

Theories of Change for the Dispute Resolution Movement: Actionable Ideas to Revitalize Our Movement



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Editor

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Introduction

A Little History

2019 was a significant year for the part of the dispute resolution movement¹ centered around American legal education. At the beginning of the year, several events – particularly the decision to discontinue Georgia State's conflict resolution program – [converged to signal a likely decline of ADR in American legal education](#). In June, there was a wonderful conference at Pepperdine, [Appreciating our Legacy and Engaging the Future](#), which attracted a terrific cast of speakers and attendees (and which I dubbed the "Past-and-Future" Conference for short).

These events were particularly significant for me as I looked back at my career and forward to an uncertain future for our movement. Dispute resolution has been at the heart of my work and identity for most of my adult life. Like many of the veterans in our field, I was fortunate to get involved at an early stage of what Jeff Stempel called the modern ADR era. There were limited precursors in history and in many parts of the world, but this was a time of substantial concentration of idealistic activity. I graduated from law school in 1980, and when I took my first mediation training in 1982, I was hooked. I opened a small law and mediation practice in Oakland, California in 1983 and published my first article, [Mediation Paradigms and Professional Identities](#), in 1984.

That was an exciting time to be part of this movement. Frank Sander presented his multi-door courthouse idea at the Pound Conference in 1976. The ABA organized the predecessor to the Section of Dispute Resolution in 1976. CPR was founded in 1977. Robert Mnookin and Lewis Kornhauser published [Bargaining in the Shadow of the Law](#) in 1979. Roger Fisher and William Ury published *Getting to Yes* in 1981. Len Riskin published [Mediation and Lawyers](#) in 1982. Carrie Menkel-Meadow published [Toward Another View of Legal Negotiation](#) in 1984. New groups of ADR practitioners formed at the state and local level in the 1980s and 1990s. There was a spurt of interest and support from donors, especially the Hewlett Foundation. Universities started programs specializing in dispute resolution. Federal and state legislatures enacted ADR statutes and mediation programs sprouted to handle community and family disputes. Jim

¹ I intentionally use the term "movement." Although some people associate movements with radicalism, dogmatism, or intolerance, there are many social and professional movements with few, if any, of these characteristics. People consciously identify and act as members of a movement in varying degrees. For some people, being part of a movement is central to their identity and activity. Others are much less conscious and intentional about how their activities relate to others'. Being part of a movement is not a salient part of their identities. For example, a rank-and-file mediator is part of the dispute resolution movement even if she doesn't take part in any organized ADR activities and doesn't consciously identify as being part of the movement. For convenience, I use the words "movement," "field," and "community" more or less interchangeably.

Boskey published *The Alternative Newsletter* several times a year which, in about 50-60 photocopied pages of small font per issue, covered virtually everything happening in the field including new books, articles, newsletters, journals, programs, jobs, trainings, events, cases, organizations, videos, official documents, and other resources. Empirical researchers studied ADR. As I described in my doctoral research conducted in the mid-1990s, [many business lawyers and executives "believed" in mediation – they "got the faith."](#)

We were the shiny new thing and people felt palpable excitement to be part of a young movement coalescing to improve people's lives. This movement largely started in the US, where most of the activity developed at first. This activity took place in many parts of society, and much of it centered in the legal profession and the courts. Faculty in American law schools played an important role, developing new curricula, scholarship, and infrastructure. We taught future lawyers and other dispute resolution professionals, developed new theories and techniques, advised institutions about dispute resolution issues, and served as a valuable hub connecting students, practitioners, courts, businesses, and other organizations interested in dispute resolution.

We are not the shiny new thing anymore, as many have observed. Inevitably, "ADR" became institutionalized in academia, practice, courts, and organizational life. Some, like [Lela Love](#) and [Nancy Welsh](#), worry that much of our field doesn't honor our fundamental principles and has lost its soul. In 2003, the Penn State Law Review published a symposium about ADR entitled "[Capitulation to the Routine](#)." As time went on, instead of feeling committed to an urgent movement, people predictably settled into our professional and personal lives.

Despite [warning signs of potential decline of our movement](#), it is not about to die out in the immediate future. There is a social infrastructure with sufficient resources and human energy to keep going for a while.

However, we see the signs of potential decline of our movement as the environment is changing around us. Over time, we could fade into obscurity if we just keep on as we have been doing.

People often observe that the [Chinese word for "crisis" supposedly is composed of characters referring to danger and opportunity](#). We are not yet in crisis, but we can clearly see both dangers and opportunities on the horizon.

The Theory-of-Change Symposium

The Past-and-Future Conference inspired me to organize the Theory-of-Change Symposium. People leave most conferences with new ideas and experiences but no sense of collective ideas, purpose, or plans. This seemed like an important time for us

to collectively take stock and see if there is widespread agreement about directions we should take going forward to maintain and enhance our good work.

In some ways, the Theory-of-Change Symposium succeeded far beyond my expectations. It inspired a wide range of people – some well-known and others not – to sketch lots of really good actionable ideas that individuals and institutions could undertake. Some pieces in the symposium focus on very specific actions and others propose "big picture" rethinking of our directions and our identity as a movement.

The symposium is incomplete in many ways, however. Considering the vast range of our movement, this symposium did not engage a number of important parts of our movement. Despite some outreach to invite authors beyond law-trained Americans, most of the pieces come from authors with those experiences, failing to reflect the fact that ADR is now flourishing in many places around the world and that people with many different backgrounds are part of the movement. Moreover, the authors do not adequately represent the diversity of life and practice.

Our field is sprawling and it's hard for anyone to even **begin** to get one's arms around it. We have an [incredibly ambitious set of goals and have devised an incredibly large set of strategies](#) to try to achieve them. Even if the field in the US stays at its current level and it continues to grow in other countries, we wouldn't be able to adequately address the current problems. But there are worrying signs about developments in the US, our world is rapidly changing, and there is a huge increase in the nature and size of problems we aspire to address. Unfortunately, there is no increase in the number of hours in a day or days in a year.

To be more effective in the face of these daunting challenges, we need more people to work on them and to collaborate more. Given the scope of the problems and the differing experiences and perspectives from around the world, it is more important than ever to enlarge and deepen global exchange and collaboration in our field. This is increasingly doable because of improvements in electronic communication, particularly on the internet and with video interactions.

The contributions to the symposium are short "think pieces," not detailed blueprints for action. [Charlie Irvine](#)'s piece most faithfully embodies the elements of a theory of change, but it is an outline that would need to be fleshed out to be enacted in real life.

This book is a compilation of [Indisputably blog posts from the symposium](#) as well as reflections on the Past-and-Future Conference and other relevant posts. They are organized into the following categories: general reflections on the conference, "big picture," impact and use of technology, legal education, professional training and practice, and research and scholarship. Many pieces would fit into multiple categories.

The most significant limitation of this book is that, although it includes good actionable ideas for individuals and organizations, there is no commitment or expectation that anyone will act on any of them. It remains to be seen what actions people take, if any.

Reflecting on the Past-and-Future Conference, [Jill Gross](#) writes, "The conference organizers recognize that we have an enormous opportunity to shape and improve the field and to build on the legacy created thus far. The harder task is to actually do it at this very moment in time, and not fall back into complacency. Indeed, the momentum generated by the conference should carry us forward to the next chapter. I surely hope it does."

Possible Collaborative Actions

Individuals can act on some of the ideas in this book on your own, without any collaboration with others. For example, you can [listen better](#), use a [Stone Soup assignment](#) in your course, or use your [presentation at an educational event to generate new knowledge](#). If a critical mass of people do things like this, there would be a cumulative benefit.

We need collective actions, however, to address the big challenges outlined in this book. Based on the ideas in this book, I think that collaborative efforts in our movement to do the following things would help us advance our work and reduce the risk of our becoming [zombies](#). Of course, this is not an exhaustive list. You and our colleagues may have other priorities for yourself and our movement. But this should be a good start for a collective agenda.

Develop Clearer Common Language of Dispute Resolution

We are supposedly communication experts and yet our own jargon is a [Tower of Babel](#). How crazy is that?

In the insightful word of Andrea Schneider, our labels "[suck](#)."

Imagine a world where we generally use the same language referring to key concepts, particularly language consistent with meanings in plain English that disputants generally would understand. Of course, people would be free to use any language they want, but wouldn't it be great if we developed some common language so that everyone would understand each other better?

The [ABA Section of Dispute Resolution Task Force on Research on Mediator Techniques](#) recommended that we develop more uniform definitions and I suggest that we [focus on this as a top priority](#), though not limited to mediation.

I am not suggesting that we try to finally come up with a universal definition of mediation (shoot me now) or to definitively distinguish mediation from settlement conferences. Or even come up with the perfect new synonyms for facilitative and evaluative mediation. No.

I am suggesting that we focus on smaller, more concrete behaviors and concepts so that people would readily know them when they see them.

Developing more uniform definitions would not only help researchers conduct their own research but it could promote [collaborations between researchers and practitioners to produce more useful theory and research](#). Using common language could be particularly valuable in dealing with disputants and other dispute resolution stakeholders. Clearer language could help students in clinical and externship courses navigate the different worlds of practitioners, clients, and faculty. Developing clearer language could also facilitate international communication.

In [this piece](#), I recommended a project that could be completed in about a year. It might begin with internal discussion within our community and then testing ideas in focus groups with academics, practitioners, and disputants and in public forums, and by inviting public comments. Developing clearer common language could help us achieve almost everything else on our agendas.

Redefine What We Do and Who We Are

A major theme in the symposium is a need to redefine the field, particularly focusing on general skills rather than particular procedures. For example, [Deb Eisenberg](#) argues that we should move past the "trifecta" of negotiation, mediation, and arbitration that has been a central focus of our identity to focus, instead, on process strategy. [Heather Kulp](#) suggests that we focus on conflict management, negotiation, and communication – skills that would enable people to better handle disputes on their own. Similarly, [Ava Abramowitz](#) proposes that we focus ADR as essential skills of critical thinking, problem-solving, communication, collaboration, and creativity. [Chris Guthrie](#) proposes that we think of leadership development as an important part of our work. [John Lande](#) suggests that we might think of our field as including processes of planning, managing, and/or resolving disputes, which would incorporate trials, lawyers, and judges as part of our field. Other pieces in this book weigh in on these issues as well.

Several pieces encourage our current community, especially in the US and especially in law schools, to reach out in many different directions. Suggestions include engaging law school faculty who don't teach "ADR" courses ([John Lande](#)), practitioners ([John Lande](#)) sections of the American Bar Association other than the Section of Dispute Resolution ([Brian Farkas](#)), parts of the legal academy other than the dispute resolution sector ([Jim Alfini](#)), courts ([Michael Buenger](#)), government agencies ([Scott Maravilla](#)), technologists ([Alyson Carrel](#) and [Amy Schmitz](#)), advocates for justice ([Grande Lum](#))

including advocates for improved access to justice ([Jackie Nolan-Haley](#) and [Michaela Keet](#)), and climate change experts ([Lara Fowler](#)).

Such outreach would require some additional effort and hassle, though it would enlist more people and their energy in "our" work – which would become **their** work too. Indeed, this would change our conception of who "we" are and what we do. For one example, lawyers-as-advocates, judges, and court administrators could explicitly be part of "our" field.

Integrate Technology into All Our Work

Like it or not, technology is increasingly penetrating virtually every aspect of life in developed societies including dispute resolution (as [Noam Ebner](#) notes). Increasing use of technology in dispute resolution can be valuable and is inevitable (as [Colin Rule](#) describes). This includes – but is by no means limited to – specific online dispute resolution systems, as [Alyson Carrel](#) and [Noam Ebner](#) point out. Considering these realities, we need to incorporate technology in our teaching ([Rebekah Gordon](#)).

Technology can produce great benefits and also great risks. As [Chris Draper](#) and [Amy Schmitz](#) explain, there are significant risks, which are not obvious because they are buried in computer code. So it is important to develop strong and effective standards for use of technology as [Linda Seely](#) suggests. Technologists will develop new technologies oblivious to dispute resolution issues unless we are at the table as Alyson, Amy, and Linda observe.

Develop Best Practice Standards

Many contributors suggest that we focus on particular skills, as noted above. Presumably, these skills would be used in many specific dispute resolution processes. It would be nice if there was some authoritative statement in our field describing the most important skills. This would be useful in teaching, training, and practice. [Rebecca Price](#) proposes developing common tools for assessing new mediation trainees, and presumably it would be helpful to have a common inventory of skills to focus on. Even experienced practitioners struggle with the very difficult work of dealing with conflict, so such an inventory could be helpful in the kind of reflective practitioner groups that [Laurie Amaya](#) promotes.

We could also develop dispute system standards. [Noah Hanft](#) recommends that transactional negotiations should **routinely** incorporate discussions of building relationships as part of the negotiations from the outset. This could be done at every scale, from negotiation of [two-person partnerships](#) to huge joint ventures involving multiple parties. [Barney Jordaan](#) recommends that businesses take advantage of mediators to help negotiate transactions when needed. [Peter Benner and I](#) advocate the use of **planned** early dispute resolution systems in organizations so that they

prepare to deal wisely and efficiently with an ongoing series of disputes. [Michaela Keet](#), [Heather Heavin](#), and I describe a simple framework for parties, lawyers, and mediators to conduct litigation interest and risk assessments. [We](#) also recommend using planned early two-stage mediation to improve the quality of decision-making in mediation. [David Henry](#) recommends that courts develop mediation optimization orders to help lawyers and parties prepare for mediation. [Jane Juliano](#) suggests creatively designing mediation procedures to include evaluations by courts. [Michael Buenger](#) proposes reconceiving courts from scratch. Although these ideas involve very disparate contexts, they all reflect **system** thinking. It would be helpful to have specific standards in the various areas, and it also would be very good to have an overall perspective of numerous interrelated systems.

[Kim Taylor](#) notes the virtues of a "Goldilocks" approach to standards – clear enough to be helpful and also flexible enough to enable practitioners to tailor the process and outcomes to meet parties' needs.

To be effective, best practice standards need to be developed by coalitions of authoritative organizations through deliberation with members of our community and interested stakeholder groups. Individual writers can propose their own "best practice" standards but they are not as influential as those developed by leading authorities.

Redesign Teaching and Training Curricula

If we agree that our field should focus more on general skills than specific procedures, we should revise our teaching and training curricula accordingly. The following are some suggested courses and ideas based on ideas in this book.

- **Make "Communication and Negotiation" the Foundational Course.** [Grande Lum](#) writes that negotiation should be the "gateway" course. Similarly, [Heather Kulp](#) identifies communication and negotiation as key skills, and she would like to see negotiation as a required law school course. [Lisa Amsler](#), [Ava Abramowitz](#), [Randy Kiser](#), and others also focus on the importance of communication skills.
- **Teach Strategic Thinking.** [Deb Eisenberg](#) suggests that "process strategies" are the heart of our work and [John Lande](#) argues that teaching students to think strategically is what it **really** means to think like a lawyer. [Randy Kiser](#) points out that thinking strategically is near the top of the list of skills that lawyers need, as identified in the major Foundations of Practice study. Ideally, there would be two separate courses on strategizing in dispute resolution and transactional negotiation, though they might be combined in a single course. Ideally, dispute resolution strategy would be co-taught by faculty specializing in dispute resolution and pretrial and trial practice. Similarly, transactional negotiation would be co-taught by faculty specializing in dispute resolution and business

transactions. Of course, this is not an ideal world, and schools need to make do with their political and resource limitations. One way to accommodate these realities would be to [pair regular and adjunct faculty](#) to co-teach these courses.

- **Work with [Alyson Carrel](#)'s "Delta Model"** of three main legal competency areas of the law, business and operations, and personal effectiveness. Concepts like this can help students and practitioners be more effective.
- **Teach Advocacy in Mediation and Arbitration.** Most new law graduates will need to be advocates in mediation and arbitration long before they will have opportunities to serve as neutrals, as [Debra Berman](#) points out. So our mediation and arbitration courses should focus primarily on skills needed to be good advocates in these processes. Even in courses with this shift of emphasis, faculty could provide basic training in the neutrals' roles. This would be intrinsically valuable and also help students develop better advocacy skills by understanding the neutrals' perspectives. Faculty reframing their courses to focus primarily on advocacy might combine advocacy in mediation and arbitration in the same course. Teaching students the similarities and differences between the two processes can be very instructive. It also might be helpful to combine the two courses to make room for other dispute resolution courses in a school's curriculum.
- **Teach Dispute System Design.** [Ben Cook](#) advocates teaching dispute system design (DSD), a practice that is particularly important for lawyers representing organizations. Lawyers and others are involved in many aspects of system design, as noted above. Schools that can't support a separate DSD course might incorporate some of these ideas and skills in other courses such as strategy courses described above. The term "dispute system design" may seem daunting, so perhaps we should use something like "process planning" instead.
- **Engage Students with the Real World.** [Ben Cook](#) says that we should narrow the gap between theory and practice and it's hard to disagree. Clinical and externship courses provide direct experience with various aspects of real-life practice. Ideally, every student would be required to take a substantial number of these courses. That was never a realistic possibility given the priorities of most law school faculty and it is even less likely as the American legal academy has contracted. We should do our best to offer as many clinical and externship opportunities as possible and encourage students to take them. I note that [faculty also can provide encounters with the real world](#) in virtually every course by using Stone Soup assignments. Faculty have great flexibility in designing these assignments including the amount of the course devoted to them. These assignments can produce an incidental benefit of prompting practitioners to reflect on their routine practices, which might lead them to act more out of choice than habit, as [Michael Lang](#) urges.

- **Improve Our Simulations and Competitions.** Everyone knows that there are major problems with the way we use simulations in our courses and competitions. They often are unrealistic and may actually teach the wrong lessons. Like Mark Twain's reported demise, [The Death of the Role-Play](#) (Nadja Alexander and Michelle LeBaron's vividly titled piece) is greatly exaggerated. Many faculty have used [multi-stage simulations](#) to make the experiences more realistic. [Debra Berman](#) has organized a nationwide program of more realistic simulations. Programs like this could be expanded to engage students around the world and in other disciplines, such as business, so that simulations would involve lawyer-client interactions as well as negotiations directly between lawyers.

Many of our extracurricular competitions are problematic, prioritizing selection of winners (and losers) over creating good learning experiences. [Tom Valenti](#) offers a host of suggestions for improving our competitions.

- **Develop Recommendations for Teaching and Training Curricula.** If a critical mass of us are interested in a comprehensive review of the "dispute resolution" curriculum, the Law Schools Committee of the ABA Section of Dispute Resolution and/or the ADR Section of the AALS could initiate a project to develop general recommendations. This might include suggestions about what courses and course sequences might be offered. They might also include suggestions about elements that should be included in particular courses as well as some optional elements. As [Heather Kulp](#) suggests, they might propose renaming some courses. As part of that effort, this project might review the [collection of syllabi on the DRLE website](#) and conduct the inventory of what we now teach that [Chris Honeyman](#) proposes. Similarly, a coalition of respected trainers might convene to develop recommendations for contents of mediation and other trainings, as [Woody Mosten](#) suggests.
- **Include ADR in Bar Exams.** Law schools pay particular attention to bar exams because of credentialing requirements, student recruitment, and *US News* rankings. [Jim Alfini](#) makes the excellent point that law schools would take ADR more seriously if ADR was included on bar exams, and he suggests ways to do this. The ADR Section of the AALS and/or Law Schools Committee of the Section of Dispute Resolution might develop a new (sub-)committee to make this a reality.

Check out [Rebekah Gordon](#)'s ideas for attracting students to our community and crowdsourced ideas about [what faculty should do to help students prepare for their future](#). Many of these ideas would make our field more attractive to law school colleagues who feel that ADR isn't "real law" and doesn't deserve much attention in the curriculum.

Develop and Implement a Research Agenda

The [excellent report of ABA Section of Dispute Resolution Task Force on Research on Mediator Techniques](#) illustrates the potential benefits and limitations of empirical research about dispute resolution. We should build on its good work and follow its recommendations.

[Nancy Welsh](#) appropriately argues that we need good data to know whether what we are doing – and espousing – is good. She is the Chair of the ABA Section of Dispute Resolution Advisory Committee on Dispute Resolution Research, which is developing recommendations about what data should be collected. She suggests that research should measure the occurrence, effects, and perceptions of dispute resolution processes. She focuses particularly on data collection by courts, which have the institutional machinery to routinely collect data. Of course, researchers could also try to collect data from private dispute resolution providers as well as disputants.

While it would be valuable for courts and professional researchers to conduct research, we should not be limited to those sources. [In response to my question, "What Me – A Social Scientist?," the answer should be "yes."](#) There is too much going on outside the courts and that is happening too fast for court administrators and a small cadre of professional social scientists to keep up with. The [Stone Soup Dispute Resolution Knowledge Project](#) provides a great opportunity for faculty, students, and speakers at educational events to collect valuable data about what is happening as we speak. [Faculty using Stone Soup assignments](#) essentially deputize students to be eyes and ears observing whatever the faculty and students choose to learn about.

Similarly, [speakers at continuing education events](#) can take advantage of these events to systematically elicit data from the audience about their experiences and perspectives. For example, you can ask what do people really do in practice. What makes sense to them – or not – about dealing with particular problems? Do they use any nifty techniques you haven't thought of? Have they noticed any changes in practice over time? What are their hopes and aspirations? How much do people use dispute resolution theory in practice? What are some problems with the theory? How do they deal with these problems?

Two programs at the Past-and-Future Conference provide useful guidance about conducting empirical research. [One program](#) focused on the value of empirical research, the nature of experimental and non-experimental research, the importance of using consistent terminology, nuts and bolts of conducting research, and suggestions for future research on dispute resolution. [A second program](#) addressed key goals of research, contextual variables that may affect dispute resolution outcomes, important issues and variables that should be studied in future research, and good methodological approaches.

It would be helpful to develop an agenda of things that would be useful to know -- especially as the dispute resolution world is changing so rapidly. In 2017, Rishi Batra, Noam Ebner, Rebecca Hollander-Blumoff, Sanda Kaufman, and I led a session at the ABA Section of Dispute Resolution conference entitled, "[Making Negotiation Theory More Helpful for Practitioners](#)." We elicited a fascinating and somewhat surprising collection of ideas for new theories -- and empirical research to test and refine new theories -- that would be helpful for practitioners.

Develop a Searchable Dispute Resolution Bibliographic Database

We are producing new dispute resolution literature almost faster than a speeding bullet and chocolate in a chocolate factory. It's tough to keep up, especially since the literature is spread out all over the place rather than in a single, user-friendly database. So it's hard for readers to find what they are looking for and for authors to get their ideas to people who want to read them. Considering the sprawling body of dispute resolution literature that ranges over multiple disciplines, I suggest that some institution create a [searchable database](#) to make it easier to disseminate and find our scholarship.

Engage the Major Issues of Our Times with Realistic Plans and Expectations

Like [Charlie Irvine](#), most of us are deeply concerned about promoting substantive justice in human interactions, not only procedural justice or efficiency. Part of this is a function of providing better access to justice, as [Jackie Nolan-Haley](#) summarizes a Past-and-Future Conference program, [Michaela Keet](#) describes a major Canadian initiative, [Colin Rule](#) illustrates the potential of online dispute resolution and technology generally, [Michael Buenger](#) envisions for the courts, and [Chris Draper](#) imagines for technologically advanced systems.

In addition to promoting access to justice, many of us want to help promote just outcomes in individual cases and in dealing with major social problems. [Deb Eisenberg](#) challenges the assumption that we can provide only justice or peace but not both. She describes efforts to promote restorative justice, help resolve public policy conflicts, stem the school-to-prison pipeline, prevent sexual assault, decrease evictions, address divided communities, and accomplish other systemic social reform goals. [Steve Goldberg, Nancy Rogers, and Sarah Cole](#) suggest that we may be called on to help resolve major social issues such as conflicts related to community division, delivery of services for opioid addicts, and climate change. [Michael Green](#) suggests a method to reduce the unfairness of forced arbitration. [Grande Lum](#) and [Rachel Viscomi](#) aspire to use our skills and resources to help heal deepening social divides. [Lara Fowler](#) outlines ways that we can use our skills and energy to help address climate change.

I suggest that we take a ["pragmatically romantic" approach](#) in trying to promote justice, particularly when dealing with powerful interests that want to maintain the status quo. This involves having realistic expectations about what we and our methods can achieve. We are more likely to be successful if we partner with others seeking justice. [Jill Gross's "CRAPP" strategy](#) – involving Credibility, Repetition, Actual evidence, Publish, and Patience – illustrates this approach.

Attract All Hands on Deck

I propose adopting an ["all-hands-on-deck" strategy](#) to engage many different populations involved in American legal education. We should broaden this idea to include an expanded concept of who "we" are, as described above, in the US and around the world.

Unbundle and Prioritize Your Life

These ideas are ambitious and individuals have only so much time, energy, and bandwidth to deal with them, especially considering our family, work, and other obligations. I suggest [reflecting on what we do](#) and considering whether we might dispense with some obligations to enjoy life more and/or contribute to some collective effort of our movement in a new way.

The descriptions of these agenda items do not include all the good ideas in this book – or that aren't proposed in this book. But hopefully they will inspire a critical mass of us to do some or all of them together.

A Note About Links

This book takes advantage of hyperlinks including both external links to materials on the internet and internal links to navigate within this document. After clicking on an internal link, you can return to a previous page, by holding the "alt" key and clicking "left arrow."

Materials on the internet sometimes disappear because they are removed or the links change. If you encounter a broken link, you might do an internet search to find the material or email me to see if I can help find the material. The internal links should not have this problem.

Please Share This Book

The wonders of technology enable me to produce and distribute this book without out-of-pocket costs so that it can be widely available without charge. Please share it with anyone who might be interested. As we plan for the future, we should particularly

cultivate enthusiastic students like [Rebekah Gordon](#) and the next generation of practitioners, academics, and leaders like [Andrew Mamo](#). The pieces in this book are short and easy to read, so faculty can assign them in your courses without increasing students' debt load.

Thanks

This book is possible only because of the generous contributions of the many authors who provided their experiences, energy, and idealism. I want to thank all the contributors to this symposium and everyone who worked to make the Past-and-Future conference a success.

I have been taking and sharing photos of our wonderful community since the [1993 workshop that Nancy Rogers and others organized](#). Pictures are worth 1000 words – but they take up a lot of space in electronic documents. So I created a photo album of the authors [available here on the Indisputably blog](#). For a complete collection of my photo albums of our community, [click here](#).

One More Thing

[YOLO](#).

The Dispute Resolution Movement Needs Good Theories of Change

John Lande*

I. Introduction¹

"Isn't there a better way?"² Those words of former Chief Justice Warren Burger in 1982 continue to reflect the aspirations of the dispute resolution community ("community") for innovation and improvement of traditional processes of dispute resolution. In a speech to the American Bar Association, Chief Justice Burger said:

The obligation of our profession is, or has long been thought to be, to serve as healers of human conflicts. To fulfill our traditional obligation means that we should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense, and with a minimum of stress on the participants. That is what justice is all about.

The law is a tool, not an end in itself. Like any tool, particular judicial mechanisms, procedures, or rules can become obsolete. Just as the carpenter's handsaw was replaced by the power saw and his hammer was replaced by the stapler, we should be alert to the need for better tools to serve our purposes.³

Almost four decades later, in June 2019, leading dispute resolution organizations convened a conference calling on our community to appreciate the legacy of past initiatives and engage the future.⁴ To follow up this important conference, I initiated the

* John Lande is the Isidor Loeb Professor Emeritus at the University of Missouri School of Law. This Article was largely adapted from posts in the Theory of Change Symposium featured on indisputably.org, a blog that seeks to link dispute resolution scholarship, education, and practice. This article is being published as 2020 J. DISP. RESOL. 121 (2020).

¹ Parts I and II are adapted from John Lande, *What's Your Theory of Change for Dispute Resolution? – Part 1*, INDISPUTABLY BLOG (Aug. 12, 2019), <http://indisputably.org/2019/08/whats-your-theory-of-change-for-dispute-resolution-part-1>.

² Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982).

³ *Id.* at 274.

⁴ *Appreciating Our Legacy and Engaging the Future: An Int'l Conference for Dispute Resolution Teachers, Scholars, & Leaders*, PEPPERDINE LAW (June 18, 2019), <https://law.pepperdine.edu/s-traus/training-and-conferences/connecting-in-classrooms.htm> (detailing the conference sponsored by Pepperdine's Straus Institute for Dispute Resolution,

"Theory of Change Symposium"⁵ to elicit and share ideas about how we can develop and use tools to resolve dispute resolution problems we have not been able to resolve before, as well as to resolve problems created by the tools we have developed. I invited academics, practitioners, administrators, and researchers, among others, in the United States and abroad to write short pieces describing their highest priority goals for the dispute resolution field and suggesting strategies for advancing them.

Theorists and practitioners developed "theory of change" concepts in the last half of the Twentieth Century to address "challenges in evaluating complex social or community change programs when it was not clear precisely what the programs had set out to do or how and therefore difficult to evaluate whether or how they had achieved it."⁶ The Center for the Theory of Change provides the following definition of theory of change:

Theory of Change is essentially a comprehensive description and illustration of how and why a desired change is expected to happen in a particular context. It is focused in particular on mapping out or "filling in" what has been described as the "missing middle" between what a program or change initiative does (its activities or interventions) and how these lead to desired goals being achieved. It does this by first identifying the desired long-term goals and then works back from these to identify all the conditions (outcomes) that must be in place (and how these related [sic] to one another causally) for the goals to occur.⁷

A full-fledged theory of change involves six steps. These steps include: (1) identifying long-term goals; (2) "backwards mapping" to connect the requirements for achieving the goals and explain the necessity and sufficiency of those requirements; (3) identifying assumptions about the relevant context; (4) identifying interventions that will create the desired change; (5) developing indicators to measure outcomes and assess the initiative's performance; and (6) writing a narrative explaining the logic behind the

American Bar Association Section of Dispute Resolution, and Aggie Dispute Resolution Program (Texas A&M University School of Law) in cooperation with more than a dozen top American law school dispute resolution programs).

⁵ For a complete collection of posts in the Theory of Change Symposium, see John Lande, *Index to the Theory of Change Symposium*, INDISPUTABLY BLOG (Sept. 18, 2019), <http://indisputably.org/2019/09/index-to-the-theory-of-change-symposium>.

⁶ *TOC Origins*, CTR. FOR THE THEORY OF CHANGE, <https://www.theoryofchange.org/what-is-theory-of-change/toc-background/toc-origins> (last visited Dec. 7, 2019).

⁷ *What is Theory of Change?*, CTR. FOR THE THEORY OF CHANGE, <https://www.theoryofchange.org/what-is-theory-of-change> (last visited Dec. 7, 2019).

initiative.⁸ Contributions to the Theory of Change Symposium include some, but not necessarily all, of these elements. Identifying assumptions and preconditions for success are particularly important.

Theories of change vary widely in scope. As an example toward one end of the continuum, Jill Gross used a "CRAPP" strategy – credibility, repetition, actual evidence, publishing, and patience – to improve the dispute resolution process for low-income parties in cases handled by the Financial Industry Regulatory Authority ("FINRA").⁹ She proposed that claimants in certain FINRA arbitrations should be given the option of participating by telephone.¹⁰ On the other end of the continuum, Maurits Barendrecht and his colleagues developed global theories about improving the justice system.¹¹ For example, in one paper, they identified general justice needs, problems that may lead to disputes, difficulties in delivering justice, and a set of approaches for supporting negotiation and adjudication processes.¹² There are many theories of change with an intermediate scope. Many law review articles provide just such theories, identifying important problems and goals and then proposing strategies for achieving those goals. Michael Buenger's article, which proposes a "zero-based" approach to leadership in the courts,¹³ and Part V of this Article are examples of theories with an intermediate scope.

To provide material for theories of change about dispute resolution, Part II of this Essay sketches out some of the many goals for dispute resolution. Part III then sets forth several strategies that have been used to advance these goals, followed by a discussion of factors that may affect the success of these efforts in Part IV. Next, Part V describes one theory of change to provide an example of a strategy for the dispute resolution community to advance a particular high-priority goal: maintaining the vitality of the dispute resolution field in American legal education.

⁸ *How Does Theory of Change Work?*, CTR. FOR THE THEORY OF CHANGE, <https://www.theoryofchange.org/what-is-theory-of-change/how-does-theory-of-change-work> (last visited Dec. 7, 2019).

⁹ Jill Gross, *CRAPP: A Strategy for Dispute Resolution Reform*, INDISPUTABLY BLOG (July 25, 2019), <http://indisputably.org/2019/07/crapp-a-strategy-for-dispute-resolution-reform>.

¹⁰ *Id.*

¹¹ *Maurits Barendrecht*, SSRN, https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=74344 (last visited Dec. 7, 2019).

¹² Maurits Barendrecht et al., *Towards Basic Justice Care for Everyone: Challenges and Promising Approaches*, SSRN (Apr. 2, 2012), <https://ssrn.com/abstract=2229686>.

