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# The Future of Employment Conflict Management Systems

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# The Future of Employment Conflict Management Systems

## Abstract

In this article, the authors have offered their view of the future of conflict management systems, and of some of the problems that will slow the pace of those systems' growth. All of these problems are related to the external environment faced by organizations seeking to develop conflict management systems, since there seems to be only a limited potential for influence of internal design features. 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 create their own system.

## Keywords

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## Disciplines

Dispute Resolution and Arbitration | Labor Relations

## Comments

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The Future of Employment  
Conflict Management Systems

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*Alternatives to the High Costs of Litigation* (2003), 21(9), 171-175

## Abstract

In this article, the authors have offered their view of the future of conflict management systems, and of some of the problems that will slow the pace of those systems' growth. All of these problems are related to the external environment faced by organizations seeking to develop conflict management systems, since there seems to be only a limited potential for influence of internal design features. 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 create their own system.

The development of conflict management systems by private and public organizations has received much attention over the past decade. The authors of this article have conducted survey and field research on these systems within large private businesses for the past six years. The results of that research and a summary of the best practices by corporations are included in “Emerging Systems for Managing Workplace Conflict: Lessons from American Corporations for Managers and Dispute Resolution Professionals” (Jossey-Bass 2003).

Understanding of the reasons for the creation of these systems, the way in which they operate, and the supporting structures necessary to continue their growth, continues to evolve. This article focuses on the future of conflict management systems. There are some barriers to their continued expansion; this article will try to list the most significant of those barriers.

First, the long scope of U.S. economic and organizational history suggests that there will be continued privatization of dispute resolution, including the privatization of employment dispute resolution. Although every set of employee—employer disputes that has arisen has been met first with regulation, ultimately, the parties have sought to resolve disputes themselves, in private, and policymakers have encouraged them to do so.

The United States’ original labor relations policies supported negotiations, in contrast to resolving labor disputes in the courts. This policy has been reinforced by courts’ deference to arbitration, and the support for private negotiations through the assistance of mediation services set up by the federal government and various states.

The second reason privatization of dispute resolution will continue is the arena of individual employment rights. It is now less than 40 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 the laws that followed.

The deregulation of whole segments of the economy also has boosted the trend toward using 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 to be drawn from the longstanding trend toward private dispute resolution, combined with the more recent moves in that direction, is that the conflict management systems detailed in “Emerging Systems for Managing Workplace Conflict” probably are just the next privatization wave. The area up for debate is not the direction of the trend, but rather the pace at which it will proceed. It seems clear 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.

Changes are anticipated in the size and range of organizations that create workplace systems, as the institutionalization of these systems and the integration of the systems with other corporate values and processes will continue.

The authors also believe that the U.S. borders will be borders to dispute resolution systems. That is, global organizations will continue to customize dispute resolution regionally, or even country by country.

## **BROADENING ACCEPTANCE**

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 clear threat such as union organizing, or burdensome litigation. The resources needed to build and manage workplace systems are also found mainly in larger organizations.

Workplace systems will be accepted increasingly in mid-size organizations. This trend will be motivated by an increasing recognition that a workplace system is simply good for business. Midsize employers will 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.

But formal workplace systems are less likely to be widely accepted into smaller organizations, mainly because of cost. Systems currently require more resources than smaller firms feel they can afford. Most organizations do not hire a dedicated human resources professional until they reach at least 200 employees. An employer without a human resources function will not focus on workplace systems.

## GOING GLOBAL?

The authors' field research indicates 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, often are unique to the U.S.

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, U.S. dispute resolution. Specifically the pro-employee laws of many other countries focus on a rights-based orientation. There is a perception that foreign employees would not accept a model that encourages self-initiative and offers significant freedom of choice as to rights versus interest-based solutions. Because of these legal and cultural differences, we do not foresee workplace systems being broadly implemented in international operations.

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.

Conflict management systems likely will become institutionalized in the future, however, by those employers that recognize their value and remain committed to their credibility. Such systems will become a universal part of the workplace culture, and that the

systems' success will be firmly accepted by all parts of the workforce. Commitment to the workplace systems will not waiver through the passing of leadership and tougher financial times.

This will occur for many reasons. First, a lot of current workplace systems were built through the efforts of an internal champion. Occasionally, corporate commitment to its workplace system has faltered when the champion has moved on. Internal champions, although not ADR experts, understand the concept and coalesce support among the senior leadership team. Over time, however, workplace systems won't be dependent on a champion.

Second, the newness and suspicion of workplace systems will disappear. Employees eventually will view conflict resolution as the norm.

