

ALTERNATIVE DISPUTE RESOLUTION: AN OVERVIEW

What is Conflict ?

A state of discord caused by the actual or perceived opposition of needs, values and interests.

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Conflicts and Disputes

- Conflict is inevitable
- Conflict is systemic
- Conflict is our response to powerlessness in the face of rapid or continuous uncontrollable change

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Causes of Conflict

- Differences in methods
- Differing personalities
- **Miscommunication**
- **Feelings and emotions**
- All aggravated by change and other stressors
- Internal issues
- Value differences
- Opposing objectives, needs, or perceptions
- **Power struggles**
- Diversity of people



Why employment disputes arise?

Equal Employment Opportunity Grievances

- race
- gender
- pregnancy
- sexual harassment
- age
- religion
- national origin

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Why employment disputes arise?

Systematic or Fundamental Concerns

- reductions in force
- relocation
- mergers and acquisitions
- automation
- bankruptcy
- major new organizational initiatives

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Why employment disputes arise?

Substantive Issues

- work methods
- pay rates
- conditions of employment

Interpersonal Issues

- personalities
- misperceptions

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Impact of Unresolved Conflict

- Multiple and/or general complaints
- Group conflict
- Bad morale, apathy
- Low creativity
- Poor decision-making
- Turnover & absenteeism
- Agency charges, lawsuits
- Violence



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Consequences of Employment Disputes

Legal Perspective

- litigation
- costly
- time consuming
- unintended, inappropriate, delayed resolution

Consequences of Employment Disputes

Human Resource Perspective

- employee turnover
- high rates of absenteeism
- lost experience, knowledge, and skills
- decreased productivity

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Consequences of Employment Disputes

Employee Perspective

- stress, depression, physical illness
- lack of autonomy/control
- decreased potential for growth and self-actualization
- unhealthy work environment and low morale

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ADR: Alternative to What?

- Substitute for court adjudication
 - 90-95% of cases settled out of court
 - Courts are not the most appropriate venues for most disputes
 - Costly
 - Time consuming
 - Wasted resources
 - Courts do not resolve most disputes and fail to address underlying issues
 - Dispute may continue after adjudication
- Need to gain better understanding of alternative methods, processes, and related benefits

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Four Goals of the “Alternatives” Movement

- To relieve court congestion and costly delay
- To enhance community involvement in the dispute resolution process
- To facilitate access to justice
- To provide more effective dispute resolution

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Dispute Settlement Continuum

Default Position: Conflict Avoidance

Direct Communication	Intervention by Third Party	Binding Processes	Extra-Legal Processes
<ul style="list-style-type: none"> • Discussion Between Principals • Discussion Through Agents • Negotiation 	<ul style="list-style-type: none"> • Ombudsman • Facilitation / Conciliation • Mediation • Moderated Settlement Conference • Private Judging • Non-Binding Arbitration • Early Neutral Evaluation • Mini-Trial • Summary Jury Trial 	<ul style="list-style-type: none"> • Administrative Action or Hearing • Binding Arbitration • Litigation 	<ul style="list-style-type: none"> • Non-Violent Direct Action • Violence / War

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Dispute Settlement Continuum

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Least Invasive: Voluntary, Non-Binding

Most Invasive: Involuntary, Binding

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Negotiation

- Most common and familiar form of dispute settlement between two parties
- Allows parties opportunity to control the process and solution
- If disputants cannot settle their dispute, a third party must be engaged and parties must determine role of *third party*

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Third Party ADR – Work Environment

Organizations using *Third-Party Alternative Dispute Resolution* Interventions designed to address employment grievances and resolve conflict

- focus on conflicts between two or more people within the same organization
- used primarily in situations where conflict disrupts necessary task interactions and work relationships among members

- Mediation
- Ombuds Program
- Arbitration

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Mediation

Mediation is an informal process in which a neutral third party, with no power to impose a resolution, helps disputing parties try to reach a mutually acceptable settlement.

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Benefits / Goals of Mediation

- settlement reduces both economic and emotional costs of dispute
- companies can avoid litigation
- employees achieve a sense of empowerment and purpose within the organization
 - employees can voice their concerns
 - employees feel important, like they are an integral part of the organization working within the context of a participatory style of management

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Benefits / Goals of Mediation

- improve working environment by creating a healthier atmosphere
- improve employee relations by promoting qualitative *transformative* human interaction

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Variations of Mediation

- **Transformative**
 - people oriented
 - empowerment and recognition
- **Facilitative** – process oriented
- **Directional** – mediator takes more ownership in directing mediation process
- **Evaluative**
 - Mediator oriented
 - Mediator evaluates merits of dispute and related claims
 - Mediator provides opinion and solutions

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Transformative Mediation

In *The Promise of Mediation: The Transformative Approach to Conflict*, Robert A. Baruch Bush and Joseph P. Folger take a *transformational approach* to resolving conflict through mediation.

