The Unspoken Resistance to Alternative Dispute Resolution

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The current effort to introduce alternative methodologies for resolving legal disputes into the mainstream of American corporate and legal systems seems to be meeting resistance. However, much of this resistance is unspoken and therefore difficult to identify. Alternative dispute resolution, or ADR as it has come to be known, is one of those subjects that receives almost universal endorsement in theory but substantially less in practice. There are probably many reasons for this dichotomy. At least some of them, however, can be traced to psychological and sociological traits that go to the very root of how we function as individuals and in society.

These traits may be keys to understanding the unspoken resistance of potential users of alternative methodologies. They also may explain what appears at times to be a failure by various groups and individuals promoting different approaches to dispute resolution to handle their own controversies in the more constructive ways they are advocating for others. My purpose in this article is to identify some of the underlying barriers to use of alternative dispute resolution processes, particularly those that rely upon some form of consensus building or voluntary agreement to reach a solution. Identification of these barriers, in turn, may help dispute resolution professionals and potential users of alternative processes make provision in the newly evolving systems for the concerns that are at the root of these barriers and likely to change, if at all, only over long periods of time.

The underlying premise of the analysis that follows is that responses to alternative methodologies for dispute resolution are driven, at least in part, by often unstated and sometimes unrecognized human needs and desires. It further assumes that certain of those needs and desires are created and more easily responded to by the individual alone, while others are more dependent upon the organization and larger world in which that individual participates. Two perspectives are considered: that of the client and that of the lawyer.

Client Considerations

Whether the client is a corporation or an individual, human instincts and motivations are critical considerations in the process of dispute resolution. All too often, corporate attitudes and conduct are analyzed separately from the attitudes and conduct of those who are in positions of control. If one looks closely, however, the two often are indistinct.

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At this more personal level, there are a number of factors at work, one of the most important of which is trust. In general, people learn to be somewhat wary of one another, particularly in commercial and political contexts. For example, one person or entity generally will not look out for another's interests if faced with a choice that pits those interests against self-interest. How far one will go in accommodating the interests of another to the detriment of one's own varies from individual to individual. But at some point, even the most altruistic person is likely to draw the line and act in his or her own self-interest.[1] Without labelling such action right or wrong, it is sufficient to note its occurrence and acknowledge that even in the absence of a dispute, an ethic exists, in varying degrees, of watching out for one's own interests and protecting them even at the possible expense of another. While few people would argue with this principle, many are reluctant to accept its inevitable consequences.

One of those consequences is the occurrence of disputes. By the time a dispute erupts, interests have clashed and each side typically has decided to act in what it perceives to be its best interest. Accepting the principle stated above, this should come as no surprise. Yet many people react as though there has been a serious breach of trust. In their minds, the opposing party is exhibiting no concern about interests other than its own. Otherwise, there either would be no dispute or at least little or no need for outside assistance to resolve it. But, once the dispute has escalated to the point that litigation is contemplated, each side tends to assume that little or no such concern exists, and mutual trust has disappeared. At this stage, perceptions of having been wronged or unjustly accused of wrongdoing begin to control. Moreover, it is probable that efforts to resolve the matter on a conciliatory basis already will have been attempted and failed. In many instances, lawsuits are the culmination of a history of unsatisfactory dealings. Indeed, by the time a lawsuit is filed, the disputing parties are likely to view the trust they once had for each other as misplaced and contributing at least in part to their present problem.

In the face of such circumstances, it is not difficult to understand why processes that ask the parties to continue to work together in some fashion are resisted. Trust and goodwill no longer exist and, in their place, are likely to be anger, frustration and hostility. When a person wants something or believes he or she is "in the right," an instinctive reaction to opposition is anger. On the heels of the anger many times comes the urge to try to convince the other person of the error of the opposing view or position. When that person (or entity) refuses to acquiesce, a sense of frustration is likely to develop. Out of the frustration is born a desire to challenge the offending party by threatening letters, lawsuit or other means that have inherent in them a show of force.

These almost instinctive reactions, whether triggered at the outset of a dispute or at the point where efforts to reach agreement break down, are understandable. In a sense, they are forms of self protection. A breach of trust, if perceived as such, can be painful and spur a desire to retaliate in kind. Further, the anger and frustration that accompany most disputes are likely to be driven by egos that want or need to be right, or at least appreciated.