Finally, workplace systems will become institutionalized because their values, philosophy, and features will become ingrained in the fabric of the organization. Success stories will build up around the workplace system. Substantive differences between the workplace system and other human resource strategies or initiatives will be ironed out. Workplace systems, including their values and features, will be seen universally as "the way we have always done it around here." That is the real definition of institutionalization.

## **INTEGRATION WITH OTHER VALUES**

Larger organizations increasingly are defining their values—those principles intended to guide both employee conduct and business strategy—as a source of competitive advantage.

Examples of corporate values include integrity of conduct, customer commitment, innovation, environmental compliance, process and product quality, and respect for employees. Organizations believe that employee behavior can be broadly influenced by defining, encouraging, and rewarding employees to act consistent with corporate values.

There will be continued integration of these corporate values with the core values inherent in workplace systems. The author's field research concludes that employers who have implemented workplace systems effectively have, for the most part, introduced new values and options into the workplace and integrated these two sets of values. In the end, there will be no differences in values.

## **ALIGNMENT WITH OTHER PROCESSES**

Workplace conflict management systems are not stand-alone features in an organization. They must be carefully aligned with other workplace processes, programs, and initiatives.

If the workplace system's design is inconsistent or at odds with these other organizational processes, the system will be less effective. If the core values of the workplace system are at odds with other dominant processes, the system will fail.

To be successful, conflict management systems must be carefully aligned with the core human resources strategies and processes. Procedural differences between these two systems are acceptable, but value differences are not. Proper alignment of the two systems facilitates employee understanding and acceptance of the conflict management system.

This is a difficult task, and not all organizations will find this integration to be a smooth transition. But despite the difficulties, successful workplace systems increasingly will become aligned with internal human resource processes.

Most large organizations today have adopted the general principles of the quality movement, also known as process improvement, continuous improvement, or "Six Sigma." Growing minorities of organizations have embraced conflict management systems as part of their quality initiative for employees. They view the workplace conflict management as a

business strategy that can be analyzed, mapped, and quantified. These employers use the quality process to develop their workplace system, including employee focus groups, monitoring of progress, and continual statistical control. These organizations report significant satisfaction through the use of this quality methodology.

In the past decade, numerous large employers have tried to become “learning organizations.” A corporate-wide initiative to build organizational capability, this process calls for systems thinking, mental models, shared vision, and team learning. The organizations seeking this initiative view knowledge and systems thinking as a broad organizational capability that can be transformed into a source of competitive advantage.

Increasingly, progressive employers have embraced thinking about workplace conflict as a social system worthy of continual analysis. They encourage individual employees to enter the workplace system “at will,” but not to stop there. These “systems thinkers” examine the sources and nature of conflict for its root cause. Whatever knowledge they glean during the examination process is broadly exchanged across the organization for reflection and adjustment.

In this way learning is continuous across numerous locations using the workplace system, and the system’s effectiveness accelerates over time. If one site identifies a design flaw, for example, this information is quickly inventoried and exchanged to all sites for their fix. If five remote sites have similar claims arising from the retirement plan, these cumulative data are noted and addressed by the system coordinator. These “systems thinkers” report significant satisfaction with this strategic initiative, and we believe that workplace systems will increasingly become a learning tool.

A significant movement embracing team concepts has evolved since the 1980s, in large and small organizations. This movement encompasses principles of innovative changes

in work structure, the absence of clear supervision and leaders, and radical expectations for self-initiative.

These team principles can take the shape of temporary cross-functional work groups, permanent cross-department teams, work groups without clear leaders, and greatly reduced time frames for decision making.

Conflict and disputes in work teams are inevitable. They occur at several levels. Some are interpersonal among team members. Some are with other teams. Some are over the interpretation of data or the allocation of resources.

To resolve these conflicts, an increasing number of these organizations have embraced conflict management systems. These employers have reported that workplace systems have effectively supported the social process values and skills required for these work teams to be successful.

Since the 1980s, organizations have become flatter and more agile in structure and process. Management layers have been removed, leading to greater spans of control among those remaining. Functions are now expected to be more adaptable and accepting of new strategic direction as industry market conditions change. Such a scenario inevitably leads to conflict and disputes over strategy, resources, data, assignments, and job performance. In the past, managers had the time to resolve functional conflicts, and the slow pace of change allowed conflict to be resolved through existing processes. This is no longer the case.

