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ALTERNATIVE TO WHAT?: PRIMARY CONFLICT MANAGEMENT—THE NEW FACE OF ALTERNATIVE DISPUTE RESOLUTION

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I come to this business of arbitrating and mediating after having spent time as an advocate, while a union lawyer, and thereafter as an arbitrator, when I switched sides to represent management.¹ In retrospect, the strength of that preparation was the interaction with mediators and arbitrators on both sides of the table. Having a sense of the damage that can be done gives me a very valuable perspective on the process.

I have problems with the title of this discussion: "Clearing the Docket: Alternative Dispute Resolution." There are three things wrong with the phrase, "Alternative Dispute Resolution ('ADR')." The first problem is with the word, "alternative." The second is with the word, "dispute." The third is with the word, "resolution."

"Alternative" is problematic because it begs the question, "Alternative to what?"² You see, ADR is a lawyer's concept. For many lawyers, ADR is alternative to litigation, which in their minds is the primary way of resolving disputes. And it has been so since we abandoned trial by combat and chose the alternative of litigation in baronial courts.

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¹ See generally Jerome K. Lieberman & James F. Henry, *Lessons From the ADR Movement*, 53 U. CHI. L. REV. 424, 424 (1986) (outlining roles of mediation, arbitration, conciliation and negotiation); William K. Slate, *Arbitration Comes of Age*, AM. LAW., May 1995, at 8 (detailing roles played by attorneys in ADR).

² See Lieberman & Henry, *supra* note 1, at 426-27. "[A]lternative in one of two senses: because the parties privately choose to avoid litigation . . . or because legal rules require or permit the courts to send the dispute elsewhere." *Id.*

I do not, however, accept the proposition that litigation is or should be the primary process for addressing conflict. That is not how life operates.³ Most rational people solve problems in other ways than by running out, finding lawyers and spending five years making each other as miserable as possible before some outsider, a judge, imposes an outcome on their relationship. So, litigation should be the alternative, and a final one at that; what we are talking about here should be primary.⁴

My second problem with the term, "Alternative Dispute Resolution," is its focus on "disputes." If you ignore a problem long enough, it will ineluctably evolve into a fully-blown dispute.⁵ It makes a lot more sense to address problems as early and effectively as possible rather than to wait for them to become disputes with a much heavier impact on the parties' interests.

My third problem, with the word "resolution," concerns what action the process must accomplish. "Resolution" of a fully-blown dispute is a big job, usually harder and more expensive than solving the earlier problem that ultimately generated the dispute. The phrase, "alternative dispute resolution," accordingly suggests a secondary process that operates too late to do too big a job, and that is a problem.

Instead of "alternative dispute resolution," I believe the more useful and appropriate term should be "primary problem solving," or "primary conflict management." With that approach the title of this program would not be "Clearing the Docket," which is what ADR seeks. With primary problem solving, we seek to have *no* docket to clear because many fewer cases would come to litigation.

Let me suggest a different approach to this concept that does present a true alternative. Look up, and you will see an example of what I call primary problem solving: this building's sprinkler system. The Law School's risk manager reasonably anticipated a risk of loss due to fire and addressed it with a mechanism designed to limit the loss consequences of those fires that do oc-

³ See Richard W. Page, *Appropriate Dispute Resolution in North America*, N.Y. L.J., May 4, 1995, at A3 (commenting on ADR procedures dignity and preference over traditional litigation).

⁴ See Slate, *supra* note 1, at 8. "ADR is no longer viewed just as an alternative to litigation, but has taken its rightful place as one of a set of options to be built into legal and business planning." *Id.*

⁵ See *id.* at 9 (outlining how effective use of ADR resolves disputes).

cur.⁶ Other such risk management efforts would include using fireproof construction materials to prevent losses and purchasing fire insurance to indemnify losses. Risk management generally involves identifying sources of loss and taking rational steps to limit them.

It is equally appropriate to anticipate and address risk of loss due to conflict.⁷ The potential costs to be avoided include not only potential liability for compensatory and punitive damages but also attorneys' fees and disruptions of a productive enterprise caught in litigation.⁸ There are tremendous costs associated with conflict.