- people in conflict are seeking an interactional transformation as much or more than reaching settlements of concise issues
- people are capable of self-determined decision making and the uncoerced understanding of others which are needed for conflict transformation
- mediation process is used as a powerful tool for satisfying human needs and reducing suffering for parties to individual disputes

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Organizational Ombuds Program

Many organizations are starting to resolve conflict through *ombuds programs*.

- During the early to mid 1990s, major corporations, like Coca-Cola Enterprises, McKinsey & Company, Chevron Texaco, Shell, Halliburton, Coors, and American Express, developed conflict resolution programs using organizational ombudspeople to resolve workplace disputes.

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Organizational Ombuds Program

Organizational ombudspeople try to resolve several cases involving:

- discrimination
- resource abuse
- harassment
- worker productivity
- mistreatment
- worker stress
- bullying
- worker morale/satisfaction
- violence
- safety
- waste
- worker/management behavior
- fraud

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Organizational Ombudsperson

An *organizational ombudsperson* is a designated neutral or impartial dispute resolution practitioner whose major function is to provide confidential and informal assistance to managers, employers and/or clients of the employer.

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Organizational Ombudsperson

- Use a variety of skills which include counseling, **mediation**, informal fact finding, and upward feedback mechanisms, offering a range of options to those who contact the office.
- Internal corporate employees who function outside the ordinary line of management structure and have access to anyone in the organization, including the chief executive officer.
- Role is to protect against abuse, bias, and other unfairness or improper treatment of organizational members.
- Address disputes and issues in a **confidential** and **neutral** environment, guided by the internal requirements for the function.

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Benefits of Organizational Ombuds Program

Benefits to User

- The ombuds process can provide employees with a vehicle for addressing constructive conflict, and resolving any form of conflict is essential to promoting a healthy work environment
- Employees have a neutral place to go to resolve issues without risks
- Sends a message to employees that company cares about them

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Benefits of Organizational Ombuds Program

Benefits to Organization

- Cost Savings
 - Uncovering ongoing theft
 - Litigation avoidance
- Communications
 - Early warning
 - Clarification of Change or Policy
 - Improved management practices
 - Corporate image

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Arbitration

Arbitration involves a process whereby contending parties agree voluntarily to submit a dispute to a neutral party for decision and agree to comply with the decision.

- Arbitration is extremely popular among U.S. companies that view it as a manageable and efficient vehicle for resolving disputes.

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Why Companies Use Arbitration

- Companies prefer arbitration to litigation so they can limit discovery, set their own rules for presenting evidence, and select a third party who will decide their cases.
- Many organizations view arbitration as the last resort in a multi-step procedure and the only alternative to a jury trial.
- Companies offer arbitration as a voluntary alternative to litigation when all else has failed.
- Companies require that their employees submit to mandatory pre-dispute arbitration agreements as a condition of employment.

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Disadvantages of Arbitration to Employers

- Arbitration provisions are sometimes viewed as one-sided, favoring employees by providing remedies similar to those they would have in court, such as back pay, and compensatory and punitive damages, while lacking comparable remedies for employers.
- Arbitrators seldom dismiss cases even when there is no apparent basis for the claim.
- Arbitrators' decisions are subject to review on very narrow grounds and not subject to full appeal on the merits, even when there is an award lacking legal justification.
- Mandatory arbitration encourages claims and may not save money in the long run, thwarting the corporate goal of pursuing arbitration as a cost effective measure.

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Disadvantages of Arbitration to Employees

- Employers have an advantage over employees since they typically draft the contractual provisions of arbitration agreements and establish the *due process* procedures associated with pursuing arbitration as a means for resolving employment disputes.
- Employees are also disadvantaged by having to sign mandatory arbitration agreements as conditions to employment.
- The legality of some arbitration agreements has been heavily litigated, and some courts excise offending arbitration provisions, or void the entire arbitration agreement, if any part fails to afford due process to the employee.
- To address these issues, employers are beginning to force employees to sign *jury waivers* as a condition of employment in addition to making employees sign mandatory arbitration agreements.

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Criteria for Selecting ADR Process

- Nature of Case
- Relationship of Disputants
- Size and Complexity of Claim / Case

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ADR Leads to Better Outcomes

- Direct involvement of parties
- Opens lines of communication
- Participants can go beyond legal definition and scope of their dispute
- Parties can go beyond systematic trading of conventional settlement negotiations

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ADR Leads to Better Outcomes

- Complex cases - negotiations conducted by private neutrals with expertise, executives or industry experts who yield results superior to those of lawyers
- Settlements based on merits of disputes

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