Future Dispute System Design: Ethical Imperatives, Millennial and Beyond

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I. INTRODUCTION

The ethical case for dispute resolution (DR) systems has always been an important consideration, and becomes even more so looking to the future. At a time when corporations are being pressured to be lean and responsive to a challenging economic environment, it is compelling to look at both the economics of dispute system performance and the ethical underpinnings of integrated employee, customer, and business community DR systems. Add the Millennial Generation's expectation of an above-board approach to business, an honest and fact-based reasoning to decisionmaking, and behavioral norms,[1] and there are the tenets for the DR systems of the future. DR systems that stand the test of time will have the ability to adapt and provide entry points and processes that flex to meet the needs of each employee.

Ethical conflicts produce organizational costs.[2] To be effective in addressing ethical issues, the systems must move "upstream."[3] By becoming an integral part of the culture of an organization, the systems can reduce both frequency and cost of conflict. The DR systems for the future must focus not only on efficient resolution of disputes, but also on the prevention of these disputes in the first place. When organizations avoid dealing with conflict, the costs are significant.[4] The costs are both direct and indirect, and may include lost employees along with wasted time, bad decisions, unnecessary restructuring, sabotage, theft, damage to property, low motivation, lost work

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[1] *See* Susan P. Eisner, *Managing Generation Y*, SAM ADVANCED MGMT. J., Autumn 2005, at 4, 6 (2005).

[2] William A. Nelson et al., *The Organizational Costs of Ethical Conflicts*, 53 J. HEALTHCARE MGMT. 41, 42 (2008).

[3] *Id.* at 51.

[4] Maureen Moriarty, *Workplace Coach: Companies Pay the Price When Managers Avoid Dealing with Conflict*, SEATTLE POST-INTELLIGENCER, Oct. 29, 2007, at C1, *available at* http://seattlepi.nwsource.com/business/337162_workcoach29.html.

time, and health costs.[5] Leadership within an organization can directly impact the use and success of a DR system by adopting it as a building block of organizational culture. As a fundamental obligation of the company, dispute resolution must be addressed at the board level, demanding DR system responsiveness to disputes within and among organizations.

II. WHAT WE SEE TODAY

Some say that people are in conflict, or fail to cooperate, as much as they achieve cooperation.[6] Others disagree.[7] There is also the recognized phenomena of "invisible conflict"—conflict that is personal to, and invisible to all except, the parties involved.[8] This invisible conflict, in particular, challenges existing systems and begs the question of just how effective a DR system can be. There is an argument to be made that the most destructive of conflicts is the conflict that in all likelihood will not be brought to the system for resolution.

One thing is apparent: when there is a failure to cooperate, communicate, or otherwise behave appropriately, and conflict results, we still see a reliance on rights-based methods of resolution—appealing to an authority role to decide who wins and who loses.[9] This even holds true in the DR system designs we have seen in the past. The multi-step process typical of DR systems invariably includes a rights-based option, either litigation or arbitration.[10] While it is undeniable that litigation is a fundamental right that

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[5] DANIEL DANA, CONFLICT RESOLUTION: MEDIATION TOOLS FOR EVERYDAY WORKLIFE 18 (McGraw Hill 2001).

[6] Eric Brahm & Julian Ouellet, *Designing New Dispute Resolution Systems*, BEYOND INTRACTABILITY, Sept. 2003, *available at* http://beyondintractability.org/essay/designing_dispute_systems/.

[7] *See* Tony DiRomualdo, *Geezers, Grungers, Gen-Xers and Geeks – a Look at Workplace Generational Conflict*, WTN NEWS, August 14, 2006, *available at* http://wistechnology.com/articles/3224.

[8] David Matz, *The Inevitability and Perils of "Invisible" Health Care Conflict*, 29 HAMLINE J. PUB. L. & POL'Y 243, 243 (2008).

