

**THE FUTURE OF CONFLICT MANAGEMENT SYSTEMS
IN EMPLOYMENT LITIGATION**

By

Richard D. Fincher, Workplace Resolutions

Ronald L. Seeber, Cornell University

David B. Lipsky, Cornell University

Over the past decade, the development of conflict management systems by private and public organizations has received significant attention from employment attorneys and in-house counsel. Many attorneys now find themselves litigating within the procedures of such systems. The authors have conducted extensive field research on these systems within large private businesses for the past six years. The results of that research and a summary of what we believe to be the best practices by corporations are included in our recent book, Emerging Systems for Managing Workplace Conflict: Lessons from American Corporations for Managers and Dispute Resolution Professionals (Lipsky, Seeber and Fincher, April 2003). Our own understanding of the reasons for the creation of these systems, the way in which they operate, and the supporting structures necessary to continue the growth of these systems, continues to evolve. In this article, we focus on the future of conflict management systems. We believe there are barriers to their continued expansion, including legal barriers. We will try to list the most important of those barriers.

What is a Conflict Management System for Employee Disputes?

A conflict management system includes, but is not limited to techniques-such as mediation and arbitration-for resolving legal disputes outside the courtroom. Rather, in the words of a report prepared by the Institute on Conflict Resolution at Cornell for the Society for Professionals in Dispute Resolution

(SPIDR) in *Designing Integrated Conflict Management Systems: Guidelines for Practitioners and Decision Makers in Organizations*: “An integrated conflict management system introduces a systematic approach to preventing, managing, and resolving conflict that focuses on the cause of conflict within the organization.” It also

- Encourages employees and managers to voice concerns and constructive dissent early,
- Integrates a collaborative problem-solving approach into the culture
- Provides options for all types of problems for all people in the workplace
- Coordinates a web of options and structures enabling problem solving
- Aligns conflict management practices with each other and with the mission, vision, and values of the organization
- Is understandable to all and is flexible and user friendly.”

A brief description of the U.S. Department of the Interior’s CORE Program is as follows:

Who and what are CORE services about?

The CORE program is a new means for Interior employees and managers to protect against abuse, bias and other improper treatment or unfairness. The CORE program is for everyone—all levels of employees and managers, union representatives and union members whose union elects to participate. Core cases are mediated by CORE Specialists who are experienced and trained in informal workplace mediation. All CORE Specialists are neutral and have no stake in the outcome of the mediation cases. Each bureau in Interior has CORE Specialists.

The CORE program identifies roles any Interior employee may face—conflicts between co-workers, conflicts between supervisors, and supervisors and management, and more. CORE is not a top-down management versus employees program—there is no determination of guilt and no punishment. CORE specialists are trained to help people discuss the cause of conflicts and develop reasonable and responsible options.

How Widespread are these Systems in Corporate America?

Our research indicates that ADR is now used routinely in employment cases by the vast majority of large American corporations. This finding has been confirmed recently by a new survey conducted by the American Arbitration Association. The use of an employment

conflict management system--as defined in this article--is confined to about 20 percent of the major U.S. corporations. The list of corporations using such systems, however, is growing and includes such prominent companies as General Electric, Halliburton, Shell Oil, Boeing, and Prudential. In fact, the number of American workers employed under employer-promulgated systems probably now exceeds the number employed under collective bargaining agreements.

The Continued Growth of Conflict Management Systems

Economic and organizational history in the United States suggests that there will be continued privatization of dispute resolution in our society, including the privatization of employment dispute resolution. The original disputes of employees and employers were met first with regulation, ultimately, but ultimately the parties have sought to resolve disputes themselves, in private, and policy makers have encouraged them to do so. The original labor relations policy of the United States supported negotiations, in contrast to resolving labor disputes in the courts, and this policy has been reinforced by the deferral of the courts to arbitration and the support for private negotiations through the assistance of the mediation services set up by the federal government and various states.

Private dispute resolution is also growing in the arena of individual employment rights. It is now less than forty years since the federal government's initial foray into that area. It is unlikely that when the U.S. Congress passed the Equal Pay Act in 1963 anyone thought that it would be the first of a flood of individual employment rights created by the federal government. Not long after that, however, efforts began to try to move toward private systems for the resolution of those disputes and the disputes arising from all of the laws that followed. The deregulation of whole segments of the economy has also furthered the trend toward the use of ADR to resolve disputes formerly heard in federal courts. Even the judiciary has supported this trend in recent times with court-annexed ADR programs for a wide variety of disputes.

