Alternative Dispute Resolution: A Tool for Diversity

BY JOHN L. WOODS | JOHN L. WOODS

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Conflict has become a growth industry. From global issues to complex business transactions, daily examples abound to show that whenever two or more humans interact, conflict is bound to follow. And, unfortunately, nowhere is this truer than in the workplace.

The landscape of the American workforce has experienced unprecedented change over the last 40 years. The emerging prominence of women and minorities has created a workforce of different races, ethnicities, and cultures. While differences are to be celebrated, they can also lead to disputes, generated primarily by perceptions, views, experiences, biases, and opinions.

More and more organizations have begun to realize that not only are workplace disputes costly, they adversely affect organizational performance and stifle human resource capabilities. Consequently, the traditional methods used to address workplace disputes (for example, litigation) are methodically being replaced with Alternative Dispute Resolution (ADR). ADR involves the use of private parties to resolve disputes through various processes, including mediation, arbitration, negotiation, and the use of ombudspersons. As a result, organizations are beginning to experience the benefits of using ADR to resolve disputes at their earliest stages.

HISTORICAL OVERVIEW: THE USE OF ADR IN THE WORKPLACE

The use of ADR began as early as the 1890s in the United States. Specifically, the Arbitration Act of 1898 provided for voluntary arbitration of disputes between railway unions and carriers. This legislation was enacted to quickly resolve labor disputes, due to the potential of economic catastrophe within the railway industry as a result of work stoppage.

The advancement of ADR has been attributed to a series of landmark cases identified as the Steelworkers Trilogy, as well as the actions of Chief Justice Warren Berger. According to Professor Homer C. LaRue of the ADR Clinic, Howard University School of Law, "The Steelworkers Trilogy assisted in advancing the use of arbitration in the union-organized setting pursuant to collective bargaining agreements. It can be safely said that arbitration has grown well beyond the organized workplace and has had a significant impact in the resolution of workplace disputes in the unorganized sector as well."

The *Steelworkers Trilogy* consisted of the following cases: *United Steelworkers v. American Manufacturing Co. (1960); United Steelworkers v. Warrior & Gulf Navigation Co. (1960);* and *United Steelworkers v. Enterprise Wheel & Car Corp.*[1] These cases established legal precedent concerning the enforcement of arbitration awards and a commitment by the courts not to interfere with the arbitration process as negotiated amongst parties through collective bargaining agreements.

LaRue also points out that Chief Justice Berger further advanced the use of ADR. "In the late 1970s, Chief Justice Berger played a major role in promoting the use of ADR within the legal community. Specifically, the ADR movement was officially recognized in the legal community as a result of the Pound Conference, which was convened by Justice Berger in St. Paul, Minnesota. This movement was timely as a result of longstanding concerns in the early 1970s, by legal and academic communities, over increased litigation and its negative effects."

In light of these historic events, arbitration became the predominant dispute resolution process used to resolve workplace disputes through the 1980s. Although arbitration proved to be cost effective and a less time-consuming alternative to litigation, critics argue that there are fundamental flaws in the way employers utilize the process. For example, with the decline of union membership, employees have experienced financial burdens as a result of mandatory arbitration provisions within employment contracts. According to LaRue, "The economic ramifications, coupled with the perceived and/or actual lack of due process

afforded to employees by their employers through mandatory arbitration forums, has prompted backlash and scrutiny of the arbitration process and pre dispute arbitration requirements by employees, plaintiff attorneys, and the courts."

THE EMERGENCE AND PROMOTION OF DIVERSITY THROUGH MEDIATION

Fundamental issues associated with the use of the arbitration process in response to workplace disputes have contributed to the emergence of mediation. This emergence is evident in numerous studies through the preferences exhibited not only by employees, but employers as well. Various studies reveal that disputants have opted to use mediation because: 1) parties have an equal say in the process; 2) parties decide settlement terms; and 3) mediation is both time- and cost-effective.

A study conducted by Cornell University titled, "The Use of ADR in U.S. Corporations," reveals that of the corporations surveyed,

> ***88 percent of corporations report using mediation, while 79 percent have used arbitration. Over 84 percent say that they are likely or very likely to use mediation in the future, while 69 percent say that about the use of arbitration. In addition, the corporations surveyed maintain that they use ADR because they dislike the risk and uncertainty of litigation, and especially view mediation as a means of control over potentially risky disputes. For example, 81 percent of respondents say their corporations use mediation because it provides "a more satisfactory process" than litigation; 66 percent say it provides more "satisfactory settlements," and 59 percent say it "preserves good relationships."***[2]

Through the increased use of mediation and its core principles, it has indirectly contributed to promoting diversity within the workplace. From a practical standpoint, mediation provides disputants with the opportunity to identify and discuss issues, clear up misunderstandings, determine the underlying interests or concerns of each party, establish areas of agreement, and ultimately incorporate those areas of agreement into solutions. Consequently, mediation often directly and indirectly addresses workplace issues that arise as a result of cultural nuances, as well as perceived and/or actual acts of employment discrimination.

John Settle, president of Settlement Associates and a former senior executive with the federal government, stresses the importance of incorporating the core principles of ADR in organizational development strategies implemented by employers. "As a result of the increased use, acceptance, and success of mediation, organizations are beginning to understand the need to train managers and executives in the area of interest based conflict resolution principles and practices," says Settle. He believes training in this area improves managerial skills through its focus on communication, problem solving, and human dynamics.