[9] *See generally* The U.S. Equal Employment Opportunity Commission, Charge Statistics: FY 1997 Through FY 2007, www.eeoc.gov/stats/charges.html (last visited January 12, 2009).

[10] ADR IN THE WORKPLACE INITIATIVE, SOC'Y OF PROF'LS IN DISPUTE RESOLUTION, DESIGNING INTEGRATED CONFLICT MANAGEMENT SYSTEMS § 3.4, at 10 (Cornell Studies in Conflict and Dispute Resolution, No. 4, 2001), *available at* http://digitalcommons.ilr.cornell.edu/icrpubs/2/.

is not lightly bargained away,[11] even arbitration as an endpoint begs the question as to the ability of dispute systems to modify or adequately address the culturally created or innately present desire for revenge, redress, or vindication that drives parties to litigation.[12]

The typical power-based structure of an organization is identical to the diagram of a distressed system.[13] So how does the DR system of the future evolve into one that compliments the model of an organizational structure that is effective? The power dynamic of the organization has to successfully turn into one that is interest-based. In order to accomplish this difficult task, the organization must address the need for engagement of a diverse and variously motivated employee base, which would mean that the interests being looked to as the dominant factors in the system are as diverse as the workforce.

Is it just easier to maintain a power-based system? After all, at some level don't all employees feel a level of comfort in knowing that there is a hierarchy, and that if nothing else, they can expect resolution when a problem is handed to a supervisor for solving?[14]

III. LOOKING AHEAD

In our current workforce, there is a segment of employees that just may be too flexible for any form of traditional DR system. We will suggest that future DR systems must be able to capture and deal with the conflicts relating to this generation in order to be effective. It might seem odd to suggest that the most flexible of employees are those that could most easily be lost to a less-than-responsive system, but we believe that to be the case. These employees would see a rigid system, or one with limited options for resolution, and weigh the effort and potential outcome of the process against an option that they see as much more realistic than do preceding generations, which is to leave and find another job. The ability to "walk," expressed as the power to avoid the conflict entirely by leaving, has been described as one of the four means of resolution recommended for system design—power, rights,

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[11] *See* Andrew M. Kepper, Note, *Contractual Waiver of Seventh Amendment Rights: Using the Public Rights Doctrine to Justify a Higher Standard of Waiver for Jury-Waiver Clauses than for Arbitration Clauses*, 91 IOWA L. REV. 1345 (2006).

[12] Charles B. Parselle, *The Satisfactions of Litigation*, MEDIATE.COM, May 2006, www.Mediate.com/articles/parselle10.cfm (last visited Jan. 29, 2009).

[13] Brahm & Ouellet, *supra* note 6.

[14] *Id.*

interest and avoidance.[15] The power to walk could become the more frequently chosen option for more flexible, disenchanted employees caught up in a workplace conflict. This reinforces the need to prevent disputes rather than focus on resolving them.[16] It is curious that the success of some systems is measured by the number of cases handled, when the goal should be to provide enough education to reduce the need for the systems themselves. Prevention of conflict through training of dispute resolution skills must be one key to future designs.[17] The goal of future dispute resolution systems should be to reduce the cycle time and cost of each encounter with the system, and to provide enough in the way of training and coaching to reduce the tension in the workplace environment.[18]

Mandatory training classes at new employee orientations would expose every employee to problem-solving tactics. This should be followed by annual refresher courses, or even online courses with quizzes that reinforce these tactics. If an employee sees this as an opportunity to become a better employee and co-worker, he or she will take the training more seriously and apply the tactics he or she learns to his or her work life.

