

NE-ACR News

Volume #17 Issue #1

Winter 2008-2009

*This is the second
of two issues on
using ADR skills.*

What you can do, Part 2

Learn a lesson from new clinic and 'fit the forum to the fuss'

By Robert C. Bordone

Imagine you're an attorney working for a nonprofit organization. A client - we'll call her Cindy - walks into your office, seeking your counsel on how to develop a large tract of wooded land deeded to her great-grandfather in 1846. What's complicated, Cindy explains, is that 63 relatives, spread across three states, are also heirs claiming a property interest in the land.

Cindy explains that she and three other cousins have already formed a legal entity to pay back taxes owed on the property and establish conclusive ownership over the land. Since both the deeds and the wills establishing ownership over the tract have vanished, your client is worried that coordinating this disparate group of heirs will be a nearly impossible task. Moreover, some of Cindy's relatives have already proven to be potential spoilers, demanding extortion

level-fees in exchange for relinquishing their claims to the property.

Cindy feels stuck. She worries about making already-strained family relations worse and is sick about the prospect of losing the land entirely if this generation can't reach consensus about how to manage it. What kind of mechanism can you propose to Cindy to bring some resolution to this problem and untangle the tricky snags of family relationships, emotions, and history?

If you think this is a far-fetched scenario conceived by a bored law school professor for a final examination in property law, think again. It's a real situation, a variation of one faced by hundreds of extended families across the United States and one that has stumped a consortium of lawyer-advocates in the South who have approached the Harvard

Continued on page 4

<u>In this issue</u>	<u>Page</u>
Designing systems <i>By Robert C. Bordone</i>	1
Teaching negotiation <i>By Rachel Viscomi</i>	1
Being an ombudsman <i>By Chuck Doran</i>	1
<u>In every issue</u>	
10 questions for: Doug Stone	2
From the president <i>By Mindy Milberg</i>	3
NE-ACR events	3
Bookmark: Yes! <i>By James E. McGuire</i>	7

Learn lesson from new clinic and 'fit the forum to the fuss'

Continued from page 1

Negotiation and Mediation Clinical Program (www.law.harvard.edu/hnmcp) for guidance on how to design a set of dispute resolution processes that can help parties manage and resolve these disputes.

It's also an example of just one of many projects that students enrolled in Harvard Law School's new Negotiation and Mediation Clinic will be faced with in this, the third year of the clinic's existence. HNMCP is premised on the conviction that leading lawyers of the 21st century ought to be trained as dispute process architects as well as experts on the formal legal system. Practically speaking, this means they need to develop the diagnostic skills to address the root causes of conflict in a myriad of circumstances, from domestic to international, corporate to nonprofit. These skills will enable the next generation of attorneys to work with different stakeholder groups, with a view toward empowering them to take an active role in efficiently resolving the conflict, with better outcomes for all.

In founding HNMCP, I had several goals in mind. I wanted to respond to the overwhelming positive response of our students to the problem-solving orientation of Harvard Law School's Negotiation Workshop. Upon completion, many students would ask, "What next?" Before the clinic was launched, there was almost no curricular opportunity at the law school for students to practice and develop the skill set we introduced them to in the Negotiation Workshop. I was also animated by a vision of the Lawyer as Problem Solver that many of my mentors – people such as Robert Mnookin, Roger Fisher, Frank Sander, and Carrie Menkel-Meadow, to name just a few – advocated for when first introducing and promoting ADR in the mainstream law school curriculum. A clinic focused on dispute systems design and its component parts struck me as the next logical step in ADR's long-standing effort to reform law school curriculums across the nation.