Settle notes that organizations that have successfully resolved workplace disputes through ADR often follow these steps:

- **Developing and Implementing Ombuds Programs**—Through the Ombuds Program, an executive or high level official is appointed and is solely responsible for managing a structured, confidential dispute resolution program that includes personal counseling, problem solving and ADR techniques, and conflict management training for all personnel.
- **Establishing a Diverse Pool of Mediators/ADR Practitioners**—In the event that external mediators/ADR practitioners are used in support or in lieu of an ombuds program, having a diverse pool of mediators/ADR practitioners will give instant credibility to internal dispute resolution programs. Specifically, stakeholders will develop trust in the ADR process if they believe there is a diverse pool of practitioners from different walks of life who truly understand and can effectively assist disputants in resolving their issues.

CASE STUDY: THE FEDERAL BUREAU OF INVESTIGATIONS' ADR PROGRAM

Organizational culture plays a critical role in the design and implementation of internal ADR programs. A case study of the Federal Bureau of Investigation (FBI) offers critical insight on the potential benefits of using internal ADR programs to resolve employment disputes and their impact on the promotion of cultural diversity. As experienced by Veronica Venture, the FBI's equal employment officer, formulating and implementing an ADR program within the FBI's culture offers both unique challenges and rewards.

Hired by the FBI in 2002, Venture reports to Director Mueller and oversees the agency's affirmative employment programs, EEO charge processing procedures, and ADR program. Venture says when she joined the FBI, the agency had a pilot mediation program in place, but it was ineffective due to its lack of structure and confidentiality, and perception of bias.

"There was no structure concerning cases that were selected for mediation, and the EEO counselors also served as mediators, thus compromising confidentiality," Venture recalls. "The Office of Personnel Dispute Resolution, within the agency's Office of Human Resources, also offered a dispute resolution mechanism that solely used management officials throughout the agency as internal mediators to resolve disputes. Consequently, complainants did not believe that our process was neutral."

According to Venture, her efforts to reform the FBI's ADR program have benefited from the FBI's "chain of command" culture. "Immediately after being hired by the FBI, I received Director Mueller's full support concerning the use of ADR within the FBI, as well as the development and implementation of an effective and efficient ADR program. He ultimately made ADR a priority within the agency and, as a result of the chain of command practice that is followed within the FBI, the ADR program instantly established credibility. Director Mueller has also mandated that the process be used to resolve employee disputes on all levels. This example establishes that if ADR is to work in any organization, it has to be wholeheartedly supported and mandated from the top down."

With the support of Director Mueller, Venture's reform and program development efforts included: 1) discontinuing the FBI's practice of using EEO counselors/investigators as mediators; 2) developing a roster of trained mediators that are diverse in professional background and experience; 3) developing an ADR unit that is solely responsible for the mediation of employment disputes; and 4) consolidating all ADR activity concerning employment disputes under the ADR unit.

To manage the ADR unit, Venture appointed Nicole Swann as the FBI's ADR manager. According to Swann, "Through this new organizational structure, the FBI has been able to develop and sustain the necessary firewall between EEO investigative and mediation functions, so that confidential information provided during the mediation sessions may be maintained. In addition, employees are beginning to trust and use the ADR program."

As a result of Venture's and Swann's efforts, the FBI has experienced both financial and non financial benefits in that it has realized a 40 percent increase in complaints being resolved prior to the EEO investigative and/or litigation processes.

As discussed, there are many benefits to using ADR. However, for disputes that pertain to discrimination, ADR provides all parties with an opportunity to express their concerns. At these negotiating tables, the hard work of open discussions can start, which can be the beginning of meaningful dialogue creating a new course to inclusiveness.

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NOTES

1. *Workforce*, January 2002, p. 34 38.
2. Lipsky, David B., and Ronald L. Seeber: "The Use of ADR in U.S. Corporations: Executive Summary. Cornell University School of Industrial and Labor Relation.

Cost Savings Attributed to Alternative Dispute Resolution

Numerous organizations have benefited from using Alternative Dispute Resolution (ADR) to address labor and employment disputes. The following is an overview of several studies that have assessed cost savings attributed to ADR:

1. A study generated by the Department of Justice of Oregon found:
   - Mediation was the least expensive of seven ADR options (including litigation)
   - Average monthly process cost of mediation was $9,537.00, compared to:
     - Dispositive Motion $9,558.00
     - Settlement Negotiations $10,344.00
     - Arbitration $14,290.00
     - Trial Settlement $19,976.00
     - Trial Verdict $60,557.00
2. A study generated by the Florida Conflict Resolution Consortium reports the following:
   - Three million in potential savings realized through successful mediation of 31 of 36 administrative disputes, selected from five state agencies and one environmental control district.
   - Savings over anticipated litigation costs ranged from $2,250.00 to $700,000. Another $2.3 million in potential savings attributed to litigation costs already incurred in cases later settled through mediation.
3. A report on the use of ADR in Massachusetts' government concludes the following:
   - Fifty seven percent of agencies that filed ADR reports and plans as required by executive order reported that ADR saved money over litigation and hearings.
   - Eighty one percent reported savings in staff time.
   - A comment in the report equates time with expense because the State Attorney General's office carries the financial burden of litigation.[1]

NOTE:

1. U.S. Equal Employment Opportunity Commission: ADR Promotional Handbook (2004).

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