Most organizational trainers will say that when a new employee is added, the cost of training and orientation is significant. They wrestle with the allotted time for training, trying to squeeze in all of the regulatory, organizational, and professional requirements. In our experience, none have taken the time to teach the tools of conflict avoidance and resolution. Short-sighted as it may be, to spend an "unproductive" four hours in this way is seen as a waste of time. Of course, the cost of replacing an employee alienated by unresolved conflict far exceeds the cost of a basic lesson in conflict management.[19] Prevention alone is not the complete answer, as conflicts will continue to surface, but considerable effort needs to be placed on training and creating a culture of engagement among employees from the very beginning. The more educated an employee is in conflict resolution, the

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[15] KARL A. SLAIKEU & RALPH H. HASSON, CONTROLLING THE COSTS OF CONFLICT: HOW TO DESIGN A SYSTEM FOR YOUR ORGANIZATION (Jossey-Bass 1998).

[16] Brahm & Ouellet, *supra* note 6.

[17] Deborah M. Kolb & Susan S. Sibley, *Enhancing the Capacity of Organizations to Deal with Disputes*, 6 NEGOT. J. 297, 297–304 (1990).

[18] *See generally* BLAINE DONAIS, *Redefining Conflict Management Systems Options*, EXTRACT #4 *in* WORKPLACES THAT WORK: A GUIDE TO CONFLICT MANAGEMENT IN UNION AND NON-UNION WORK ENVIRONMENTS (Aurora: Canada Law Book 2006), *available at* http://www.mediate.com/pfriendly.cfm?id=2331.

[19] William G. Bliss, *Cost of Employee Turnover*, THE ADVISOR, http://www.isquare.com/turnover.cfm (last visited January 11, 2009) (discussing the cost of training an employee in general).

more likely her or she is to resolve issues at the interpersonal level before they become conflicts that must be addressed by the company.

Modern dispute system design must also recognize that there are no "little people" in an organization. The hierarchy of management must be irrelevant to the process used to prevent disputes. It is either good or bad for the organization—a yes/no question. If the board and senior leaders do not use it, why should the other employees?

This is not to say that the same entry point and resolution option needs be applied to all. Ideally the system will have as many options for entry as are necessary to support each employee. Just as compliance or safety spontaneous reporting systems have as many entry points as necessary to capture all potential issues, the DR system must have a convenient and comfortable entry point for each employee preference. This may be a report to a supervisor, a human resources intake point, an online or telephone contact point, an office of conflict resolution, or an ombuds office.

Once in the system, the methods of resolution can be as diverse as the employees. At a fundamental level, there may be those who are interested in using conflict coaching to improve their own skills and attempt to deal with an issue informally. Another set may wish to have a facilitated meeting with the other party to work through ways to improve the relationship. Still others may elect to mediate the situation, once they have learned the various options available and understand mediation to be their choice. The important point being that, rather than the DR system dictating the steps to follow, it provides options that employees can choose to fulfill their needs.

IV. THE MILLENNIAL GENERATION

The entrance of the Millennial Generation into the workforce potentiates the need for an updated DR system. Millennials are considered "the most high-maintenance generation to ever enter the work force."[20] The Millennial worker is more concerned with happiness than money, wants to feel like he or she is making a difference, needs to be taken seriously, wants to be seen as a team player, has to feel challenged, needs prompt feedback, and dislikes slowness and inefficiency.[21]

Quality of life is much more important to Millennials than it was to previous generations in the work force,[22] so when a conflict arises, they are more likely to move on to the next best thing rather than endure a DR

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[20] Eisner, *supra* note 1, at 10.

[21] *Id.* at 6–10.

[22] *Id.*

system's attempt to resolve a conflict. For these reasons, the Millennial worker needs to have a DR system that encourages employees to come forward with disputes at all levels so that the system and the organization can be as preventive as possible. If the employees are just encouraged to surface when there is a conflict that they cannot solve on their own, the organization is living with an unknown level of unresolved invisible conflict.

Not only is the Millennial Generation less likely to use a DR system in the first place, but it also needs a system that will provide instant feedback, interactivity, speed, and satisfaction that the process will end with a just result.[23]

V. THE INTERGENERATIONAL WORKPLACE

While it is obviously important to focus on the Millennial Generation as we design the DR systems of the future, there are three other generations to consider. Traditionalists, Baby Boomers, and Generation X are also an integral part of today's workforce. Each generation brings its own unique qualities and shortcomings into the workplace, and as such must be considered in the design process.