Beneath the egos are likely to lurk fears. For some, it is a fear of being wrong and the loss of stature, respect, or affection; for others it is fear of being taken advantage of or manipulated. Whatever the fear is, as long as it is there, or a risk is perceived, people will go to great lengths to protect themselves, even if that

means engaging in lengthy, costly legal proceedings. Compared with the alternatives, which many view as perpetuating a more vulnerable state, the fighting route will seem preferable.[2]

Coupled with the internal workings of the individual are a number of external factors over which the individual often has no control. The organization for which one works may measure success by traditional yardsticks and value recovery of the last possible cent or establishment of a definitive principle over other outcomes. In that situation, the possibility of beating the other side and maximizing one's own reward is attractive. The corporate executive who is trying to advance in such an organization will not have the flexibility to utilize procedures less likely to achieve such ends. For him or her, litigation or other adversarial processes will continue to provide the best opportunities.[3]

Similarly, if an organization has a low tolerance for errors or misjudgments, the corporate official faced with the choice of acknowledging liability or channeling the matter into a long proceeding that has the potential of obfuscating the original misdeed (or postponing the day of reckoning) will almost certainly choose the latter. While allowing corporate officials to retain control of the process and responsibility for the decision are cited as benefits of voluntary forms of dispute resolution, less involvement may be preferable in cases where a party seeks to distance itself from the conduct in question or portray it as something other than it is.

Another example of the impact of existing norms is the concern expressed repeatedly that proposing a conciliatory approach will suggest weakness in the case or the party's commitment to it. Because so much emphasis is placed on appearances, people forget that the perception of an event need not define the event. An offer of settlement or an invitation to use a more conciliatory approach is not, in and of itself, an indication of weakness. One can have the strongest possible case and make such an offer. Regardless of how the other party chooses to interpret the action, a settlement offer neither changes the facts of the case nor an attorney's ability to prove the case.

Yet, by allowing concern over how actions are likely to be interpreted to control a situation, one person allows the other's definition of the circumstances to become their own. By doing that, more power is given to the other person than may actually exist, and the person acting out of fear of perception is rendered far less effective than he or she could be. In such circumstances the greater strength may lie in taking the action desired, recognizing how it could be perceived and being prepared not to let that perception control.[4] However, such strength is not the type typically appreciated or rewarded in a corporate context where the appearance of dominance has come to be valued.[5] An individual prepared to take such action may be deterred out of concern over how it will be interpreted by superiors.

In short, it is difficult to consider the viability of alternative methodologies for dispute resolution outside the context of the culture—corporate, political, or otherwise—in which a dispute arises. At stake are deeply embedded value systems which are likely to take substantial time to change, even if the desire to make such changes is strong.

Lawyer Considerations

Many of the individual inhibitions affecting clients are operative as well at the

lawyer level. By the time most clients seek legal assistance, they have established in their own minds positions that they believe are at least defensible, if not correct. Notwithstanding the many unkind remarks made about lawyers, most clients, when it comes to their own matters, relish the concept of "lawyer as hired gun." Faced with these client expectations, lawyers are often reluctant to suggest approaches that do anything but vindicate their client's position. There is concern about appearing less than fully committed to their client's cause. There is also hesitance or lack of ability to diffuse the emotional attachment reflected in the client's position.

It takes certain skills to help people release or channel anger and use it to achieve more forward-looking results, and attorneys certainly are not trained for such tasks. In fact, almost the reverse is true. Lawyers are trained to represent their client's position zealously, as long as it is anything short of frivolous. The inclination, therefore, is not to look beyond the client's position to the underlying interests that could, perhaps, be better met in some alternative way, but to develop arguments and bases for advancing the client's position.

Finally, there is the ego of the lawyer who wants to think of and present himself or herself as able to deliver the result the client seeks, or better yet to exceed the client's expectations.

The same fears ultimately are likely to lurk beneath the lawyer's ego as underlie the ego of the client, thereby increasing the chances of commitment to protectionist strategies. What often occurs, in fact, is that the ego investment of the lawyers on both sides of a case becomes itself a driving force in strategy and other decisions.

For the lawyer on the other side of the case approached with a proposition suggesting some alternative methodology, there is yet another consideration. Given the training most lawyers have had and the adversarial atmosphere in which lawyers typically work, a not surprising first reaction to ADR often is suspicion. The ever-alert advocate is likely to assume, at least until proven wrong, that some trick or trap is involved. Feeling the same ego concerns and fears as the opposing counsel, this lawyer will want to insure that acceptance of such a proposal is neither a gullible action nor a disservice to his or her client. In addition to assuaging self doubts, the lawyer in such a situation also must convince the client of the benefits of this approach. The client is likely to have questions as to why the other side is proposing ADR or, why, if this step is so advisable, the client's own lawyer did not suggest it.