With logic similar to work teams, organizations have embraced workplace conflict management systems to provide a cultural foundation and clear options, training, and specific tools to channel and resolve conflicts arising from this new organizational reality. Employers who have implemented workplace systems as an enabling vehicle in flatter and more agile organizations have reported success in their results.

Thus, workplace systems increasingly will be accepted by flatter and more agile organizations.

### **A COMPETITIVE BENEFIT?**

A competitive benefit is generally defined as an organizational capability that is publicly recognized and encourages candidates to select one employer over another. It creates the image of a choice employer. For example, the marketing legacy of Cincinnati's Procter & Gamble Co. is a competitive advantage in college recruiting, for example. The famous Crotonville, N.Y., Learning Institute is a competitive benefit of General Electric Corp. in retaining executives. Microsoft Corp.'s technology prowess has made it a national employer of choice for technology-oriented people. Other companies gain competitive benefit through their salary structure, their medical benefits plan, their retirement benefits, their growth history, and even their location.

The "Emerging Systems for Managing Workplace Conflict" field research includes interviews with numerous corporate executives, including presidents, chief financial officers, human resources vice-presidents, and general counsels. Interviewees were asked whether workplace systems already are or will be viewed as a competitive benefit in the marketplace.

There were a variety of responses. As one would expect, all users of workplace systems emphasized that the system must be effective to ever become a competitive benefit. This means that the system must be credible, must actually be used by employees, and must have an established track record of corporate commitment.

The majority of those executives interviewed did not yet view the existence of a credible workplace system as a competitive benefit for candidates and employees. They believed that most systems are too new to gain this status. They also believed that most

employees do not fully understand conflict resolution and the advantages resulting from a systemic channeling of conflict.

In a few interviews, executives commented that the “image” of their workplace system is linked to whatever event precipitated building it, sometimes embarrassing litigation or a union organizing campaign.

Most executives voiced a hope, however, that employers with workplace systems will eventually be recognized in the talent market and will be viewed as an “employer of choice.” They believe that the existence of workplace systems will become linked to a more friendly culture, higher morale, higher quality decision making, and a more professional work environment. In a few organizations, candidates are informed about the workplace system as a recruiting tool. We believe that in the next decade, workplace systems will be marketed as a competitive benefit for retention and recruiting purposes.

## **THE INTERNET AND CONFLICT MANAGEMENT**

Historically, negotiations over business disputes have occurred face-to-face. There was a paradigm that people required physical and visual presence to create movement and settle a dispute. Both law schools and business schools taught it that way, and everyone believed it.

In the past 20 years, though, this model has been modified: Negotiations started to occur over the telephone. Although there was some adjusting required, parties recognized the savings in time and convenience. As a result, telephonic negotiations are now a commonly accepted option during the dispute resolution process. Many disputes have been resolved over the phone outside the physical presence of the parties.

This online dispute technology is already delivering results in limited cases. One prominent labor arbitrator the authors know has adopted online technology in his practice. Whenever possible, he conducts pre-hearing conferences and “live” hearings from his home over the Internet, using video-streaming equipment and other technologies.

In the past, this arbitrator reports, he would have resisted the technology because of a perception that he would lose the ability to assess the credibility of witnesses. Over time, though, he has not found this to be the case. He claims that most cases do not turn on visual impressions of witness credibility and that, when required, there are other techniques to evaluate the credibility of testimony.

The precise direction of online dispute resolution cannot yet be predicted with any finality. There are numerous barriers to its full acceptance. One is security—ensuring the privacy and confidentiality of settlement discussions and agreements. Another is jurisdiction—How do real world jurisdictional disputes translate into cyberspace? Another is creating legally binding web agreements. Another is defining and respecting the procedural rules of the online process.

Despite these current barriers, however, online dispute resolution represents the new frontier for workplace conflict resolution. Disputes do not necessarily have to be settled face-to-face. Online dispute resolution is a tremendous opportunity with broad appeal to a variety of large and small organizations.

## **BARRIERS TO FURTHER GROWTH**

Although there is a strong probability of 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 for leaders to consider on whether to develop and implement a conflict management system. There are several key challenges to the pace at which the privatization of conflict and dispute resolution will proceed.

The U.S. Supreme Court is now clearly and firmly in favor of employment ADR. The line of cases that began with *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), expanded with *Circuit City Stores Inc. v. Adams*, 532 U.S. 105 (2001), and was seemingly finalized in *EEOC v. Waffle House*, 534 U.S. 279 (2002), has created a series of precedents that seem unlikely to be challenged in the near future.