So what is Dispute Systems Design, and how does it differ from and build upon ADR? If you imagine that ADR involves the study of various individual and hybrid dispute resolution processes (such as mediation, arbitration, negotiation, regneg or regulatory negotiation, summary jury trials, etc), then Dispute Systems Design is the study of how one assembles a comprehensive program of dispute resolution, one that encompasses a range of dispute resolution procedures specifically designed for a particular institution, organization, or stream of conflict situations. Dispute Systems Design examines the component steps of tailoring various ADR processes into a coherent and workable set of procedures for users. It answers questions such as: How do you decide who the relevant stakeholders are? How do you assure procedural justice by engaging important constituencies in the design process? How do you implement and evaluate the success of a system once it's in place?

Dispute systems designers are experts in process design. They map out the interest sets of various stakeholders; identify patterns of deference between and among parties; and design tailored processes to help constituencies reach their goals in ways that maximize value. An aspiration of our work over time will be to develop new theory and models based on our practice experience.

This focus on dispute diagnosis and dispute resolution prescription in law school represents, for those of us running this new clinic, an evolutionary step for law school curriculum and for ADR. We reject the naive notion that ADR processes such as mediation and conciliation are always superior to litigation or other traditional rights-based approaches to dispute resolution. While we are strong proponents of the advantages of interest-based approaches to conflict management, we recognize that recommending mediation as the solution to every conflict is as deficient a strategy as promoting litigation to resolve every dispute.

In medical school, aspiring physicians are taught more than just how to treat disease. They're taught to diagnose it properly. We think the same should hold true for law schools and so, by imbuing our students with skills of dispute diagnosis, design, implementation, and feedback, we hope to train a new generation of lawyers. We hope to equip this new generation with the skills they will need to succeed in a world where conflicts are deep, complex, and less susceptible to simple resolution by either a court or a mediator.

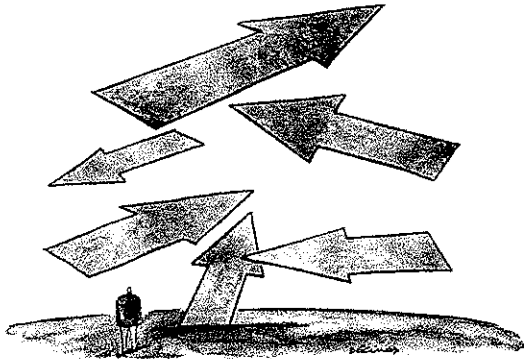
For many years, ADR zealots focused their efforts on advocating for the general incorporation into the judicial system of dispute resolution mechanisms, such as mediation or arbitration, to name only two

prominent models. Given the skepticism with which such alternative processes were met, it made sense for the first generation of ADR scholars and practitioners to take this tack. Now that most practitioners at least acknowledge the inevitability that ADR is here to stay (even if they themselves aren't fans of it), the time has come to be more nuanced in our advocacy of interest-based dispute resolution processes.

Indeed, it is my view that even the most ardent supporter of alternative dispute resolution would agree that there are pros and cons to each dispute resolution procedure. What would be the impact on today's struggle for equal marriage rights, for example, had the major civil rights cases been mediated rather than litigated? And would we always endorse "traditional justice" mechanisms over court-based systems in African villages, even if that meant supporting amnesty for perpetrators of horrific atrocities during the 1994 Rwandan genocide? The discipline of dispute systems design hopes to give practitioners the analytical skills they need to approach these sorts of macro-level questions about "fitting the forum to the fuss," to quote a foundational phrase of the field coined by Professors Frank Sander of Harvard Law School and Stephen Goldberg of Northwestern Law School.

If our work is of interest to you, we invite you to visit our website www.law.harvard.edu/hnmcp. Ours is a new program, and we welcome the opportunity to connect with those who are interested in our work or may have project ideas for students in our clinic. If you have any questions, comments, or inquiries, please do not hesitate to contact us at hnmcp@law.harvard.edu. And thank you!

Robert C. Bordone is the Thaddeus R. Beal assistant clinical professor of law at Harvard Law School and the director of the Harvard Negotiation & Mediation Clinical Program.



©Doriano Solinas/Getty/Stock Illustration RF