The conclusion we draw from the longstanding trend toward private dispute resolution, combined with recent state and federal court decisions, is that the conflict management systems we have detailed in our book are probably just the next wave of privatization. The area up for debate is not the direction of

the trend, but rather the pace at which it will proceed. It seems clear to us that while there might be minor setbacks, and there are barriers to further growth, these systems will continue to be newly implemented in organizations and will be more widely accepted in the coming years.

Broadening Acceptance into More Organizations

We believe that there will be increased acceptance of workplace systems into a broader range of organizations. For the next few years, this trend will occur mainly with larger employers because they are the organizations that commonly have the “presenting issue” that triggers the concept. These triggering events have included an internal crisis, a perceived threat (such as union organizing), or burdensome litigation. The resources needed to build and manage workplace systems are also found mainly in larger organizations. We increasingly see that workplace systems are being accepted in mid-size organizations. This trend will be motivated by an increasing recognition that a workplace system is simply good for business. Mid-size employers recognize that organizational conflict can be a source of creativity and productivity and workplace systems can effectively channel such conflict to constructive ends. Mid-size employers have the same core interests in resolving conflict, as do large employers. For these reasons, we expect workplace systems to migrate into mid-size employers.

Will Workplace Systems Become Global?

Our field research indicated that no employers have adopted workplace systems for their international operations. Some have considered it and chosen not to do so. There are many reasons for this. First, the precipitating events that typically trigger the creation of workplace systems, such as litigation, are often unique to this country. Second, the laws of some other countries already provide many of the options inherent in a workplace system. Most European countries, for example, provide both statutory avenues of appeal in cases of discharge and mandatory workers councils. Third, there is a perception that global dispute resolution is different from, and in some cases behind, dispute resolution in the United States. Because of these legal and cultural differences, we do not foresee workplace systems being broadly implemented in international operations.

Workplace Systems Will Become Institutionalized

The general commitment to ADR in organizations has historically been fragmented at best. Our research has established that conflict resolution strategies are valued in some functions but not others. Mediation may be used in employment litigation but not in product liability. Arbitration may be used in consumer disputes but not in environmental disputes. Even in the same law department, some attorneys embrace ADR and some resist it. Overall, ADR has been very slow to become institutionalized in organizations.

We believe that conflict management systems will become institutionalized in the future, by those employers that recognize their value and remain committed to their credibility. By this we mean that the system will become a universal part of the workplace culture, that its success will be firmly accepted by all parts of the work force, and that commitment to the system will not waiver through the passing of leadership and tougher financial times.

Barriers to Further Growth

Although we have presented a strong case for the probability of the continuing development of conflict management systems, there are potentially significant problems that could slow the pace of that growth. For organizations that have hesitated to this point, important issues remain that might give leaders pause as they consider whether to develop and implement a conflict management system. In this section of the article, we will present what we believe to be the key challenges to the pace at which the privatization of conflict and dispute resolution will proceed.

Potential Legal Barriers

The United State Supreme Court is now firmly in favor of pre-dispute agreements to arbitrate statutory claims. The line of cases that began with *Gilmer*, expanded with *Circuit City*, and clarified in *Waffle House* has created a series of precedents that seem unlikely to be challenged in the near future. Thus, the fundamental legal issue is not whether “mandatory agreements to arbitrate employment claims” are enforceable, as it was throughout the 1990s, but whether there has been sufficient opposing case law to make arbitration agreements difficult to enforce and the outcomes less final and binding.

Despite the pro-arbitration policy set forth in *Circuit City*, employees still have numerous avenues available to them to challenge arbitration agreements as unenforceable contracts. Generally applicable contract defenses can be applied to invalidate arbitration agreements without contravening the Federal Arbitration Act. These defenses are commonly fraud, duress, or unconscionability. Most recently, lower state and federal courts have been deeply troubled by arbitration procedures that deny due process and take away rights available in court. At this time, the most successful challenges to arbitration agreements involve adequacy of consideration to current employees, lack of knowing and voluntary waiver, allocation of expenses to the claimant, and the limited scope of remedies available to the arbitrator.