Because of self-doubts or client skepticism, the lawyer faced with a proposal to utilize an alternative means of dispute resolution may object or even aggressively oppose it. In that circumstance, it is incumbent on the side that initiated the idea to continue to support it calmly and resist the temptation to fight back. In many cases, after this initial testing period, the lawyer and client on the other side may be more willing to accept the proposal on its face value and embrace it as their own.

Exploring Attitude Shifts

Alternative methods of dispute resolution, other than those that provide a decision maker with authority to bind the parties, appear to demand levels of human behavior and personal autonomy that, for the most part, are not the norm. More than anything else, this may be the reason for reluctance to utilize these proce-

dures. Recognition of this often overlooked factor, in and of itself, is likely to be a helpful first step. Open acknowledgment of such concerns can lead to efforts to address them.

These efforts, if they are to be successful, will require participation by both the legal and business communities, perhaps with the assistance of professionals trained to address more psychologically – and organizationally – rooted problems.

The way we handle disputes reflects the way we live in the world in a host of other circumstances. It is difficult to alter one while leaving the other completely intact. Even if that could be done, it is likely that the new systems eventually would develop the same deficiencies that now burden litigation or else become merely additional preliminary steps to be taken before ultimately resorting to litigation.

To avoid this likelihood, people should learn how to view disputes and the outcomes sought from new perspectives. At the individual level, it is possible to encourage a new way of looking at controversy by analyzing and, to some extent, redefining the context within which the problem developed. For example, if conduct is viewed as a breach of trust or an effort to take advantage, parties are likely to seek either vindication or retribution rather than a way to solve the underlying problem. From this perspective, the question traditionally answered by litigation (i.e., who is right) will appear controlling.

But, returning to the premise that people tend to act in their own self-interest, it is possible to view the inevitable clash of interests, even if some are ill-motivated, as a predictable consequence of functioning in the world, not as a breach of trust. In this context, who among the various actors is right need not, and in fact would not, be the only inquiry. Among the other questions raised in this broadened inquiry would be: Given the range of divergent interests, can a mutually acceptable accommodation be reached? Are there reasons why particular interests cannot or should not be accommodated? Are there factors outside the interests of the parties that should be taken into consideration from a precedent or policy perspective?

Ultimately, the parties still may conclude that what they need is a simple determination of right or wrong under a specific principle of law. But the process by which this conclusion is reached, if it is premised on a broader inquiry and goes beyond the sense of breached trust, is likely to be a constructive undertaking. Moreover, the process should lead the parties to choose and effectively use the dispute resolution vehicle most appropriate to their circumstances. At this stage, the vehicle itself becomes less significant as the parties will have agreed upon the critical question or questions to be answered and presumably will proceed, in whatever forum they choose, in an expeditious fashion. Attention will be focused on the investigation into the problem which the parties by this time will have mutually and reasonably defined.

To utilize such an approach, it is necessary at the outset to identify all the possible factors and considerations (legal, practical, personal, political, etc.) affecting the situation. An effort must then be made to suspend judgment long enough to get a sense of the overall picture presented by the circumstances. From there, the individuals involved can identify their priorities and decide how best to proceed.

Lawyers, if they are willing and able to do so, can assist their clients in achieving this broad view of the problem. They are at least one step removed from

the emotion and ego concerns that often blind the involved parties. To the extent that lawyers perceive the client's expectations as seeking this type of assistance, their own ego needs will be met by providing it.

The lawyer and client should openly discuss any pressures on the client to seek specific end results. In this way, the client will be able to separate the external circumstances over which it has little or no control from internal aspects that may be more readily managed alone. Where external circumstances are a barrier, some corporations or other institutions may wish to undertake efforts to modify their corporate or institutional culture. This might enable people, for example, to take responsibility for errors without fear of unnecessarily harsh reprisals.

From an objective standpoint, an approach premised on this broad perspective can be undertaken without making unnecessary concessions so long as people are willing to rely on the type of internal strength described earlier. Outcomes that are fair, just, and practical may lack the bravura of big wins, but in the long run may be even more advantageous. Over time, a longer-term view may be valued as highly as the more traditional short-term win is today. In the interim, if the interest is in having the longer-term view prevail, it will take reinforcement from those in authority to sustain the people willing to reach for less than popular results.