Using the risk management approach for losses due to conflict requires creative lawyering to design and implement effective systems that identify problems that can generate conflict as early and effectively as possible and to address those problems while they still are only problems. This can prevent the problems from evolving into fully-blown disputes that require lawyers, judges, a court system and a docket of disputes to litigate.⁹

The basic black-letter law of contracts provides tools to construct conflict management systems, put them in place before they are needed, and make positive outcomes more likely.¹⁰

Now, Wayne Outten's view of ADR is unusual for an attorney. Many traditional attorneys view ADR as a collection of unitary concepts that cannot vary from a few boilerplate formulations. "Whoops," they say, "we've got a lawsuit. Let's mediate; let's arbitrate; let's use a mini-trial; let's use fact-finding." Those are the ADR concepts they know. But what do they know about them? All they frequently know about them is that processes with these names exist. But, because they have not thought about creating

⁶ See David J. Berman, *Managing Disputes In-House*, RECORDER, May 22, 1995, at A6 (noting rise of company programs in form of internal problem solving tools to reduce risk of litigation between employees and management).

⁷ See *id.* at 50 (noting potential cost savings from establishing solid ADR systems).

⁸ See Slate, *supra* note 1, at 8. "ADR costs are lower; dispositions are faster; privacy is maintained; the process is less formal; and the outcomes can preserve and sometimes even improve relationships among participants." *Id.*

⁹ See generally John B. Bates, *Mediation: The Pursuit of Compromise*, USA TODAY (Magazine), Mar. 1994, at 38 (noting survey finding estimated \$49,000,000 savings from ADR use); Yardenna Hurvitz, *Getting Comfortable With Change*, RECORDER, Apr. 12, 1995, at A7 (citing rising use of mediation by attorneys).

¹⁰ See Slate, *supra* note 1, at 9 (discussing use of arbitration clauses in contracts); see generally Page, *supra* note 3, at A5 (outlining elements which ADR contract clauses should cover "including the ADR processes to be used, the appointing or administering authoring, the number and qualifications of the arbitrator(s) or mediator, the procedural rules, the location of the hearing(s) and the language of the award").

systems that meet the culture and needs of the workplace or the community with the problem, they often try to push the people with the problem into a limited process, never realizing that they can custom-design a system to address the problem.¹¹

Sexual harassment disputes in employment provide a useful example of the shortcomings of traditional approaches and strengths of creative lawyering. The difficulty of sexual harassment allegations that are denied is that an employer can easily become caught between and adverse to each of the *primary* disputants, the accuser and the accused. The dilemma in a stereotypical sexual harassment case is that, if the employer believes the charges, the accuser may sue and, if it believes the accuser, the accused may sue. And the employer may have to wait anywhere from three to five years to learn from a jury that it should have believed the other—or that its investigation was flawed by self-interest. Either way—and let us assume a good-faith decision in both cases—the employer loses, even if it should ultimately prevail in the resulting litigation. As noted, traditional litigation is expensive and disruptive. Successful standard mediation on the eve of trial would save only the cost of trial and do nothing to avoid the costs and disruptions of discovery and preparation while the case awaits trial. And it seems unlikely that a plaintiff with a juicy jury issue would agree to voluntary arbitration.

Now let us analyze the situation with the primary-conflict-management approach that I propose. The employer's problem is that it must make a credibility determination that it is not qualified, either by experience or disinterest, to make. And that problem is complicated by the lack of any significant incentive for the primary disputants to cooperate fully with the employer's investigation. Indeed, an employee who is a potential plaintiff operating with a "lottery" mentality might adopt a "wait-and-see" attitude or even withhold information in the hope of improving his or her case in future litigation with the employer.

A system I have developed to manage such conflict uses arbitration and mediation elements in an advisory fact-finding process that keeps the employer from getting caught between the primary

¹¹ See, e.g., Richard K. Jeydel, *In-house Counsel Increasingly Depend on ADR*, N.J. LAW., May 22, 1995, at A18 (addressing need to tailor ADR clauses to particular environment with problem).

disputants and, as a practical matter, obligates them to participate affirmatively in addressing the problem. In effect the employer contracts out the necessary credibility determination to an impartial, professional arbitrator to conduct a hearing and issue a non-binding fact-finder's report that the employer will use to evaluate the situation and decide what action to take.¹² The employer uses the same management authority that it would have used to say, "Tell *me* what happened," instead to say, "Tell the *fact-finder* what happened; and I, the employer, will wait until I have neutrally-determined findings of fact to decide how to proceed."