Challenges to Arbitration Based on Unconscionability

Unconscionability may be applied to invalidate arbitration agreements without contravening the Federal Arbitration Act. While the concept is difficult to define, it is generally accepted to mean “the absence of meaningful choice” together with “terms unreasonably advantageous” to one of the parties. Courts examine the process by which the agreement was made and whether it was the product of clear and voluntary consent. This concept has proven to be the most successful defense used by plaintiffs to argue that a mandatory arbitration agreement is unfair and should not be enforced against them. According to one court, the most infamous case of an unfair pre-dispute arbitration agreement came from Hooters of America, Inc.

In 1994, Hooters restaurants gave their employees the ultimatum to sign a pre-dispute agreement to arbitrate future employment claims. By 1996, a female bartender in South Carolina claimed a company official was harassing her by grabbing and slapping her buttocks. In 1999, the U.S. Court of Appeals for the Fourth Circuit held that the former bartender did not have to arbitrate her sexual harassment claim against the restaurant chain. Finding that Hooters of America, Inc., set up a dispute resolution process “utterly lacking in the rudiments of evenhandedness” the Appeals Court concluded that the company breached the arbitration agreement and violated its contractual duty of good faith. Under the rules, the employee had to

provide notice of the nature of the claim and the specific acts or omissions involved, but the company had no reciprocal obligation to respond in writing or provide notice of its defenses. The employee, but not Hooters, had to provide a list of all fact witnesses and a brief summary of the facts known to each. Hooters had total control over the list of potential arbitrators. Finally, only the company could move for summary judgment or record the arbitration hearing.

Barriers with the Use of Neutrals

Most conflict management systems rely on neutrals who are external to the organization, yet not all observers accept the fact that arbitrators are somehow inherently neutral when they are providing services in a dispute. Some court cases have commented on the bias inherent in a system in which the neutrals are paid by the organization, but are expected to be entirely neutral on each case in which they are involved. Bias can be a particular risk when a single neutral, or a very small pool, is used by an organization. While such an arrangement may be efficient, it can lead to employee suspicion that the system is somehow fixed against their interests. The bottom line is that employees and policy makers, as well as the promulgators of workplace conflict management systems, have to have a high level of confidence in the neutral profession. Otherwise, the movement will be stunted by this problem.

Barriers with ADR Providers

The role of the ADR provider is evolving rapidly in the early part of the twenty-first century. The traditional full-service model of the AAA is being threatened, both by users of the services and by regulators. The AAA traditionally was brought into labor-management agreements, and other institutional arrangements, as a complete administrator of dispute resolution programs. They routinized case filing, offered a complete set of rules for the conduct of mediation and arbitration, provided a roster of neutrals and a means of choosing one from among the proffered list, and even provided a neutral site for the conduct of hearings. For neutrals, they provided a means of obtaining work and offered the quality of their own organization as a credential and certification of the qualifications of the neutral.

Many organizations have chosen another model in their development of their conflict management systems. These newcomers to dispute resolution have sometimes created a system that demands a flexibility and a cost structure that does not fit within the traditional provider model. Whether the traditional providers will respond with more customized offerings remains to be seen. Thus, as we noted earlier, it is our belief that sources of neutrals and neutral services will continue to expand in response to this need for flexibility.

Providers have also been criticized for the very feature that makes them attractive to so many of their customers. Users have questioned the quality, consistency, and contemporary knowledge of their panels. The providers' response has been to weed out their panels. AAA recently removed approximately 70 percent of their occasional neutrals and reconstituted their roster with more active neutrals aligned with their projected caseload. AAA also recently began requiring annual educational updates for members of their rosters. These moves are clearly in response to the market and the demand for high-quality rosters.

Conclusion

Employment attorneys and in-house counsel must quickly understand the advantages and disadvantages of workplace dispute systems for their clients. Court litigation is no longer the acceptable road for most clients. Clients are insisting on innovative alternatives from their legal counsel.

In this article, we have offered our view of the state and future of conflict management systems. We have suggested some of the problems that will slow the pace of growth of those systems. All these problems are related to the external environment faced by organizations seeking to develop such workplace systems. The threat of the courts, problems with neutrals, and the evolving role of neutral providers may give pause, though, to those organizations currently debating the strategic question of whether to implement their own workplace system.

Citations

Gilmer v. Interstate/Johnson Lane Corp., 500 US 20 (1991)

Circuit City Stores, Inc. v. Adams, 121 S. Ct. 1302 (2001)

EEOC v. Waffle House, Inc., 121 S. Ct. 1401 (2001)

Hooters of America Inc. v. Phillips, 173 F.3rd 933 (1999)