¹³ Michael L. Buenger, *Rethinking the Delivery of Justice in a Self-Service Society*, 2020 J. DISP. RESOL. 109 (2020).

II. Possible Goals of a Theory of Change for Dispute Resolution

Proponents of "better ways" to manage disputes have aspired to numerous goals including, but not limited to:

- Helping people solve problems and manage conflicts so that they avoid destructive disputes;
- Giving parties the choice of a variety of dispute resolution processes;
- Increasing parties' control over the dispute resolution process and outcome;
- Increasing procedural and substantive fairness;
- Using parties' values and norms in dispute resolution;
- Creating value, i.e., producing resolutions that better satisfy all parties' interests;
- Improving dispute resolution for disadvantaged individuals and groups;
- Protecting interests of unrepresented third parties;
- Improving parties' ability to handle disputes on their own;
- Increasing parties' empathy and concern for others;
- Reducing tangible and intangible costs of disputing;
- Reducing the time required to handle disputes;
- Reducing the use of trials and the courts generally;
- Improving the quality and simplicity of dispute resolution processes;
- Providing appropriate confidentiality;
- Preserving relationships when desired;
- Reducing hostility between disputants and others affected by disputes;
- Increasing compliance with dispute resolution settlements and adjudications;
- Developing cohorts of skilled and ethical practitioners, including advocates and neutrals;

- Improving court procedures;
- Reducing burdens on courts and other institutions handling disputes;
- Developing support for dispute resolution processes in government, business, and other organizations;
- Improving achievement of organizational goals through conflict management techniques; and
- Changing the popular culture to value constructive conflict management processes and devalue destructive ones.

The dispute community has identified problems created or not adequately addressed by our efforts. Some of our goals are to reduce or eliminate such problems including, but not limited to:

- Lack of access to good dispute resolution processes for large portions of the population;
- Disadvantages of weaker parties, including members of groups subject to historical discrimination such as women, people of color, and lesbian, gay, bisexual, and transgender individuals;
- Unequal provision of dispute resolution services leaving low-income parties with "second-class" justice and parties who can afford private dispute resolution with premium justice;
- Pressure, coercion, or legal requirements to use certain processes or accept certain outcomes;
- Disempowerment of parties by lawyers or neutrals who dominate the process;
- Poor quality and/or inefficient processes;
- Insufficient resources to provide appropriate services;
- Prevention of disclosure of information of public interest;
- Prevention of parties from using public courts;
- Prevention of parties from joining their cases in collective actions;

- Undermining development of legal doctrine because some cases are settled and do not produce court opinions;
- Decreasing amount of judicial experience in public courts because judges become private neutrals;
- Reduced support for the public court system because elite parties use private processes; and
- Confusing dispute resolution jargon.

Developing good theories of change for the dispute resolution field is a very difficult challenge. Our community is heterogenous, comprised of members who do not all share the same goals. Even if we agreed about all of the relevant goals, we could not achieve them all because of resource limitations, tradeoffs between goals, and various stakeholders' differing interests constraining our efforts. We also have a difficult challenge in achieving our goals because, considering the wide range of tools that have been deployed in recent decades, it is not clear what additional tools or changes in existing tools would produce a significant improvement.

III. Strategies for Implementing a Theory of Change for Dispute Resolution¹⁴

To effectively reach our goals in the future, we should consider our purposes and the tools we think could help achieve them. Our community has created and supported an impressive "toolbox" of strategies to accomplish our goals including:

- Increased number, variety, and refinement of dispute resolution processes, often specialized for particular types of disputes;
- Dispute resolution programs and entities in courts, businesses, government agencies, and other institutions, both in-person and online;
- Systems for selecting appropriate processes based on early case assessments;
- Use of paralegals, unbundled legal services, and court systems to provide free or low-cost assistance in handling disputes;
- Education of parties about the range of dispute resolution techniques;
- Protocols to protect vulnerable parties, such as domestic violence victims;

¹⁴ PARTS III AND IV ARE ADAPTED FROM JOHN LANDE, *WHAT'S YOUR THEORY OF CHANGE FOR DISPUTE RESOLUTION? – PART 2*, INDISPUTABLY BLOG (Aug. 13, 2019), <http://indisputably.org/2019/08/whats-your-theory-of-change-for-dispute-resolution-part-2>.

- Materials, in-person assistance, and technological tools to help parties handle their disputes on their own and participate in dispute resolution processes;
- Public information about dispute resolution practitioners and programs;
- Literature and materials for academics, practitioners, and the general public;
- Production and dissemination of empirical research about dispute resolution;
- Initiatives to increase diversity of dispute resolution practitioners;
- Initiatives to improve quality of dispute resolution processes;
- Trainings and continuing education programs for practitioners;
- Education of lawyers to be effective advocates in dispute resolution processes;
- Instruction about dispute resolution in law school and other higher education programs;
- Conflict resolution education and peer mediation programs in elementary and secondary schools;
- Legal regulation of practitioners and/or dispute resolution processes;
- Ethical standards, rules, and review processes;
- Legal protection of confidentiality of communications in dispute resolution processes;
- Laws authorizing courts to order parties to use dispute resolution processes;
- Uniform laws;¹⁵
- Bilateral and multinational international treaties and agreements;
- Dispute resolution professional associations and committees at local, state, national, and international levels;

¹⁵ Timothy J. Heinsz, *Revised Uniform Arbitration Act: Modernizing, Revising, and Clarifying Arbitration Law*, 2001 J. DISP. RESOL. 1 (2001); National Conference of Commissioners of Uniform State Laws, *Uniform Mediation Act and Official Comments*, 2003 J. DISP. RESOL. 1 (2003).

- Dispute resolution committees in local, state, and national bar associations;
- Convening of stakeholders to address specific issues; and
- Dispute system design techniques.

These strategies have not been universally implemented nor completely effective in achieving their intended purposes. Moving forward, some theories of change might involve expanding use of strategies that have been applied only in limited situations, correcting problems with strategies that have not produced the intended outcomes, or combining multiple existing strategies.

IV. Trends Relevant to Dispute Resolution Theories of Change

To develop realistic theories of change, it is important to consider contextual factors that may affect potential strategies. We should consider the developments in our field in the period since Chief Justice Burger's speech as well as relevant trends in our field and greater society. The dispute resolution field – and the world generally – is constantly changing. A theory of change for dispute resolution should consider past, present, and potential future circumstances and trends including, but not limited to:

- Institutionalization of dispute resolution in courts and other institutions;
- Difficulty anticipating court results because of low trial rates;
- "Creeping legalism," the tendency of dispute resolution innovations to become legalized over time;
- "ADR fatigue," the feeling that ADR is not the "shiny new thing" anymore;
- Decreased funding for courts and other government entities that use or might use dispute resolution processes;
- Large population of low-income and other self-represented litigants;

- Cut-off of Hewlett Foundation funding¹⁶ and decline of the resources it supported;
- Contraction and restructuring of legal practice in the U.S.;
- Contraction of the system of legal education in the U.S. and many law schools' resistance to fundamental change; and
- Aging of a large cohort of senior law school faculty specializing in dispute resolution with limited prospects of repopulation.

Some conditions and trends in society generally may also affect the dispute resolution field. These trends include, for example:

- Change in demographic composition in various parts of society;
- Prejudice and discrimination against disfavored groups;
- Inequality of resources and power;
- Fluctuation of economic conditions;
- Changes in political power and philosophy in various branches and levels of government;
- Technological change;
- Increase in number and sophistication of communication modes;
- Increased use of social media;
- Decreased consensus about evidence, facts, and truth;
- Increased political polarization;
- Cyberwar and other abuses of the cyberworld;

¹⁶ The Hewlett Foundation began making major investments in dispute resolution in 1984. JEROME T. BARRETT & JOSEPH P. BARRETT, A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION: THE STORY OF A POLITICAL, CULTURAL, AND SOCIAL MOVEMENT 223 (2004). In the mid-2000s, the Foundation made its last grants as part of its major dispute resolution initiative. William & Flora Hewlett Found., *Grants*, https://hewlett.org/grants/?keyword=dispute&sort=date¤t_page=3 (last visited Dec. 7, 2019).

- International migration;
- Climate change; and
- Deterioration of the Post-World War II order with the ascendance of authoritarian countries like China and Russia and weakening of democratic countries like the U.S. and many countries in Western Europe.

Failure to take factors such as those listed above into account could render our theories and strategies ineffective. Therefore, it is important that our community continue to identify trends – both within the field and external to it – that may affect dispute resolution developments.

Similarly, proponents of improvements in dispute resolution should consider how social change occurs. Sociologists have developed numerous theories about the process of social change, and various theories have come in and out of fashion since the Enlightenment.¹⁷ Social change theories describe different mechanisms of change such as:

- Mechanisms of one-directional change such as accumulation of knowledge, selection of superior ideas, and specialization;
- Mechanisms of curvilinear or cyclical change that recognize limits to growth and natural cycles;
- Conflict, competition, and cooperation;
- Tension and adaptation to changes in a social system;
- Diffusion of innovations; and
- Planning and institutionalization.¹⁸

¹⁷ The enlightenment was an intellectual and philosophical movement in the Eighteenth Century relying on reason as the primary source of knowledge and advocating values that are the basis of modern Western societies. See *Age of Enlightenment*, WIKIPEDIA, https://en.wikipedia.org/wiki/Age_of_Enlightenment (last visited Dec. 7, 2019).

¹⁸ William Form & Nico Wilterdink, *Social Change*, ENCYCLOPÆDIA BRITANNICA, [https:// www.britannica.com/topic/social-change](https://www.britannica.com/topic/social-change) (last visited Dec. 8, 2019).

There is no single generally accepted theory of social change, so proponents of theories of change should consider what social change dynamics might be applicable in particular situations.

V. An All-Hands-on-Deck Strategy For American Legal Education

To illustrate a theory of change for dispute resolution, Part V advocates for an "all-hands-on-deck" strategy to maintain the vitality of the dispute resolution field in American legal education. Although it does not include all of the elements of a formal theory of change,¹⁹ this theory identifies a major goal, discusses assumptions about the future, suggests why past efforts have not been effective, proposes some concrete steps to achieve the goal, and describes causal connections between the proposed strategies and desired goal.

A. The Future of Dispute Resolution in American Legal Education²⁰

Dispute resolution faculty in American law schools have played an important role in our field and have a lot to contribute in the future as our society and legal system evolve. We not only teach future lawyers and other dispute resolution professionals, we also develop new theories and techniques, advise institutions about dispute resolution issues, and serve as a valuable hub connecting students, practitioners, courts, businesses, and other organizations invested in dispute resolution. Maintaining the vitality of our legal education community should be a high-priority goal for our field.

The dispute resolution field in American legal education is facing a slow-moving demographic disaster. There is a cohort of extraordinary – and aging – senior dispute resolution academics in American law schools. As they retire, it seems unlikely that law schools will hire new faculty to fill most of their positions with faculty specializing in dispute resolution. This and associated developments pose a threat to the vitality of the dispute resolution field, especially related to legal education.

This bleak assessment is based on several assumptions about possible future dynamics in legal education. First, a series of leading dispute resolution faculty will retire within the next two decades, and their schools probably either not fill their positions or fill them with faculty who specialize in other subjects. Some schools may view dispute resolution courses to be "merely practice courses" that can be taught much cheaper by adjunct faculty. Over-stretched adjunct faculty may get little guidance and support for their teaching. Some candidates for new faculty positions may perceive

¹⁹ *How Does Theory of Change Work?*, *supra* note 8.

²⁰ *Part VI is based on John Lande, We Need an All-Hands-On-Deck Strategy Now to Maintain the Vitality of Our Field in the Future*, INDISPUTABLY BLOG (Sept. 18, 2019), <http://indisputably.org/wp-content/uploads/Lande-TOC.2.pdf>.

that dispute resolution is a disfavored area and thus will not risk listing dispute resolution as an interest in their applications. As the cohort of experienced dispute resolution faculty dwindles, some law school administrators may cut back dispute resolution course offerings. As a result, some colleagues who now have an interest in dispute resolution – even those who are far from retirement age – may become demoralized and drift away from our community. Scholarship and service by regular faculty specializing in dispute resolution may not be valued as much as in the past. Faculty may produce less significant dispute resolution scholarship or produce less of it altogether.

Many law schools will face intense competitive pressure to attract students and, for many schools, hiring dispute resolution faculty may not seem like a good strategy to fill their classes. Dispute resolution instruction in many schools may become routinized, limited primarily to techniques that are commonly used in practice, and would not include the rich range of material now included in dispute resolution courses. If there is a substantial reduction in the number of faculty interested in dispute resolution, the American Bar Association Section of Dispute Resolution may reduce its dispute resolution activity related to legal education and discontinue sponsoring the Legal Educators' Colloquium.²¹ Similarly, the Association of American Law Schools Alternative Dispute Resolution Section may shrink and stop sponsoring the annual Works-in-Progress conference.

These possibilities foreshadow the risk that in the foreseeable future, dispute resolution may survive in American law schools only as a faint shadow of its former self. I am not predicting that all this actually will happen. However, given current trends, it is plausible to assume that much of it will happen in the next 10-20 years – especially if members of our community do not start taking action soon to counteract these possibilities.

There are already indications that some of these dynamics are underway. Douglas Yarn, the executive director of the Consortium on Negotiation and Conflict Resolution at Georgia State College of Law, described how his school decided to close the consortium and devote its resources to another subject.²² This decision is one of several indicators of a shift of priorities away from dispute resolution in American law

²¹ The annual conference of the American Bar Association Section of Dispute Resolution includes a day-long Legal Educators' Colloquium for the benefit of law school faculty focusing on dispute resolution.

²² John Lande, *What Will Be the Future of ADR in U.S. Legal Educ.?*, INDISPUTABLY BLOG (Jan. 24, 2019), <http://indisputably.org/2019/01/what-will-be-the-future-of-adr-in-us-legal-education>.

schools.²³ These indicators may be our "canaries in the coal mine,"²⁴ warning of potential dangers ahead.

The dispute resolution field may be a victim of our success in some ways. We are not the "shiny new thing" anymore. Members of our community generally do not have the same intense passion that existed when Chief Justice Burger made his remarks and there was a burst of enthusiasm and experimentation. Many courts now require parties to mediate, and lawyers now view mediation as a regular part of litigation. Arbitration is a routine dispute resolution method in many contexts. Most law schools include some instruction in dispute resolution and quite a number have impressive dispute resolution programs. Dispute resolution faculty have produced a substantial body of scholarship and are involved in many dispute resolution organizations. Indeed, most dispute resolution faculty are very busy with work, family, and other commitments, so it seems rational for faculty to focus on their immediate obligations and not worry about demographic problems that will not be felt for a while.

Although it is understandable why individual faculty would focus so much on their personal commitments, the cumulative effect would be a "tragedy of the commons": people will focus on their individual self-interests and de-emphasize a common interest.²⁵ The tragedy of the commons is based on the socio—psychological phenomenon of diffusion of responsibility, where people are less likely to take responsibility when they believe that others may do so.²⁶ Understandably, the larger the group, the easier it is to assume that others will take responsibility, and the easier it is to internally justify our own inaction.

To counteract these trends effectively, the dispute resolution community should focus on these issues now because it would take time for this strategy to take effect, and delaying implementation would aggravate the problem. If there is a downward spiral causing dispute resolution colleagues to perceive that our community is shrinking, some colleagues will withdraw their time and interest, reinforcing that perception. At that point, people may be "heading for the exits" and the "survivors" may doubt that it is

²³ See *id.*

²⁴ *Canary in a Coal Mine*, WIKTIONARY, https://en.wiktionary.org/wiki/canary_in_a_coal_mine (last visited Dec. 8, 2019) ("An allusion to caged canaries (birds) that miners would carry down into the mine tunnels with them. If dangerous gases such as carbon monoxide collected in the mine, the gases would kill the canary before killing the miners, thus providing a warning to exit the tunnels immediately.").

²⁵ *Tragedy of the Commons*, WIKIPEDIA, https://en.wikipedia.org/wiki/Tragedy_of_the_commons (last visited Dec. 8, 2019).

²⁶ *Diffusion of Responsibility*, WIKIPEDIA, https://en.wikipedia.org/wiki/Diffusion_of_responsibility (last visited Dec. 8, 2019).

worth sticking around in the field. In other words, it may be too late if we wait until the deterioration is more obvious.

B. Possible Strategies to Keep Dispute Resolution Alive in American Law Schools

There are many possible strategies for addressing these problems to maintain the vitality of dispute resolution in American law schools. The following eight possibilities are discussed in more detail below: (1) encourage junior and mid-career faculty to take increasing leadership; (2) engage current faculty who weakly identify with dispute resolution; (3) recruit new faculty interested in dispute resolution; (4) attract faculty who do not specialize in dispute resolution to incorporate it in their teaching and scholarship; (5) support adjunct faculty; (6) take advantage of administrators' experience; (7) keep retired colleagues engaged; and (8) encourage faculty to act so that colleagues can see their contributions. Ideally, we would pursue all of these strategies. We should undertake as many as time, effort, and resources will allow.

1. Support and Engage Junior and Mid-Career Faculty to Take Increasing Leadership

We should begin the transition into leadership of a cohort of junior and mid-career colleagues in our field. If the scenario described above is realized to a significant extent, they will be the ones to bear the brunt of leading a possibly-dwindling community. Some such faculty have a tendency to minimize their own importance, saying that they are "only junior" colleagues. They may weigh their contributions against those of senior colleagues and put themselves down by comparison. In fact, junior and mid-career colleagues have a lot to offer and often do not give themselves enough credit. More importantly for our common interest, we need them to step up with more confidence and take on further leadership.

2. Engage Current Faculty Who Weakly Identify with Dispute Resolution

Many colleagues who subscribe to the Dispute Resolution in Legal Education listserv²⁷ have some interest in dispute resolution but do not come to conferences or participate in our organizations for various reasons. We should reach out to some of them individually to see what, if anything, might strengthen their identification with the field and encourage them to participate and make contributions to the field. Presumably, many of them would not find it useful to come to in-person events like the annual American Bar Association Section of Dispute Resolution conference, but perhaps there

²⁷ *Dispute Resolution Listserv*, UNIV. OF MO. SCH. OF LAW, <https://law.missouri.edu/csdr/drle/dispute-resolution-listserv> (last visited Dec. 8, 2019) (there are over 300 subscribers to the listserv).

are other things that they *would* find valuable. People often ignore general messages on the listserv, so this might require individual emails or calls to connect with some of these colleagues.

3. Recruit New Faculty

Although it may be hard to get law schools to recruit and hire faculty to specialize in dispute resolution, we should do what we can to groom suitable candidates and help them get faculty positions. We also should advocate for faculty candidates who are interested and experienced in dispute resolution even though they specialize in other subjects.

4. Help Faculty Who Do Not Specialize in Dispute Resolution Incorporate It in Their Teaching and Scholarship

Considering the limited prospects for recruiting a substantial cohort of new faculty specializing in dispute resolution, we should try to help existing junior and mid-career faculty incorporate dispute resolution in their teaching and scholarship.²⁸ For example, if faculty are interested in contracts, civil procedure, or virtually any traditional subject, we might encourage them to focus on dispute resolution issues within those subjects in their work. We might collaborate with them by, for example, giving advice and offering to be guest lecturers or co-teachers.

We can conduct annual summer workshops designed specifically for faculty who do not specialize in dispute resolution but want to incorporate it in their teaching or scholarship. These workshops might "piggyback" on summer programs offered by various schools teaching dispute resolution skills for practitioners, which some of these faculty might also want to attend. Considering that most faculty have limited travel budgets, it might be important to subsidize the special programs for such faculty. We might seek funding from foundations, private donors, or other sources interested in dispute resolution.

It also would be good if we could encourage such "recruits" to attend the annual American Bar Association Section of Dispute Resolution conference and other events. Indeed, although they would not immediately be dispute resolution experts, it would be good if they could be included in programs at these events, which could increase their identification with and connection to the field.

²⁸ See generally John Lande, *Infect a Colleague Today – & Next Year & the Year After That!*, INDISPUTABLY BLOG (Aug. 11, 2019), <http://indisputably.org/2019/08/infect-a-colleague-today-and-next-year-and-the-year-after-that>.

5. Support Adjunct Faculty

If law schools are going to rely increasingly on adjunct faculty in place of regular faculty, there is greater need to integrate adjunct faculty in our field. To our credit, our community has taken steps to support adjunct faculty. We probably will need to do more and do it more regularly in the future.²⁹

6. Take Advantage of Faculty Administrators' Experience

Many of our colleagues are or have been administrators, and they have valuable experience that would be good to share and tap systematically. These might include present and former deans, associate deans, and dispute resolution program directors. As the legal education environment becomes more challenging, this cadre of administrators might value having a support system. They could also provide a valuable perspective for our community in trying to maintain our vitality.

7. Keep Retired Colleagues Engaged

We should try to keep retired faculty engaged in the field, perhaps with periodic telephone or video conference calls, which might be partly social. Their participation in the field and connection with colleagues has been an important part of their identity. It would be good to enable them to stay engaged without making substantial time commitments. Those interested in being part of an "emeritus club" would be natural candidates to be mentors for junior and mid-career colleagues becoming involved in our community.

8. Encourage Faculty to Act So That Colleagues Can See Their Contributions

If faculty see colleagues participating and taking action to address the problems described above, we are more likely to want to do so as well. Conversely, if we perceive that colleagues are not taking action, we are likely to avoid doing so ourselves, feeling that we would be acting alone and that our actions would be ineffective. Thus, taking no action to promote the continued vitality of the community signals to colleagues that this effort is not, in fact, worth the effort.

Publicizing our activities is an important element of this strategy because it demonstrates to our colleagues an interest in preserving our community. There are many ways people can share news of their work. An easy way to publicize activities is

²⁹ See John Lande, *Integrating Adjunct Faculty*, INDISPUTABLY BLOG (Aug. 8, 2019), <http://indisputably.org/2019/08/integrating-adjunct-faculty> (summary written by Ava Abramowitz of conference program featuring Tracy Allen, Dwight Golann, and Brian Pappas).

by posting messages on the Dispute Resolution in Legal Education listserv³⁰ about one's activities, successes, and challenges. Similarly, colleagues can write guest posts on the Indisputably blog.³¹ Of course, colleagues can communicate through publications and presentations at conferences and other educational events.

VII. Conclusion

Addressing Chief Justice Burger's question, there **are** better ways to handle disputes than the status quo. In the decades since he posed his challenge, many academics, practitioners, judges, government officials, businesspeople, and others have been incredibly creative in devising new and better ways to manage conflicts and handle disputes. Our collective efforts have generated great benefits to individuals, institutions, and society generally.

The dispute resolution project is not now complete and never will be. Our innovations have not fully penetrated through society to benefit all who might take advantage. Our innovations are imperfect, and some have created new problems. Society continues to evolve at a rapid rate, so there are constantly new problems of dispute resolution to address. Faculty at American law schools, among others in the field, are important actors needed to fulfill the potential of this project. We need to continue the work of creating better ways to manage conflict and handle disputes. Developing realistic theories of change can help us do so.

³⁰ See *Dispute Resolution Listserv*, *supra* note 27.

³¹ See INDISPUTABLY BLOG, <http://indisputably.org> (last visited Dec. 9, 2019).

Reflections on the Past-and-Future Conference

The Past-and-Future Conference – aka [Appreciating our Legacy and Engaging the Future: An International Conference for Dispute Resolution Teachers, Scholars, and Leaders](#) – was a major impetus for the Theory-of-Change Symposium.

It took place on June 18-19, 2019 at Pepperdine Caruso School of Law and was so-sponsored by the Straus Institute for Dispute Resolution, ABA Section of Dispute Resolution, and Aggie Dispute Resolution Program, Texas A&M University School of Law in cooperation with the Cardozo School of Law of Yeshiva University, Marquette University Law School, University of Missouri School of Law Center for the Study of Dispute Resolution, Dispute Resolution Institute at the Mitchell Hamline School of Law, the Ohio State University Moritz College of Law, Sandra Day O'Connor College of Law at Arizona State University, UC Hastings Center for Negotiation and Dispute Resolution, Center on Dispute Resolution at Quinnipiac University School of Law, Northwestern University Pritzker School of Law, Saltman Center for Conflict Resolution, University of Nevada-Las Vegas, University of Oregon ADR Center, Conflict Resolution Program at Santa Clara University School of Law, and Fordham School of Law.

The conference was jam-packed into two full days with an incredible collection of prominent leaders of our movement. There was an air of excitement. This event seemed like a big deal, perhaps a landmark event in our history.

People wrote pieces summarizing some of the presentations that are included in later parts of this book. This section includes some general reactions to the conference.

Andrew Mamo, a junior faculty member, [appreciates our fundamental insights](#) that we take for granted but still are new to others. He urges that we truly appreciate our legacy so that we can build on what we have inherited.

Jill Gross, a veteran in our movement, observed an ["urgency" of this moment](#) with luminaries worried about the future of the field. She notes that it can be depressing to consider that, despite all our achievements, we have not solved the critical issues facing our society. It is hard to move forward and not "fall back into complacency." She hopes that the momentum from the conference will motivate us to move forward together.

Rebekah Gordon, a law student who strongly identifies with our field, describes her experience as a [mixture of excitement and alarm](#). She was thrilled to mingle with legends in our field – and was anxious to hear presenters' expressions of apprehension. She urges people to appreciate the foundation we have provided to students like her, have hope, and "pass the baton" to the next generation.

These three voices capture a sense of this moment. Feelings of hope, anxiety, and

determination swirled together. In their own ways, they all expressed a determination to avoid complacency and take on the challenges we will face in the future.

Appreciating our Legacy and Building the Future of Dispute Resolution

[Andrew Mamo](#), as a relative newcomer to the dispute resolution field, **appreciates our fundamental insights and also the need to go beyond our familiar theories. He is a Lecturer and Clinical Instructor at Harvard Law School.**

My thanks to the organizers and participants at the Appreciating our Legacy and Engaging the Future conference. It was a tremendous gathering of so many individuals in our field – from those who were present at the creation to those like myself who are just getting started.

The conference impressed upon me the importance of "appreciating our legacy" in two senses. First, we cannot take for granted the fundamental lessons of our theory – such as engaging with disputes as opportunities for creative (and value-creating) problem solving, distinguishing interests from positions, and listening with empathy. These lessons remain counterintuitive to many in the legal profession and beyond. Even if it's all old hat to **us**, we still have much to do to make these lessons available to all.

Second, that we must **appreciate** our legacy in the sense of continuing to build upon what we have inherited. We cannot rest upon our inheritance, merely tinkering around the edges of our practices. Rather, we must continue to forge new paths and to question the theory that we have received. After all, the world of 2019 is not the world of 1976. The barriers facing individuals who wish to vindicate their rights are different today, in our age of mandatory arbitration and litigation waivers, than they were at the time of the Pound Conference. So too are the available opportunities for disputants, as ODR platforms begin to go mainstream. These changes in the dispute resolution landscape, among others, call for rethinking the nature of the multi-door courthouse, the relationship of law to "alternative" dispute resolution, the importance of diversity, and much more. We can hardly begin to "engage the future" of dispute resolution without genuinely "appreciating our legacy" in this sense.

Reflections on the Conference on the Past, Present and Future of ADR

Jill Gross reflects on the Past-and-Future conference, noting that we have an enormous opportunity to build on our legacy to shape and improve the field. She cautions that we have a difficult task to actually do it at this very moment in time and not fall back into complacency. She is Associate Dean for Academic Affairs and Professor at Pace University Elisabeth Haub School of Law.

The [wonderful conference at Pepperdine Law School](#) attended by 150 ADR legal educators and professionals explored the legacy of the field of ADR and predicted its future. Co-sponsored by the Aggie (Texas A&M) DR Program and the ABA Section of Dispute Resolution (in cooperation with numerous other law school DR programs), the conference featured panels on the past, present and future of ADR scholarship, teaching, and service. Some panels applauded the field's accomplishments. Others bemoaned its failures.

What struck me was the urgency of the reflective moment – why in 2019 are luminaries in the field worried about its future? Perhaps it has something to do with the polarizing politics of the day; perhaps it has to do with developments in legal education; perhaps it has to do with the maturity of the field. After all, constitutional law has been around since 1789, but alternative dispute resolution did not emerge as a field until the 1960s and 1970s, following another very polarizing time in our nation's history. Fifty years plus of ADR thought has led to a collective vocabulary: interests-based bargaining; court-connected processes; facilitative mediation; mandatory arbitration; early neutral evaluation, and so on and so on. But, for all its achievements, dispute resolution principles still cannot solve the critical issues facing our society. That can be depressing to think about.

The conference organizers recognize that we have an enormous opportunity to shape and improve the field and to build on the legacy created thus far. The harder task is to actually do it at this very moment in time, and not fall back into complacency. Indeed, the momentum generated by the conference should carry us forward to the next chapter. I surely hope it does.

The Future is Calling. Don't Hang It Up Yet!

Rebekah Gordon describes her experience at the Past-and-Future conference. She had a mixture of excitement about the ideas expressed at the conference and alarm about the expressions of apprehension about the future of the ADR field. She urges people to have hope and to pass the baton to the next generation. She is a third-year student at Northwestern Pritzker School of Law.

I will never forget my first experience in my mediation course. It all clicked for me. I found a class that allowed me to stretch my communication muscles in a legal context that wasn't moot court or journal. My tendencies to hear what people are really saying under their phrasings came alive. My ability to read between the lines and amplify the interests of parties who can't find the words was under the spotlight.

I found the lane I was created for. And one class turned into two. Then, two classes turned into becoming a certified mediator in the Illinois court system. And certification afforded me the opportunity to help real people with real issues all before I cross the graduation stage. What an honor! What a privilege to serve. I do not take these experiences lightly.

On my quest to figure out how I can continue to use my ADR skills in my future legal career, my train of thought led me to think about maybe teaching, or developing technology to help disadvantaged non-represented parties, or figuring out more ways to teach students about implicit bias in negotiation and mediation contexts.

The ADR world opened up to me – and led me to the conference at Pepperdine. I was in rooms with the people who wrote my textbooks and produced the numerous studies I referenced in class. I was sitting next to people who crafted the surveys I took during the school year. I drank coffee with people who defined what I stand on now.

Although I heard some positive buzz in the air about the future of the field, it was a little disheartening to hear that some were afraid the field was plateauing. Despair and apprehension were the words that were used.

I immediately felt a responsibility to sound the alarm. I wanted to scream at the top of the lungs in that very moment and say – HEY, I'M OVER HERE! THE FUTURE IS IN YOUR MIDST! The future was in the room. And not just me, a law student who loves ADR and all it has to offer. The future as it relates to technology was in the room. The future as it relates to innovative programming and outreach was in the room. The future as it relates to impacting the justice system was in the room. I heard so much of the future in two days that it made my mind swirl with ideas, projects, and a long I-Need-To-Look-This-Up list.

I say all of this to say to you: First, thank you for all for welcoming me in your world. And two, have hope. I firmly believe ADR is the future. As long as there are people, there will always be a need for an arbitrator, a negotiator, or a mediator. The work you all have done and are doing is building the groundwork for my own successors to run the race. So, pass the baton. The marathon isn't over. I see no finish line in sight. ADR is here to stay in whatever and whichever manner it takes.

The Big Picture

Many of the contributions in this book take on "big picture" issues in our field. Some suggest reviving values from the outset of the current ADR era and others propose fundamental re-thinking of the concepts and scope of our field. Some contributions describe how we might address major social issues.

To shake things up a bit, you might start with Noam Ebner's previously unpublished piece in which he argues that [our field is ripe for disruption](#). If we continue on our current path, it soon could become a zombie. There's nothing like a potential apocalypse to get one's attention. Or maybe not. Read his piece and see what you think.

Who Are We and What is Our Field About?

Some argue that our field – or at least a significant part of it – has lost its way by failing to honor what should be our fundamental principles and they hope for restoration of these principles. For example, Lela Love notes that part of the initial excitement in the ADR field was based on a mediation process that went beyond the adversarial process. She suggests that this [vision has evaporated](#) in much contemporary mediation practice. Similarly, Nancy Welsh [questions whether there still is a "soul" in our field](#), particularly mediation. She describes a "humble" vision of merely helping people resolve their conflicts without concern about access to justice, informed consent, or procedural justice. She hopes for "more humanistic successors" such as collaborative law to embody the most important components of our field's soul.

Several people focus on how we conceive and define our work and mission. Deb Eisenberg notes that ADR has [traditionally focused primarily on what she called "trifecta" of negotiation, mediation, and arbitration](#). While she is correct that much of our focus has been on the big three, we have developed an incredible variety of dispute resolution processes. We often refer to a "toolbox" of processes and techniques and I developed this [handout for my classes suggesting that there are at least fifty ways to resolve disputes](#), riffing on Paul Simon's fifty ways to leave your lover. Moreover, I point out that "ADR" is not limited to processes that necessarily involve neutral third parties, focus on parties' interests, require party self-determination, are limited to "good" or private processes, or are innovative. ADR is more than merely a toolbox and [there isn't a clear criterion for distinguishing what is ADR and what isn't](#).