This is a minimalist procedure because no one must waive anything. The primary disputants keep whatever rights and causes of action they may have, and the employer retains its full range of managerial prerogatives to address the situation. The primary disputants must, on pain of insubordination or adverse inference from lack of participation, cooperate fully to convince the fact-finder of their respective probity.

When I developed this procedure, I had thought there were three possible outcomes, all of which would improve the employer's resulting position. Assume first the employer's "worst-case" scenario: the fact-finder determines that sexual harassment did occur as charged. In that case the employer will have had a neutral determination of that fact not more than three weeks after the initial charge, instead of having to wait five years while back pay liability mounts and a perception of "justice delayed" builds that can generate a large punitive damage award.

Having neutral confirmation of exposure enables the employer to take immediate steps to solve the problem. For example, a promotion decision tainted by sexual misconduct can be rolled back and rerun by a disinterested manager while the complainant receives three weeks back pay for the position he or she claims to have been wrongly denied. Other sexual misconduct scenarios will obviously produce more expensive outcomes for the employer, but, in any case, early determination of the facts will enable the employer to minimize losses and take early corrective action evidencing good faith that may assuage a potential plaintiff's outrage

¹² See Slate, *supra* note 1, at 8. Fact finding, pursuant to the ADR, provides for an "investigation of a complaint by impartial neutral parties who examine the issues and facts for a nonbinding report." *Id.*

and reduce exposure to punitive damages. And the neutral determination of fact will shield the employer from wrongful discharge or defamation claims by the accused.

In the second and third potential outcomes, the fact-finder either (a) decides affirmatively that the charged sexual misconduct did not occur or (b) concludes that the credibility conflict cannot be determined based on the record adduced by the primary disputants. In either case, the employer needs only to reiterate its absolute policy that it will not tolerate sexual harassment, to conduct sensitivity training if appropriate, and to help re-establish a productive relationship between the primary disputants.

In both cases, the employer is better off than if it had made the same determination after its own investigation. First, the impartial fact-finder's determination, made after a full hearing of testimony, made under oath and subject to cross examination, will be inherently more acceptable because of the fact-finder's lack of interest and the primary disputants' full opportunity to participate and be heard. As a result, a certain number of complainants, having had a fair shot at convincing a neutral decision maker, will have had the catharsis necessary to continue work without having to seek vindication in a lawsuit. Second, those who remain sufficiently enraged to pursue litigation are less likely, having had a neutral determination of no case, to find an attorney willing to take their case on a contingent basis. And finally, for those fewer employees who do secure counsel and commence litigation, what better posture for the employer before a judge or jury than to be able to ask, "What more could we have done than to retain a neutral finder of fact and to rely on his or her determination?" Certainly the employer's willingness voluntarily to adopt such a procedure is persuasive evidence of good faith. And the employer will have the benefit of a transcript of plaintiff's allegations and proofs at the fact-finding hearing that will establish conclusively the employer's state of knowledge at the time it addressed plaintiff's claim.

In fact, I was gratified to discover a fourth, and most dramatic outcome in these cases. In the dozen cases in which I have been involved since developing this concept, not one hearing has had to occur. In every case the primary disputants, forced to deal with each other and the problem directly, have reached their own resolutions. A few cases have ended based on little more than an apol-

ogy and a handshake. In one case, however, a senior management official took early retirement. In all cases, the primary disputants executed releases to the employer as part of the settlement.

Why has this process worked so well? Because its design required the primary disputants to be in the same room and to participate in solving the problem they own as well as the employer. Contrast that with the parties' posture in traditional litigation, which is to stay as far apart as possible, send in their lawyers, keep everything as close as possible to the vest, share no information, and wait five years for a determination of liability while their lives turn into shambles around them.¹³ That, I suggest, is not useful to anyone. The real challenge for creative lawyers, driven by client service agendas, is to get the people with the problem into the same room.