Traditionalists are the oldest generation in the workplace. They are loyal, resistant to change, likely to remain with the same company over time, and prefer a traditional approach to management.[24] Traditionalists are not technologically savvy. The DR system of the future must not alienate this older generation by relying solely on technological avenues for dispute resolution. Baby Boomers make up the largest generation in history. Like Traditionalists,[25] they tend to be loyal and are not comfortable with technology.[26] However, they dislike authoritarianism, want to be treated as equals, and have become workaholics in their quest to achieve material success.

Generation X is far less loyal than the previous generations. This generation is more concerned with a work/life balance and not likely to enjoy the long hours of its workaholic parents. Generation X prefers a coaching management style with prompt, specific, and constructive feedback.[27] Additionally, Generation X is far more technologically advanced than the Traditionalists or Baby Boomers.

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[23] *Id.*

[24] *Id.* at 5.

[25] *Id.*

[26] Eisner, *supra* note 1, at 5.

[27] *Id.* at 6.

Adding the Millennial Generation to the mix, it becomes clear why it is imperative that the DR system of the future is versatile and accommodates the needs of each generation. An online system would be ideal for Generation X and the Millennial Generation, but would undoubtedly alienate the Traditionalists and Baby Boomers. On the other hand, a strictly meeting-based, in-person process would bore the younger two generations and be seen as too slow and not interactive enough to be worth the hassle. An effective DR system must balance the loyalty and technological inefficiencies of the Traditionalists and the Baby Boomers with the "one foot out the door" mentality and technological savvy of Generation X and the Millennial Generation.

VI. SYSTEM RESPONSIVENESS

Spontaneous reporting systems: they are the standard for patient safety systems in healthcare, they are the standard for compliance systems in all industries, and they are the standard for environmental and industrial safety in manufacturing. Why are they not the standard for dispute systems? For example, today in healthcare, there is a system that is available to receive patient safety issues: spontaneous reports involving any aspect of the environment of care. These reports are received and reviewed by quality department staff, and if they involve physician performance, they are diverted to a peer review staff. If they involve the environment of care relating to the facility, they are diverted to the facility safety committee. If they involve system quality as represented in hospital policy or process, they go to the quality process for root cause analysis. There is a separate compliance telephone line and online compliance reporting process. If the issue is compliance related, it is addressed by the compliance office; but if the information is really related to an HR issue, HR is notified. If it is a quality issue, it is diverted to quality.

Why not have the same process contain a choice to divert potential communication and conflict/dispute issues to the office of dispute resolution? If conflict systems were as robust as the patient safety reporting systems, would patient safety systems see fewer events?

VII. FUNDAMENTAL MEASURES

The goal of a new DR system is not large numbers of cases being handled, but large numbers of preempted conflicts. Registering hits to the system creates a picture of the interaction points that spawn disputes, and can create measured interventions on a system-wide scale to ease the friction points. A system that allows all employees, customers, vendors, etc. to use an

137

online system to register concerns about behaviors and interactions that may lead to conflict within the organization would create a sort of electronic ombuds office. Real-time reports of issues that are not yet conflicts, or situations that could have been costly conflicts but were avoided (near misses), and what the employees are doing when faced with these situations, become the data for trend analysis and prevention. The trends are then used to formulate training updates. In responding to the environment of the culture of today's workplace, the system must be immediately accessible, and must provide direct and relevant responses. If the issue is not in the process of resolution within the week, the employee may be ready to move on.

The system must be able to capture the issues presented without regard to the format or the entry point. The following examples demonstrate the point. A clerk in the mail room has an issue with the times that he is given for lunch by a supervisor whom he feels is playing favorites with another clerk. The complaining clerk has not discussed this with the other clerk or the supervisor. He accesses the company DR system and reports the issue in writing. When no response is received within a few days, he complains to HR in a written anonymous memo. After another week with no action apparent, he accesses the company compliance website and submits a complaint describing the favoritism as a violation of company policy. From the employee's perspective, he has complained three different times, all to no avail.