Heather Kulp argues that we shouldn't focus on "dispute resolution" or assume that ADR really is just about mediation. Instead, we should [focus on conflict management, negotiation, and communication](#). Similarly, Ava Abramowitz suggests that we should reframe our field to include risk management, value creation, and problem-solving in addition to dispute resolution and deal-making. As such, she says that we should focus on what she calls the ["four C's": critical thinking and problem-solving, communication](#)

[skills, collaboration skills, and creativity](#). Deb Eisenberg urges that we [reframe "ADR" as "process strategy"](#) to more accurately reflect what our field really is about. Chris Guthrie proposes that we should include [leadership as a critical skill](#). I suggest that we define our field as [processes of planning, managing, and/or resolving disputes](#) or something like this. If we use a definition of our field along these lines, I argue that trials should be considered as part of ADR and that litigators and judges should be considered as part of our field.

Noam Ebner provides a different angle, arguing that [technology should be an integral part of all of our activities](#) including process management, business structures, public engagement, research, and teaching.

In some ways, these definitions might seem to suggest only minor adjustments in the way we describe what we do and who "we" are. On reflection, they have the potential for fundamental re-conceptualizing our work and the theories of change we might use in the future.

Randy Kiser proposes a [set of ideas to advance our field](#). These include renaming it, protecting it with stronger ethical regulation, improving it by addressing well-known problems, promoting it more effectively in law schools, prioritizing the skills that lawyers actually rely on most frequently, and refreshing it by recruiting and mentoring new leaders.

Nancy Rogers and I reminisced about a three-week summer institute that she and others organized at Ohio State in 1993 and how the dispute resolution field might organize similar efforts to renew the field. Just as that institute was designed to "plant seeds," we [pondered the need to do a new round of seed-planting](#) to generate new colleagues who will succeed us and build on our work.

Big Issues and Strategies

We are a movement of idealists. We want to improve people's lives and make our world better. Many of the contributions to this symposium tackle big issues and suggest big strategies to address them.

Charlie Irvine urges us to [take substantive justice seriously](#) – not just procedural justice, efficiency, or other goals of dispute resolution. He argues that we should use processes that promote people's "justice reasoning" and produce at least as much justice as formal adjudication.

Jacqueline Nolan-Haley reported on the program at the Past-and-Future Conference about the [relationship of ADR and access to justice](#) (A2J). Cynthia Alkon identified multiple definitions of "access to justice," showing that there is no clear meaning of the term. Jen Reynolds observes that the early ADR movement was concerned with

important issues such as inequality, bias and privilege, and that the trend today is towards resolving disputes. Andrea Schneider notes that dispute system design processes offer the possibility of improving access to justice. She said that ADR has both systematically improved A2J by developing processes in addition to traditional court adjudication and it also ADR has undermined A2J by restricting access to the courts through mandatory arbitration, as Jean Sternlight describes. In another program, Michael Green argued that, for "forced arbitration" to be considered a fair and transparent form of ADR, it [must employ a critical mass of diverse arbitrators](#) who better reflect the make-up of powerless parties in disputes with large businesses.

Steve Goldberg, Nancy Rogers, and Sarah Cole identify possible [critical issues for the future of dispute resolution](#) including resolution of major social issues (such as conflicts related to community division, delivery of services for opioid addicts, and climate change), use of restorative practices, online dispute resolution, use of artificial intelligence, decisions about what law to apply, and increasing the use of collaborative decision-making in dispute resolution organizations.

Woody Mosten describes various ways that mediation trainings can [improve the quality of mediation and include more peacemaking in our work](#). He urges mediators to be open to a range of approaches and philosophies and to incorporate a philosophy of peacemaking in their practices. He advocates expanding training curricula to address intake and practice management strategies, work in interdisciplinary teams, intractable conflicts, social science research, a broad range of mediation strategies, and dispute prevention.

Some contributors focus on legal and court reform. For example, Jill Gross describes her ["CRAPP" strategy – Credibility, Repetition, Actual evidence, Publish, and Patience](#) – that she used to successfully promote a change in rules benefitting low-income parties in FINRA arbitrations. Michael Buenger zooms out to propose [restructuring entire court systems](#). He writes that modern court systems do not adequately meet the needs of actual and potential users of the courts and he recommends a "zero-based" approach to designing courts as if we were starting from scratch. In truly diversified "justice centers," all forms of dispute resolution would have "quasi-equal" status. He argues that courts should protect core values such as due process, access to justice, fairness, objectivity, and equal protection – and also be easily accessible with relatively simple designs.

Rachel Viscomi suggests that we [convene facilitated online video conversations](#) to connect people from different areas of the country and with different deeply-held perspectives. This would help people build connections with others and learn about how they see the world, expanding their understanding and sense of connection.

Lara Fowler observes that addressing climate change involves incredibly difficult conversations requiring [many dispute resolution tools to address global challenges](#).

She recommends having students engage local communities, bridging areas of expertise within universities and communities, creating "how to" guides for effective processes, bridging areas of expertise within the legal profession and American Bar Association, and recognizing the important role of arbitration in resolving climate change issues.

In developing theories of change for our field, I suggest that we take a "[pragmatically romantic](#)" perspective. We should aspire to achieve great goals – and also be realistic in our strategies and expectations. Building on Marc Galanter's classic article, *Why the "Haves" Come Out Ahead*, I argue that it is unrealistic to expect that process adjustments by themselves will protect weaker parties in conflicts with stronger parties. Galanter shows that organizing "one-shotters" (the "have-nots") into repeat-players (the "haves") is critically important. Without this transformation of the parties, repeat-players generally are able to thwart one-shotters' strategies. To counter exploitation by powerful parties, we need to understand how they see their interests and we should have realistic expectations about the effects that ADR processes can produce by themselves.

Rooting for the Zombies: ADR is not Future-Proof

Noam Ebner suggests that the structure and activities of the ADR field render it particularly vulnerable to disruption by sharp change processes occurring in fields adjacent to ADR and in society at large. He is a Professor of Negotiation and Conflict Resolution at Creighton University's Graduate School.

*"But I don't want things to change!"
"But you can't stop the change. Any more than you can stop the suns from setting."
– Shmi Skywalker laying some truth on Anakin Skywalker*

Introduction

About twenty years ago, as I shifted my focus from law to mediation, people (most of whom thought they knew what law was but had never heard of this other thing) often asked me why I was going down this risky road.

Sometimes, I explained my choice by introducing mediation as one of those roles that is so fundamentally necessary to society that it is apocalypse-proof. Think of it: After everybody has hit each other with the sticks and stones of Einstein's World War IV, or after the zombies have risen, rampaged, and – once sated – retreated, a decimated humanity survives only in small gangs scrounging their existence across a ravaged landscape. These survivors will still need people to resolve group conflict around the campfire, or to bring the clans together when faced with joint dangers. I still think this is true, and in that sense – bring on the zombie apocalypse!

However, let's not confuse "apocalypse-proof" with "future-proof." To be future-proof means that you are somehow uniquely resistant to obsolescence in the face of future events that are only vaguely predictable. I suggest that ADR is anything but future-proof. In fact, I predict that when the future hits ADR full force, some in the field are going to be rooting for the zombies to make their move so that we can go back to being relevant.

change, Change, and Beyond

Reading through the many insightful articles in the Theory-of-Change Symposium, my sense was that some explored change with a lowercase "c," and others, Change with a capital "C." I enjoyed thinking that there are many ways to cast this distinction, based on what seems to the reader to be more or less important, more or less urgent, more or less devastating or vitalizing.

Be that as it may, in this essay I'll discuss something that I consider a capital "C" Change topic. In fact, it's so capital C that it's a "D": **Disruption**.

Disruption has become such a buzzword that it is hard to use it anymore. It's particularly hard to use it precisely, so I'll let myself off that hook (something I would never do with an ADR term!), first using it precisely and then expanding its application.

In its original business sense, as coined by Clayton Christensen, [disruption](#) is a "process whereby a smaller company with fewer resources is able to successfully challenge established incumbent businesses."

Can this original sense, rewritten slightly, apply directly to ADR? A professional field, comprised of many established incumbent businesses and service providers who largely implement the same approach to delivering the same services – starting to sound familiar? – is successfully challenged by a new player. This new player is able to supply the same – or better – services, only more efficiently, cheaper, and in a way that the market prefers.

Of course, that could **never** happen to **us**.

And of course, that's what Eastman-Kodak thought, as did that taxi company you used to call when you needed a cab. What was its name again?

And yet, it is not surprising that we don't spend our time considering that disruption might be on the way. In general, many people don't like to dwell on the fact that **Winter is Coming** even when they know it to be true. And, after investing many years of education and practice in a certain profession, it is perfectly natural to prefer to rest secure in its perceived stability, rather than recognize that we could be deemed irrelevant in the blink of an eye.

Many Roads Lead to Disruption

Is ADR's Uber out there, in formation, right now? Don't rule it out. Could someone come up with a brilliantly disruptive model in five years? When you add time into the mix, it would seem that the odds of this happening increase. Unless, of course, the field has built the very best mousetrap possible, **right out of the gate**.

Beyond considering disruption in its strict market-share-distribution sense, though, I suggest we consider ADR's further potential to be substantively disrupted, or whatever word you would apply to connote "drastically affected by sharp effects of change processes."

Literally, disruption means **drastic change that occurs and changes the structure of something**. Cast a foreboding light on that, as many people do when considering disruption, and you get **drastic change that occurs and changes the structure of something, rendering it unappealing, anachronistic, or moot**.

What might change, outside the narrow view of ADR service provision models, that might render us irrelevant, undesirable, or unnecessary? Well, for one, people might light their own campfires and learn to sing Kumbaya around them without our help. But there might be other changes on the horizon with equally significant impact. We would not be the first service providers or professionals to discover that demand for their services has dropped or vanished. Ask your travel agent. Ask the cashier at Walmart. And they are not alone.

Moreover, ADR is not only an industry and a professional service. Perhaps this is my romanticized view, as a professor in the field. Still, even if I'm a dreamer, I'm not the only one. There are many who would agree that ADR provides services that are grounded (to some extent) in science, and emanate from worldviews.

Scientific ideas get disrupted by other ideas, and over time, as they do, paradigms and worldviews rise and fall. Thomas Kuhn laid out the process of how this happens in *The Structure of Scientific Revolutions*. What ideas forming out there might serve the ADR worldview better than our current practices? And, what worldviews out there might someday supplant our present ADR worldviews?

ADR: Ripe for Disruption

An industry can be disrupted by a cheaper mode of service provision upending traditional market control. A field of practice can be blindsided by external events and developments. Ideas and worldviews can be disproved, improved on, and replaced. I wonder whether, incorporating elements of all three categories as it does, ADR might not be particularly vulnerable to disruption.

There are any number of pseudo-models suggesting what makes an industry ripe for disruption. [One](#) suggests that the significant factors are consolidated market power, antiquated technology, and unchanging, unresponsive, business practices. [Another](#) spotlights industries with a business mentality of "If it ain't broke, don't fix it," and complacency towards the market. A [third](#) enumerates complacency from past successes, loss of touch with consumers, ignoring of new entrants, and outdated business models. These are only examples, but applying them to ADR is certainly cause for concern, if disruption is not on your desired activity-list for the next few years.

Applying these models, and expanding on them, here are some characteristics of the ADR field that I believe makes it vulnerable to disruption (if you are an exception to one of the generalizations I am about to make: sorry, of course I didn't mean you! Move on down to the next one):

- For the most part, our best intentions notwithstanding, we largely offer one service (two, if you wish to consider mediation **and** arbitration. Many readers, I suspect, identify with one of these to the virtual exclusion of the other, so my "single service" comment holds).

- Our intentions to embed ourselves at all levels of society notwithstanding, most of the activity, and nearly all of the **financial** activity of the field, are focused on one "profit center": legal disputes.
- We offer tailored, bespoke, time-laborious processes – time-laborious not only on our side, but on the part of the user as well.
- We have one major client or referral source (courts).
- Nearly every time we sell a service, we must go through a formidable gatekeeper (or two) – parties' lawyers.
- We largely market our benefits around a single set of themes: "faster, cheaper, and better than X." What if those no longer hold true? [What if ADR was no longer the fastest, cheapest, and best way to resolve conflict](#) (whatever "best" means)? ADR has other advantages, but we've largely focused on these three.
- For the most part, we are ignoring technology and the notion of developing it internally. As Alyson Carrel and I have discussed, beyond a number of tailor case-management systems, and platforms for communicating at a distance, it is [rare to encounter](#) software designed to enhance our work in the mediation room itself. [Here](#) and [here](#) are **very** recently developed exceptions.
- Similarly, we are ignoring potential applications of generic or externally-developed technology.
- We are [ignoring changes](#) in human and societal development, and in our current and clients' preferences.

All of these – particularly, once combined – seem to leave the field ripe for disruption in the narrow and wider senses of the term.

The Wind of Change Blows Straight

Focusing inwardly on ADR and what we, as members of the field, tend to do, prioritize, or believe, only provides half the picture. For a full view of the sources of change that might affect us dramatically and in the near future, we must look beyond the ADR field – to adjacent fields and processes they are undergoing, and to society in general.

Here are some winds of change gathering beyond ADR's boundaries that might soon affect it forcefully. Some of these might impact ADR more directly than others, and it is hard to predict their developmental timeline. All, however, are coming our way, a year or ten down the line:

- Spread of technology providing [emotional support](#) assisting people to work out conflict-related emotions throughout the day.
- Development of technology that can [act as a third party](#), playing an active role in resolving disputes without a human mediator.
- Development of [blockchain technology](#) that will reduce conflict, facilitate its quick resolution with little need for external intervention, and outsource any intervention to non-professionals, or at any rate, professionals outside the traditional ADR field.
- Online Dispute Resolution (ODR) in the court system [disrupting the economics of the legal field](#). As Elayne Greenberg and I have written, court ODR will be implemented, at least at first, primarily in the low-to-mid value cases so commonly referred to ADR.
- ODR in the court system joining forces with other developments in legal tech to disrupt the legal profession.
- ODR in the court system altering and displacing court-connected ADR.
- Changes in [human behavior, conflict](#), patterns of resolution, [procedural needs, and justice preferences](#).

Looking Around, Looking in the Mirror

It's not that the ADR field does not think about powerful change and even disruption. It's just that we don't think about it happening to **us**. We are more than willing to be rocks of stability, even lifelines, to **other** fields facing instability. For example, consider discussions in the Theory-of-Change Symposium and elsewhere regarding [disruption in the legal field](#), and regarding the need to [thoroughly revise legal education](#) in light of sharp changes in practice. In these, we (probably correctly) cast the legal field [ADR](#) or [ADR-derived skills](#) or [thinking processes](#) as lifelines. ADR's **own** disruption, though, is not explored. The solutions to everyone's woes, we seem to have none ourselves, in terms of our field's durability, its contributions, and its ongoing value.

Indeed, a very different existential point of vulnerability and concern has concentrated our attention, as has been discussed by [John Lande](#), [Randall Kiser](#), and others: the sense of ADR's twilight in law schools. Indeed, many of the thoughts on change in this symposium respond to, or stem from, these concerns.

To avoid the two topics being conflated, I'll stress that in discussing the ADR field's potential to be disrupted I am not referring to concerns that ADR in academia might unfortunately go off gently into the night. Rather, I raise the concern that ADR practice might get hit by a freight train (of course, this may render at least part of ADR academia

moot by extension). I suggest that we need to pay attention to both of these existential issues.

So, What Do We Do?

Here is where I might be expected to discuss the literature on avoiding, thwarting, and surviving disruption. Perhaps, even, provide a roadmap to follow, titled "How to Future-Proof ADR, Save It from Disruption, and Lose 10 Pounds."

I won't, though.

My theory of change is based on the assumption that disruption of ADR is in the offing, and that the field would do well to understand the forces that will soon shake our window and rattle our walls, prepare to cope with them, and find constructive ways to channel their energy.

It does not (yet) extend to knowing just what those constructive ways are. I'm sure I am only seeing a partial picture of the disruptive forces surrounding ADR, and I'm aware that my analysis of ADR's vulnerability to disruption may be too associative to warrant applying [business strategies for coping with disruption](#).

My hope is that introducing disruption as a topic will lead others to join in and explore ADR through a disruption perspective. Deep understanding, as well as field wide conversation, can lead to good planning.

When disruption happens, it doesn't smash everything and everyone to smithereens, equally. Market players who are agile, flexible, and prepared can thrive. As a field, we should consider how we might gain these characteristics. But we're not there yet, and I wouldn't want to be the one to put the cart before the horse. If I were to be prescriptive, it would only be to say, "We need to talk about this."

I'll end with a plot twist:

While a lot of the discussion of disruption is framed in negative, cautionary, defensive, or ominous terms, let's not forget: disruption can be a force for good.

There are a lot of people out there who need conflict assistance, and they are not getting it from us.

Perhaps a good dose of ADR disruption is just what the world needs.

Perhaps we should be leading it.

New Horizons for the ADR Field: Where Are We Headed and Where Can We Go?

These are summaries from the Past-and-Future Conference.

Michael Z. Green: Forced Arbitration and Arbitrator Diversity.

Lela P. Love: ADR Vision Meets ADR Reality.

Nancy A. Welsh: Three Pathways for Mediation in Search of Soul.

Chris Guthrie: ADR Provides Foundations for Leadership.

Ava J. Abramowitz: Reframing ADR as an Essential Skill.

**Noam Ebner: Bringing Mediation into the 21st Century by Thriving
Through Technological Adoption**

The Appreciating our Legacy and Engaging the Future conference held at Pepperdine Law School and co-sponsored by the Straus Institute for Dispute Resolution, ABA Section of Dispute Resolution, and Texas A&M's Aggie Dispute Resolution Program got off to a wonderful start, with over 150 ADR educators and professionals filling the room. After opening remarks, the conference's first plenary discussed the ADR field's achievements and legacy. The field has come such a long way, and has done so much good! And yet, panelists and audience alike clearly felt that not all had gone as planned, some things require fixing, and there is still a whole lot of work to be done.

This experience set the stage for the second plenary, entitled *Engaging Our Future: Opportunities and Challenges*, which this piece describes. The panelists recognized that even the diverse and considerable experience of those onstage paled beside the collective experience and wisdom that was gathered in the room. This session, therefore, opened with a brief informal polling of participants to get a sense of who comprised this larger group, so concerned with the future of ADR.

While we did not collect precise numbers, it appeared that most of the participants attending the conference identified as teachers, more or less equally divided between adjunct and full-time faculty. Most identified as practitioners, to one extent or another, reflecting the pracademic profile typical to the field. Most identified as having experience in mediation, and most had a background in law. When exploring the time-horizon of the group, a not-insignificant number of people indicated that they were planning on retiring, stepping down, pulling back or otherwise decreasing their involvement in the field over the next 2-3 years. This number expanded substantially at the 5-year mark. On the other hand, a fair number of hands were raised to express intentions of remaining in the field for another 20 years.

The session proceeded with each of the speakers sharing a vision for one or more possible futures regarding one area or aspect of the field. The point was not to capture **all** of the possible futures for the field in its entirety. Rather, in addition to sharing each speaker's core vision, the program was intended to:

- **orient** participants' mindset towards the future, for the remainder of the conference;
- **frame** some of the issues to be discussed in detail in later sessions of the conference;
- **model** future-oriented thinking; and
- **demonstrate the range** of micro or macro levels of the field's activity that would benefit by a future-oriented examination.

The speakers summarize their remarks as follows.

Michael Green argues that for forced arbitration to be considered fair, parties (especially big businesses) may be required to randomly select arbitrators from a pool involving a critical mass of diverse arbitrators. He is Professor of Law and Director of the Workplace Law Program at Texas A&M University School of Law.

One of the biggest opportunities and challenges will be the impact of so-called "forced arbitration" when it is employed by powerful businesses to limit recovery, process, and transparency for the powerless in our society – or what Jean Sternlight has called the "little guys." Specifically, after failures to limit the spread of forced arbitration through the courts and Congress, what processes will be developed as a response to social movement pressures and public criticism? And finally, how will the color line and gender line for neutrals be addressed in a comprehensive manner?

For arbitration to be considered a successful form of ADR in the future, it must shift from the use of power imbalances (present in individual forced arbitration and class arbitration waivers) that leave concerns about fairness and transparency. Finally, arbitration processes will need to establish and employ a critical mass of diverse arbitrators who reflect more precisely the make-up of the powerless parties attempting to resolve their disputes with large businesses. However, the real challenge presented regarding diversity is to recognize that the parties, especially the big businesses, must agree to select diverse arbitrators.

Unlike general concerns about improving workplace interactions by promoting diversity, employers and big businesses face negative ramifications in choosing diverse arbitrators who can make rulings that the parties do not like. For many, arbitration represents a fair process in which the arbitrator decides who wins and who loses the dispute. If parties (especially big businesses) advocate for a specific arbitrator as a means to promote diversity, then those parties face backlash for their diversity pursuits if the arbitrator rules against the positions they argued at the arbitration. This result has led me to suggest that the only resolution may rest upon finding a way in which

parties may arbitrarily select arbitrators from a pool involving a critical mass of diverse arbitrators.

Part of the initial excitement in our field had to do with the development of a process – mediation – that went beyond, outside, the adversarial process. In that vision, mediation had the intention and capacity for the development of human understanding, creative collaboration, and interest-based, sometimes integrative, agreements.

Lela Love notes that part of the initial excitement in the ADR field was based on a mediation process that went beyond the adversarial process, and she observes that this vision has evaporated in much contemporary mediation practice. She is Professor of Law and Director of the Kukin Program for Conflict Resolution at Benjamin N. Cardozo School of Law.

What if that vision is evaporating in the world of practice? Here in California, most commercial mediators exclusively use caucuses having eliminated the joint session, relate to the lawyers as their clients, and host a process more akin to settlement conferences and neutral evaluation. Would we remain excited about the field if we taught to that model instead of the classical facilitative model?

Some people in our field may have been to the ICC International Commercial Mediation Competition in Paris, held each year in February. Participation there leads one to think that cultivating listening skills, the ability to excel in option development, and the art of closing a deal is the future of mediation. Is that competition – and others like it – a fairy tale and, in reality, we are on course to wake up again in a very adversarial world? What if our foundational mediation concepts are not where we're at now?

Nancy Welsh identifies three potential pathways for mediation reflecting different conceptions of its "soul": (1) a business helping clients end their conflicts and move on, (2) an accountable business honoring goals of access to justice, meaningful and informed consent, and procedural justice, and (3) a "midwife" to other processes such as collaborative law or online dispute resolution. She is Professor of Law and the Director of Aggie Dispute Resolution Program at the Texas A&M University School of Law.

Much of our focus in the field has moved to the business of dispute resolution – i.e., what it takes to be a successful mediator or arbitrator, how to make money, what referring lawyers want, how to represent clients successfully in mediation and arbitration, and how to assure the enforcement of outcomes. For law professors, this real-world focus makes sense as we prepare our students to move into practice. But is there still a "soul" to the field of dispute resolution, especially mediation? What are we trying to achieve besides institutionalization?

In response to these questions, I foresee the future of mediation as going in three distinct directions. The first direction accepts the focus on mediation as a business – and as an honorable craft. Mediators and lawyers need not aim for goals as high-minded as self-determination, justice, or enhanced understanding between people. Rather, their aim may be described, quite simply, as helping people to end their current all-consuming conflicts and move on. There can be nobility in this humbler vision of mediation, and within law schools, we need to prepare our students for it.

A second direction also accepts, to some degree, this focus on mediation as an institutionalized business – but demands accountability, and requires mediation to demonstrate that it is providing access to justice, meaningful and informed consent, and procedural justice. This policy-focused direction requires greater transparency, data, and research than presently exists. Increasingly, there are court administrators who are leaders in this area, influenced by what they learned in law school.

A third direction does not accept or support mediation as an institutionalized business. Indeed, it bears no loyalty to mediation at all. Rather, mediation represents a transitional mode, midwifing other, more humanistic successor processes and practices. This direction requires us to identify and innovate with the most important components that supposedly comprised mediation's "soul." Collaborative law is one such successor process. Certain visions of ODR may also incorporate these critical components. A third successor group may be non-neutral advocates serving as quasi-mediators. Finally, lawyers and law students might themselves become successors, if we can sufficiently identify and teach them the tools of communication and understanding that are most critical to the "soul" of mediation.

Chris Guthrie argues that ADR provides foundations for leadership. He is Dean and John Wade-Kent Syverud Professor of Law at Vanderbilt Law School.

I am convinced that those of us steeped in ADR have much to offer as teachers and scholars in the field of leadership **and** as leaders. Unfortunately, leadership, as a field, is under-developed in law, at least relative to business / management, education, and public policy.

One **possible** future for ADR is to provide the (or, more likely, a) theoretical foundation (and the practical skills) for law school-based teaching / training / scholarship in leadership. In my remarks, I tried to make the case that dispute resolution teachers / scholars can provide law students with the theory and skills they need not only to succeed as advocates in dispute resolution processes but also as leaders (which, as future lawyers, they will almost inevitably become).

Ava Abramowitz argues that we should teach students the "four C's: critical thinking and problem-solving, communication skills,

collaboration skills, and creativity. She is a mediator and Professorial Lecturer at Law at George Washington University Law School.

In today's world – and more importantly, in tomorrow's – students need more than the teaching we ourselves received in order to make it. I don't think ADR's academic future is dim. Far from it: It can shine brightly, if we choose to reframe it substantially, actively including risk management, value creation, and problem-solving, as well as dispute resolving and deal-making. Considering what is going on in society today, if we think and teach that expansively, the world is ours.

It is skills development that demands the heavy lifting. What skills do our students need? Other disciplines studying this issue suggest four skills that all students of any discipline – law students included – require. Each of these can be learned through a negotiations course specifically crafted to teach those four skills. These skills are generally called "The Four Cs":

- **Critical thinking and problem solving:** With people, and their interests and needs as the nexus and not just the demands of the law;
- **Communication skills:** With one-way communication, or advocacy, taking the back seat to joint communication for shared understanding;
- **Collaboration skills:** Enabling our students to cope with, if not enjoy, all the rough-and-tumble that working together entails; and
- **Creativity:** Learning to think and to create options that fall outside of the Pareto curve.

Why these four skills? Because it is these skills that will maximize law student utility in whatever they choose to do. It is these skills that will allow them to function effectively in groups which, increasingly, is how things get done. It is these skills that clients want and are willing to pay for. It is these skills that will make them the "go-to" attorney who can not only resolve disputes, but can also solve problems and even make deals, when deal-making is called for – as it so often is. It is these core skills that society needs in order to move forward more productively. And finally, it is conveying these four skills to our ADR students that will distinguish them most sharply from the majority of typical graduates of the typical American law school of today.

Noam Ebner offers a vision of ADR in which technology is an integral part of all of the field's activities. He is Professor of Negotiation and Conflict Resolution in Creighton University's Department of Interdisciplinary Studies.

Our field needs to incorporate technology across all of the field's activities in order to preserve the field's relevance, utility, and indeed its very viability, in the future. Many other conference sessions related to technology. For example, one session focused on technology's role in actual negotiation and dispute processes, and in teaching courses in our field. In another session, Colin Rule's excellent presentation on online dispute resolution (ODR) put this area on the table, front and center. However, ODR is but one aspect of the field's relationship with technology, and regrettably, it tends to overshadow other important aspects, such as the [use of technology to support mediators conducting traditional face-to-face processes](#).

My vision for ADR's future includes a blueprint (or at least an initial set of guidelines) for developing an ADR field thriving by incorporating technology into **all** its activities: process management, business structures, public engagement, research, [teaching](#), and more.

Beyond Settlement: Reconceptualizing ADR as "Process Strategy"

[Deborah Thompson Eisenberg](#) argues that it is time to retire the confusing, incomplete, and myopic acronym of "ADR." She recommends that we reframe ADR under the more inclusive and flexible concept of "process strategy," a field that studies and teaches "the process strategies that lawyers and others use to help individuals, communities, organizations, and nations accomplish change, create value, or address conflicts." She is Professor of Law and Faculty Director of the Center for Dispute Resolution at the University of Maryland Francis King Carey School of Law.

The dispute resolution field is in a time of transition. Many professors and practitioners who blazed trails for us have moved on or will retire in the foreseeable future. While we celebrate the tremendous growth of ADR over the past few decades, some are concerned, if not downright [panicked](#), that [the future of ADR in the legal academy and in the courts looks bleak](#).

Consistent with our field's mantra of turning crisis into opportunity, let us welcome this challenge with the same courage, candid self-reflection, and open-minded creativity that we ask of mediation participants.

I believe that it is time to retire the term "ADR." Reframed to be forward-looking, this time of transition (or crisis, if you prefer) presents an opportunity for us to reconceptualize our field to encompass the broad scope of our collective work.

Confusion About the Nature of Our Field

As I write this piece for the Theory-of-Change Symposium, I confess that I am struggling a bit: what is the "theory" that we are changing? As a field, we lack a unified theoretical underpinning. The ADR field grew rapidly, grounded in a binary dichotomy of ["litigation" versus "settlement"](#) or "justice" vs. "peace." The value of ADR as presently conceptualized depends, in part, upon dissatisfaction with litigation and the desire for less adversarial and more efficient "alternatives" that value self-determination and neutrality. We study and teach processes that will achieve [procedural justice](#) and positive outcomes for the participants and efficiency and other benefits for the judiciary. Yet, we tend to be a **how**-focused field – **how** the trifecta of negotiation, mediation and arbitration processes should be conducted, **how** these processes [affect](#) the parties and other stakeholders, and **how** these processes [compare to litigation](#). This is important and necessary work, but it is not sufficient.

Many people outside of our field view ADR as one "black box," lumping all processes together without appreciating the differences between them. (How many of us have had to explain to colleagues that ADR is not simply arbitration? Or mediation?)

Worse, some perceive us as Pollyannaish proselytizers who advocate that ADR processes will magically produce peace and harmony in the world. Of course, this is not true. We do not hold hands and sing kumbaya at our conferences (although some of us have been known to belt out some karaoke). Many [ADR scholars](#) have examined process options from a critical lens, and we should continue to do so. Our [field recognizes](#) the need for [transparent data](#) and [rigorous research](#) about the use and impact of a variety of processes, and much exciting scholarship in this regard is [emerging](#).

But the perpetuation of a **specific** process should not be our goal. Consider mediation, for example. Even if the use of court-based mediation declines, ADR remains relevant to society and important for law schools and lawyers. Our field is much larger than any one process.

In a time of extreme polarization in our society, when democratic civil discourse and the rule of law seem to be threatened, our field is more vital than ever. **We teach and write about this stuff** – dialogue across divides; communication and persuasion; the sources, cycle, and [psychology](#) of [conflict](#); strategies to prevent, manage, and resolve conflicts; strategies to accomplish systemic change; the impact of [lawyering process and negotiation strategy on outcomes](#). We need a new moniker and theoretical framing to capture what our field means and why it matters to lawyers, courts, and society more generally.

Problems with the ADR Moniker

First, we need [updated branding](#) that is more precise and less limiting than ADR. All three terms that label our field – Alternative, Dispute, and Resolution – are incomplete, myopic, and confusing to outsiders.

"Alternative" taints the field as being either subversive (which I personally like) or second best to litigation. Many of us either change the term to ["appropriate"](#) or drop it altogether because we [incorporate litigation](#) into our teaching and scholarship.

"Dispute" (and its cousin "conflict") sounds reactive in nature, focused on matters that already have devolved into litigation or some other oppositional posture. "Dispute" also trivializes the subject matter addressed by the field, sounding too much like small claims bickering between neighbors. That excludes the segments of our field that focus on proactive processes to make change or structure complex relationships.

Finally, "resolution" keeps us mired in the [false "settlement" versus "justice" dichotomy](#) that early critics of the field established. "Resolution" perpetuates the stereotype that a matter needs to "settle" for a process to be successful. Indeed, sometimes the desired goal requires a competitive approach such as protest or impact litigation. "Resolution" also fails to recognize our field's analysis and application of processes to accomplish

systemic change or create value, in areas such as public policy conflict resolution, restorative and transitional justice, and dispute system design.

We need a descriptor that is more inclusive and comprehensive. At various times, the field has experimented with terms such as [problem solving](#) and lawyering, but they likewise fail to capture the full scope of our field (and "problem solving" has some of the same issues as "settlement" or "resolution").

Our Field is About Process Strategy

The business world uses the concept of ["process strategy"](#) to describe the processes that businesses use to achieve their competitive priorities or provide something of value.