The shift in consciousness needed to make such new values the norm is not likely to occur quickly, if at all. In the meantime, it is necessary to recognize the various conflicting pressures inherent in almost any dispute, and to be prepared to respond to whichever of those pressures is dominant. In this way, providers of dispute resolution services can respect individual value systems, and not try to push their clients to change their values or world views beyond where they are willing to go. Such coercive efforts not only would be unlikely to succeed but also are abhorrent to the underlying principles of many of the newly emerging forms of dispute resolution, certain of which are premised on not forcing standards or solutions on the parties.

Left to their own devices and instincts today, most lawyers and clients will still seek to "win" in a traditional sense. Until that definition of "win" is expanded to include mutual gain and loss and the enhancement of relationships, alternative methodologies may be forced into service of ends, such as defeating the opponent, that some of them at least were not devised to meet. Alternatively, they may come to be viewed as poor substitutes for litigation, which in some people's minds will remain "the real thing." Measured in monetary or other similarly stark terms, clients may achieve greater successes (and failures) through the traditional adversary process. If that is the case, there is little advantage in trying to convince them otherwise for that will only create expectations which in most cases will not be met. The result then is likely to be disillusionment and an even greater aversion to the alternative process than had they never participated in it.

It is preferable to outline honestly how an alternative process is advantageous, even if not likely to produce the same results as litigation. To the extent such an explanation highlights values that are of lesser interest to the parties involved than those vindicated through more traditional processes, traditional processes should be used. Proponents of alternative methodologies make a mistake trying to substitute one for the other, and risk loss of credibility in the process.

In this same vein, it is important to note that any time a mediation or negotiation breaks down and a more adversarial approach taken, it not be viewed as a failure of the alternative system. In an effort to avoid this unfavorable perception, many proponents of alternative dispute resolution get caught in the trap of pushing for resolutions at all costs, thereby perverting the process and often leading to dissatisfaction with the results. Yet, if one operated from a more comprehensive view of the problem and had identified the driving force, that is the ends sought, it may be obvious that use of more forceful means or imposition of a decision may be necessary at some point.

This sometimes is a hard lesson for advocates of alternative methodologies, many of whom themselves are driven by the same bottom line considerations that force their clients to take more adversarial positions. With the emphasis on statistics in terms of cases resolved and the need to justify the existence of the alternatives in monetary terms, these advocates are not willing to leave or make room for competing interests and approaches. Not surprisingly, they become models of the same behavior they ask their clients to eschew.

Again, at the core of this behavior are very real human needs and desires. The inability of some members of the dispute resolution community to deal with these needs and desires individually and work effectively among themselves provides another opportunity to explore the reasons why people generally may be reluctant to utilize less adversarial processes. By acknowledging our own reactions and recognizing our own vulnerabilities, those of us practicing in the field may gain the most valuable insights into resistance to alternative approaches and be better prepared to respond effectively.

NOTES

1. In some absolute sense, one can assume that anything one does is done out of self-interest or else it would not be done. For purposes of this commentary, however, a distinction is made between conduct that is outwardly inconsistent with one's apparent interests and conduct that, while outwardly inconsistent, may satisfy deep-seated psychological needs and from that perspective be totally consistent. Reference in this context is to the former.

2. In some situations, part, if not all, of the anger and frustration directed at the opposing party may more appropriately belong with oneself for mistakes made or some wholly unrelated third party against whom action is not possible but who in some way also is at fault. However, this is a subject that few people like to raise with each other, let alone lawyers with their clients. Lawyers are sensitive to the fact that a client's anger easily can transfer to a lawyer who is perceived by the client to be less than fully supportive of his position and thereby also in disagreement with him. Few lawyers like to get into this posture with their clients. It is easier and probably more lucrative to assume the role of avenger of the perceived wrong.

3. While alternative methodologies conceivably can be utilized for the same win/lose objectives, perhaps on a less costly and time-consuming basis, to do so may be unfortunate. If parties approach these alternatives with the same mindsets as they approach litigation in terms of results sought and tactics considered acceptable, we are likely over time to recreate many of the same problems that currently burden litigation. For example, if parties agree to mediate solely for the tactical reason of accomplishing delay, or attempt to manipulate or deceive each other in a mediation in order to achieve specific ends, mediation will quickly lose its attractiveness as a meaningful alternative. If so abused, mediation is likely to generate inappropriate results or else to be viewed as merely another maneuver in an already game-fraught system of dispute resolution.

4. In certain circumstances, a client may be more concerned about cultivating a particular perception than about responding to the situation created by the specific case. In such circumstances, it may be appropriate to determine a course of action on the basis of perceptions.

5. In the legal context, efforts to create an appearance of strength can include anything from posturing and bravado to pleading wars on a host of tangential issues.