Now, what Wayne Outten called "cram-down arbitration" is the result of a United States Supreme Court case, *Gilmer v. Interstate Johnson Lane Corp.*¹⁴ In that case an individual's contract of employment, which required arbitration of disputes arising out of his employment, was forced to stay plaintiff's federal court age discrimination action and compel arbitration of his statutory claims under the Stock Exchange's internal arbitration process.¹⁵ Wayne's "cram-down" epithet rests on the fact that, in order to become a stockbroker, Gilmer had to sign a U-4 agreement that, like investors' form contracts with their brokers, requires submission of all disputes to arbitration under the rules of the New York or American Stock Exchange, the National Association of Securities Dealers, or the American Arbitration Association.¹⁶ Gilmer had no choice. As a condition of employment he had to arbitrate claims for which he would have otherwise have had the right to sue in federal court to vindicate his statutory rights. Moreover, Gilmer found himself in an arbitration process where the decision

¹³ See Bates, *supra* note 9, at 38. The key to successful mediation is party negotiation. *Id.* "The heart of mediation—and the reason it is so efficient—is that it is an open, direct, no-nonsense approach to getting the parties together to air their grievances and state their positions." *Id.*

¹⁴ 500 U.S. 20 (1991).

¹⁵ See *id.* at 26. The Court ruled that "all statutory claims may not be appropriate for arbitration." *Id.* If a bargain to arbitrate has been made, however, "the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.*

¹⁶ See *id.* at 20-21.

maker was someone from the securities industry¹⁷—the opportunities for conflict of interest are obvious—who may or may not have had any training or experience in conducting hearings or interpreting and applying legal rights. Small wonder that Gilmer felt abused and that due process advocates call this “cram-down” arbitration.

Whether or not you like what happened to Mr. Gilmer, the importance of *Gilmer* is that it provides a useful conflict-management tool. Creative lawyers can use contracts to create processes that get disputants into the same room where problem solving can occur.¹⁸ Nothing in *Gilmer* would prevent an employer from requiring mediation as a precondition for suing.¹⁹ One of my colleagues, general counsel of a large insurance company, did just that, adding to agents’ employment contracts a requirement of at least four hours of good faith negotiation between the parties in the presence of a trained mediator before bringing lawsuits. That got the people with the problem into the same room, and it resulted in a dramatic reduction of litigation. Over the program’s first five years, only one case required a lawsuit as opposed to fifty in the prior five years.

There are many other things one can do to design effective conflict management systems.²⁰ Time prevents addressing all, but first you must identify the problem, identify the outcome you want to achieve, and, working backwards from the outcome, develop and draft a strategic process for getting from problem to outcome.²¹

That is what true ADR should be. It is about lawyering. It is not about waiting for a lawsuit and then saying, “I know these things called mediation and arbitration; let’s try to convince plain-

¹⁷ See *id.*; see also *Mastrobuno v. Shearson Lehman*, 115 S. Ct. 1212, 1217 (1995). The Court held that although the contract called for use of New York law, “absent[.] . . . contractual intent to the contrary, the FAA would pre-empt [state law rules].” *Id.*

¹⁸ See *Gilmer*, 500 U.S. at 32 (citing 9 U.S.C. § 2). “[A]rbitration agreements are enforceable ‘save upon such grounds as exist at law or in equity for the revocation of any contract.’” *Id.*

¹⁹ *Id.*

²⁰ See, e.g., Ellen Yamshon, *Disabilities Act Doesn’t Have to Be Bad News For Business*, SACRAMENTO BEE, Nov. 13, 1994, at F2. “The act itself . . . contains mechanisms to significantly lower the burdens associated with resolving conflicts that arise from implementing it.” *Id.*

²¹ See *First Options of Chicago, Inc. v. Kaplan*, No. 94-560, 1995 WL 306184, at *3 (U.S. May 22, 1995). The Court held that if parties agree to arbitrate they can ask a court to review the arbitrator’s decision, “but the court will set that decision aside only in very unusual circumstances”. *Id.*

tiff to forego a jury trial in the name of clearing overburdened court calendars.” That is not what ADR is about. That’s kidding yourself, and that’s wasting clients’ money.

The bottom line is not to let problems evolve so they become grist for lawyers’ mills, but rather to manage conflicts and to solve problems as early and as effectively as possible. That is what true ADR should be.