I propose that the legal world likewise use something akin to "process strategy" as a broader framing of our field: **We study and teach the process strategies that lawyers and others use to help individuals, communities, organizations, and nations accomplish change, create value, or address conflicts.**

Framing our field in terms of process strategy would accomplish several goals. First, it describes what we hope law students learn as they transition into their work as lawyers, judges, and leaders. The process strategies they use to accomplish client goals or positive change are at least as important tools as the governing substantive law. In this regard, our field undergirds nearly every subject taught in law school, especially civil procedure, international law, business transactions, public law, public interest lawyering, as well as leadership and professionalism. The future is interdisciplinary. Many of us already teach across the curriculum, and more of us should do so.

Second, the process strategy lens emphasizes that the field has advanced far beyond the traditional trifecta of negotiation, mediation and arbitration. It frees us to be nimble, adapting to [changing needs](#) and [technologies](#). Rather than asking, "[How can we increase the use of mediation?](#)" or some other specific process, we should, like a mediator, ask an open-ended question: "What are the desired interests and goals [of the client, community, court, or organization] and which process strategies can best be applied to accomplish them?" This framing frees us to explore not only **reactive** processes that respond to conflicts but also **proactive and preventive** legal process strategies (such as transactional deals, policy reform, consensus-building, and organizational change).

Third, a broader framing allows the field to study the application of process strategies to accomplish social justice. I see this as an area of tremendous growth potential. At last year's clinical law conference, those of us who teach at the intersection of clinical law and ADR noticed many panels related to the use of innovative process strategies to accomplish systemic social change. Law school ADR programs are exploring the

application of process strategies, such as restorative justice and public policy conflict resolution, to [stem the school-to-prison pipeline](#), [prevent sexual assault](#), [increase access to justice](#), [decrease evictions](#), [address divided communities](#), and [accomplish other systemic social reform](#) goals. Without labeling their work as ADR, clinical law professors likewise are activating dispute resolution methodologies to tackle a range of issues, such as environmental protection, criminal justice reform, and community development. Our field should collaborate with our clinical colleagues, who are eager to integrate our strategic process knowledge and skills into their courses and client advocacy.

As we stand on this precipice of a changing ADR landscape, let us stop staring down towards certain doom.

As the sage advice goes: "Look where you want to go." Let's take a step back from the ledge and consider the horizon of unexplored opportunities for our teaching, scholarship, and applied work the field of process strategy.

What is (A)DR About?

John Lande notes that ADR is not limited to processes that necessarily involve neutral third parties, focus on parties' interests, requires party self-determination, are limited to "good" or private processes, and are innovative. He ponders whether trials should be considered as part of ADR and whether litigators and judges should be considered as part of our field. He is the Isidor Loeb Professor Emeritus at the University of Missouri School of Law.

Does ADR include trials? I know, I know. This sounds like another one of my dumb questions.

Although I have a pretty broad conception of dispute resolution, my initial reaction was that trial is one of the few procedures I would exclude from dispute resolution. As described below, on reflection, I probably would include trials. More importantly, I would reframe the question.

Two things prompted my question. First, the Institute for the Advancement of the American Legal System wrote a blog post about "short, summary, and expedited trial programs." Are these dispute resolution processes?

Second, a colleague in my dispute resolution center noted that he teaches trial practice and he asked if this is dispute resolution.

Why Bother With Definitions?

In some situations, it is important to have authoritative definitions with clear lines distinguishing what's in or out. For example, in many sports, it makes a big difference whether a player is in or out of bounds. Officials can spend what seems like hours reviewing videos and applying legalistic decision rules to make the right rulings, which can affect which teams win or lose a game.

In most areas of legal doctrine, it is important to have relatively clear standards because there can be major consequences depending on which side of the line a case falls. For example, when criminal defendants claim self-defense, their freedom may depend on whether the courts decide that the facts fit within that defense or not.

In sports and courts, there is general agreement about the lines, even though different umpires and judges may differ somewhat in their views about things like the proper size of the strike zone or how to apply the law in particular instances.

For many things in the dispute resolution field, there aren't clear lines with significant consequences and there is no authority like a court or sports umpire to "call balls and

strikes." For an exception that illustrates my general point, consider a question someone asked me about whether parties in "deal mediations" qualify for confidentiality protection. The answer may depend on whether courts decide that the process really is "mediation" and this could affect whether critical evidence is admissible at trial.

For most issues related to dispute resolution processes based on agreement, such as negotiation and mediation, I think that definitions have much less significance. Consider statements that some "mediation" processes really are just "settlement conferences."

Of course, there is no dispute resolution referee to "call it" one way or the other. And there isn't the same kind of stark consequence based on which category it falls into. (Some people are concerned that unclear dispute resolution definitions lead to confusion of parties. This assumes that such parties have a clear understanding of the processes to begin with, and there probably aren't a lot of such situations where people are confused by the dispute resolution labels.)

And, as a wise person once said, "[\[DR\] labels suck](#)."

What Makes Something Dispute Resolution?

Although dispute resolution labels are problematic, they can help identify who we are and distinguish what we do from other activities.

Here's a list of possible distinguishing factors – and why they don't work.

Neutral Third Parties. Many people in our field identify it primarily with third-party processes such as mediation and arbitration. Of course, unassisted negotiation (i.e., without a third party) is widely recognized as part of our field. In the legal context, probably many more cases are resolved through negotiation than mediation and arbitration combined.

Focus on Parties' Interests. The landmark book, *Getting to Yes*, and many other publications highlight the importance of focusing on interests rather than positions. But arbitration doesn't focus on parties' interests and probably most negotiations and mediations in legal cases these days don't either.

Party Self-Determination. Many people think of dispute resolution primarily in terms of settlement processes in which the parties decide whether to settle and what the terms should be. Of course, this excludes arbitration. Parties may not even have the choice of whether to participate in a dispute resolution process, such as in court-ordered mediation and adhesion contract arbitration. And they may not even get to speak very much, such as when their lawyers tell them to shut up in mediation.

Good Processes. Many of us don't like dirty tricks in negotiation, coercive tactics by mediators, or adversarial maneuvers in arbitration. We may criticize them as bad dispute resolution processes but they still are considered as dispute resolution. Professionals in our field aspire to provide high-quality processes. So do many lawyers and judges.

Private Processes. Some people focus on the concept of "private ordering" but much dispute resolution takes place in public settings and is conducted by public employees. For example, some mediators are employed by courts and conduct mediations in courthouses.

Innovation. Historically, ADR has been about improving dispute resolution processes. But courts often try to improve their processes. And some dispute resolution professionals resist changes to their preferred procedures.

In her article, "[The Trouble with Categories](#)," Linda Edwards describes the "classical" approach in which membership in a category is based on the presence of certain characteristics deemed to be essential. An alternative approach is based on degree of similarity (or "family resemblance") to certain prototypes. Unfortunately, this alternative approach doesn't solve our problem because trials resemble arbitration more than arbitration resembles mediation.

Another conception of ADR is a system of providing alternatives for parties to choose from and especially helping them choose appropriate dispute resolution processes in particular cases. Under these conceptions, trials would be part of ADR. Trials are appropriate dispute resolution processes in some cases and they add to the range of alternatives that parties may choose.

Courts as Tools of Cooperation

Part of the reason that it just doesn't feel right to consider trials as part of (A)DR is the assumption that the courts are necessarily adversarial, producing only on win-lose solutions rather than solving problems. This assumption isn't necessarily accurate.

My views are colored by my [study of Cooperative Practice](#), where lawyers and parties start by trying to negotiate but may go to court if needed. Unlike **Collaborative Practice**, the lawyers may appear in court, though they try to avoid or minimize court processes.

One Cooperative lawyer described her perspective as using courts as "tools of cooperation" when necessary. Although this goes against widespread perceptions of courts as nasty snakepits, courts actually do foster cooperation in many ways.

A Cooperative lawyer said that courts sometimes provide helpful "reality therapy" for parties with unrealistic expectations in divorce cases. Some parties may need a court hearing to decide temporary arrangements while their case is pending and this "dose of reality" may motivate them to resolve the ultimate issues themselves.

Another lawyer described a case in which both parties had unreasonable expectations about child custody. Their lawyers were very frustrated with them and jointly asked the judge to give the parties a "scared straight" lecture in chambers, which had salutary effects.

In some cases when Cooperative lawyers end up trying their case, they cooperatively plan the trial. This may involve agreeing to focus solely on the merits of the issues and avoid tactics that would unnecessarily aggravate the conflict. Although this may sound naïve and certainly lawyers don't do this in some trials, this approach reflects the underlying values of our rules of legal ethics.

Numerous court rules are designed to encourage cooperation before and during trial. Judges often promote cooperation by directing lawyers to resolve discovery disputes or even "go out in the hall" to settle their cases. And, of course, judges regularly conduct settlement conferences, which probably far outnumber the number of mediations.

I suspect that most trials involve appropriate professional lawyering without the histrionics or dirty tricks that people often associate with trials. Most people probably have unrealistic perceptions of trials based on distorted and/or atypical portrayals.

Much of the public image of trials comes from sensationalized news coverage of unusual cases, as news executives figure (probably correctly) that people will be bored by stories about routine trials. The other major image of trials comes from TV shows and movies, which seem written to satisfy seeming insatiable consumer appetites for melodramatic morality plays relying on a few hackneyed plot devices.

Professionals working in the courts may also focus on the extreme cases of bad adversarial behavior because these stories are more salient and interesting than the routine cases in which no one acts outrageously. It's like the fact that people generally don't focus on all the planes that land safely but pay a lot of attention to planes that crash or disappear.

I have documented what I call [ordinary legal negotiation](#) (OLN), which I suspect is quite common but "flies under the radar" of most dispute resolution scholars and practitioners. In OLN, lawyers undramatically try to settle cases based on shared understandings of applicable legal or other norms. I suggest that

Lawyers are more likely to use an OLN approach to resolve the ultimate issues in a case when (1) the lawyers know each other, (2) they believe

that their counterparts are experienced and competent, (3) they want to maintain reputations for reasonableness, (4) there is a relatively clear body of applicable legal or other norms, (5) the facts of a case can be readily likened to arguably comparable cases, (6) there is not enough at stake to justify an all-out adversarial battle, and (7) using an OLN process is considered a legitimate negotiation method in the particular legal culture. Of course, not all of these conditions would be necessary for lawyers to use an OLN approach.

I suspect that, analogous to OLN, there are what might be called "ordinary trials." Lawyers may put on ordinary trials when they trust their counterpart lawyers, believe that flamboyant behavior is counterproductive, and/or want to maintain a reputation for reasonableness, especially when there is not enough at stake to "pull out all the stops."

What is (A)DR About?

Part of the definitional problem is that we usually focus on small slices of a case, typically at the end, rather than looking at cases holistically. But that's not how parties and lawyers typically experience them. Lawyers live with cases from their first contact with their clients about the problems. Parties start to deal with their conflicts even earlier than that.

Pretrial litigation often includes a [long string of negotiations](#) along with other processes such as discovery procedures, consultations with experts, judicial status conferences, and court hearings, among others. A single case could involve several processes for resolving the ultimate issues including negotiation, mediation, arbitration, and trial.

Focusing only on the final process of dispute resolution is like identifying an elephant solely by examining its tail and ignoring the rest of its body. Although it is important for some experts (like ear, trunk, and tusk specialists) to focus on specific parts of the anatomy, it is also important to recognize that these organs work only if they are integrally connected with the entire beast.

This analysis suggests that trials should be part of our world of dispute resolution even though it feels odd because it is inconsistent with our traditional notions of "ADR" as "alternatives" to trial. It may be helpful to consider that professional identities and boundaries regularly shift, as described in [Andrew Abbott's excellent book, *The System of Professions*](#).

Although I think that definitions in our field generally aren't that important, as described above, I think it's helpful to have a sense of who "we" are and what we do.

One could think of dispute resolution as processes of planning, managing, and/or resolving disputes or something like this. This would include pretrial litigation and trial

because dispute resolution isn't limited to processes that are private or involve party self-determination as noted above.

This definition isn't completely satisfactory because it would include people in our community (such as most lawyers and judges) who don't identify themselves as part of our community and aren't recognized as such by established members of our community.

On the other hand, categorically omitting them and their work also doesn't feel satisfactory.

As a practical matter, should we consider that expedited or summary trials are dispute resolution? If so, what about "normal" trials?

Should our colleagues who teach pretrial and trial practice be considered as part of our community?

By what analysis would you answer these questions?

Reflecting on these questions may help us figure out who "we" are and what we are about these days.

Reframing Our Field to Focus on Improving People's Ability to Handle Disputes on Their Own

[Heather Scheiwe Kulp](#) believes our field's survival depends on refocusing on conflict management, negotiation, and communication – skills people readily identify they want – rather than on the narrower "dispute resolution." In building capacity for people to better manage conflict, we also improve the downstream effects of conflicts. She provides examples of how we have done this and can do this. She is the Alternative Dispute Resolution Coordinator for the New Hampshire Judicial Branch Office of Mediation & Arbitration. This is an expression of her personal views and does not represent the opinion of the New Hampshire Judicial Branch.

For a field to thrive, it must add value to people's lives. Consider two possible reasons why the average person may not see the value of ADR: (1) Most people don't think they are in "disputes" or have "legal needs." They have "problems" or [someone else](#) has a problem with them. (2) When such problems arise, most people handle them on their own. That's what 80% of U.S. adults said in an [American Bar Foundation study](#) as did the same percentage in a [Legal Services Corporation survey](#) of low-income Americans. Maybe they talk to family and friends. Maybe they do an internet search. But they rarely seek professional assistance, primarily because they don't recognize a need for such assistance.

Of course, I believe that ADR professionals frame and offer assistance with conflicts in ways that are helpful to solving problems. And certainly, we could do a better job of describing how we add value in the context of legal disputes.

Yet I worry our field will become more exclusive and underutilized the more we overlook how people **actually** think about and seek to manage conflicts. We unnecessarily narrow the field when we use terms like "conflict / dispute resolution" to describe what we do, or when we assert the [fallacy that ADR = mediation](#). We misleadingly promise that we can help people resolve disputes more cheaply than attorneys or courts, even though most people with civil disputes that land in court [don't hire attorneys](#) and court fees often are cheaper than private mediation.

I propose a few prescriptive reframes to help us better achieve the goal of adding value to people's lives by improving people's ability to handle disputes on their own.

Recognize that Negotiation and Effective Communication are the Underlying Skill Set of ADR

We should focus on negotiation and effective communication as the key skill sets we offer. People are desperate to ["upskill"](#) in areas like collaboration and systems

thinking. And [employers want people with problem-solving skills](#) more than any other skill. Why use the term "ADR" or "dispute resolution," when people would rather learn about "negotiation" or "communication" or "problem-solving"? When we focus on what people actually want, our field can better meet people where they are and help them grow.

For instance, when thinking about how to retool law schools to be [competency-based](#), let's require every law student to take a negotiation course (and as a first step, every law school must **offer** a negotiation course). Let's also retitle some of our otherwise niche-sounding courses to have broader appeal. For example, we might call a course "Communicating about Employment Issues" rather than "Employment Mediation."¹ **We can still teach the same things**, but reframing what we call it to better match people's identified needs is more likely to bring a wide range of people into the fold: future CEOs, business people, in-house counsel, employment benefits professionals, employment discrimination advocates, and labor union representatives.

Focus More on the Management of Conflict than on Resolution

In the same vein, we could recognize that "resolution" is actually the downstream need resulting from many upstream problems. To demonstrate how the principles of ADR can be applied to better prevent and manage conflict (not just resolve it), we should start – or at least focus more – on the upstream challenges.

For example, in addition to improving our mediation skills to better serve people getting divorced, we should also ask why people are getting divorced.² Are there ways we can add value at the front end of a relationship that would help people better manage conflict that will inevitably arise?

- What if conflict management professionals teamed up with financial professionals to offer a seminar to all couples who file for a marriage license about "talking about money in your relationship"?
- What if conflict management professionals paired with pre-marital counseling providers to offer couples a session on expressing disagreement with one another in healthy ways?

¹ I'm not picking on any one substantive area of law, course, or type of course. Rather, I'm posing as an example how we might broaden our frame of ADR-related courses to introduce more students to the concepts of improved communication and problem-solving.

² Let me be super clear: this is not a condemnation of divorce or people who get divorced. Divorce is the best option in many circumstances. Rather, I provide this as a concrete example of a downstream result that we currently "resolve," when we could offer a lot of value in the upstream process that may also positively impact the downstream result.

- What if mediators offered on-the-spot 15-minute coaching sessions via a text chat for couples who are arguing about who does the dishes or takes on the second job?

Perhaps the upstream is also the space where ADR and the ["important modes of interaction" like "resistance and activism"](#) connect (hat tip to Jen Reynolds), providing not only incremental individual reform but also systemic change.

Add Value Where You Sit (or Stand / Roll / Fly / Walk / Motor)

Upstream examples like these illustrate how we might see the opportunities to incorporate our skills and research in the very workplaces, homes, and organizations where we interact with others every day. I urge newer members of our community to look for opportunities to help manage conflict right where they are, share specifically how they might be helpful, and say "yes" when they are asked to contribute. While not everyone will become a full-time professional mediator or ADR professor, people might teach negotiation in an adult-education program or create a new restorative justice-based disciplinary system as members of their local school board. Others might facilitate local conversations about how their community uses a vacant lot or heals after a racially-motivated incident. Other ADR professionals might volunteer to be on their company's committee to review the sexual harassment policies and procedures, or offer to design a new complaint system for customers. Opportunities abound for us to use our skills right where we are.

You may recall the online conversation John Lande and I had a few years ago about [ADR Careers](#). One of our conclusions was that newer ADR professionals could significantly benefit from more experienced ADR professionals [vouching for their competence](#). Providing opportunities to [eager new colleagues](#) is an easy way to ensure the future, and something all of us who are already in the field can do from where we sit.

For instance, the New Hampshire Judicial Branch [Office of Mediation and Arbitration](#) (where I am ADR Coordinator) started an internship program for people interested in learning more about ADR and the courts. In two years, I've had five excellent interns – seniors in college to second-career law students – who help me think through challenges of managing statewide court ADR programs. They observe court, get familiar with the access to justice issues prevalent in the court system, and think with me about how ADR can **and cannot** help manage those issues. Offering an internship is not hard. In fact, it is quite enjoyable to have colleagues in an otherwise often-lonely profession.

Will these interns become professional mediators? Maybe, maybe not. But what these interns want to do with the experience and skills of ADR is actually just as interesting and potentially impactful:

- start a youth diversion program for kids in his hometown in Prince George's County, MD
- work with entrepreneurial women in Africa to develop their negotiation skills, so they can provide greater financial stability for their families
- analyze and redesign standard plea negotiation processes as a public defender
- offer services as a collaborative law attorney to family members fighting about parents' estates
- design healthier and more helpful employee and manager feedback systems as CEO of a business

As [Chris Guthrie](#) says, ADR provides an excellent foundation for leadership training. I am happy, and humbled, to support this innovative integration of ADR into their future careers, and I think this benefits not only our field, but the world.

Rebekah Gordon reminded us that ["The Future Is in Your Midst!"](#) and to me, it looks bright. To keep it so, we need to continually re-examine the messages we are sending and the value we are adding to make sure they match people's actual wants and needs. We have much to offer, and much to learn.

Suggested Directions for the Dispute Resolution Community

[Randall Kiser](#) suggests six methods of protecting DR curricula and improving DR practices. He is a principal analyst at DecisionSet® in Palo Alto, California, a Scholar-in-Residence at the University of Indiana Maurer School of Law, and the author of four books on attorney and law firm performance.

Dispute resolution professors, practitioners, and enthusiasts are justifiably alarmed by five trends highlighted at the recent "Past-and-Future" Conference at Pepperdine University: (1) the retirement of tenured dispute resolution faculty and law schools' failure to replace them with new tenured dispute resolution faculty; (2) the transfer and consolidation of some law schools' dispute resolution curriculum into interdisciplinary programs or business school curriculum; (3) law schools' continued or increased reliance on adjuncts to teach dispute resolution courses and the consequent decrease in dispute resolution scholarship; (4) fewer dispute resolution courses at some law schools that previously promoted a strong ADR curriculum; and (5) an emerging consensus that funding for and interest in dispute resolution research and education is waning. As Douglas Yarn observes, "[ADR is no longer the bright shiny new thing it once was.](#)"

Although the advance of dispute resolution systems, scholarship, and curricula seemed inexorable 30 years ago, we must now recognize that many academics and practitioners do not share our convictions about dispute resolution. Many academics question whether a dispute resolution curriculum is essential or desirable in law schools, and practitioners appear to be suffering from ADR fatigue, as evidenced by declining membership in dispute resolution organizations and attendance at dispute resolution conferences. The momentum initially ignited by *Getting to Yes* and later underwritten by The Hewlett Foundation now yields to a concern that the dispute resolution field is losing its status.

This crisis, like all crises, presents a wonderful opportunity to reevaluate and re-constitute the dispute resolution field. "A crisis is a terrible thing to waste," economist Paul Romer declared, and we should be self-critical, realistic, and foresightful in making sure that we intelligently exploit this crisis. Six possible corrective measures are outlined below.

Rename It. "DR" and "ADR" suffer from a lack of identity, clarity, and appeal. The terms are not "sticky" – they are not immediately understood and remembered, and they do not change something. Concreteness, simplicity, emotional appeal, and credibility are necessary elements of sticky ideas, and dispute resolution and ADR are decidedly unsticky. The terms can apply to procedures, systems, philosophies, practice areas, curriculum, ideology, skill sets, and a body of law. The comprehensiveness and vagueness of DR and ADR eviscerate their meaning.

In the process of renaming DR and ADR, we might come closer to a clear definition of what they mean and a persuasive message about what the DR community stands for. At a minimum, the new name should capture the most advantageous features of DR and ADR: consensual resolution, self-determination, confidentiality, economy, timeliness, voice, creativity, comprehensiveness, and durability. The acronym SAFER (Strategic Alternatives for Effective Resolutions) might encapsulate these features while being sticky.

Protect It. To recover some credibility among parties and their attorneys, the dispute resolution community would benefit from a stronger emphasis on mediation and mediator ethics. The [European Code of Conduct for Mediation Providers](#) and the [European Code of Conduct for Mediators](#) impose considerably stronger standards to protect parties than their U.S. counterparts. Many of these standards, if adopted in the U.S., would upgrade the public perception of mediation.

Preserving confidentiality is a critical element of mediation ethics. But in actual practice, confidentiality sometimes restricts parties and their attorneys more than it restricts mediators. Some mediators relate details of their mediations, deleting only the parties' names and a few other details to preserve confidentiality. Some ethicists, however, believe that confidentiality means that the parties themselves could not identify themselves in a mediator's narrative. In her excellent book, [Mediation Ethics](#), Ellen Waldman succinctly states, "The parties – and the parties alone – choose when information transmitted to the mediator may be communicated to a broader circle." The issue of confidentiality merits more serious attention than it has received from the dispute resolution community. It's at the core of the parties' sense of trust.

Improve It. Many practitioners have developed a jaundiced view of ADR and regard it as a concept that failed to fulfill its promise. As ADR has become institutionalized, the procedure often is seen as just another procedural hurdle on the way to settlement or trial. Some attorneys express a more cynical view and describe it as a procedure that exacerbates power imbalances between the parties and prolongs resolution. Other attorneys describe mediation as "free discovery." In another post in this symposium, mediator David Henry notes that [attorneys do not spend enough time "thinking and preparing for success at mediation."](#) ADR procedures, in short, have been abused, and the dispute resolution community would benefit from curtailing these abuses.

Promote It. Law school scholars do not pay much attention to dispute resolution scholarship. This contributes to a developing sense that dispute resolution is more closely related to an attorney's skill set than an academic discipline. Only one law journal listed by John Lande in his [table of dispute resolution publications](#) is among the top 200, as ranked by Washington and Lee University School of Law's combined score for impact factor and total cites. Some of the most significant research impacting the conflict resolution field emerges from other domains – neuroscience, behavioral economics, psychology, and sociology. This is not a criticism of dispute resolution

research, which has been of immense benefit to the dispute resolution community. But we must acknowledge that dispute resolution may not become an integral part of law school curriculum until its scholarship meets the academy's conventional standards for measuring journal success.

Prioritize It. Law schools face competing demands for courses in ethics, advocacy, trial practice, arbitration, mediation, and client counseling. If dispute resolution curriculum should complement law schools' recent efforts to develop "practice-ready" and "profession-ready" students, we need to pay closer attention to the skills that attorneys prioritize. In the Institute for the Advancement of the American Legal System's [Foundations of Practice](#) survey of 24,000 attorneys, the respondents ranked these skills, among others, as being necessary for an attorney's success in the short term:

- Recognize and resolve ethical dilemmas in a practical setting (61% of all respondents)
- Recognize client or stakeholder needs, objectives, priorities, constraints and expectations (50%)
- Think strategically (46%)
- Negotiate and advocate in a manner suitable to the circumstances in transactional practices (38%)
- Assess possible courses of action and the range of likely outcomes in terms of risks and rewards (33%)
- Prepare for and participate in contract negotiations in transactional practices (27%)
- Identify appropriate method(s) of dispute resolution in transactional practices (24%)
- Prepare for and participate in mediation in litigation practices (21%)
- Prepare for and participate in arbitration in litigation practices (14%)
- Employ dispute resolution techniques to prevent or handle conflicts in transactional practices (13%)

For law schools establishing dispute resolution curriculum priorities, some of the most important takeaways from this massive survey are:

- Inculcating ethics into every aspect of law school education, including dispute resolution courses, should be a high priority
- Showing students how to think strategically and comprehend clients' goals and priorities is a threshold requirement
- Teaching students how to evaluate cases and matters and accurately forecast outcomes is considerably more important to practitioners than mediation and arbitration skills
- Negotiation skills have a higher priority for practitioners than mediation and arbitration skills

I place special emphasis on case evaluation, forecasting, strategy, and client objectives because those factors are minimized in law school courses and could add value to dispute resolution curriculum. Sometimes dispute resolution courses focus on treatment (e.g., mediation and arbitration) before students learn diagnosis and prognosis. This inverts sound clinical practice.

Refresh It. Many of the current leaders in the dispute resolution field have maintained those positions for 20-30 years. They are proficient, dedicated – and slightly stale. The dispute resolution community has been remiss in developing its own succession plans and has tended to value experience over rejuvenation. To correct this bias, each current dispute resolution leader could identify and mentor at least two leaders who will start guiding the dispute resolution community within two-to-five years. This enables the dispute resolution community to capture the current leaders' wisdom and transfer that wisdom to another generation of leaders. It also might restore the energy, idealism, novelty, and commitment that characterized dispute resolution in its earlier phases.

Conversation with Nancy Rogers about the Past and Future of the ADR Field

[Nancy Rogers](#) and [John Lande](#) reminisced about a three-week summer institute that she and others organized at Ohio State in 1993 and how the dispute resolution field might organize similar efforts, among other things, to advance the field. Nancy is the Dean Emeritus, Professor Emeritus, and Director of the Program on Law and Leadership at the Ohio State Moritz College of Law. John is the Isidor Loeb Professor Emeritus at the University of Missouri School of Law.

John: I have been going through some of my old files and I ran across one with materials from the 1993 summer institute that you conducted at Ohio State. I was struck by how fortunate I was to be able to attend that event, which came at a critical time in my career and the development of our field. So I wanted to let you know how much I appreciated being included.

Now, a quarter century later, there are [signs that the ADR wave we have been part of may be receding](#). Of course, it is impossible to know the future. In any case, it has been very fulfilling for me to be part of our community, which has done very valuable work. Thanks again for your contribution to my development.

Nancy: Thanks for your thoughtfulness in sending this. I am pleased that the seminar fit into the right moment for you to be thinking about next steps – its goal! I heard from most of the students every so often in the few years following, and they used that time in many different ways. Some – about eight as I recall – seminar participants turned some of their teaching and writing toward dispute resolution.

This seminar was an example of one major and broader thrust of those times – to plant the seeds in many law schools and in many parts of the practice. The need for that seed-planting may be waning, at least in the ways then envisioned (though perhaps not for others reasons as I will soon mention), because it succeeded.

In those days, I regularly explained to lawyers the difference between arbitration and mediation, and few had participated in a mediation. I'll bet that you experienced that at first as well, John. I have the impression that now even though law schools may use adjuncts, they are mostly offering some instruction in this area. And I no longer run into attorneys who do not know what mediation is. They seem to accept that it should be part of legal education, just as pre-trial litigation and trial practice are, and that they should know how to use it. They often hope to become mediators themselves, especially as something rewarding to do in their retirement from an advocacy practice or judging.

Another of our goals in that seminar and more broadly among those in the field was to spark more scholarship in the field. For whatever reasons (not claiming to know the reasons), scholarship regarding mediation (and also arbitration and negotiation) has burgeoned since Craig McEwen and I first wrote our mediation treatise 30 years ago, and that scholarship has become more international in scope.

So what is missing? Perhaps it's that the number of tenure-track faculty in dispute resolution will wane because law faculty who anticipate that their law school will not achieve prominence in this field will decide to handle the topic through adjuncts. As you well know, that is not an unusual approach for law faculty to take in fields outside the foundational legal theory courses of the first year.

If that's a bad result, perhaps it's time for another seminar for existing or prospective full-time faculty. Our theory in holding the seminar was that most law schools would not hire in the dispute resolution field, but that some faculty who already had another field would be permitted to switch fields or spend a part of their teaching and writing in dispute resolution. We tried to find people with that interest and to facilitate their taking advantage of tooling up in a new field by underwriting most of the expense of doing so.

If someone wants to offer another such seminar, I would add that the seminar faculty was a key to the success. We recruited an amazing group of faculty who had many ideas for scholarship that would improve the quality of disputing – more than they could possibly write about – and who had a mentoring disposition. It was a tremendous experience for me as well to sit through that teaching – I learned an enormous amount during those three weeks.

John: Thanks for your very thoughtful response, Nancy.

You provided a valuable perspective on the history of our field since your institute. It took place at an exciting time in our history and contributed to the remarkable growth since then, which you note. Certainly, most law schools now provide some dispute resolution instruction, and a wonderful cadre of colleagues has created a rich body of scholarship. So we have succeeded in integrating our work into legal education and practice.

I think that there's still a real need for perspectives from our field in teaching and scholarship. In legal education, there still is an overwhelming emphasis on legal doctrine. Teaching practical skills and problem-solving orientation generally seems to be a secondary priority. A few innovative schools have established one- or sometimes two-credit course requirements using these approaches, but they are rare and less than optimal in a 90-credit program. It's understandable that law school faculty and administrators would take a defensive stance considering the contraction of legal education, competition for students, and the bizarre influence of *US News*. It would be nice if we can persuade them that the continued vitality of our field is in their interest.

You talked about a modern-day follow-on seminar. You're right that the caliber of the faculty at your institute was very important. Indeed, you attracted great faculty including Deborah Hensler, Craig McEwen, Maurice Rosenberg, Frank Sander, and Gerry Williams, among others.

I am concerned that there is a substantial cohort of fantastic colleagues who will be aging into retirement in the not-too-distant future, which could cause a real loss to our field. Just as your institute was designed to plant seeds, perhaps we need to do a new round of seed-planting to generate new colleagues who will succeed us and hopefully build on our work. Some groups, like the Law and Society Association and Federalist Society, have programs specifically designed to cultivate future generations in their fields. Perhaps we should do something like that.

Mediators Need to Stop Apologizing About Justice

[Charlie Irvine](#) argues that the mediation community should focus squarely on the goal of promoting substantive justice. He is a mediator and the Course Leader of the Strathclyde Law School's Masters Program in Mediation and Conflict Resolution in Glasgow, Scotland.

Mediators were on the back foot about justice long before I joined the game. To labour the sporting metaphor, big hitters from left and right mounted attacks so eloquent, so minutely argued (and such fun to read) that mediators ceded the ground altogether. If we speak of justice at all, it is to claim that other benefits flowing from our work – cost, speed, comprehensibility, humane-ness – render its shortcomings a price worth paying.

By 1998, Robert Benjamin was already mourning the loss of that early vision of "conspiracy with the parties" where the mediator could say, "Here is what the law may be. What do you people want to do?"¹ By 2020, we could caricature busy (and successful) mediators as saying, "Here is what your clients want to do. What does the law say?"

Goals

The history is tortuous, but the Theory-of-Change Symposium encourages us to look forward, starting with our goals. So here are three:

- Restore non-lawyers' confidence that they are capable of serious thinking about justice.
- Make the case that mediation, insofar as it facilitates people's justice reasoning, provides more, not less, justice than formal adjudication.
- Redefine justice beyond the ever-sharpening "shadow of the law."²

The History

Where to start? Well, the 1970s. From my (UK) perspective, it seems no sooner had Frank Sander and others begun to institutionalize US mediation inside the "multi-door

¹ Robert Benjamin, [Mediation as a Subversive Activity](#), mediate.com (1998).

² Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE LAW JOURNAL 950 (1979).

courthouse"³ than critics found it wanting. The vague term "ADR" didn't help. When deploring the privatization of justice, the culprit resembled arbitration. When settlement was the bogeyman, ADR looked more like mediation.

This is well-trodden territory. A few key names provide the gist. Consumer champion Laura Nader found consensual processes wanting because they couldn't deliver what US courts in class actions had started to do: name, shame and punitively damage large corporations.⁴ Socio-legal scholar Richard Abel loftily accused "informal justice" of providing the powerful with a "sword to enforce their rights" while denying the disadvantaged the "equivalent shield."⁵ And Yale law professor Owen Fiss's broadside enumerated the harms of any outcome to a dispute other than formal adjudication, including privatizing justice and depriving courts of "interpretive occasions."⁶

Although approaching 40 years old, these critiques remain "largely unchallenged"⁷ and recently have been recycled in England & Wales,⁸ even influencing my own small jurisdiction of Scotland.⁹ While they undoubtedly include some caricaturing, their substance remains troubling for mediation. If it fails to deliver justice, all the cost and time savings in the world are little consolation. While people may resent expensive lawyers and baffling delays, they certainly don't want injustice, nor "second class justice."¹⁰

³ Frank E. A. Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 UNIVERSITY OF FLORIDA LAW REVIEW 1, 12 (1985).

⁴ Laura Nader, *Disputing Without the Force of Law*, 88 YALE LAW JOURNAL 998 (1979).

⁵ Richard L. Abel, *The Contradictions of Informal Justice*, in THE POLITICS OF INFORMAL JUSTICE, VOL. 1. THE AMERICAN EXPERIENCE 267, 296 (Richard L. Abel ed., 1982).

⁶ Owen M. Fiss, *Against Settlement*, 93 YALE LAW JOURNAL 1073, 1085 (1984).

⁷ SIMON ROBERTS & MICHAEL PALMER, DISPUTE PROCESSES: ADR AND THE PRIMARY FORMS OF DECISION-MAKING 9 (2d ed. 2005).

⁸ HAZEL GENN, JUDGING CIVIL JUSTICE (THE HAMLYN LECTURES (2008)) (2010); Michael Bartlet, *Mandatory Mediation and the Rule of Law*, 1 AMICUS CURIAE 50 (2019); Linda Mulcahy, *The Collective Interest in Private Dispute Resolution*, 33 OXFORD JOURNAL OF LEGAL STUDIES 59 (2013).

⁹ Charlie Irvine, *The Sound of One Hand Clapping: The Gill Review's Faint Praise for Mediation*, 14 EDINBURGH LAW REVIEW 85 (2010).

¹⁰ Martin A. Frey, *Does ADR Offer Second Class Justice?* 36 TULSA LAW JOURNAL 727 (2000).

Preconditions for Change

Theory of change process asks us to "map back" from our goals to work out the steps needed to achieve them. I propose two.

First, we need a much better understanding of non-lawyers' thinking about justice. A first-year law student wrote recently: "*Lay individuals are not capable of concluding rationally justified outcomes.*" In the absence of alternative perspectives, is it surprising that studying law heightens the belief that justice is too complicated for ordinary people's reasoning?

We need to build on research like that of Tamara Relis, whose detailed ethnography of medical negligence mediation is a goldmine of information about the consumers of the justice system. From her, we learn that parties' – both plaintiffs' and defendants' – aims for litigation and mediation are so different from those of their attorneys and mediators that they occupy "parallel worlds."¹¹ Other scholars have studied consumer perspectives on matters like procedural preferences¹² and satisfaction with the mediator¹³ but rarely seek ordinary people's views on substantive justice. This is the subject of my own doctoral research, and I'd like to challenge others to address the topic and help enrich our understanding of the people we serve.

Second, alongside empirical work we need to re-think our theories of justice. We need to distinguish justice from legality.¹⁴ Law is important but it's not all there is. If justice is defined solely in legal terms, only legal experts deserve a seat at the table. Access to justice becomes access to law. Access to mediation, insofar as it allows for outcomes

¹¹ TAMARA RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION: LAWYERS, DEFENDANTS, PLAINTIFFS AND GENDERED PARTIES 8 (2009). One notable exception is Nancy A. Welsh, *Stepping Back Through the Looking Glass: Conversations with Real Disputants About Institutionalized Mediation and its Value*, 19 OHIO STATE JOURNAL ON DISPUTE RESOLUTION 573 (2004).

¹² Donna Shestowsky, *Inside the Mind of the Client: An Analysis of Litigants' Decision Criteria for Choosing Procedures*, 36 CONFLICT RESOLUTION QUARTERLY 69 (2018); Roselle Wissler, *Court-Connected Mediation In General Civil Cases: What We Know From Empirical Research*, 17 OHIO STATE JOURNAL ON DISPUTE RESOLUTION 641 (2002).

¹³ Jess K. Alberts, Brian L. Heisterkamp & Robert M. McPhee, *Disputant Perceptions of and Satisfaction with a Community Mediation Program*, 16 INTERNATIONAL JOURNAL OF CONFLICT MANAGEMENT 218 (2005); Lorig Charkoudian, Deborah Thompson Eisenberg & Jamie Walter, *What Difference Does ADR Make? Comparison of ADR and Trial Outcomes in Small Claims Court*, 35 CONFLICT RESOLUTION QUARTERLY 7 (2017).

¹⁴ John Gardner, *The Twilight of Legality* (Oxford Legal Studies Research Paper No. 4/2018 Sept. 23, 2017) <https://ssrn.com/abstract=3109517>.

other than what the law provides, becomes, at best, a quick and dirty alternative, and at worst, a positive harm.

Life would grind to a halt if every agreement and every relationship required judicial approval. A broader theory of justice would extend legitimacy to the vast amount of energy expended by ordinary people on issues of fairness and justice outside the legal system.¹⁵

Mediators need a theory of justice that accounts not only for parties' substantive thinking – what's the right thing to do here? – but strategies and tactics too. We are quite comfortable with the notion of lawyers engaging in a game of litigation. Why not lay people? The people I have interviewed were quite open about their thinking on factors like risk, cost, presentation and, just like lawyers, legal rules.¹⁶

Basic Assumptions

In the interests of brevity, I list these without supporting arguments (tough for an academic!).

- Non-lawyers have the capacity to reason about and to achieve justice.
- Legal education, rather than expanding this capacity, narrows and focuses it towards a particular purpose, i.e., predicting the outcome of adjudicative processes, usually at appellate level.¹⁷
- This, in turn, has led those who operate the justice system to neglect and undervalue that wider capacity, characterising it as "subjective."¹⁸

¹⁵ Tania Sourdin, *The Role of the Courts in the New Justice System*, 7 YEARBOOK ON ARBITRATION AND MEDIATION 95 (2015).

¹⁶ A large body of scholarship already exists on the question of justice in mediation. See, e.g., James Coben, *Gollum, Meet Smeagol: A Schizophrenic Ruminant on Mediator Values Beyond Self Determination and Neutrality*, 5 CARDOZO JOURNAL OF CONFLICT RESOLUTION 65 (2004); Jonathan M. Hyman & Lela P. Love, *If Portia Were a Mediator: An Inquiry into Justice in Mediation*, 9 CLINICAL LAW REVIEW 157 (2002); Ellen A. Waldman & Lola Akin Ojelabi, *Mediators and Substantive Justice: A View from Rawls' Original Position*, 30 OHIO STATE JOURNAL ON DISPUTE RESOLUTION 391 (2016).

¹⁷ See John Lande & Jean R. Sternlight, *The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, 25 OHIO STATE JOURNAL ON DISPUTE RESOLUTION 247 (2010).

¹⁸ Debbie De Girolamo, *Sen, Justice and the Private Realm of Dispute Resolution*, 14 INTERNATIONAL JOURNAL OF LAW IN CONTEXT 353 (2018).

Interventions

Next, theory of change asks what interventions are required to achieve the goals. I see two:

First, gather more data regarding ordinary people's justice reasoning. This is a challenge to both researchers and practitioners, and further subdivides into qualitative and quantitative methods.

Qualitative approaches include interviews, observation, and document analysis. Hundreds of studies already exist but tend to focus on process issues like user satisfaction or mediator behaviour. Researchers should examine substantive justice and how outcomes were arrived at.

Quantitative approaches reach much larger populations by putting numerical values on the subject of study, e.g., how just was the outcome on a scale of 1-10? One variant is to build on qualitative findings and present respondents with a list; e.g. which of the following factors influenced your thoughts on the outcome – "teaching the other party a lesson," "getting some money," "realising things might not go my way in court," or "being put back in the position I was in before the dispute."¹⁹ Surveys can be administered by mediators and mediation program directors. While the questions lack subtlety, the larger sample may provide important insights.

Second, dialogue with policymakers and the justice system. We need to counterbalance the emphasis on cost and speed as mediation's primary benefits. We know that fairness and justice matter too. Indeed, our clients often plough on with ill-advised litigation if they view a proposed settlement as unjust. Armed with more data about ordinary people's justice reasoning, we can be bold in challenging the idea that our work is second-class. We offer a process where parties can negotiate both the outcome and the criteria for evaluating that outcome. This could be seen as the ideal, with adjudication the "alternative," a fall-back for hard cases.

Indicators

How will we know that change has occurred? Here are some suggested indicators:

- Mediation schemes employ measures other than settlement rates, cost savings, and speed.
- Mediation schemes express outcomes in terms of justice delivered.

¹⁹ All of these have emerged in my own research.

- Mediation schemes (and individual mediators) contribute to the formation and development of justice norms through systemic reporting, for example, by contributing to an anonymised digest of outcomes.
- Consumers develop greater agency, choosing to resolve their own dispute as a default, rather than when compelled or cajoled by the justice system.

Conclusion

The Theory-of-Change Symposium asks us to work out what the world would look like if our dreams became reality. Doubtless my vision of bringing lay people's reasoning inside the justice tent requires refinement. Not all will share it.

But from the moment I first heard a famous mediation scholar say mediators had no interest in fairness and justice, my hackles were raised. My mind shot to the hundreds of people who had sat in my office wrestling with those very things. This post is dedicated to them and all the mediators with the empathy and confidence to work with them as they hone resolutions that are fair and just.

ADR and Access to Justice

Jacqueline Nolan-Haley summarizes key issues in the discussion about the relationship of ADR and access to justice (A2J) at the Past-and-Future Conference. These include definitions of access and justice, factors affecting A2J, how ADR has undermined A2J, and how ADR can systematically improve A2J. She is Professor of Law at Fordham Law School.

I am inspired by so much of what I heard from so many excellent speakers at the "Appreciating Our Legacy and Engaging the Future" conference. For me, one of the most thoughtful and critical discussions was "ADR and Access to Justice," a topic which I admit is close to my heart. Cynthia Alkon, Jen Reynolds, Andrea Schneider, and Jean Sternlight engaged with an attentive (and "eager to participate") audience in considering questions about the meaning of access to justice, how ADR has both enhanced and diminished access to justice, and the future direction of ADR as a source of access to justice.

Cynthia Alkon led the first discussion about the meaning of the term "access to justice." After offering multiple definitions from both domestic and international law sources, she asked the audience for their views on the meaning of access to justice. Her question prompted a wide variety of responses, some focused on the many meanings of justice, and others on the concept of access.

Andrea Schneider addressed the question of how ADR has provided access to justice in the past. Focusing on three categories – process, lawyers, and better outcomes, she noted that dispute system design gives us the possibility of providing access to justice without lawyers.

Jean Sternlight's remarks concerned how ADR has been detrimental to achieving access to justice and she pointed to human nature and power as the source of the problem. Not surprisingly, she offered as her prime example of the "bad guy" here, mandatory arbitration. It both impedes justice and imposes high costs on access to justice.

Jen Reynolds concluded the initial panel conversation by addressing the question of how ADR can improve access to justice in the future. She noting that the early ADR movement was concerned with important issues such as inequality, bias and privilege, and that the trend today is towards resolving disputes. She challenged the audience to think about where and how we can do something about the systemic sources of conflict.

In the midst of an idealistic discussion of ADR's future potential as an access to justice tool, John Lande observed that we should have realistic expectations of how ADR can change the world.

Questions from the audience included: Has ADR **contributed** to the access to justice problem? What is the standard of comparison when assessing whether ADR improves access to justice? Does ADR have a different meaning in ODR?

The panelists' concluding comments urged that we help students to see beyond the actual cases they are working on and to develop conflict literacy, that we look at who gets to design processes and understand their goals, that we work towards more transparency, and that we be willing to learn from failures of the past.

Questions for the Future of the Dispute Resolution Field

Stephen B. Goldberg, Nancy H. Rogers, and Sarah Rudolph Cole identified critical issues for the future of dispute resolution including resolution of major social issues, use of restorative practices, handling disputes online, use of artificial intelligence, decisions about what law to apply, and increasing collaborative decision-making in dispute resolution organizations. Steve is Professor Emeritus of the Northwestern University School of Law and President of the Mediation Research and Education Project, Inc. Nancy is the Dean Emeritus, Professor Emeritus, and Director of the Program on Law and Leadership at the Ohio State Moritz College of Law. Sarah is the John W. Bricker Professor of Law and Director of the Program on Dispute Resolution at the Ohio State Moritz College of Law.

We recently finished the Seventh Edition of *Dispute Resolution: Negotiation, Mediation, Arbitration and Other Processes* published by Wolters Kluwer. In the course of our revision, we identified several questions that we thought may have significance in the dispute resolution field.

We found that, in the eight years since the Sixth Edition of our casebook was published, the most impactful changes in the field have not been law-related, though we noted several of these, particularly in arbitration. Instead, the innovations by those using their dispute resolution expertise to deal with societal problems and to seize the potential of technological progress provide the basis for many of the changes in this edition.

As we sent the manuscript off to the publisher, this is how we begin the concluding chapter: The dispute resolution movement established a foundation of support for dispute resolution processes and led to substantial institutionalization of mediation. Those now entering the field can help society deal with current challenges and unmet conflict resolution needs. They can take advantage of ongoing progress in technology as they design both online and in-person processes. They can also take advantage of case law and commentary created early in the field's development as a basis for considering current public policy issues. Here are a few questions to illustrate what remains ahead:

- What adaptations of dispute resolution practices might give society tools to tackle such current challenges as community division, conflicts over delivery of services for opioid addicts, and climate change?
- Could the restorative practices, including truth and reconciliation commissions, play a useful role with respect to the current U.S. issues regarding civil rights?

- How do we adapt what we have learned about dispute resolution techniques and regulation and translate these lessons effectively to an online platform?
- Conversely, what can we learn from millions of online dispute resolution cases (much of the data in retrievable form) that might improve dispute resolution processes, whether offered off-line or online? How can data analytics help parties' selection of a dispute resolution process?
- How should artificial intelligence be utilized to improve dispute resolution processes and inform unrepresented parties about their BATNAs?
- As mediation is institutionalized, what practices will insure that the mediation continues to meet the goals set for it (for example, if set up to allow parties the opportunity to engage in resolving their disputes, what should be done if mediators tend to evaluate the merits in separate conversations with attorneys, foregoing both joint sessions and party involvement)?
- As dispute resolution processes are conducted across state and national borders, and matters arising from them might be litigated in either state or federal courts, how can we make clear what law applies? Or how might we harmonize these laws through uniform laws and ratification of international conventions so that it does not matter as much which jurisdiction's law applies?
- How might leaders adapt ADR techniques to ensure greater collaborative decision-making within their organizations?

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Toward Integration and Peacemaking in the Mediation Field

Forrest S. (Woody) Mosten urges mediators to be open to a range of approaches and philosophies and to incorporate a philosophy of peacemaking in their practices. He advocates expanding training curricula to address intake and practice management strategies, work in interdisciplinary teams, intractable conflicts, social science research, a broad range of mediation strategies, and dispute prevention. He is a mediator and collaborative attorney with offices in Beverly Hills and La Jolla and is an Adjunct Professor at UCLA School of Law.

The growth and acceptance of mediation may be one of the most important developments in access to justice and resolution of disputes in recent decades.

However, it has been a bumpy ride! Mediation leaders and organizations have had our own intractable conflicts, mediation thought leaders have argued over the purity of our respective mediation theories, and the mediation field has suffered strife with the organized bar, collaborative law community, and legislatures and courts in many jurisdictions.

The goal of this piece is to identify some of these conflicts, propose strategies to help resolve them, and encourage increased integration and harmony in the mediation world. I hope that practitioners and academics will shed our myopia and search for more integrative visions of our training and practice.¹

The following are descriptions of some standard practices in our field, each followed by a proposed strategy to promote increased harmony in the field.²

¹ In 1999, I convened a group of trainers at the Western Justice Center in Pasadena, California, to explore pedagogical innovations. The format was to have each invitee lead a training module with the rest of the participants serving as students in training. This symposium morphed into a special issue of the Family and Conciliation Court Review showcasing papers from some of the participants. See Forest S. Mosten, *Mediation 2000: Training Mediators for the 21st Century*, 38 FAMILY AND CONCILIATION COURT REVIEW 17 (2000).

² This piece reflects my imperfect observations of the field without empirical foundation. I hope that others will conduct research to support or modify these views.

Modulate Many Mediators' Litigation Orientation with Increased Use of Facilitative and Interest-Based Approaches

Mediators with backgrounds as judicial officers and litigators³ often work primarily in caucuses utilizing evaluative interventions in a single-session format.⁴ This approach to mediation usually is activated in later stages of litigation, close to trial dates, and after most discovery has been completed. The main "consumers" of these mediations are litigators who engage mediators who they know and are comfortable with: mediators who are schooled in the trenches of litigation.⁵

Courts, training organizations, and mediator organizations should study how late-stage, caucus-based, evaluative mediations compare with early, joint-session-based, facilitative mediations. Training programs should offer both models as different approaches to mediation. We should avoid artificial distinctions between civil and family mediation approaches and, instead, focus on what parties need in their cases. Trainings should use "tool box" approaches of strategic interventions⁶ rather than one-size-fits-all models.

³ These mediators cover all fields of law. Even though mediators handling non-family matters (such as business, real estate, probate, and personal injury cases) often rely heavily on use of caucuses and evaluative techniques, so do many family mediators who are lawyers or retired judges.

⁴ Single-session format is contrasted with sequential-session format. In single sessions, mediation participants commit to a limited period of time, generally within one day. Everyone expects that by the end of the session, the dispute will be settled or the parties will proceed to court or litigation-focused negotiation. In sequential-session format, the parties meet for a limited time period (generally two to four hours) with a plan for one or more sessions in the future. In some sequential sessions, the parties focus on specific issues. In other sequential sessions, they work on all outstanding issues. Mediators should be trained to use both formats and combine them as appropriate.

⁵ Parties who are represented by lawyers generally are not involved in the selection of mediators and do not communicate directly with mediators before mediations begin, unlike self-represented parties. We should study the process for selection of mediators, including parties' participation and consent.

⁶ See, e.g., DOUGLAS FRENKEL & JAMES STARK, *THE PRACTICE OF MEDIATION: A VIDEO-INTEGRATED TEXT* (3rd ed. 2018); DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES : EFFECTIVE STRATEGIES FOR NEUTRALS AND ADVOCATES* (2008); CHRISTOPHER MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* (4th ed. 2014).

Broaden Range of Mediation Interventions for Mediators Who Prefer Facilitative and Transformative Approaches

Many mediators – including but not limited to family mediators – encourage mediation early in cases, prefer facilitative and transformative approaches, rely heavily on joint sessions, and work with lawyers outside of mediation sessions.

Just as the transformative approach⁷ has its limitations, facilitative models may benefit from judicious use of evaluative approaches and alternative mediation formats. For example, mediators should consider how and when to offer mediator settlement proposals or engage experts for confidential abbreviated evaluations.⁸

Review Court and Community Mediation Programs Protocols Serving Self-Represented Parties

Mediators in community and court mediation programs serving self-represented parties generally use a single-session format have limited time periods, often just one to four hours. These parties often need significant time for orientation about mediation and help in developing good mediation strategies.

Policymakers for court and community programs should review their mediation protocols to provide more information and assistance to self-represented parties. For example, orientation videos and meetings might be unbundled from the mediation sessions. They could be provided prior to the mediation day and/or posted online so that parties can watch them at their convenience. Programs can provide coaches for self-represented parties to help them prepare for and participate effectively in mediations.

Deepen Mediation Training by Addressing Intractable Conflicts, Social Science Research, and Broad Range of Mediation Strategies

The mediation field is a Tale of Two Realities: (1) resolution of personal and business disputes, and (2) handling of long-term social challenges such as ethnic and geopolitical problems, climate change, world hunger, and diversity and equality issues. Most mediators focus only on resolving the conflicts of parties in the room rather than

⁷ See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (rev. ed. 2004).

⁸ See, e.g., Forest S. Mosten, *Confidential Mini Child-Custody Evaluations: Another ADR Option*, 45 FAMILY LAW QUARTERLY 119 (2011); Margaret Shaw, *Mediator Proposals: Let Me Count the Ways*, DISPUTE RESOLUTION MAGAZINE 27 (Winter, 2012).

broader societal justice issues such as those addressed by Mediators Beyond Borders International and the Beyond Intractability Project.⁹

Mediation trainees would benefit from an understanding of the commonalities of these approaches and how strategies from each approach can be transferred into new contexts. Mediation trainings should address intractable conflicts,¹⁰ social science theories presented in major works such as *The Handbook of Conflict Resolution*,¹¹ and foundational theories presented in *The Making of a Mediator*.¹²

Increase Use of Interdisciplinary Teams in Mediation

Mediation training programs generally don't teach how to work with collaborative attorneys or mental health and financial professionals in mediation.¹³ Similarly, mediators rarely are taught how to serve in collaborative law cases. Parties and professionals alike often see mediation as just the "next stop" along the litigation highway rather than the "last stop" so that focus and resources can be marshalled into a resolution at the mediation table.

Mediators need training in team building and skill sharing with collaborative professionals. Mediators should be trained in working with collaborative attorneys¹⁴ from the beginning of a negotiation, when trouble strikes during negotiations as well as upon termination of a collaborative process. Given that many mediators work alone as sole practitioners, training is needed in learning about interdisciplinary teamwork that includes co-mediation and integration of mental health and financial professionals as neutrals, coaches, and evaluators within the mediation process.¹⁵

⁹ [Mediators Beyond Borders International](#); [Beyond Intractability](#). David Hoffman and I co-facilitated a [Peacemaker Retreat](#) in January 2020 in San Diego.

¹⁰ See PETER T. COLEMAN, *THE FIVE PERCENT: FINDING SOLUTIONS TO SEEMINGLY IMPOSSIBLE CONFLICTS* (2011).

¹¹ PETER T. COLEMAN, MORTON DEUTSCH & ERIC C. MARCUS, *THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE* (3d ed. 2014).

¹² MICHAEL D. LANG & ALISON TAYLOR, *THE MAKING OF A MEDIATOR: DEVELOPING ARTISTRY IN PRACTICE* (2000).

¹³ See Forrest S. Mosten & Lara Traum, *Interdisciplinary Teamwork in Family Law Practice*, 56 *FAMILY COURT REVIEW* 437 (2018).

¹⁴ See FORREST S. MOSTEN, *COLLABORATIVE DIVORCE HANDBOOK* (2001); *BUILDING A SUCCESSFUL COLLABORATIVE PRACTICE* (Forrest S. Mosten & Adam Cordover eds., 2018).

¹⁵ *Id.*

Incorporate Intake and Practice Management Strategies in Mediation Training

Mediators are trained to help parties sitting at the table but generally aren't trained to do telephone intake or proactively convene mediation parties. When mediation case managers handle intake, mediators are shielded from the intake process and meet only parties who have already committed to mediation. This experience differs greatly from private practice where parties or counsel select mediators from an "audition list" and mediators mediate only cases when they are selected.

Few mediation training programs give more than passing reference to how to build and manage a mediation practice. Mediators in private practice must be financially stable to succeed over the long term. This omission in trainings is particularly significant because the qualities of successful mediators at the table (such as patience, rapport, building trust, accurate reporting, and good listening skills) often are far different than entrepreneurial qualities needed to run a profitable small business.¹⁶

Basic and advanced mediation training should cover client intake and practice management.

Mediators Should Help People Form Strong Personal and Business Relationships and Plan to Prevent and Manage Disputes

Most mediations and trainings focus on conflicts that have ripened into disputes. Very few trainings focus on prevention of legal problems and conflict wellness. For example, there is a great unmet need for mediation to help people build business partnerships and handle estate planning and other needs of the elderly.¹⁷

When mediators help resolve disputes, they should also help people form or rehabilitate relationships, and prevent and manage possible future conflicts. Such efforts can be symptomatic (such as dispute resolution process clauses included in settlement agreements) and asymptomatic (such as mediations in the formation of premarital relationships, businesses, and construction projects through the use of partnering processes).¹⁸

¹⁶ Stephen B. Goldberg & Margaret L. Shaw, *The Secrets of Successful (and Unsuccessful) Mediators Continued: Studies Two and Three*, 24 NEGOTIATION JOURNAL 393 (2007); Robert J. Rhudy & Maryland Mediation and Conflict Resolution Office, [Engaging Conflict for Fun and Profit: Current and Emerging Career Trends in Conflict Resolution](#) (March 2014).

¹⁷ See Forrest S. Mosten & Lara Traum, *The Family Lawyer's Role in Preventive Legal and Conflict Wellness*, 55 FAMILY COURT REVIEW 26 (2017).

¹⁸ Frank Carr with the CPR Partnering Subcommittee of the CPR Construction Advisory Committee, [Partnering: Aligning Interests, Collaboration, and Achieving Common Goals](#) (2010).

Move Beyond Mediation to Include Peacemaking¹⁹

In recent years, there has been an important effort to integrate peacemaking into mediation practice and training. Peacemaking means helping improve others' lives, repair their relationships, and prevent future conflict. Peacemaking is actively restoring and creating harmony in interactions with clients, colleagues, opposing parties, family members, judges, court staff, witnesses, experts, and others in one's community. But it is not a process. Rather, it is a set of values, personal attributes, goals, and behaviors that guide our work. In other words, peacemaking reflects core values as expressed through one's work as a mediator, lawyer, or other professional dealing with conflict. Peacemakers come from all backgrounds, and there is no litmus test to earn your peacemaker card. While we hope that mediation is a kinder and gentler way of resolving disputes, some mediators use a peacemaking approach and others do not.²⁰

Mediation training and practice should integrate peacemaking concepts and strategies. For example, every mediator should be prepared to help parties make effective apologies, offer forgiveness, and be ready to handle rejection of an apology.

Conclusion

Mediators' quest for acceptance by professional and consumers may depend on an increased acceptance of various models and practice approaches. This requires continual reflection as a field.²¹

Mediation requires a myriad of practice approaches outside a mediator's field of specialization. These approaches need to be identified in basic training programs and explored throughout mediators' careers. For example, mediators specializing in real estate disputes may have no formal mediation training and use all-caucus, evaluative,

¹⁹ Forrest S. Mosten, *Beyond Mediation Toward Peacemaking*, ACRESOLUTION MAGAZINE 30 (Summer 2013) (adapted from keynote address at 2011 Association for Conflict Resolution annual conference).

²⁰ BRINGING PEACE INTO THE ROOM: HOW THE PERSONAL QUALITIES OF THE MEDIATOR IMPACT THE PROCESS OF CONFLICT RESOLUTION (Daniel Bowling & David Hoffman eds., 2003); FORREST S. MOSTEN & ELIZABETH POTTER SCULLY, COMPLETE GUIDE TO MEDIATION 179 (2d ed. 2015); KIM WRIGHT, LAWYERS AS PEACEMAKERS: PRACTICING HOLISTIC, PROBLEM-SOLVING LAW (2010); Forrest S. Mosten, *Lawyer as Peacemaker: Building a Successful Law Practice Without Ever Going to Court*, 43 FAMILY LAW QUARTERLY 489 (2009); David Hoffman, [TEDx Talk: Lawyers as Peacemakers. Really?!? Yes, Really.](#)

²¹ Yes, I am suggesting the adaption of the concept of [kaizen](#) to continually improve our field.

mediator- and lawyer-dominated mediation techniques.²² Conversely, facilitative family mediators may resist using appropriate evaluation techniques. All these approaches may be effective some of the time. Hopefully, all mediators will improve their craft by considering styles, disciplines, and practice models outside of their normal comfort zones.

As the torch passes from our founders to new generations of practitioners and thought leaders, we should incorporate peacemaking in our literature, practices, and organizational structures.

²² Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: "The Problem" with Court-Oriented Mediation*, 15 GEORGE MASON LAW REVIEW 863 (2008).

CRAPP: A Strategy for Dispute Resolution Reform

Jill Gross describes the "CRAPP" strategy she used to successfully promote a change in FINRA rules. This consists of Credibility, Repetition, Actual evidence, Publish, and Patience. She is Associate Dean for Academic Affairs and Professor at Pace University Elisabeth Haub School of Law.

More than a decade ago, as courts began enforcing class action waivers in arbitration agreements, it grew more and more apparent to me that disputants with arbitrable claims of small dollar value would proceed under the respective forum's small claims arbitration procedures. This warranted a renewed focus on whether those small claims procedures provided disputants with sufficient access to justice.

In the securities industry, most disputes between brokerage firm customers and their firms are resolved in arbitration before the Financial Industry Regulatory Authority ("FINRA"), a securities self-regulatory organization. FINRA's arbitration procedures for claims of small dollar value are codified in Rules 12800 of its Code of Arbitration Procedure for Customer Disputes and 13800 of its Code of Arbitration Procedure for Industry Disputes. Until very recently, FINRA's "Simplified Arbitration" procedure permitted customers of broker-dealers (or employees of brokerage firms) to have their claims of \$50,000 or less resolved by one arbitrator either based exclusively on paper submissions or following a full-blown live, in-person hearing. The former prevented parties from being heard orally; the latter involved arbitration forum fees that made the claims economically not viable to pursue.

To correct this procedural flaw that I believed decreased an investor's (or employee's) access to justice, about ten years ago I conceived of a hybrid option: a shortened telephonic or video-conference hearing that would offer procedural justice (i.e., an opportunity to be heard) to claimants yet provide a cost-effective method of dispute resolution. To convince FINRA to adopt this procedural reform, I embarked on what I now call the "CRAPP" method: Credibility, Repetition, Actual Evidence, Publish, and Patience. (I thank the ADR Conference "Appreciating Our Legacy and Engaging the Future," hosted by Pepperdine Law School's Straus Institute in June 2019, for inspiring me to crystallize my thoughts.)

Starting in 2007, I published several articles, presented at conferences, and filed with FINRA and the SEC multiple comment letters proposing reforms to the Simplified Arbitration process. As a direct result of my efforts, eleven years later in the summer of 2018, the SEC approved FINRA's proposal (filed in January 2018) to add a "Special Proceeding" option to its Simplified Arbitration process – to provide parties with an additional convenient and cost-effective hearing option for parties, effective September 17, 2018. (Because FINRA is a regulated entity, the SEC must approve any change to the FINRA arbitration codes, following a public rule-making process, including

opportunity for public comment.) Under the revised rule, if a claimant who has filed a Simplified Arbitration selects a live hearing rather than the "paper" option, the claimant must select one of two hearing options: either a full-blown, in-person hearing identical to the one for non-simplified arbitration, or a "Special Proceeding" – a telephonic hearing of limited duration during which each party can present one witness, who would not be subject to cross-examination (though arbitrators can question the witnesses).

Since its passage and through July 24, 2019, 27 out of 147 eligible customer claimants and 76 out of 572 eligible industry claimants (18% and 13% of eligible claimants, respectively) opted for the Special Proceeding. This demand for the telephonic procedure demonstrates that disputants wanted another option.

Each of the "CRAPP" elements was critical to my success in altering the rules to better help investors of modest means pursue their claims in FINRA arbitration in a cost-efficient yet procedurally just manner:

Credibility – I have been either practicing or writing in the area of securities arbitration for more than 25 years, and have been an arbitrator in the forum for 20 years. I served a four-year term on the National Arbitration and Mediation Committee of FINRA, on which policy and rule changes are vetted and debated. While on the NAMC, I built professional relationships with lawyers who represent both investors and broker-dealers, worked with FINRA staff, and approached issues with both idealism and pragmatism. Through all these activities (and others), I have tried to maintain my neutrality, covered the area fairly and objectively, and focused on FINRA's successes as well as failures. I firmly believe this credibility strongly contributed to the success of my proposal.