Another employee in distribution feels that she is being targeted by co-workers unfairly. Her performance is average, but every time she misses a deadline or fails to attend a meeting on time, they single her out for ridicule and complain to supervisors. Other co-workers have had similar issues, but they are not treated in the same way. The co-workers do not include her in invitations to after-work gatherings, and ignore her during breaks and at lunchtime. The employee has reached her limit and sends a note to the DR intake system online. The note says she is fed up with the treatment she is getting from co-workers and needs to talk with someone immediately. How long should she have to wait for a response? What are the risks?

As seen from these examples, employees needs contemporaneous feedback to see that their concerns are being taken seriously. Perhaps an online system that routes the issue to the proper channels and then sends frequent confidential email updates to the employee would satisfy this need. Employees need to feel involved in the process, not like this is just another thing that is happening to them.

When the generation of workers most attuned to computers, cell phones, and instant messaging[28] has to file a written request for an appointment to talk with someone who will then process a request for a review of the facts following a two week investigation, followed by a meeting with the person who will then arrange for a meeting with the person with whom there is an issue, it is easy to see why there may be a loss of confidence and patience with the process.

VIII. TECHNOLOGY AND THE FUTURE

With "tele-immersion" technology, could it be possible to have a system that provides a more responsive and immediate environment for interaction?[29] Would the use of avatars provide enough of an interactive, real-time experience to give participants a sense of the mediation experience?[30] There are entire environments that have been created online where the community is composed of digital representations of each person. For the technology-driven generation, this would be a more attractive option than having to set up a meeting and sit face-to-face. In fact, many would say that they would feel more comfortable and would speak more candidly online than in person. An online system would be an excellent alternative where the emotions of the parties are so high that the parties prefer not to face each other. When a dispute is that intense, it is more effective to conduct the DR process online because the parties will be less defensive and better able to think clearly and focus on a resolution rather than the dispute itself.[31]

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[28] Wikipedia, Generation Y *at* http://en.wikipedia.org/wiki/generation_Y (last visited February 10, 2009).

[29] David A. Larson, *Technology Mediated Dispute Resolution (TMDR): Opportunities and Dangers*, 38 U. TOL. L. REV. 213, 215–17 (2006) (discussing the potential impact of tele-immersion).

[30] *See generally* Marshall Scott Poole et al., *Conflict Management in a Computer Supported Meeting Environment*, 37 MGMT. SCI. 926, 927 (1991). Avatars are commonly recognized as an example:

> An avatar is a computer user's representation of himself or herself, whether in the form of a three-dimensional model used in computer games, a two-dimensional icon (picture) used on internet forums and other communities, or a text construct found on early systems...It is an "object" representing the embodiment of the user.

Wikipedia, Avatar (computing) *at* http://en.wikipedia.org/wiki/Avatar_(computing) (last visited February 10, 2009).

[31] Arno R. Lodder & John Zeleznikow, *Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in a Three-Step Model*,

Today's technology for producing interactive representations of individuals is quite evolved.[32] No one knows exactly what benefits future technology will offer, but we do know that as it continues to rapidly evolve, there will be opportunities for flexible DR systems to improve accessibility.

With instantaneous availability of a tremendous volume of data and other resources, disputants have the ability, together in a virtual environment, to explore potential resolutions and jointly identify relevant information that would assist in doing so. Of course, the basics remain essential. The neutrality of those involved in setting up and administering the process will be fundamental to success. The lack of consistent professional standards and low public recognition of the profession of dispute resolvers combines to put at risk any process that does not put trust of process and those involved first and foremost.[33] Participants will continue to seek not just prompt, but also affordable, fair, and fact-based processes.[34] If the system just looks like another corporate project infused with employees concerned solely with the company's best interest, employees engaged in conflict will think, "why bother?" Involving employees/stakeholders in the design process could help employees feel like the system was established for their benefit, and they will be more likely to use it. "If they build it, they will use it, refine it, tell their friends about it and make it their own."[35] Today's employees need to feel like the company wants to solve their problems, or there is no point in going through the process—they will just leave.