In *Waffle House*, the Supreme Court carved out an agency exemption for a predispute waiver by retaining agency rights, where they exist, to not be a party to an arbitration system the agency did not voluntarily accept. Thus, the fundamental legal issue is not whether these schemes are legal, as it was throughout the 1990s, but whether there has been enough “chipping around the edges” to make arbitration difficult to enforce and less final and binding than users would hope for.

Other than that exception, the important legal actions to come seem to be the continuing efforts by the courts to define a set of standards for due process in dispute resolution systems. A large and growing number of recent cases, primarily decided at the state court level, have focused on carving out due process standards for those conflict management systems that contain arbitration waivers.

## PROBLEMS WITH NEUTRALS

Most conflict management systems rely on external neutrals—that is, neutrals outside 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. This can be a factor particularly when a single neutral, or a small neutrals' 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 leading conflict resolution professional organizations have tackled this problem, recognizing that it calls into question their members' integrity their members and their profession. The National Academy of Arbitrators, Cortland, N.Y.-based non-profit group of labor arbitrators which also is an honorary society, confronted the ethical dilemmas directly in a 1999 survey by asking its members their views on a wide range of ethical issues presented by arbitrator participation in conflict management systems. The Association for Conflict Resolution, a Washington, D.C., professional group that emphasizes mediation as well as arbitration, also has addressed the ethical issues in its conflict-of-interest policies.

The bottom line is that employees and policymakers, as well as the promulgators of workplace conflict management systems, need a high level of confidence in the neutral profession. Otherwise, no matter the pace of growth, the movement will be stunted by this problem.

One means of addressing the neutral question is through credentialing. At this point, there is no standard for minimum qualifications or training for arbitrators and mediators. These standards likely will be developed over time, although it is impossible to say when.

The inevitability of credentialing may not seem so obvious to all the groups trying to prevent it, but it seems that the field would be well served by at least some minimum statement of qualifications.

Credentialing could address or even resolve the question of whether all disputes that involve even the smallest legal matter require neutrals who are lawyers. On the other side of the same coin, credentialing could resolve whether all lawyers or former members of the judiciary are automatically qualified to conduct employment mediations with a legal issue at the core.

Credentialing could be implemented through minimum training hours, written tests, skill-based tests, client evaluations, or apprenticeship and it could legitimize neutrals' training providers, a field in which reputation currently counts for more than the quality or content of the training itself.

Neutrals' credentialing has not proceeded easily to this point. In 2000, the Federal Mediation and Conciliation Service proposed a set of guidelines for the training and experiences required to meet its standards for a four-grade system for mediator classification. To put it mildly, these standards were not accepted by the other providers or by the neutrals themselves.

The Maryland court system's Mediation and Conflict Resolution Office is engaged in a grassroots effort to determine appropriate minimum standards for state mediators. The Association for Conflict Resolution has had a task force address the issue-without being able to form a consensus, much less put it before the membership.

Although many organizations have contemplated a solution to this problem, it is unlikely that one will emerge. In the absence of agreed-upon standards for the qualifications of mediators and arbitrators, the open market will determine how neutrals obtain work.

The ADR provider role is evolving rapidly. The American Arbitration Association's traditional full-service model 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 dispute resolution program administrator. It standardized 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 preferred list, and even provided a neutral site for hearings. For neutrals, the AAA provided a means of obtaining work and offered the organization's quality as a credential and certification of the neutral's qualifications.

Many organizations have chosen another model in developing conflict management systems. These ADR newcomers have sometimes created a system that demands flexibility and a cost structure that does not fit within the traditional AAA model. Whether the traditional providers will respond with more customized offerings remains to be seen. Thus, sources of neutrals and neutral services likely will continue to expand in response to this need for flexibility.

Providers also have been criticized for the 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 moved to a professional roster of fulltime neutrals, and had greatly reduced the roster of its occasional neutrals. It 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.

Many regulatory trends begin in California. If that is true in conflict management, neutral providers may be in for a rough period of scrutiny. In the spring of 2002, the

California Legislature held hearings on neutral providers and ultimately passed the first significant regulation of the organizations that provide these services.

The California Legislature was particularly focused on conflicts of interest. Some neutral organizations had a longstanding practice of investing funds in corporate customers that contracted with them for mediators and arbitrators. The California law now specifically defines and prohibits conflicts of interest for neutral providers. The law also requires extensive disclosure of any prior neutral history with the parties in order to avoid even the appearance of a repeat-player effect, in which employers are favored over employees. Whether such state level regulation will occur elsewhere is unclear, but certainly this could be a troubling trend for providers.