Repetition – Another component to my strategy was repetition: keep presenting my idea at conferences, seminars and during informal conversations. I also repeated it to multiple audiences: regulators, FINRA dispute resolution staff, scholars, other securities clinic directors, arbitrators, and practitioners. In three separate comment letters to FINRA's predecessor forums in 2007-08, I expressed concerns about the costs of a live hearing for a Simplified Arbitration. In March 2012, I filed a comment letter supporting the proposed increase in the threshold for Simplified Arbitration to \$50,000, reiterated my concerns about the costs of the live hearing option, and offered publicly the telephonic option. In July 2014, FINRA convened a Dispute Resolution Task Force. Chaired by retired law professor (and my former colleague and frequent co-author) Barbara Black, the Task Force considered strategies to "enhance the transparency, impartiality, and efficiency of FINRA's securities dispute resolution forum for all participants." In the spring of 2015, I submitted comments to the FINRA Task Force, both via a writing and a telephone call, including a proposal to adopt a telephonic option for Simplified Arbitration. The Task Force's December 2015 "Final Report and Recommendations" included a recommendation to offer an affordable, truncated in-person hearing as an alternative to a paper arbitration for low-dollar-value

claims. In this day and age of much "noise" and inbox explosion, I have learned that repeating a suggestion is necessary for it to be heard by the right person / people.

Actual Evidence – A third component of my strategy was to cite to actual evidence that there was a "problem" needing fixing, rather than just an academic idea in a vacuum. I cited to an [empirical study](#) I had conducted (with Prof. Black) regarding investors' perceptions of the fairness of securities arbitration. I also re-examined some of the raw data zeroing in on small claims and found that investors' negative perceptions of fairness decreased even more in the context of Simplified Arbitration. This made sense in light of the procedural justice literature: in a proceeding where the only economically viable option was an opaque paper "hearing," it stands to reason that parties would perceive it as more unfair.

Publish – A fourth component of the CRAPP method is to publish. I published a [law review article](#) and a shorter piece in a PLI publication offering and explaining the idea, with each publication reaching a different audience. In addition, as required by the rule-making process, each of my comment letters was published on the SEC's website.

Patience – Fifth, to make change, one must have patience. I waited 11 years from my identification of the "problem" to the implementation of a solution. I did not jump up and down, criticize regulators for not moving faster, tweet sarcastic GIFs, or pull hair out of my head for not getting quicker results. I just kept pushing politely and respectfully. It was a long process from idea to policy change, but rewarding nonetheless. Similarly, future patience will be needed to refine the procedure. When proposing the telephonic option, I purposely did not specify the particulars of the revised hearing option, leaving it to the forum to design a procedure that worked best for its constituents. Some have criticized the provision that bars any cross-examination. However, with additional patience and experience, perhaps FINRA will re-examine and tweak that provision in the future.

In sum, by successfully lobbying FINRA to reform its arbitration code governing small claims, I believe I have made an impact and helped investors and employees of modest means. The CRAPP method worked. Upon reflection, the CRAPP strategy should work not just for ADR reform, but for any proposed change to public policy, the law, or people's views. Consider using it.

Designing the Courts to Truly Meet Users' Needs

Michael Buenger argues that the modern court system should – but does not – adequately meet the needs of actual and potential users of the courts. He recommends a "zero-based" approach to designing the courts as if we were starting from scratch. He is the Executive Vice-President / Chief Operating Officer of the National Center for State Courts.

"Most lawyers, even trial lawyers, don't get their problems solved in a courtroom. We like to go to court. It seems heroic to go to court. We think we're the new, great advocates, better than anything we've seen on TV, and we come home exhilarated by having gone to court."
– Attorney General Janet Reno

Our Outdated Court System

I recently saw a presentation where the speaker flashed up two slides. The first slide was entitled "Courts – 200 years ago." The second slide was entitled "Courts – Today." They were the same slide. The slides confirmed what Professor Erika Rickard observed:

The American judiciary predates the country's founding: the first court in Massachusetts originated 325 years ago, followed by a proliferation of state and later federal courts. From the court system's inception through the first half of the twentieth century, the courtroom experience remained largely unchanged: litigation and appeals, primarily conducted by attorneys representing the parties involved. As a consequence, both criminal and civil procedure and their authorizing statutes were drafted with the following assumptions: fully represented parties, with limited technology, and low case volume.¹

Visuals can be more jarring than words. The presentation illustrated in 10 seconds what hundreds of academics, practitioners, and authors have tried to dissect in myriads of articles. For all the diversifying and new program developments that have occurred in the last half-century, our public dispute resolution system remains anchored in a binary approach that sees procedurally intense adversarial combat before a neutral and detached magistrate as the best method for seeking truth and justice and for resolving differences. All other forms of dispute resolution are classified as lesser alternatives.

¹Erika Rickard, *The Agile Court: Improving State Courts in the Service of Access to Justice and the Court User Experience*, 39 W. NEW ENGLAND LAW REVIEW 227, 228 (2017).

Janet Reno's observation about lawyers and courts is accurate. The solutions to most disputes seldom are found in the courtroom. Indeed, the mere threat of the courtroom is often enough to solidify thinking towards some form of negotiated settlement. The problem, of course, is that far too often, the settlement of the dispute occurs on the "courthouse steps" after much time, energy, and money has been spent teeing up a case for trial. Too frequently, the "courthouse steps" is used as an expensive bludgeon to obtain a result that was probably pre-ordained for many cases at the outset.

Nevertheless, our public dispute resolution system is designed around that location as the beginning and end point for resolving disputes even though it is not used in most cases. It is akin to two competing cardiac doctors finally deciding that a less intense form of medical treatment is better just as the patient is being wheeled into the operating theatre for open heart surgery. Our procedures, routines, and thinking view the great courtroom battle as the epitome of a proper dispute resolution process. It is the place where heroes are made or broken. Other approaches to resolving our disputes, though more commonly used, are somehow viewed as lesser in value, permanence, and effect.

The problem with this binary view on delivering justice services – what we might call the big "A" of the adversarial approach and the little "a" of supposedly lesser alternatives – is that it ignores the multi-dimensional nuances of virtually all human conflict and the spectrum of services needed to resolve those conflicts. Our system presumes the "big A" approach will be needed in every matter (not just cases) even though all the evidence points to the fact that most cases ultimately are resolved under some form of the "little a" approach. This partition between adversarial and "lesser" alternatives is neither necessary nor optimal.

Designing Courts to Meet Users' Needs

To be more responsive, more focused on end-user demands, our public justice system needs to move more rapidly to implement multi-dimensional approaches to dispute resolution. These approaches should be more accessible, affordable, and calibrated to achieve sustainable outcomes, not simply produce case outputs. Yet, even in the face of evidence that most people want simpler more user-focused systems, we remain mired in a system that is far too procedurally complex for ordinary people to understand, much less access. The stark reality today is that many people in this country simply cannot afford – in time or money – to "go to court" as we have traditionally understood that concept. They certainly are not willing to constantly invest in a "courthouse steps" settlement approach. The result of this long commitment to the courthouse is that an entire private dispute resolution industry has emerged to challenge the monopoly once enjoyed by the courts. This new industry has designed itself around greater convenience, lower costs, and less acrimony – in other words, the end-user.

It is incontestable that the expansion of multiple forms of dispute resolution over the last 60 years – some in the public space and some in the private space – has radically transformed many aspects of our justice system. Many courts today offer mediation and other services, either directly or through annexed services. Notwithstanding these efforts, the issue that remains is whether all this intellectual investment and programmatic change has been transformative enough to meet the public's diversifying justice needs and expectations. I submit it has not.

To maintain both relevance and legitimacy, we need to remove the "A" in ADR. We need to move more rapidly and deliberately in understanding **what the public expects from its** justice system, not what we expect of the public when accessing that system.

Understanding the public's view of the system is critical now as a new generation of Americans take the stage with far different attitudes about their interactions with institutions, including the public justice system. In its most recent survey of public attitudes towards the state courts, the National Center for State Courts found that a majority of respondents continue to believe that too many judges do not understand the challenges facing people who appear in their courtrooms. In contrast, a majority of respondents gave positive responses to questions concerning the need for expanding legal self-help systems and alternative access to the courts. Concepts such as legal check-ups, web-based access, self-help centers, and alternative service providers received positive public support ranging from 56% to 64%. Online dispute resolution (ODR) and the unbundling of legal services received overwhelming support. People increasingly prioritize costs, convenience, timeliness, and other values over traditional core concerns for fairness, objectivity, equal protection, or even due process.

It remains to be seen whether this shift in priorities reflects actual behavior or is merely defined by hypothetical perspectives. Due process may seem antiquated until it is your case under consideration. But the courts can no longer be the only justice forum, where swarms of lawyers battle one another in front of an umpire calling balls and strikes while the parties watch from the bleachers. Now there are other stadiums available.

Exponential Changes in Dispute Resolution

We know that things are changing rapidly. Futurist Ray Kurzweil, for example, observed, "Our intuition about the future is linear. But the reality of information technology is exponential, and that makes a profound difference. If I take 30 steps linearly, I get to 30. If I take 30 steps exponentially, I get to a billion."

In the arena of dispute resolution, all signs point to significant changes in opportunities for resolving disputes – not linear changes but exponential changes. Technology is bringing new methods to bear with, for example, ODR (both for mediation and adversarial proceedings) becoming more widely available in the public and private space. Some systems "automate" the process with Augmented Intelligence (AI). Still

others seek to "crowd source" justice by posting disputes online and asking the "public" to help resolve the matter. These are powerful indications that there is an element of dissatisfaction in our traditional public justice systems with all their procedural intensities and commitments to established practices.

There is, of course, a danger to all of this change. Mob rule seldom produces sound outcomes and AI may be good at pattern recognition but that is not the same thing as sound judgment. But unless we offer something better, we cannot be surprised when others step in to fill a vacuum with programs that may seem more appealing even if they do not achieve the ends of justice.

Principles in Zero-Based Court System Design

So how does a traditionally linear institution – suit-filed, case-submitted, judge-decided – confront exponential social change? It begins, I believe, with the singular notion of "zero-based thinking" by court leaders. This is no easy task for institutions that are so grounded in tradition, steadfastly committed to protecting core social and legal values, and charged with promoting uniformity and predictability.

Nevertheless, if we are to protect such important principles, we need to rethink from a zero-base what practices and programs are needed in the face of exponential change. The American justice system is not a creation from on high but rather a human institution formed and reformed over more than 300 years. Like all institutions – public and private – it is a social construct designed around particular needs and defined by the challenges of the time and culture in which it works. Institutions are, therefore, capable of adaptation or collapse. We can confront and manage exponential change more effectively if we candidly answer this simple question: Knowing what I know today, would I design the system that I have?

It is a simple question, but the answer can be jarringly complex. As Dr. Donald Sull, a global expert on business strategy at MIT, has noted, leaders make commitments because making commitments is necessary to any endeavor – private or public. But, as Sull also notes, absent the willingness to constantly rethink institutional commitments, the commitments that initially provided the foundation for success "harden" over time and constrain the ability to respond to change. Staying committed to the commitments becomes the superseding value, not the intrinsic worth of the commitments themselves. Commitments can calcify and inhibit new thinking even in the face of stark evidence of monumental changes in the operating environment. And they leave institutions unable to make the needed adjustments. If we wouldn't choose the current system if we could start from scratch, it is time to rethink some of the fundamental commitments of the system.

So what could a new public system of justice look like? It would begin by acknowledging that there is a vital role for different forms of dispute resolution services within the public justice system, each designed around litigant needs, not institutional

survival, or tradition, or heroic notions of great courtroom battles. We know, for example, that as a general principle adversarial combat produces neither the truth nor a satisfying outcome in many types of cases. Getting warring parents in a courtroom to battle out their differences seldom dampens grievances or produces healthy, sustainable outcomes. Some case types need to be viewed through a different lens of dispute resolution – a lens that directs the case towards more facilitated results that the parties can embrace.

An improved system would be simpler in design and accessibility. As previously noted, the American judicial system has its origins in three centuries of practice and tradition. Some might argue it is grounded in traditions older than that given the influence of the English justice system. From its inception and throughout most of its history, the system has remained largely unchanged, committed to the court as the preeminent dispute resolver, wrapped in increasingly intense procedural structures designed to channel conflicts towards the courtroom. As the late Frank E.A. Sanders observed years ago, "We have tended to assume that the courts are the natural and obvious – and only – dispute resolvers." When that is the case, the default setting for court as resolver is the adversarial battle in the courtroom. This has been, if you will, the "commitment." But, as Sull noted, long-engrained commitments harden over time even when they might not make sense in an emerging environment.

While there have been some changes in the public justice system, it remains largely framed around the notion of fully-represented parties operating in a procedurally intense structure designed to channel conflict to an adversarial output of winners and losers. Yet, with increasing regularity, many people appearing at courthouses are not represented by attorneys, do not understand the complex procedures, and are more interested in resolving a problem than furthering a conflict.

To be clear, procedure is important when it is grounded in protecting core values such as due process, access to justice, fairness, objectivity, and equal protection. But when such values are superseded by dogmas undergirded by vast unintelligible procedures, we have lost most of the public. Our intensely procedure-based system should be re-examined with an eye towards great clarity, simplicity, and accessibility to multiple mechanisms of dispute resolution. Knowing what we know today about the needs of the public, should we maintain our commitment to such complexity?

In tandem with answering the complexity question, a reframed system would provide programs that are scaled and scalable, built on a foundation of triage where end-users' needs are assessed early on and matters – not just cases – are directed towards a resolution process tailored more specifically to the underlying dispute.

It would migrate away from the notion of courthouse and towards the institutionalization of truly diversified "justice centers." The great jurist Oliver Wendell Holmes once thundered at a young lawyer, "This is a court of law not a court of justice." Most people come to the courthouse seeking justice not law. The pursuit of justice often requires

more nimble understandings of human conflict and dispute resolution than a court of law as Holmes would understand that terminology.

Finally, such a system would recognize the continuing need for agility by elevating all forms of dispute resolution to quasi-equal status within the umbrella of the public justice system. We would no longer talk about the "big A" approach and the "little a" approach to dispute resolution. A commitment to institutional agility ignores this distinction and encourages an intellectual investment in new approaches to dispute resolution. This would enable the system to handle all manner of disputes, or, if lacking that capability, have the willingness to refer matters to others with innovative programs and expertise. It would recognize that, for dispute resolution to be effective, a public-private partnership is needed because only a court can speak with finality but getting to that point may not always be necessary. In the end, some disputes ultimately do need someone to make a final judgment because the parties cannot work out their differences. This should not, however, be the first step. It should be the last.

The questions that we are being forced to confront are: Knowing what we know, would we design the system we have? Should we remain vested in certain commitments constructed over 300 years?

To some degree, we have begun to answer the questions as seen in the incremental changes that are occurring. This does not, however, have to be a throw-the-baby-out-with-the-bathwater moment. There are principles and traditions worth protecting because they continue to make sense.

Yet, in our quest to answer zero-based questions, we should heed one of Sull's other cautions. When we should look deeply into the core of the issues, we should not engage in "active inertia" by thinking that we are doing something sweeping when we make changes only "on the edges" that essentially perpetuate an outdated system.

It is important to answer fundamental questions about our dispute resolution system in a systematic and penetrating fashion so that it will diversify in a manner than satisfies people's real needs for justice and dispute resolution, protects their fundamental rights, produces sustainable outcomes, fosters a predictable legal system, and promotes social stability.

Engaging Deep Differences Online

[Rachel Viscomi](#) describes how we can use online communication to help people engage with others who have deeply felt differences. She is Assistant Clinical Professor at Harvard Law School and Director of the Harvard Negotiation & Mediation Clinical Program.

As we approach the next election, we continue to confront important challenges about engaging across deeply felt differences. Our country remains polarized, and many feel disconnected from those whose views differ from their own. Against this background, many in our field have worked to bring people together to learn from each other in facilitated dialogue settings.

A theory of change for traditional dialogue efforts might look something like this:

If we bring people of different views together to talk with the guidance of a skilled facilitator, they will learn from each other about the experiences that inform their respective views and ultimately see each other in a more complex way, helping to open their minds more broadly to the humanity and complexity of others with whom they disagree. Eventually, we will reach enough people through direct dialogue opportunities to trigger a collective shift in our thinking as a nation about how we engage each other on these issues.

There is evidence that supports this basic theory of change. Direct dialogue work can help people build relationships and expand their understanding of other perspectives. Gwen Johnson described her experience in [Hands Across the Hills](#), a project bringing together people from Kentucky and Massachusetts with different (and some similar) perspectives. In the Harvard Negotiation and Mediation Clinical Program [Thanks for Listening](#) podcast, she said, "I think that it has stretched my mind and now that it's been stretched, it can't go back to its original size."

At the same time, as many of us who've done this work can attest, coordinating traditional facilitated dialogues is time-consuming and requires a significant amount of logistical work – publicizing the initiative, recruiting folks who are willing to come together to talk with others about their views, coordinating many schedules for a multiple session engagement, training and assigning facilitators, etc. It can be especially challenging to attract a robust diversity of views given geographic or institutional demographics. While some programs have addressed this last challenge by bringing people from different parts of the country together in person, the logistical and funding barriers make it challenging to imagine doing this at scale.

Using the Internet to Increase Dialogues

The comparative simplicity of setting up online dialogues would allow us to increase our reach and ability to connect people significantly. While the foundational theory of change would remain essentially the same, our transaction costs would be greatly reduced, and our range would expand exponentially. If your neighbor had a great experience in an online dialogue series, she could forward you a link and recommend that you give it a try yourself. She might send that same link to a friend from her hometown, her brother in the Midwest, and her best friend who is stationed abroad.

Given that we'd be able to extend invitations to people across the country, our ability to source a wide range of viewpoints and experiences should increase. We could publicize this effort with email outreach to local libraries, community colleges, and political groups across the political spectrum nationwide.

Our sign-up link could bring interested participants to a central website where they could indicate interest, availability, and topics they'd be interested in discussing. Ideally, we'd also ask people to offer some indication of their views on that subject so that we could ensure a rough mix of perspectives. Once a minimum of 6-8 people were available who shared similar topic interest and availability, we could assign a facilitator who would extend an email introduction and video conferencing link for the first session.

It would be easier to recruit skilled facilitators once we would no longer need everyone to be in a shared geographic location. As demand increased, we could continue to expand our roster by offering video-based facilitation training and coaching. We could work to attract more facilitators from underrepresented communities, increasing the range of perspectives on the facilitation team and opportunities for learning through co-facilitation. While we're at it, let's leverage our online platform to enable a learning hub for facilitators to discuss and reflect on their experiences. And given that our dialogues will already take place using video technology, the ease of recording a conversation (assuming participants signed a consent form, of course) means we could easily amass a trove of data that could enable interesting research.

Would we lose something with this approach? Of course. It's harder to build relationships online. And virtual dialogues are hard to access if you do not have some technological savvy and the requisite resources including a computer, high speed internet access, and free time.

However, we'd also gain something. We'd expand access, decrease the time and cost of organizing this work, and give more people the ability to connect with their fellow citizens directly, rather than forming their views of them based on how they are portrayed in the press. We might even generate enough interest in dialogue from folks who had participated online that we could set up follow-on in-person sessions with less front-end work.

A simplified theory of change might look something like this:

If we convene facilitated video-based conversations online, we can enable people from different areas of the country to build connections with others and learn about how they see the world, expanding their understanding and sense of connection. Those who enjoy the experience will share their experience with others, increasing the reach of the work. The more people we reach, the greater likelihood that we'll eventually help shift the way we relate to each other.

Who's with me?

Floods, Fires, Drought and More: The Climate is Changing and Dispute Resolution Tools are Needed (Now!)

[Lara B. Fowler](#) notes that addressing climate change – both in reducing greenhouse gas emission and adapting to the impacts from a changing climate – requires incredibly difficult conversations. She argues that the tools of dispute resolution – negotiation, mediation, and even arbitration – are critical in addressing these global challenges at all levels, local to global. She is a Senior Lecturer at Penn State Law School and Assistant Director for Outreach & Engagement, Penn State Institutes of Energy & the Environment. Currently, she is in Sweden on a Fulbright researching where people are working together on challenging water issues.

The Crisis and Opportunities in Climate Change

As I watch the news from Australia of the absolute devastation from numerous, massive wildfires or read about the worst ever floods in Jakarta, Indonesia, I see, now more than ever, the critical need for good dispute resolution tools to help address climate change issues. The urgency highlighted by the daily news provides a very good opportunity for the dispute resolution community to share our skills in negotiation, facilitation, mediation, and to be aware how arbitration is being used to shape outcomes related to climate change.

In the climate change world, the terms "mitigation" and "adaptation" are terms of art. Mitigation is the reduction in greenhouse gas emissions, notably carbon dioxide but also a range of other gases like methane or even nitrous oxide (used as an anesthetic in medical procedures). Adaptation is the process of adjusting to the impacts resulting from climate change, such as moving a town because of eroding coastlines, cutting electricity deliveries to avoid fires, or pumping groundwater to handle drought conditions. Obviously, mitigation and adaptation are extremely difficult tasks.

In response to the U.S. Government's announcement of its intent to withdraw from the Paris Climate Agreement, some cities, states, tribes, businesses, universities, healthcare organizations, and faith groups created a coalition called "[We're Still In](#)." This coalition represents a commitment by the signatories to reduce their own greenhouse gas emissions and meet the goals of the Paris Climate Agreement.

Climate change is both a challenge and an opportunity. It is predicted to act as a "threat multiplier," magnifying underlying tensions into larger threats and conflicts. As I work this year in Uppsala University's Peace and Conflict Research Department, I'm surrounded by discussion of armed conflicts and the devastating human impacts that result.

Climate change also is an opportunity. In her [2016 TedTalk](#), Christiana Figueres, the leader of the Paris Climate negotiations, noted that climate change gave her optimism, in part because of how it was bringing unusual parties together. Though global dynamics have changed since 2016, the We're Still In Coalition has made remarkable progress. In 2019, the [Global Commission on Adaptation](#) found that investing now in adaptation can repay up to ten times the amount invested, saving trillions of dollars over the long run.

The challenges of mitigation and adaptation offer critical opportunities to take advantage of our dispute resolution tools. People with negotiation, facilitation, and mediation skills could be incalculably valuable in having more productive conversations at all levels. Arbitration is already being invoked in many energy related disputes, especially investor-state disputes. In talking with a colleague who focuses on arbitration, a significant number of arbitration decisions are energy-related.

What Can We Do?

Based on my experience having worked in public policy for the State of Oregon, as a private practice facilitator and mediator, and now working in the academic sphere, I think there are many ways we can use dispute resolution skills to address critical problems of climate change. The following are some possible ways forward, which are not ranked in priority and which could be pursued simultaneously.

Work with Our Students to Engage Local Communities on Climate-Related Issues. Our students are quite aware of the concerns related to climate change and may be interested in knowing that their dispute resolution skills could be put to use locally. Many communities are trying to achieve climate-related goals. While focused on the **substance** of what they want to accomplish, such communities may not be as focused on the **process** to ensure that their goals can be supported and effectively implemented. Clinics, classes, or even individual students can be of immense help to a community or group thinking through these issues.

As an example, I taught "Mediation of Environmental and Public Policy Issues" during the 2018 spring semester. In this course, my law students helped facilitate a public dialogue on water management in our local region. They interviewed interested parties, conducted a situation assessment, and then worked with local elected officials to set up and conduct a public event that brought together more than 120 people. My students were thrilled to both learn skills and help the community. In turn, community leaders were pleased with the very professional help they received from the students.

Going forward, we need to solve some problems to use students to accomplish these goals. My students are concerned about getting practical experience and skills. How can we help meet our students' and communities' needs at the same time?

How can we match students' need for professional skill building with community needs? How can we convince local stakeholders that dispute resolution skills can be quite helpful in having very challenging conversations? How can we bridge the environmental world and the dispute resolution world, much as Lawrence Susskind has done at MIT or the University of Utah's S.J. Quinney School of Law's [Environmental Dispute Resolution Program](#) has done?

Bridge Areas of Expertise Within a University or Community. Changing energy systems and adapting to climate impacts require a wide range of knowledge. In a university system, it is critically important to engage colleagues working on climate science, energy, or other climate-related subjects. Colleagues at Penn State, for example, want more productive conversations within research teams; between research faculty, post docs, grad and law students; with policy makers; and with communities. In particular, I have heard a marked interest in negotiation training. We, in the dispute resolution world, can help lay the groundwork for better engagement about key climate challenges.

We should engage with existing programs and leverage the work we are doing to address climate challenges. We should partner with others who already focus on team science. For example, the [Interdisciplinary Integration Research Careers Hub \(Intereach\)](#) recently hosted [a webinar](#) on careers in team science facilitation. The [University Network on Collaborative Governance](#) also focuses on bridging university programs focused on collaborative governance.

We should build specific programs that seek to bridge between universities and communities, such as the University of Maryland's Francis King Carey School of Law's [Public Policy Conflict Resolution Fellows Program](#), which "brings together a diverse group of influential Maryland leaders to expand their negotiation, conflict resolution, and consensus-building skills" through 2.5 day training session. Another example is Florida State University's [Civic Advance Project](#), which recognizes communities for their engagement efforts. In one of these efforts, the [City of Smyrna Beach](#) "held a 10-month civic input process to gather ideas regarding resiliency and sustainability. One outcome was the creation of a \$15 million bond issue to purchase land that was slated for development along a critical watershed, Turnbull Creek. The group did significant public outreach. The bonds were approved with over 75% of votes cast."

Create "How To" Guides for Effective Processes to Address Climate Change.

I have been impressed by Ohio State's Moritz College of Law's [Divided Communities Project](#) in compiling key lessons learned from communities facing civil unrest.

Developing ADR tools and working with agencies at different levels can help bridge the dispute resolution and climate change worlds. Although there are numerous guides related to public policy engagement in general, we should develop similar materials specifically relevant to communities struggling with climate-related goals. This would take working together as practitioners, academics, and various stakeholders to

assemble straightforward and easy-to-use materials for communities or businesses to collaborate in achieving their climate-related goals.

An interesting example comes from California, which passed the State Groundwater Management Act in 2014 during the state's five-year drought. As part of this initiative, California [provided for facilitation assistance](#) and a set of tools for communities working to implement local regulations. In 2019, a [study](#) looking at the development of local groundwater agencies suggested that "local and state agencies should be doing more to educate their members on the value of alternative dispute resolution processes, like mediation and facilitation."

Bridge Areas of Expertise within the Legal Profession and American Bar Association. There are a lot of efforts in the legal world to deal with problems of greenhouse gas emissions, but there seems to be less linkage with the dispute resolution world.

In 2018, Michael B. Gerrard and John C. Dernbach published a book entitled, [Legal Pathways to Deep Decarbonization in the United States](#). In August 2019, the [ABA adopted a climate resolution](#) encouraging its members to do pro bono work related to climate, particularly reduction of greenhouse gas emissions. These proposals particularly focus on changing laws associated with greenhouse gas emissions, such as promoting energy efficiency.

As Brian Farkas noted in his post, ["A Modest\(ish\) Proposal: Enhancing Impact Through Joint Spring Conferences,"](#) we could build bridges between different parts of our own constituencies such as between the ABA Dispute Resolution Section and the Section on Energy, Environment, and Natural Resources (SEER). Several years ago, I worked with others to conduct a session at the Dispute Resolution Section conference on stormwater management. Unfortunately, this session was seen as an outlier and had only limited attendance. There may be many reasons for this, but connecting dispute resolution and substantive issues is important to realize our field's potential to solve important social problems.

The opportunity for bridging and leveraging different sections, or sub-committees, is very real. SEER has a committee on [environmental dispute resolution](#) and a different committee on [climate change, sustainable development and ecosystems](#). The Section on Dispute Resolution has a committee on Public Policy, Consensus Building, and Democracy. We should collaborate with each other.

The Pace Environmental Law Review and the Pace Energy & Climate Center offer an opportunity for this kind of discussion through an upcoming conference in November 2020 on energy and decarbonization. A call for abstracts is out now, due in May 2020; for more details, see [online](#).

Recognize Arbitration as a Key Part of Addressing Climate Change. Arbitration is an increasingly important part of the dispute resolution toolkit in energy and climate-related topics. At a global level, cross-border disputes are likely to end up in arbitration. During a panel on energy and arbitration during the 2017 Penn State Energy Days forum, one speaker noted that the vast majority of energy cases are arbitrated. As noted above, many cases in arbitration deal with energy issues. In 2019, the International Chamber of Commerce (ICC) published a report entitled, "[Resolving Climate Change Related Disputes through Arbitration and ADR](#)." While it discusses mediation as one tool, most of the report focuses on potential arbitration of climate-related disputes, particularly at an international level.

When we teach about arbitration, we should help our students better understand the substantive concerns related to climate change and energy. As noted in the ICC's report, finding arbitrators who understand energy is a critical challenge.

There seems to be a sizable split between mediation and arbitration in the dispute resolution world, yet both these tools are important in preventing and resolving disputes. We should think constructively about how the various tools of dispute resolution can be used together.

Conclusion

The challenges of climate change are playing out now in communities around the globe. There are tremendous opportunities for our dispute resolution field to constructively engage with efforts to reduce greenhouse gas emissions and adapt to the rapidly changing conditions in our communities, regions, states, countries, and planet.

For Pragmatic Romanticism About ADR, Understanding Why the "Haves" Come Out Ahead

[John Lande](#) argues that the consequences of ADR processes are the result of human decisions about how to use them and are not intrinsic to the processes themselves. To counter exploitation by powerful parties, we need to understand how they see their interests and we should have realistic expectations about the effects that ADR processes can produce. He is the Isidor Loeb Professor Emeritus at the University of Missouri School of Law.

"Mediators equalize the power between the parties." Have you heard that claim?

I used to hear it with some frequency, though (fortunately) not much lately.

Considering this idea even for a nano-second, obviously it is wildly optimistically untrue as a generalization – and it doesn't even make sense in individual cases.

Some of the discussion at the Past-and-Future Conference about successes and failures of our movement prompted me to think about this. Jean Sternlight referred to Marc Galanter's classic article, *Why the "Haves" Come Out Ahead*, and noted that people generally act out of self-interest. This analysis should prompt us to have realistic expectations about what our field can and cannot accomplish.

If you haven't read Galanter's article, let me suggest that you check out this [post](#) about my book chapter, *For Pragmatic Romanticism in Law and Dispute Resolution: Reflections on Galanter's Remarkably Realistic Analysis of Why the Have-Nots Come Out Behind*. The chapter is only slightly longer than the title and the post includes a link to Galanter's article.

His article provides a cautionary analysis of potential strategies that were more and less likely to help "have-nots." Inspirational images of advocates like Ralph Nader created unrealistic expectations of the potential for more law, courts, and lawyers to promote social progress. Galanter argued that while these factors could be useful in such efforts, organizing "one-shotters" (the "have-nots") into repeat-players (the "haves") is critically important. Without this transformation of the parties, repeat-players generally are able to thwart one-shotters' legal strategies. Based on this analysis, he suggested plausible strategies for helping have-nots.

Galanter essentially cautioned against what Carrie Menkel-Meadow later called "litigation romanticism." She favors romanticism about some things, including the legal system, and argued that "to love an idea or institution realistically we need to see the object of our love as it really is."

For Pragmatic Romanticism About Dispute Resolution

We need to avoid the trap of **unqualified** ADR romanticism. These days, folks in our field generally don't subscribe to the simplest versions of this romanticism such as the notion that mediators equalize power. Indeed, many of us are quite critical of various aspects of ADR.

There is much to criticize about the way people use ADR, and there are opportunities for improvement. Perhaps the most egregious contemporary example of haves' taking advantage of their power is the use of adhesion contracts to force have-nots to use arbitration, especially without the possibility of class-wide arbitration. In negotiation and mediation, haves regularly use their power to impose unfair processes and results with little participation by the have-nots. The list goes on.

Academics and professional practitioners are right to point out problems and to promote improvements in current ADR practices. Our scholarship sometimes influences courts and other policymakers to make changes. We provide advice, such as being reporters for uniform laws. We help develop and operate innovative ADR processes. We are most likely to be effective when our ideas support (or are not inconsistent with) the interests of powerful stakeholders.

We should be humble and realistic in our expectations about what we can (and should) do to remedy problems with ADR processes. This is a similar perspective as mediators who treat the parties as being responsible for their decisions, good and bad. When parties follow our suggestions and produce good results, ultimately it's their responsibility (with some help from us). When they don't follow our advice, that's also their responsibility, clearly not ours.

Just as having more law, courts, and lawyers won't offset the power of the haves, as Galanter suggests, certainly just having good ideas and dispute resolution processes won't do so either. He teaches that when powerful interests are determined to use their power, the main way to neutralize it is by having less powerful interests coalesce to get more power.

For example, we can argue until we're blue in the face about the unfairness of binding pre-dispute arbitration clauses and non-disclosure agreements in sexual harassment cases. Powerful employers that use these agreements are not likely to be persuaded to change their practices until something like a #MeToo movement pressures them to do so.

The Need to See the World Through Others' Eyes

Pragmatic romanticism also requires us to have realistic understandings of the perspectives of people and entities who we think are using problematic practices. "ADR" is an inanimate set of processes without human agency, so we should focus on

how people use ADR processes and not assume that any particular ADR processes have universal, intrinsic qualities independent of how people use them. Sometimes, powerful stakeholders have bad motives and sometimes they are struggling to do the best they can given their perceptions of their circumstances. In either case, we are more likely to achieve our goals by accurately understanding their perspectives.