Two main problems an online system must address are confidentiality and security. With online conversations, there will be the possibility that one of the parties can print the conversations and share them; relieving the other

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10 HARV. NEGOT. L. REV. 287, 302 (2005) (discussing advantages of online dispute resolution).

[32] Examples of avatars can be seen in interactive internet-based collaborative environments where you can dance, eat, drink, and play, and in the popular Nintendo® Wii™ interactive gaming system that places you in the body of an avatar and allows you to move freely in your own environment to control movement in the on-screen environment.

[33] Adam Furlan Gislason, Note, *Demystifying ADR Neutral Regulation in Minnesota: The Need for Uniformity and Public Trust in the Twenty-First Century ADR System*, 83 MINN. L. REV. 1839, 1839–42 (1999).

[34] Roger S. Haydock, *Civil Justice and Dispute Resolution in the Twenty-First Century: Mediation and Arbitration Now and for the Future*, 27 WM. MITCHELL L. REV. 745, 746 (2000).

[35] Cathy A. Costantino & Christina Sickles Merchant, *How to Design Conflict Management Systems*, 14 ALTERNATIVES TO HIGH COST LITIG. 48, 48 (1996) (discussing the importance of involving stakeholders in the design process).

party of the confidentiality that party was guaranteed.[36] Trust in the DR system could be generated by a greater Code of Ethics, ensuring confidentiality by placing penalties on those who abuse the process.[37] Security is a major issue with any online transaction. The system would need to secure against the possibility of a hacker intercepting the conversation as well as someone impersonating a party to the dispute.[38]

While it is important to consider the needs of the Millennial Generation as we look to the future, we must not forget the other generations in the workplace. Customization is key for the DR system of the future. For example, in-person meetings may be preferred by older generations, while Millennials see meetings as a waste of time.[39] The DR system of the future must consider the needs of the intergenerational workforce and provide employees with options to create an optimal DR system for each individual. Because different generations approach conflict in different manners, it follows that they will need a customizable DR system to resolve these conflicts so they can handle conflicts as they like, instead of feeling like they only have one avenue for resolution. A system that allows more tenured employees to set up in-person meetings while also allowing Millennials to use more modern technology will provide the best balance for an intergenerational workforce.[40] The system becomes strategic in nature rather than simply reactive.[41]

IX. CONCLUSION

When a system becomes supportive of, and coaches for, an ethical culture of collaboration, it becomes a process that minimizes costs through education about the ways in which employees can deal with communication and interaction issues before they become conflicts. Institutionalized it may be, but this system certainly would not be stale and predictable. What we describe is a multi-faceted, technology-based, and primarily integrated DR

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[36] Sarah Rudolph Cole & Kristen M. Blankley, *Online Mediation: Where We Have Been, Where We Are Now, and Where We Should Be*, 38 U. TOL. L. REV. 193, 203–04 (2006) (discussing confidentiality concerns in online mediation).

[37] Gislason, *supra* note 33, at 1882–83.

[38] Cole & Blankley, *supra* note 36, at 203–04.

[39] Eisner, *supra* note 1, at 6, 9–10; K. Lynn Wieck, *Motivating an Intergenerational Workforce: Scenarios for Success*, 26 ORTHOPAEDIC NURSING 366, 368 (2007).

[40] *See, e.g.*, Weick, *supra* note 39, at 368.

[41] David B. Lipsky, Director of the Scheinman Inst. on Dispute Resolution, Cornell Univ., Address at the ABA Section on Dispute Resolution Annual Conference: Integrating Conflict Resolution Systems in Corporate America (2008).

process that connects from the very top of the organization and remains relevant to every employee.