to employers the authority to resolve public claims using private methods.

Beyond ADR: Integrated Conflict Management Systems

By the 1990s, many employers began to move beyond ADR, designing and implementing holistic "integrated conflict

management systems" (ICMS). These grew out of organizations' efforts to adopt a proactive, strategic approach to managing workplace conflicts. Several years ago the Society of Professionals in Dispute Resolution (now the Association for Conflict Resolution) appointed a task force—of which I was a member—to investigate the systems phenomenon and make recommendations on "best practice." In its final report, the task force wrote, "[W]hile the more formal dispute resolution processes such as grievance procedures and mediation are necessary, they are insufficient because they usually address only the symptoms of conflict, not the sources. . . . An integrated conflict management system addresses the sources of conflict and provides a method for promoting competence in dealing with conflict throughout the organization."[1]

Lessons Learned

In 2006, the Cornell Institute on Conflict Resolution (ICR) celebrated its tenth anniversary. The Institute's many studies include a 1997 survey of the Fortune 1000 on their use of ADR, focusing particularly on arbitration and mediation, and a 1999 survey of the National Academy of Arbitrators (the premier organization of American labor arbitrators), focusing in part on the extent to which these labor arbitrators had accepted non-union employment arbitration cases and other ADR work.[2] Another ICR project produced 200 field interviews on conflict management with managers and attorneys in nearly sixty U.S. corporations.[3]

ICR's research, as well as that of other scholars, has taught us many lessons about ADR and conflict management systems. Inspired by David Letterman, I have assembled a "Top Ten List" of lessons we have learned, but space limitations force me to restrict my discussion to the three I think are most important.

Lesson 1: ADR Is Here to Stay. In his best-selling book *The Tipping Point,* Malcolm Gladwell explores the conditions that convert a social and behavioral trend into an epidemic. The tipping point is that point in time when suddenly everyone is "infected" by a particular phenomenon.

Gilmer fueled the ADR epidemic.

ADR probably reached a tipping point ten or fifteen years ago. A key factor was the Supreme Court's seminal 1991 decision in the *Gilmer* case, which effectively allowed employers to require employees, as a condition of their employment, to waive their right to sue and, instead, accept arbitration as the means of resolving their statutory claims. *Gilmer,* reinforced by the Court's *Circuit City* decision in 2001, fueled the ADR epidemic, especially the use of employment arbitration.

Congress also played a key role, passing a series of statutes encouraging the use of ADR. In 1990, Congress passed the Civil Justice Reform Act, which virtually mandated that federal courts adopt an ADR program.

There is almost no prospect that the Supreme Court will reverse its course on ADR in the foreseeable future, nor is there any likelihood that Congress will repeal the various statutes supporting use of ADR. And the belief that our legal system will somehow become a model of efficiency or that the union movement will expand significantly—as desirable as those developments might be—represents the triumph of hope over experience. ADR has been institutionalized and is clearly here to stay.

Lesson 2: There Is Less Certainty about Systems. Adoption of authentic

conflict management systems seemed to accelerate at the beginning of the new century, but it is my judgment the trend has flattened in recent years. American management is famous for its momentary infatuation with passing fads and fancies. On one day, total quality management is the rage, and the next day it is passé and re-engineering has taken its place as the fashion of the moment.

Will the fickleness of American managers eventually spell the doom of conflict management systems? There are persuasive arguments on both sides of the question. On the one hand, adopting an ICMS required a leap of faith on the part of management, largely because the benefits of such systems were exceedingly difficult to calculate (and possibly unknowable) while the costs of implementing and maintaining a system are not insubstantial. On the other hand, I am not aware of a single organization that has adopted an ICMS and then abandoned it.

Lesson 3: Fairness Is the Key to Success. I wish I could report that the ICR interviews with managers and attorneys revealed that one of their major motives in using either ADR or conflict management systems was their desire to ensure a fair and equitable workplace. In fact, however, interviewees hardly ever uttered the word "fairness." They almost always reported that their major motivation was to avoid the costs associated with resolving disputes in court or via collective bargaining.

Although the majority of the systems we have examined at the ICR contain the rudiments of fairness and due process, there are still too many that are rigged to favor the employer. The legal battleground has now shifted to the question of whether employer-promulgated ADR techniques and systems provide employees with adequate procedural and substantive due process protections. The courts have been purging conflict management systems of their most "unconscionable" elements, but the degree to which the courts will eventually require systems to have a panoply of due process protections remains to be seen.

It is my conviction that the ultimate success of ADR techniques and systems hinges on whether they actually do provide employees with a fair and equitable means of resolving their complaints. I do not believe that, in the long term, employers will be able to persuade their employees to accept systems that are manifestly unfair. Employees will exercise their classic options of either "exit" or "voice": they will leave organizations with unfair systems or they will seek to change such systems, possibly turning to unions for assistance in doing so. Nor do I believe that, in the long term, the voting public will tolerate a private system of justice that is measurably inferior to the public system. The best course of action for employers who want to ensure the success and stability of ADR techniques and systems, therefore, is to include in their design and management enough due process protections to ensure that the systems are fair and equitable. I am confident that employers, spurred on by the courts and their own employees, will move in this direction. As Martin Luther King Jr. said, "The arc of the moral universe is long, but it bends toward justice."

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NOTES

1. A. Gosline et al., *Designing Integrated Conflict Management Systems: Guidelines for Practitioners and Decision Makers in Organizations* (Ithaca, NY: Cornell University Institute on Conflict Resolution, 2001), 8.
2. See D. Lipsky and R. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations* (Ithaca, NY: Cornell University Institute on Conflict Resolution, 1998); and M. Picher, R. Seeber, and D. Lipsky, *The Arbitration Profession in Transition: A Survey of the National Academy of Arbitrators* (Ithaca, NY: Cornell University Institute on Conflict Resolution, 2000).
3. D. Lipsky, R. Seeber, and R. Fincher. *Emerging Systems for Managing Workplace Conflict: Lessons from American Corporations for Managers and Dispute Resolution Professionals* (San Francisco: Jossey-Bass, 2003).

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