Here's an example. What could be dumber than savvy business executives routinely hiring lawyers to handle continuing flows of extremely expensive, lengthy, and risky disputes in litigation? This seems to make no sense for repeat-players who are very sensitive to the huge costs and risks of litigation. One might understandably assume that they are out of their minds.

Peter Benner and I did a [study interviewing inside counsel about why their companies used planned early dispute resolution systems – and why other companies often don't](#). Turns out that in many companies, most of the players have interests in maintaining the status quo and they feel that it's not in their interest to change. While it's easy for an outsider like me to assume that I know what other people should do, I can easily imagine that I would act as they do if I were in their situations.

Being pragmatic requires having realistic expectations and using appropriate standards for evaluation. Like all human institutions, ADR is imperfect – and, of course, "it" is many very different things. Rather than evaluating it by comparing it to an unattainable ideal or unrealistic claims (such as equalizing power), we should compare it to plausible expectations and other institutions, such as the traditional legal system. Considering various criteria for evaluation, we should assess how much net benefit various categories of parties receive using ADR processes compared with other institutions or reasonable expectations.

I admit to having romantic visions for our field. I have had a "mediator's high" and seen how we have improved life for many people. I am also disappointed that people and institutions have not taken advantage of much of ADR's potential and have abused it in significant ways.

As a predicate for pragmatic efforts to pursuing our romantic visions, we must see ADR as it is, recognizing both the virtues and vices in the ways that people use it.

Part of seeing the world as it is involves understanding how the world looks through the eyes who experience ADR. Qualitative interviews – by [faculty in their scholarship](#) and students in [Stone Soup assignments](#) – are remarkably helpful for this task. And more fun than a barrel of monkeys.

Impact and Use of Technology

Technology. It's both a blessing and a curse. These days, even [digital immigrants](#) can't live without it. It creates opportunities to improve our lives that were unimaginable decades and even years ago. In the dispute resolution world, it not only spawns discrete online dispute resolution systems, but it changes the way that lay people, professionals, and organizations handle conflict, and it is revolutionizing the way that many courts operate. So far, mostly so good.

It also brings risks that are hard to fully imagine. Powerful technological systems are designed and operated by fallible humans, who may inadvertently build in errors that are hard to detect. This may be especially true as systems increasingly rely on artificial intelligence and the assumptions that these systems "learn." We are creating allegedly "smart contracts" that are made by ordinary humans. [Bad actors can wreak immeasurable havoc](#) by hacking systems, invading privacy, weaponizing data, harassing people, and undermining social institutions.

Like it or not, technology affects people's interactions and conflicts, organizational operations, and conduct of disputing. This section includes pieces that focus specifically on technology in dispute resolution, including benefits, risks, and strategies for managing the risks. Some pieces in other sections also address the effects of technology and how our field should deal with it, especially the ones by [Lisa Amsler](#), [Debra Berman](#), [Michael Buenger](#), and [Rachel Viscomi](#).

In this section, I rave about Noam Ebner's article, *Negotiation is Changing*, which provides an impressive account about the wide range of changes in our lives – particularly technological changes – that should [fundamentally change our conceptions of negotiation and dispute resolution generally](#). Based on an extensive review of how people and their everyday behaviors have radically changed in recent years, Noam writes that "people-as-negotiators, and therefore negotiation itself, have also undergone significant change." As a result, the "negotiation field must explore whether its most foundational skills, and the principles it has accepted near-axiomatically for the past fifty years, can remain unaltered, given negotiator change and negotiation change."

Several contributors describe new opportunities for dispute resolution offered by evolving technology. Colin Rule writes that technology in dispute resolution can provide benefits similar to the multi-door courthouse, helping people choose the best process to solve their problems. It has [great promise to help expand access to justice, build sustainable agreements, and avoid conflict escalation](#). Indeed, he argues that technology can help us evolve and improve our practice.

Alyson Carrel argues that [technology innovation and dispute resolution should go hand in hand](#) and suggests three ways for the dispute resolution field to influence the

diffusion of technology in the practice of law: (1) adopting a new competency model integrating skills from both dispute resolution and technology, (2) exploring the use of legal technology & innovation platforms in OFFline dispute resolution processes, and (3) teaching dispute resolution skills in legal technology & innovation courses. She outlines a "Delta Model" about legal practice that she and others have been developing, comprised of three competency areas: the law, business and operations, and personal effectiveness skills. This model incorporates technology, problem-solving, communication, and emotional intelligence to better serve clients.

Rebekah Gordon summarizes the discussion in a program at the Past-and-Future Conference about how technology affects teaching. Participants discussed how technology can [expand access to dispute resolution processes, affect emotional dynamics in conflict, and create challenges and opportunities in teaching](#).

Chris Draper envisions possible future uses of technology to promote collaborative justice in dispute resolution. He argues that currently, technology is delivering "justice" faster and making injustice transparent, but that it has the potential to do more. He advocates [fundamentally changing the nature of justice by optimizing the process of peer decision-making](#) as compared with the current system of using juries in legal cases and traditional processes in developing regulations. He recognizes real risks, which he generally attributes to "opportunistic design," and he recommends use of rules, plans, and substantive thought about cause and effect to manage the risks. To design "DRTech," he advocates exhaustive modelling rooted in scientific principles and statistically significant data, shifting our technological focus from platforms to processes embedded into current frameworks, and overhaul communication strategy modules when preparing students to work in technology-enabled environments.

While new technologies create new potential benefits, they also create major risks. Amy Schmitz describes the development of "smart contracts" and the challenges in resolving disputes about them. Based on an article that she wrote with Colin Rule, she explains the [need for good dispute system designs to be built into smart contracts](#), which are essentially computer code spread across blockchain nodes distributed throughout the world. Futurists predict that smart contracts will create efficiencies and resolve transactional trust issues. However, although they are nominally "smart," they cannot prevent disputes and, indeed, can create many new types of disputes. For example, there is no single owner of blockchain systems, so it can be difficult or impossible to hold anyone accountable for flaws. There are risks of fake data, hacking, and violations of privacy, and it may not be clear what nations or entities have jurisdiction to resolve disputes or whose law would apply. So smart contracts need their own dispute resolution systems and our community needs to be actively involved to get this right.

Linda Seely argues that ODR systems may be ineffective or problematic in providing access to justice. This is a particular concern for self-represented litigants in small

claims courts. Some providers may focus primarily on making money with little knowledge of or interest in using good ODR practices. To remedy these problems, she advocates for a [coalition of interested stakeholders to produce standards and principles for ODR platforms](#).

Drop Everything and Read Noam Ebner's Masterpiece Right Now

[John Lande](#) raves about Noam Ebner's article, *Negotiation is Changing*, which provides an impressive account about the wide range of changes in our lives that should fundamentally change our conceptions of negotiation and dispute resolution generally. John is the Isidor Loeb Professor Emeritus at the University of Missouri School of Law.

I generally prefer not to tell people what to do. So perhaps I should reframe the title to "If You Don't Read Noam's Masterpiece Right This Minute, You Will Hate Yourself Forever."

I refer to [Noam Ebner's](#) article, *Negotiation is Changing*, which is part of the [Tower of Babel symposium](#). He has been thinking about the ideas in this piece for quite a while and I'm thrilled that they crystalized in an article in our symposium, where it fit right in.

When I first heard Noam's premise that negotiation is fundamentally changing, I thought that it was just another one of his crazy ideas. Having read the article, I realize that it is not only a delight to read with his wonderful voice, but it is brilliant. This should be considered as a classic in our field.

In the tradition of [future studies](#) (or what Noam would call "change studies"), it develops broad insights derived from a variety of disciplines to analyze trends and anticipate future developments. The first half of the article describes general trends in society and you will undoubtedly recognize yourself and others in this analysis. The second half applies these observations to negotiation.

Noam offers a fundamental critique of negotiation theory, though it is relevant to all of our dispute resolution field and beyond. Based on an extensive review of how people and their everyday behaviors have radically changed in recent years, he argues that "people-as-negotiators, and therefore negotiation itself, have also undergone significant change."

Although he focuses primarily on technological changes, he notes that other factors, such as gender, culture, and the environment have been changing rapidly, which may contribute to changes in negotiation.

"Once you look for change, it is everywhere." He describes how people's bodies (especially our brains) are physiologically changing, and how we are changing our behaviors, are being changed by our new behaviors, and are interacting in new ways. He illustrates his thesis by describing changes in behavioral, psychological, and emotional elements of negotiation including attention, communication, empathy, and trust.

He uses these points to show how these elements of the classic book, *Getting to Yes*, are different than they used to be. Moreover, the overall effects of these changes may be greater than the sum of the individual changes. As a result, he argues that the "negotiation field must explore whether its most foundational skills, and the principles it has accepted near-axiomatically for the past fifty years, can remain unaltered, given negotiator change and negotiation change."

He notes that negotiation scholars and teachers are "prone to the status quo bias, given our vested interest in things staying largely the same, allowing us to use largely the same textbooks and teach the same courses" rather than questioning the validity of our traditional canon of negotiation theory. He urges us to undertake a new research agenda, considering this canon through "a combination of candid reflection and research replication [and] subject it to tests of relevancy, accuracy and suitability."

So do yourself a favor and read it right now. You don't want to hate yourself forever, do you?

Integrate Technology into the Practice of Dispute Resolution

Colin Rule urges the dispute resolution community to integrate technology into the provision of mediation and arbitration, as well as training and certification of mediators and arbitrators. He is Vice President for Online Dispute Resolution at Tyler Technologies. In 2017, Tyler acquired Modria.com, an ODR provider that Colin co-founded. From 2003 to 2011 he was Director of Online Dispute Resolution for eBay and PayPal.

Technology and the Multidoor Courthouse

In his famous 1976 speech, "Varieties of Dispute Processing," at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (now usually referred to as the Pound Conference), Frank Sander envisioned a future justice system that could direct parties into appropriate pathways customized to the particulars of their disputes. Frank wondered aloud whether the "courts of the future" (in particular, courts around the year 2000) might help to screen incoming complaints, matching each dispute with its most appropriate form of resolution.

There's no way that Frank could have envisioned the coming invention and expansion of the internet as he delivered that speech in St. Paul more than 40 years ago. But the rise of the internet since then has transformed our society, creating opportunities exactly along the lines he predicted.

Technology now enables us to customize almost every area our lives, both personal and professional. Many of us know millennials who find it hard to imagine how we got anything done in the days before we could text, videoconference, or surf the internet. How did we find people at the airport? How did we figure out the latest conversion rate from pesos to dollars? As the years progress, it's getting hard to remember how we managed to get anything done.

But if we now leverage technology so thoroughly, it makes sense that we would also use it to transform the way we resolve disagreements and disputes. Most people use technology tools to complete the items on their to-do lists every day, so they now expect that they will also be able to draw upon them to resolve any problems that they encounter. From minor annoyances with eCommerce purchases to parking tickets to restaurant complaints, technology already is making it easier to find solutions when problems crop up. Now technology is being applied to more complex emotional disputes, like workplace issues or divorce and custody cases, and higher-value matters, like commercial and contract disputes. Just like finding people at the airport, we'll never go back to the way it was before.

All societies need to provide their citizens access to just means to resolve disputes, and as our society moves online, there are more opportunities to provide that access through technology. Citizens now demand efficient and effective redress 24x7 because that's the level of responsiveness they already enjoy on websites like Amazon and Google. We need a justice system that works the way the internet works. In the future, resolution processes should not be dependent on geographic location, because the internet makes determining a precise location for each interaction almost impossible. We need to design a new justice system that works at the speed of technology, enabling fast and fair resolutions anywhere within the reach of the internet.

Changing Disputes Necessitates Changing Dispute Resolution

Many professions have been transformed by technology. If you think back to the 1950s, the practice of medicine was very much a hands-on discipline. Today, however, technology is everywhere in the practice of medicine, from telemedicine to MRIs to laser surgery. The same is true in the world of finance. Stock trades used to happen face-to-face on the floor of the stock exchange, with people holding little slips of paper and calling out their orders. Now financial markets operate at the speed of light with computers conducting trades in milliseconds. A stock trader from 1980 would be amazed to see the trading floors empty in 2020, replaced by server farms conducting millions more trades in the blink of an eye.

But even as technology has transformed those professional fields, the fields themselves did not go away. The introduction of technology increased the efficiency and effectiveness, but it did not replace humans – it just changed their role. Now there are even more people employed in the fields of medicine and finance than there were before technology took over, but now people manage the technology instead of doing all the work by hand.

This kind of change has now come for the law – and by extension, dispute resolution (because dispute resolution lives in the shadow of the law). These changes are not being driven primarily by lawyers, bar associations, judges, or court administrators. They are being pushed most significantly by the disputants and litigants themselves. The long delays that are routine in the judicial system are out of sync with the fast pace of life in our newly digitized society. Disputants now demand faster, cheaper, and more efficient resolution processes that deliver outcomes in days or weeks instead of months or years. They're no longer willing to pay large retainers and be billed by the hour to resolve their cases over a long period of time. Technology is giving them the means to push for the kinds of changes they want.

The legal system also is suffering from several crises that are accelerating the move towards digitization. One is a very high rate of self-represented litigants (SRLs). Many courts report that 50 to 60% of the new cases being filed are coming from SRLs, which frustrates litigants and creates administrative costs for the courts. Also, state

legislatures are cutting budgets for court systems. Politicians must balance many competing priorities in making budget decisions, and when resources are tight, the funds allocated to the courts are being reallocated to matters considered more pressing. In addition, law schools are reporting that it is harder for recent graduates to find paying positions in the law than it was 10 or 20 years ago. To save costs, some law firms have outsourced their entry-level work to less expensive employees and contractors in other parts of the world. This is making young people more hesitant about choosing a legal career. The strategy for dealing with these issues can't be going back to the way things worked before the Internet.

These changes bring new challenges, surely, but they also present opportunities. The biggest opportunity may be the use of technology to expand access to justice. In the past, many people didn't bother to pursue redress for minor annoyances because they sensed that the resolution process would be more of a headache than a fair resolution was worth. But now that technology has made pursuing redress easier and more convenient, the calculation has changed, so more people are deciding that they want to pursue resolution. Technology also is enabling the creation of new paths to redress in the private sector alongside traditional resolution forums like the courts, enabling parties to select the path they feel most suits their needs.

Overcoming Reluctance to Embrace Change

Many experienced mediators may feel a sense of dread when reading this piece. They may ask themselves, "Why is it necessary that we re-invent face-to-face processes that currently are effective and that we have worked to refine over the past few decades? Plus, there is so much we do not know about the effectiveness of these new techniques. What is the sense in fixing something that is not broken?"

The answer is that using the same techniques while society is changing radically due to technology is likely to reduce the effectiveness and utilization of dispute resolution services over time. If the dispute resolution field is to stay relevant and useful to the younger generation (who eventually will become the older generation), it is important to engage with these changes and learn when and how to leverage technology.

Part of the hesitation about welcoming this move to online dispute resolution (ODR) may be generational. Most young mediators are very comfortable with technology and are open to integrating it into the way they service their parties. Eventually, all mediators may appreciate the benefits of ODR, just like their clients. After all, being able to reach agreements from anywhere – including your home office, at the pool, on the golf course, or at the beach – can be pretty great. ODR can expand the reach of one's practice and increase efficiency by handling a lot of the administrative minutiae that prevents mediators from focusing entirely on the needs of the parties.

ODR certainly is not a panacea. People are just as complicated on either side of a computer-based interaction as they are face-to-face. There is nothing magical about the use of technology that suddenly makes all disputes easily resolvable and makes parties more reasonable, less angry, and less emotional. However, research to date indicates that technology does have great promise in helping to expand access to justice, build sustainable agreements, and avoid escalation. We can identify which disputes and at what point in each dispute that technology may be most helpful in assisting parties to reach agreement. By building on existing ODR platforms and leveraging dispute system design frameworks to address the full spectrum of design criteria, it's easy to see how ODR can enable mediators to help more people reach better outcomes around the world. Mediators, provider organizations, and courts can learn about the advantages and challenges in using ODR for cross-border disputes so they can best decide when to use – and not use – technology with their parties.

I've been sensing a bit of fatalism that has crept into the dispute resolution field as of late. Law school professors who have specialized in ADR are retiring and are being replaced by professors who specialize in other disciplines. There is a sense that some of the energy has drained out of the movement. Some suspect that we may have already seen the high-water mark for ADR and we're now starting a slow decline.

I think the cynicism about our current politics in the US and the adoption of intentional conflict escalation by our leaders has more than a little to do with this sentiment.

But I think we need to take the longer view. If we can evolve our practice to leverage technological change instead of being threatened by it, I believe we have many higher water marks still in our future. Eventually, the political winds will blow in another direction, and our leaders may come back to us to learn how conflict resolution can help us heal. In the meantime, the changes wrought by technology will only accelerate. My grandfather always used to say, "Don't build your business where the highway is, build your business where the highway is going." This is good advice for everyone trying to future-proof their field and their movement. Leveraging the flexibility that undergirds dispute resolution to build for the future can help us do exactly that.

Conclusion

When Frank Sander gave his speech in 1976, his vision of a courthouse with multiple pathways to justice was a radical concept, but the wisdom of his recommended approach transformed the provision of justice in the United States over the next few decades. I think that when he spoke about "courts of the future" in the "year 2000," he was predicting something along the lines of the possibilities that have been opened by ODR. Instead of a clerk at a desk, routing disputants to one of a dozen doors inside a physical building, ODR aims to make every mobile phone a point of access to justice, with algorithms dynamically directing cases toward hundreds or thousands of virtual

doors available to fit each disagreement to a specifically crafted and appropriate forum for resolution.

As the adoption of ODR by courts continues to accelerate, growing from dozens to hundreds to thousands, there is a direct line back to the future envisioned in Frank Sander's speech. The algorithms that ODR relies upon are getting smarter and more powerful every day, which means they are getting more effective at sorting cases into appropriate resolution channels. It is undeniably true that the power of technology to resolve disputes is dwarfed by the power of technology to generate new disputes. But ODR can expand access to justice, make courts operate more efficiently, and encourage citizens to pursue redress as opposed to giving up. We truly stand on the shoulders of giants like Frank Sander. Now the burden is on us to follow through on the promise of his original vision and to keep ADR vibrant and relevant for the future.

Opportunity to Influence at the Intersection of Dispute Resolution and Technology

[Alyson Carrel](#) argues that technology innovation and dispute resolution should go hand in hand. She presents three pathways for the DR field to influence the diffusion of technology in the practice of law. She is a Clinical Associate Professor at Northwestern Pritzker School of Law and was the Assistant Dean of Law and Technology Initiatives from 2017-2019. [Click here for more information about her.](#)

There is [plenty of evidence of innovation in legal practice due to technological change](#). Experts in legal technology / legal innovation agree with the dispute resolution (DR) field about the importance of human connection and empathy, and they often focus on the interplay between lawyers' adoption of new technology and practical problem-solving. With this common ground, the DR field should take a more active role in legal technology innovation, both learning from and influencing the diffusion of innovation in legal practice.

The adoption of these changes in legal practice is in an early stage, and it relies on thought leaders and influencers to encourage others to participate. The [diffusion of innovation theory](#) suggests that innovations are adopted over time according to different groups' openness to change. People who are most open to change need little to no convincing that the innovation is worth trying and are the first to adopt innovations. The adoption of innovations starts slowly with a small number of people most open to change, and it accelerates as mainstream users influence people who are less open to change. Bill Henderson, a law professor at Indiana and founder of the [Legal Evolution blog](#), wrote, "For roughly 5/6th of the legal market, the [adoption of new innovations is more a social process of imitation than a mental process of analytical reasoning](#). ... Adoption decisions are more than a rational, explicitly stated risk calculations; they are also strongly influenced by the often-unstated desire to fit in or, alternatively, the fear of being left behind."

Last spring, I participated in a symposium at Georgia State University School of Law on the [impact of artificial intelligence on the law](#). Throughout the day, presenters spoke convincingly about the opportunities that artificial intelligence provided for legal practice. I was the last speaker on the last panel of the day, and I planned to talk about the [growing importance of emotional intelligence in the face of increasing reliance on artificial intelligence](#). Instead of following my plan to cite research supporting the importance of emotional intelligence in the law, I ended up sharing quotes from all the day's previous presenters where they, the legal technologists and futurists, talked about the value of emotional intelligence and the role of trust and empathy in lawyer-client relationships. They didn't need any convincing at all – they had already accepted it and were doing the convincing.

It is heartening to know that thought leaders in legal technology and innovation recognize the increasingly important role that emotional intelligence and practical problem-solving will play as the legal profession adopts more artificial intelligence. Unfortunately, DR rarely is part of the conversation, and, when it is, it often is relegated to a narrow discussion of online dispute resolution (ODR). Similarly, the DR field rarely talks about technology and innovation, and when it does, it is equally relegated to a narrow discussion of ODR.

Yet there is tremendous overlap in the skills being taught in legal technology and DR courses because both have a shared focus on a better understanding of and relating to clients. There is a [growing number of legal technology programs and initiatives](#) in law schools, which represents an opportunity for the DR field. To leverage this opportunity, academics should recognize the role that technology will play in DR processes and the role DR skills do play in legal technology innovation.

The DR field should enter the conversation about technology & innovation and help shape the future of the legal profession. We successfully played this influencing role when ADR was the shiniest innovation in legal education. We can take on this role again now that the shiny new thing is legal technology and innovation.

Here are three entry points where we can join the conversation and become influencers:

1. Adopting a new competency model integrating skills from both DR and technology
2. Exploring the use of legal technology & innovation platforms in OFFline DR processes
3. Teaching DR skills in legal technology & innovation courses

Using the Delta Model to Define Legal Competencies

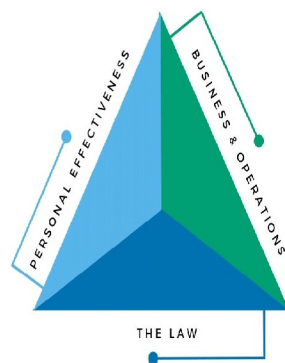
We should adopt a new competency model for 21st Century legal professionals that recognizes the interplay between technology, problem-solving, data analytics, and emotional intelligence – and that provides law schools, law firms, and other organizations a model to visualize and understand the relationship between these skills.

For the past 18 months, I have been part of a working group developing the [Delta Model](#) – a new competency model that shines a spotlight on the important role problem-solving skills, communication, and empathy play given the increased focus placed on technology & innovation.

It is comprised of three competency areas: The Law (understanding clients' legal issues), Business & Operations (understanding the tools and technologies related to the delivery of legal services, business of law, and legal operations), and Personal Effectiveness Skills (having the self and relationship awareness to work with others and understand clients' issues beyond the law).

DELTA MODEL

a competency model for
the 21st century legal professional



The delta model is comprised of three competencies, representing the knowledge, skills, and abilities related to:

- The Law - understanding clients' legal issues
- Personal Effectiveness - having the self and relational awareness to work with others and understand clients' issues beyond the law
- Business & Operations - understanding the tools & technologies related to the delivery of legal services, business of law, and legal operations

© 2019, [@DeltaModelLawyr](https://www.alysancarrel.com/delta-competency-model), <https://www.alysancarrel.com/delta-competency-model>. The Delta Model working group is comprised of Alyson Carrel (Northwestern), Cat Moon (Vanderbilt), Shellie Reid (Michigan State), Natalie Runyon (Thomson Reuters), and Gabe Teninbaum (Suffolk).

Including all three competency areas in a single model is intended to show that each area is important in the development of legal professionals. Every lawyer must have some of each of these skills to be successful, but not necessarily an equal skill level in each area. The balance of the three areas that particular individuals need will vary depending on their role and the organizations where they work.

By distinguishing the skills associated with personal effectiveness, the model strategically creates space in which the DR field can play a significant role as the legal profession shifts focus to technology & innovation. This model provides an avenue for our field to connect with legal technologists.

The Delta Model, which provides a platform for DR scholars and practitioners to influence the adoption of technology in the law, is receiving a lot of attention and it is

still in development. We hope that law schools, law firms, and organizations will consider adopting it to inform their curricular and professional development efforts.

Using Legal Technology & innovation Platforms in OFFline DR Processes

Although discussion of technology in dispute resolution typically is limited to ODR and is understood almost exclusively as the use of DR where the parties are meeting in an online environment (e.g., text, email, video conference, synchronous or asynchronous), legal technology can do a lot more than just recreate our processes in an ONLINE environment. It can enhance our OFFline processes when parties meet face-to-face (F2F) as well.

Technology doesn't have to take the place of the mediator nor the location of the mediation. It can enhance **parties' and lawyers'** abilities to access and analyze massive amounts of information. Consider this: I don't have dinner with Alexa or Google Home, but I regularly engage Alexa / Google Home when I have a dinner party to ask for information, play a game, or set a timer so that I don't forget the dessert in the oven.

Noam Ebner and I recently published an article about the [use of technology in offline mediation](#). We include examples of mediators using technology during a F2F mediation such as utilizing predictive analytics tools to help parties make BATNA assessments and decision-tree analyses. We predict that the next generation of DR users will demand that mediators use more effective technology tools to facilitate F2F dispute resolution processes. In a follow-up article, we introduce some [possible approaches for exploring these new platforms in a typical mediation training or class](#) to teach students to recognize when and how technology might enhance a traditional, offline, F2F mediation process instead of simply adopting or rejecting it. We want future mediators to assess when and how to adopt technology innovations and, when doing so, ensure the integrity of the mediation process.

Teaching DR Skills in Legal Technology & innovation Courses

There are a growing number of legal technology & innovation initiatives that share an interest in [practical problem-solving skills](#) and in which DR instructors could play a significant role.

One example comes from Dentons, the world's largest law firm, which has created [NextLaw Labs](#), an entirely new entity focused on innovation. NextLaw Labs Head of Product Maya Markovich said, "As technology begins to take on more of the quotidian tasks in industries like law, [the most valuable skills \[for teams\] will be those ... attributes like inclusiveness, emotional intelligence, and empathy](#)." To support their attorneys learning these attributes, Dentons launched a professional development initiative called [NextTalent](#), which highlights the importance of skills such as "leadership, team

development, mindfulness, emotional intelligence, and resilience," to "enable every lawyer and professional in the Firm to develop and unlock human potential in the digital era."

The importance of emotional intelligence also is recognized by the [Institute for the Future of Law Practice](#) (IFLP), a non-profit organization, which trains law students in legal technology & innovation skills such as "business, design, project management, technology, and data analytics." As part of the IFLP application process, students must not only provide the traditional cover letter and resume, but they also must participate in a [structured behavioral interview](#) to demonstrate they have "the initiative and the problem-solving skills, and the interpersonal and teamwork skills, and the oral communication skills to have a good foundation to develop from."

In law schools, new [innovation lab courses](#) are pairing law students and computer science students to engage in "collaborative efforts responding to challenges posed by client partners involving the use of technology to improve legal services." The interdisciplinary faculty running this type of course at Northwestern recognized that students must learn to collaborate and problem-solve in teams of diverse thinkers. For the past three years, the law school's Center on Negotiation and Mediation faculty provided a training module focusing on these skills.

At Suffolk Law School, students can enroll in courses taught through the #1 ranked Legal Innovation and Technology (LIT) Lab. In a recent magazine article describing the successes of the LIT Lab, Suffolk alum [Sammie Elefant](#) implored future law students to take LIT Lab courses by highlighting the practical problem-solving skills she honed, not the new coding skills she gained. She wrote, "What a legal education should be about is learning to become a problem-solver. ... It will be a monumental disservice to not expose yourself to the part of law school that teaches law students how to [collaborate, communicate, and empathize](#) with their clients and business counterparts."

These examples just scratch the surface in describing how professionals who have focused on legal technology & innovation have embraced the importance of empathy, creativity, and problem-solving in legal practice and education.

Why are we leaving it to the technologists alone to spread this message of the importance of problem-solving skills? We should be integral to **their** classes and **their** initiatives. We should be part of their problem-solving sessions, hack-a-thons, and labs. Not only can we teach in legal technology and innovation courses, but we can invite legal technology & innovation faculty to teach in our courses as well.

Conclusion

The increasing spotlight on legal technology initiatives provides an opportunity for the DR field to be part of the development of the legal profession in the future. The spotlight is not only on technology, but also on problem-solving, communication, and emotional intelligence. It is about thinking creatively to better serve clients.

If anything, the DR field needs to step into this spotlight to shine the light on our role training future attorneys using the skills necessary to succeed in a 21st Century practice. We need to broaden our own understanding of what technology can offer by embracing technology in the OFFline settings in addition to the ONline ones.

The new Delta Model of lawyer competence can help administrators, colleagues, employers, and students understand the interplay between technology and emotional intelligence. We should encourage law schools, law firms, and other organizations to adopt it as a guiding principle for curricular and professional development initiatives.

The future is bright if we can see the opportunities before us and actively participate in the innovations resulting from technological developments.

How Technology Affects What and How We Teach

Rebekah Gordon summarizes the discussion in a program at the **Past-and-Future** conference about how technology affects teaching. Participants discussed how technology can expand access to dispute resolution processes, affect emotional dynamics in conflict, and create challenges and opportunities in teaching. She is a third year student at Northwestern Pritzker School of Law.

There's this rumor going around that technology is here to stay. This is the truth. We can't escape computers, phones, apps, webcams, and anything else somebody in Silicon Valley comes up with. Technology is at our fingertips and it is no surprise that it is not always met with open arms. Technology has done more than crossed the threshold of our classrooms – it is mounted on the walls and carried by every student enrolled in our courses.

In a program at the Past-and-Future Conference led by Erin Archerd, Alyson Carrel, and Noam Ebner, participants formed three circles in the Malibu sun and discussed participants' comfort, confidence, and curiosity as it pertains to technology's effect on ADR and how it is taught in the classroom. The following summarizes some themes in the three conversations.

Can Technology Increase Access to Justice and Allow Practitioners to Grow Their Practices? Speakers emphasized there is no one-size-fits-all answer. Some people were optimistic about the use of technology to enable remote participation in dispute resolution processes. This can increase access to justice by enabling low-income litigants to participate while missing less work and promoting environmental justice by reducing participants' travel. One self-identified digital "nomad" gave an example of having completed a mediation with German parties that morning before attending the conference.

Are We Using Technology to Avoid the Difficult Emotional Work of Resolving Conflict? Many people spoke about how technology (in both the ADR and everyday, interpersonal context) can be used by participants to feel safe, but it also can be used to disengage from discomfort. One person described a training in the 1990s in which her trainer argued that arbitration and litigation were "easy" on clients whereas mediation and negotiation that required real courage, ego strength, emotion, and sophistication. Technology allows people to remain distant from each other or from an interaction that would have required some of these traits. This reminded one person of the discussion in an earlier plenary session about whether we are no longer asking clients to do the difficult work of sitting with conflict.

How Can I Incorporate the Topic of Technology in Dispute Resolution into My Course Plan if I Don't Know Anything about It? Here are some suggestions. Ask

your students to help you! You are not alone in this. You can be the expert on negotiation and mediation issues and invite your students to suggest the technology that can contribute to improving different parts of these processes. Giving students a sense of status and making them feel like the experts in the classroom enriches the experience for them. You can do this about incorporating technology in the classroom and in dispute resolution processes. Try facilitating a circle discussion, in which you ask students about helpful ways to use technology in school and watch their eyes light up. Pull on their energy and know-how and turn your curriculum up a notch.

Some may find it unimaginable to fit our ADR principles and practices into a 4x2" phone screen, but what was once impossible is happening before our eyes. For those who want some additional direction, Noam and Alyson just published an article entitled, [*Digital Toolbox Pedagogy, Teaching Students to Utilize Technology in Mediation*](#) describing a variety of approaches for teaching technology in mediation.

The Dispute Resolution Community Should Actively Craft a DRTech Roadmap to Produce Technology That Will Promote Collaborative Justice

[Chris Draper](#) believes that technology is not being strategically implemented to take advantage of the expansive potential of dispute resolution. He advocates development of a strategic dispute resolution technology (DRTech) roadmap to transform our legal system into one that enables dynamic, collaborative justice. He is Managing Director of Trokt, a cloud-based platform that controls complex collaborations.

As a [Xennial](#) engineer with an expertise in reducing risks of human interactions with technology, I got into the dispute resolution community by accident. With nearly two decades' experience in the early-stage startup space (and as the son of a litigator), "justice" too often seems like a game played by specialists in back rooms where powerful experts exploit weak lay people.

Having been immersed in efforts to use technology to prevent miscommunications from interfering from meaningful collaboration, I am convinced that access to collaborative justice – where people's desires do not conflict with others' dynamically, collaboratively-defined rights – is at the intersection of technology, dispute resolution, and society.

The current narrow, specialized, and siloed uses of DRTech are promoting a conception of dispute resolution as a separate function within our legal system as opposed to fundamental practices that could redefine justice. To date, DRTech has been focused on solving two narrow sets of problems: delivering "justice" faster and making injustice transparent.

Efforts to expedite justice include applications that help people pay parking tickets or court fees online, track cases with electronic records, and manage scheduling across organizations. While these are valuable tools, their application paradoxically risks an acceleration of **injustice**. By making processes too fast, making language too simple, or making actions too permanent, these types of tools can allow the powerful to more efficiently exploit the weak. This can divert us from the potential to transform our current legal system into a dynamic system of collaborative justice.

Efforts to make injustice transparent include applications that help examine sentencing bias, inequitable taxation policies, and standardized testing bias. These technologies have allowed us to more accurately characterize the mathematical uncertainties that our minds gloss over, finding correctable trends hidden in the noise of our complex societies. Yet these tools cannot see hidden truths regarding the "why" behind the data. DRTech that makes injustice transparent can only increase the speed and clarity of correlations for which we must determine causation.

Using DRTech to Promote Collaborative Justice

The dispute resolution field has seen most of the DRTech challenges as needs for process improvements. DRTech provides the opportunities to do more than that – to promote substantive justice when the underlying technologies are designed, built, and released in a deliberate and coordinated manner.

DRTech currently is nibbling around the edges of technological structures that could deploy dynamic, collaborative concepts to promote justice and that could be expanded. Here are some examples:

Peer Optimization. We are already seeing tools that can optimize who receives jury summonses based on past participation data. Yet more could be done. What if we could be sure that – no matter where we are – any jury presiding over any dispute is truly made up of our peers? What if any of us could be a juror from the convenience of our own home, presiding over anonymized facts? What if our expertise could be called upon for the moments when it is most useful, preventing under-informed rulings on specific issues without requiring our presence when we are less effective?

Collaborative Judgment. We are already seeing tools that can help large groups refine complex problems into actionable decisions. Yet more could be done. What if we could define what is "right" by how an unbiased representation of our community views the case? What if the variability produced in modern jury trials could be smoothed by adding opinions of "appropriate" people until the "just" answer emerges?

Restorative Regulation. We are already seeing tools that automatically cluster regulatory comments so they can be more effectively addressed. Yet more could be done. What if we directly bridged the gap between disputes and policy? What if performance regulations were no longer modified by precedent, but instead were defined by the collaborative judgment of our peers?

Addressing the Fears of Technology

For those who are wary of the technologies that would be required to bring these aspirations to fruition, many of these ideas can seem outlandish, impossible, or downright scary. For example, even our current process of selecting jurors imperfectly from an often-biased pool can easily feel safer than using data needed to make that process better. The onslaught of Russian bots can make it seem like there is nothing we can do to provide a level of identity security equivalent to a modern courthouse. Our current face-to-face processes involving human qualities that often are now lost in technological translation may make us doubt that future generations will ever be able to effectively convey emotion or empathy online. The historic dependence on current technological applications with socioeconomically inequitable accessibility can make us

forget that the technology landscape is rapidly shifting to become more personalized and ubiquitous all the time.

It is easy to forget that Facebook did not set out to be a menace to society. It became a menace because it did not have a plan for growing with society.

The technology failures that rightfully scare non-technologists most often can be attributed to opportunistic design. When there are no rules, no plans, or no substantive thought about cause and effect, innovative technologies likely will produce troubling results. Just because a piece of technology can be built does not mean it **should** be built.

Achieving the aspirations for DRTech described above can be accomplished through straightforward development efforts – as long as we understand the appropriate balance between technology needs, wants, and dreams. Where [standards like those suggested by Linda Seely](#) can help the dispute resolution community understand the protections it "needs," discovering the technological wants and dreams for getting to collaborative justice requires a community-directed technology roadmap. To realize these opportunities, the dispute resolution community must be willing to dream together about what currently seems unattainable to avoid the rise of a "Dispute Resolution Facebook."

A Roadmap is Possible

While the diversity of the dispute resolution community can make some people doubt that a unifying roadmap is attainable, there are precedents for coalescing around a seemingly impossible consensus.

For example, the space launch industry was very similarly fragmented in theory and practice until the Common Standards Working Group collaboratively developed its [unified regulatory strategy](#). In the same way those efforts created the regulatory stability that enabled pioneers like Virgin Galactic, SpaceX, and Blue Origin, the current ABA ODR Task Force efforts may similarly capture the technological needs of the dispute resolution community.

While current technological inequities can make some people doubt that any technology roadmap could be fully inclusive, there are precedents for rapidly solving seemingly impossible tech challenges. For example, mobile banking in Africa seemed impossible until the financial industry developed lightweight, text-based apps that fundamentally altered the cost and accessibility of banking technology.

And while past regulations often have seemed as if they would always be prescriptive and static, there is precedent for regulatory strategies that adapt at the pace of

innovation. For example, performance-based strategies adopted in the early 2000s now enable us to implement dynamic objectives based upon evolving practices.

These successes can be replicated. Yet doing so may require many in the dispute resolution community adjust its thinking to the fundamental realities underpinning DRTech.

Realities of DRTech

Taking the leap from correcting transparent injustice to promoting collaborative justice requires an active effort to recognize the potential benefits of DRTech. To do this, we should recognize the following facts about use of technology.

It's Not Magic. DRTech's primary utility is the acceleration of communication. There is both opportunity and danger when DRTech outpaces human dispute resolution.

The Creator Cannot Be Removed from Its Creation. Technology can be perfectly and usefully ignorant. It always will learn as it is taught.

Technologies are Like Prescription Medications. When technologies are combined correctly, they can be powerful. When we ignore possible interactions, they can be lethal.

Human Minds are Binary. Our minds are designed to gloss over uncertainty so that we can make "black and white" decisions in a world that is fundamentally grey. As [Kahneman](#) and [Tversky](#) found, even people trained to account for uncertainty must routinely fight the natural tendency to view the world in ways that can mimic computers that can see only "1" or "0."

Intuition and Bias are Two Sides of the Same Coin. Like computers, human minds use data recursively to develop rulesets that develop their paths of learning. When these rulesets make us falsely believe things, we label them as bias. When rulesets help us correctly identify problems, we label them as intuition.

Imperfect Technologies Can Be Useful. Too often, people – including those in the dispute resolution community – assume that a technology must be "perfect" before it can be used. Of course, perfection is not possible. Instead, when considering adopting new technologies, we should compare their relative utility to the human systems they would replace by using the same risk / benefit analysis and standards.

Principles for Designing DRTech Strategies

As the dispute resolution community rethinks the fundamental underpinnings of DRTech's capabilities, our strategic visioning should be based on a few key activities:

Expand Exploration of the Science Behind Dispute Resolutions Processes. A room full of 100 mediators could explain the mediation process in at least 867 different ways. Their subjective reflections on personal experience would too often trump a rigorous analysis of the linguistic, game theory, or psychological principles being used. We should consistently and accurately describe the basic processes and risks associated with human dispute resolution systems. Similar to the exhaustive modelling underpinning Ava Abramowitz's book, [Architect's Essential of Negotiation](#), these explorations should be rooted in scientific principles and statistically significant data.

Shifting our Technological Focus from Platforms to Processes. Modern technology is modular, interoperable, and cross-platform. Dispute resolution should not be seen as silos separate from the traditional legal system, so our DRTech should focus on routines and algorithms embedded into current frameworks.

Teaching How to Compensate for Tech. Technology often dulls human senses. Dispute resolution curricula that incorporate email or video negotiations reflect an understanding that students must be exposed to these forms of communication that use modern technologies. However, effective communication techniques using these technologies as opposed to techniques in face-to-face, co-located situations are figuratively "apples and oranges." [Teaching communication in technology-enabled environments requires a different, more deliberate approach to the communication process](#). Since communication is a core competency of effective dispute resolution, training programs should fundamentally overhaul communication strategy modules when preparing students for technology-enabled environments.

Conclusion

Our world, including our disputes and resolutions, is moving online. There is a remarkable opportunity to weave dispute resolution into the fabric of our new reality – and provide the collaborative justice that has never been accessible in the past.

Resolving a New Kind of Trade War Through ODR

Amy J. Schmitz describes the development of "smart contracts" and the challenges in resolving disputes about them. She explains the need for good dispute system design to be built into smart contracts. She is the Elwood L. Thomas Missouri Endowed Professor at the University of Missouri School of Law.

Technology is revolutionizing the alternative dispute resolution (ADR) field. Despite the long-held assumptions that increasing understanding, building empathy, and crafting resolution are possible only in-person, effective ways have emerged for assisting the resolution of the exploding number of disputes that have burgeoned online. Technology has become the "fourth party" through the growing field of online dispute resolution (ODR), which includes use of technology and computer-mediated-communication (CMC) in negotiation, mediation, arbitration and other dispute resolution processes. Indeed, others in this Symposium have written about ODR and technology, more generally, in the ADR field.

This piece looks at a new problem that the ADR and ODR community must face: resolution of disputes involving "smart contracts." It's hard to wrap one's brain around smart contracts. They are different from traditional or common e-contracts in that they are essentially computer code spread across blockchain nodes distributed throughout the world. In other words, they are made up of "nodes" that consist of computer-coded algorithms that live in a decentralized ledger. A decentralized ledger, such as blockchain or [ethereum](#), is a computer-coded ledger spread throughout computers instead of being centralized in one computer or database. This decentralization helps make smart contracts nearly unhackable. Furthermore, these decentralized ledgers are immutable, meaning that the code generally cannot be altered.

There is growing hype about their use. Futurists predict that smart contracts will create efficiencies and resolve transactional trust issues. The idea is that smart contracts may largely eliminate the need for complicated and costly letters of credit, bonds, and security agreements by digitizing automatic enforcement or payment in immutable computer code. In other words, smart contracts can codify if-then actions that may mimic contracts if built on a prior agreement, or could simply carry out payment or enforcement based on objectively delineated facts.¹ Examples of if-then actions are "If it rains, X gets an umbrella," or "If the goods reach port A, B gets paid."

The problem is that no amount of computer code can preclude development of disputes. An oracle, a third-party fact verification system, could incorrectly detect rain,

¹ See Amy J. Schmitz & Colin Rule, *Online Dispute Resolution for Smart Contracts*, 2019 JOURNAL OF DISPUTE RESOLUTION 103 (2019); see also Amy Schmitz, [Blockchain, Smart Contracts, and ODR - from Cyberweek 2019](#), YouTube.

code may be flawed, and there could be disputes about what qualifies as "rain" (mist, fog, sleet), etc. Furthermore, someone may contract for a product that is defective, leaving parties with no choice but to attempt litigation to recoup losses.² Aside from resetting – i.e., shutting down – the whole system, these kinds of disputes generally are without legal redress and present a challenge for blockchain architectures.³

Trade "Wars" in the Blockchain

Pindar Wong, the chairman of [VeriFi](#) (Hong Kong) Ltd and co-founder of the first licensed internet service provider in Hong Kong in 1993, has argued that these robust smart contracts could diminish the impact of trade wars.⁴ Mr. Wong observed:

Trade warriors are fighting yesterday's battles. Instead of pitting their smokestack, 20th-century factories and armies of workers against each other, governments should apply blockchain's "Don't Trust, Verify" approach to trade arrangements, using it to reduce trade friction and improve cross-border relations to the betterment of their societies.⁵

The idea is that smart contracts allow parties to avoid tariffs and turf wars because they are housed in a decentralized ledger, and they guarantee performance or payment because the performance or payment is translated into immutable code. Moreover, this ledger is transparent, allowing parties to track shipments, payments, and other transactional occurrences every step of the way – without need for reliance on governments or even humans (assuming correct coding of the data). Furthermore, trust could be inherent with the transparency and automatic enforcement of the coded performance. Nonetheless, disputes will develop and a new kind of "trade war" could develop.

For starters, because each node of a blockchain ledger is potentially located in a different part of the world, blockchain ledgers do not have a clearly identified location or jurisdiction for each transaction. It is possible that parties could code jurisdictional choice into their smart contracts, but even that may be subject to public policy and statutory challenge within any one nation's courts. Even if parties choose jurisdictions with laws requiring enforcement of smart contracts, traditional courts may not have

² Riikka Koulu & Kalle Markkanen, [Conflict Management for Regulation-Averse Blockchains?](#), in REGULATING INDUSTRIAL INTERNET THROUGH IPR, DATA PROTECTION AND COMPETITION LAW 8-10 (R.M. Ballardini, O. Pitkänen, & P. Kuoppamäki eds., forthcoming).

³ *Id.*

⁴ Pindar Wong, [Blockchain's Killer App? Making Trade Wars Obsolete](#), Coindesk, May 21, 2018.

⁵ *Id.*

capacity and expertise to decide the disputes, and the inefficiencies of traditional courts would thwart the benefits of smart contracts.

In addition to questions around litigating smart contract disputes, questions loom regarding responsibility and accountability within the blockchain or other distributed ledger systems. By the nature of blockchain, there is no single owner of a blockchain system. That means that it is unclear who should be held accountable for any flaw or failure. The very ethos is libertarian in the sense that communal "law" and shared understandings should govern operations. Despite these idealistic aspirations, the ADR and ODR community should be aware of these disputes and ready to devise the best possible means for resolving these disputes.

The immutability of blockchain also raises questions of data privacy, which may create yet more disputes and "wars" between nations with conflicting policies around data. Cross-border blockchain platforms are examples of public networks that will handle personal data. It will be difficult to balance an individual's right to privacy in an open network, especially considering that many blockchain networks have little control over where data will be transferred and who has access to that data. Considering that, by its nature, blockchain is both transparent and private, should or does it matter who has access to the data?

In sum, expected and unforeseen disputes will arise regarding smart contract coding and execution. There is even a risk that fake data will improperly trigger, or fail to trigger, smart contract clauses. Computer coders could face damages for creating improperly structured contracts, while hackers may attempt to manipulate data to the advantage of one party or the other.⁶ Parties may fight about whether the code accurately memorializes their agreement, and even coders may dispute "interpretation" of the code.⁷

Accordingly, smart contracts need their own dispute resolution systems. Interest in smart contracts will continue to grow, meaning that more and more smart contracts will be created. Some disputes are inevitable as is true with any form of contract (smart or otherwise). Coding for possible breaches of contract can go only so far because there will always be a lack of foresight and information, as well as unpredictable human behavior.⁸ There also will be technical problems and mistakes in the coding. Furthermore, traditional litigation fails to address smart contracts' need for remedies

⁶ *Id.*

⁷ Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form,"* 100 COLUMBIA LAW REVIEW 94, 103 (2000); Lon L. Fuller, *Consideration and Form*, 41 COLUMBIA LAW REVIEW 799, 800-01 (1941).

⁸ Schmitz & Rule, *supra* note 1, at 110-115.

that preserve anonymity and fit within the blockchain culture. Courts and traditional processes simply will not work for resolving many smart contract disputes.

The Need for Good Dispute System Design Within the Blockchain Ethos

Currently, the leading means for regulating smart contracts, or deciding smart contract disputes, seems to be to "reset" the system to avoid further damage. But this does not provide actual decisions on the disputes or remedies for those harmed. In other words, this is a measure to "stop bleeding" and does not resolve the disputes.

That said, there is some movement toward crowdsourced ODR. ODR providers like [Kleros](#) allow for this crowdsourced ODR by having token holders essentially be the jury and look at the evidence presented by each side. These token holders / jurors, who can be anyone who purchases tokens, then vote with tokens on the party that they think should "win" a given dispute. These token holders do not need any special background and remain anonymous, but they are "peers" in that they understand and work with digital ledgers, at least enough to be token holders. The side with the most tokens wins, and the token holders who chose that winning side get to take back their tokens along with the tokens of the voters who choose the "losing" side. The idea relies on a game theoretic model; Kleros implements other measures to stop "cheating" and attempting to game the system. The question, however, is whether this crowdsourced ODR is the product of good system design.

Dispute system design goes beyond consideration of positive law to consider the modes of legal reasoning in a given setting. This allows us to think about the dispute resolution system in a much more contextualized way, responsive to the unique needs and expectations of a particular socio-legal culture. Indeed, we should challenge assumptions that parties always have freedom to make private choices within this architecture. In smart contracts, the coders – or powerful parties devising smart contract systems who are creating the code – may end up with all the power in designing dispute resolution systems. For example, in smart contract disputes, consumers may not have real choice in deciding how disputes will be resolved through [RocketLawyer](#)'s partnership with smart contract pioneer [OpenLaw](#). Process designers and stakeholders must be prepared to provide real process choices for smart contract parties. Moreover, goals of efficiency and independence deserve respect within this ethos.

That said, the challenge for the ADR / ODR community is to address smart contract dispute resolution and establish best means for resolving these disputes before we lose our "say." Indeed, technologists and corporations that are pouring billions of dollars into smart contracts are not attending ADR / ODR conferences or thinking about how smart contract disputes will be resolved. Legislators passing laws stating smart contracts are enforceable generally do not understand what smart contracts are, let alone the best means for resolving related disputes. Even tokenized ODR is more in

tune with dispute system design than the default – "reset" the system and simply stop the bleeding once a smart contract goes awry. But tokenized ODR may be vulnerable to risks if not properly devised.

Accordingly, the time is now for developers and users of smart contracts to build ODR into their code to promote the necessary efficiency and safety. We need good and ethical ODR providers to provide appropriate choices for resolving smart contract disputes. This can include online negotiation, mediation, arbitration, and perhaps other processes. These providers should follow ethical standards for ODR, beginning with those put forth by the International Council for Online Dispute Resolution and the "best practices" that the ABA Section on Dispute Resolution is developing.⁹ Hopefully, innovation and competition between startups designing and providing ODR systems also will promote best practices.

Smart contract ODR should honor and support the efficiency of smart contracts. Accordingly, ODR should be built into the computer code, allowing parties to quickly resolve disputes without need for pausing to go to a court or in-person proceeding. Ideally, this ODR should incorporate lessons from the historical development of international arbitration by allowing for resolutions based on accepted norms similar to *lex mercatoria*. Furthermore, placing disputed funds in escrow while ODR takes place will help ensure trust and enforcement of decisions.

Of course, more nuanced considerations should go into this dispute system design and we must be ready to tackle this new technological challenge.¹⁰

⁹ See Linda Warren Seely, [We Need Standards and Principles for ODR](#). I am Co-Chairing the ABA Section of Dispute Resolution ODR Task Force, which aims to create best practices around various types of ODR.

¹⁰ For further explanation, see Schmitz & Rule, *supra* note 1.

We Need Standards and Principles for ODR

Linda Warren Seely argues that many people in the public and ODR providers do not understand how ADR works. As a result, ODR platforms may not help the public effectively, efficiently, and ethically resolve their disputes, ensure compliance with the values of the dispute resolution profession, and serve the public good. She advocates for a coalition of interested stakeholders to produce standards and principles for ODR platforms. She is the Director of the ABA Section of Dispute Resolution.

Recent reports on the future of the legal profession point to two strategies for its success. One is an increased focus on alternative / appropriate dispute resolution (ADR) and the other, which builds on ADR, is online dispute resolution (ODR).¹ Many disputants and technology experts don't have a clear understanding about ADR. As a result, ODR systems may not be as effective as they should be in providing access to justice. To remedy this problem, we need standards and principles for ODR providers.

The ADR field has not done a good enough job of explaining to the general public the benefits of ADR processes and how to access them. Many individuals with personal or relational legal disputes have little, if any, understanding of how ADR processes can help them. This is particularly true for self-represented litigants in small claims courts, who have no clear idea of how to choose an appropriate process. Some reports and surveys indicate that most U.S. citizens don't even know when they have a legal problem. Even some court administrative office technologists don't know what mediation is (as reflected in a session at the recent [International ODR Forum](#)).

As a result, the ADR field has failed both potential users and the justice system by failing to close the access-to-justice gap. Our processes haven't provided the relief valve needed to ensure that people with relational and personal problems understand how to get effective justice processes and avoid an overburdened court system that doesn't effectively deal with their problems. Instead, they crowd the court system, desperately seeking solutions.

Or they turn to other options. In an age when the public routinely seeks solutions online, it only makes sense that they would turn to ODR providers, who may or may not be ADR professionals. ODR platforms may or may not adhere to the values and principles that ADR professionals believe are most important in our profession. Some

¹ People use the term ODR to mean many different things, including use of technology to facilitate communication (e-mail), online court process, software technologies that assist disputants to negotiate, and artificial intelligence to help disputants refine how they state their interests.

providers may focus primarily on making money with little knowledge of or interest in using good ODR practices.

One way to educate the public, ADR providers, and other professionals might be to develop and promote standards and principles for ODR providers. This would encourage ODR providers to provide high-quality products and services, and enable ADR professionals to educate disputants about ADR processes and what to look for in ODR platforms.

As part of a coalition of interested stakeholders, the ABA Section of Dispute Resolution could help produce a set of standards and principles for effective development of ODR platforms. The goals would be to help the public effectively, efficiently, and ethically resolve their disputes, ensure compliance with the values of the ADR profession, and serve the public good. Using these standards, the ABA and its partners could educate the public about the use of ADR / ODR. We could publicize this information on websites of courts, legal services providers, ADR providers, and consumer organizations. We should encourage ODR providers to increase public confidence by publicizing their compliance with the standards.

This is the right time for ADR professionals to reach out to the public with accurate information about the ADR processes, how to use them, where to find them, and why they might choose an ADR process instead of proceeding as a self-represented litigant in a court system. As part of this process, ADR professionals should promote good ODR systems, which disputants will increasingly use in the future.

Legal Education

Legal education was the focus of much of the Past-and-Future Conference and this symposium for several reasons. There is a robust network of American law professors interested in dispute resolution, and many of the conference speakers are from that community. In the US, and probably many other countries, there is a lot of dispute resolution activity by law-trained professionals in and around courts. Negotiation is an everyday activity for lawyers and they often are involved in other dispute resolution processes as well. Virtually every American law school offers at least one dispute resolution course and many offer several courses. An impressive infrastructure supports this dispute resolution curriculum, including the Legal Educators' Colloquium at the annual conference of the ABA Section of Dispute Resolution, an active ADR Section of the Association of American Law Schools, an annual works-in-progress conference for law school faculty, the DRLE website and listserv, the Indisputably blog, and a network of outstanding law school dispute resolution programs, among other things. There is substantial legal scholarship about dispute resolution pedagogy.

There is a sense of foreboding about the future of dispute resolution in American legal education. This was reflected by a listserv post about a year ago in which Doug Yarn described the decision by his law school to discontinue its dispute resolution center. That post sparked some online conversation, captured in one of the pieces in this book. The American legal market has been restructuring since the Great Recession in 2008 and in response to technological changes in legal practice. Aggregate law school enrollment declined dramatically, causing many schools to shrink and some to close. Under these circumstances, there are limited prospects for hiring new faculty to fill positions of retiring dispute resolution faculty. This is especially true considering increasing pressure to attract students and that ADR isn't the "shiny new thing" any more.

Despite some feelings of apprehension, participants in the conference and symposium are not ready to give up and, indeed, continue to generate ideas and enthusiasm to regenerate our work. These ideas are particularly relevant to legal education in the United States and may not be as relevant in other countries.

Some of the contributions in this section suggest focusing on key skills like communication, negotiation, strategizing, much like the ideas that [Deb Eisenberg](#), [Heather Kulp](#), and [Ava Abramowitz](#) described above. In addition, authors emphasize the importance of giving students realistic experiences to learn how practitioners actually behave in real life.

[Doug Yarn, Jean Sternlight and John Lande had an online conversation](#) which was sparked by Doug's listserv message describing his school's decision to cut back its dispute resolution program. We worried what will happen to our programs when the large cohort of senior faculty retire. Jean suggested that our most important

contribution is teaching a more complete approach to lawyering that "considers the disputants and their needs / wants, and how to communicate, persuade, make decisions." I reminded people of the [Legal Education, ADR, and Practical Problem-Solving \(LEAPS\) Project](#) that many colleagues in our community developed to integrate "practical problem-solving" throughout the curriculum. I questioned how much we pursued the LEAPS initiative in the past, and suggested that we could take it up now using the resources we developed.

Despite the robust infrastructure described above, we could do more. Dispute resolution is as multi-disciplinary as it gets, but there is limited interaction between disciplines. [Chris Honeyman](#) is concerned about slow "takeup" of multiple large-scale efforts over the past 15 years to find more diverse sources of wisdom in our field and to make them easier to access and use in teaching and in practice. He proposes a project to compile a cross-section of syllabi and compare them to what **could** now be taught be possible.

[Lisa Amsler](#) writes, "Law schools fail to sufficiently teach students about human voice in conflict management. Instead, they primarily teach lawyers how to substitute their voice for that of their clients in advocacy, moot court, and legal writing and research courses." She argues that law schools should focus on the sophisticated knowledge that lawyers and their clients need and that technology cannot provide: interpersonal communication and voice about what matters to us as human beings.

[Ben Cook](#) encourages continued efforts to narrow the gap between theory and practice by helping students understand the complexity of real-life practice. He also recommends that we provide more opportunities for law students to learn about and practice dispute system design, which is important in anticipating future legal needs and serving clients.

[Grande Lum](#) argues that negotiation is a key advocacy skill for all lawyers and has been especially important for those in pursuit of justice. In today's polarized environment, negotiation is particularly important to bridge divides and find common ground. He advocates making negotiation a central part of the legal curriculum by "turbocharging" the basic negotiation course, collecting and disseminating data about the indispensability of negotiation skills, and starting "Negotiation Revolution 2.0," which would involve building on relationships in our community and strengthening our ADR institutions.

[Debra Berman](#) argues that law schools should be cautious not to train a generation of students with unrealistic expectations about the potential for getting work as a mediator, especially soon after they graduate. Instead, we should focus more on teaching mediation advocacy. She critiques typical simulations of negotiation exercises as being unrealistic and argues that simulations should be more like real life,

where lawyers do most of their negotiations by phone or email, over a significant period of time, and with clients and opposing counsel they may not necessarily know.

[John Lande](#) argues that law schools should teach law students to think strategically when representing clients. He recommends that law schools offer courses in strategic case evaluation and management that integrate elements of interviewing, counseling, pretrial litigation, negotiation, and mediation in a coherent practical framework. He bases his proposal on recommendations in interviews with lawyers about good pretrial practice, which include taking charge of cases from the outset, getting a clear understanding of clients and their interests, developing good relationships with counterpart lawyers, carefully investigating cases, making strategic decisions about timing, and enlisting mediators and courts when needed.

[John Lande](#) writes that, although he and Rafael Gely are not developing new resources for the Stone Soup Project, recruiting faculty, or actively promoting it, the Stone Soup website has everything you need to give your students great learning experiences through encounters with the real world. Faculty don't need us to do this anymore – you can do it yourselves. Your students will be grateful and you all will enjoy the learning experience.

[Cynthia Alkon, Noam Ebner, John Lande, and Lydia Nussbaum](#) led a program at the ABA Section of Dispute Resolution Legal Educators Colloquium in 2016, entitled, "Preparing Students for the Future of Dispute Resolution: Skating to 'Where the Puck Is Going, Not Where It's Been.'" This piece summarizes the presentations and audience suggestions with a wide range of ideas about what skills and knowledge that lawyers would need in the future and how to prepare students to be effective practitioners.

[Ava Abramowitz](#) describes ideas from a program at the Past-and-Future Conference to help adjunct faculty become better integrated into legal education and encourage law schools to take advantage of the value that they add.

[Rebekah Gordon](#) argues that we need to educate students more effectively about the benefits to ADR courses. She suggests that faculty participate in orientation, actively publicize ADR activities and opportunities, tell students how having ADR skills may help them get jobs, and make ADR a graduation requirement.

[Tom Valenti](#) has worked on student negotiation and mediation competitions for many years, and he is concerned that we are not doing as good a job as we could in using these competitions to achieve their intended goals. He provides a detailed set of suggestions for organizing student competitions.

[Jim Alfini](#) argues that increasing coverage of ADR on bar exams would increase law schools' commitment to teach ADR to increase bar passage rates. He also suggests

that we could build support for ADR in law schools if we sponsor more events with legal educators generally, not only events focusing exclusively on ADR.

What Will Be the Future of ADR in US Legal Education?

This is a conversation between [Doug Yarn](#), [Jean Sternlight](#) and [John Lande](#), which was sparked by Doug's listserv message describing his school's decision to cut back its ADR program. Doug is Professor and Executive Director of the Consortium on Negotiation and Conflict Resolution at the Georgia State University College of Law. Jean is the Michael and Sonja Saltman Professor and Founding Director of the Saltman Center for Conflict Resolution at the UNLV William S. Boyd School of Law. John is the Isidor Loeb Professor Emeritus at the University of Missouri School of Law.

Doug's posted his message shortly after Nicholas A. Mirkay (formerly Creighton and now Hawaii) and Palma Joy Strand (Creighton) wrote a blog post, [Disruptive Leadership in Legal Education](#), about their experience at Creighton, where the "Negotiation and Conflict Resolution Program was transplanted to a Department of Interdisciplinary Studies in the Graduate School and its expertise and vision quarantined from the JD curriculum and students."

Doug: I feel a need to explain to this community what happened to Georgia State (GSU)'s search for a new faculty member in ADR. For various personal reasons, I am planning to retire in 2020. In anticipation, our dean asked me to chair the recruitment committee to find a successor who would start this coming fall. Most of you probably noticed the job posting I distributed on this listserv at the end of last summer. We were very excited (and challenged) by the quality of the applicants.

To make a long story short, after the "skype" interviews, our dean decided we needed to restrict the search to entry-level and untenured laterals only. The reasoning behind this was sound and I concurred. At the end of the on-campus interviews, our dean informed the committee that her preference would be not to fill the position this year or in the foreseeable future. Not because of the candidates, who were terrific, but because ADR – and particularly international ADR – would no longer be a strategic priority for the law school. Although the school will continue to offer the basic ADR courses in the program of instruction and maintain our mediation clinic, we will not maintain our Hewlett theory-building center, Consortium on Negotiation and Conflict Resolution (since 1987), or our international arbitration and mediation center, or pursue a more robust ADR program after I retire. To use Michael Moffitt's metaphors, GSU will not be an ADR island – maybe it will be some salt.

I'll just note here that GSU Law is an extraordinary law school at which I have been privileged to teach. I have great respect for my dean and appreciate the many pressures and demands on law school deans. She took up the reins only very recently, and her thoughts about the position and the place of ADR in our strategic plan were evolving separately as we proceeded with the search. After several long conversations

with her about this, I believe she has made the best decision for our law school at this point in its development.

I want to apologize to everyone who applied. We never intended to waste anyone's time or raise anyone's hopes only to pull the chair out from behind at the last moment. Also, I want to thank everyone who applied. As Frank Sander often said, he shifted into ADR because of the better class of colleagues. I couldn't agree more.

Despite whatever disappointment we caused by withdrawing the position, everyone has been extremely gracious and understanding. For this, I am particularly grateful. I'm also grateful for the opportunity to get to know some of our younger colleagues better and for the privilege of being exposed to their ideas, research, and aspirations. It's also a bit intimidating to realize that I would have no chance today of getting a faculty position with this level of competition. At one point, I tried to convince the dean to let me hire two people as I am certain that with almost any combination of two hires from the applicant pool, GSU could have been a nationally-ranked "island" almost overnight ... which brings me to a separate related issue.

As I anticipate the unwinding of much of my ADR work at the law school, I have to reflect on the future of ADR (much less conflict resolution) in legal education. I have long been ambivalent about many developments in the field, including some of the various manifestations of ADR in legal education. Without boring you with my thoughts on all this, I have been reminded by this recruitment experience that ADR is no longer the bright shiny new thing it once was, and, despite the unquestionable need to educate and train students in ADR representation, the possibility of creating new islands of ADR seems limited at best as legal education adjusts to the new post-great recession realities.

Moreover, how sustainable are those that already exist? Unless there are other sustaining drivers in place creating deeper institutionalization, much of the support for things beyond ADR in the curriculum (ADR centers, specialty degrees, etc.) are mostly reliant on the interest and energies of those faculty members who are devoted to the field. When we retire or turn our energies elsewhere, what happens to our programs? I'm sure some of you have planned for transitions and program sustainability, but I am curious as to what your thoughts and feelings are on the matter.

Jean: Wow, Doug. Your post is long, but there is so much packed in – some sad, some brilliant, some hopeful.

1. It is sad that your program will soon close. Perhaps the only positive spin is that the world recognized you were irreplaceable? But I know that is very small comfort.
2. On the brilliant – you are totally right (I think) that the attitude of legal academia has changed / is changing towards our field. We discussed this a bit at last spring's ABA

Section of Dispute Resolution conference and I know it was discussed extensively at our recent [West Coast Dispute Resolution Conversation](#). I think at SEALS too? (No, we did not solve the problem yet ...) In some ways perhaps we are victims of our success – no longer the shiny new program because ADR is everywhere. But if our programs close and fewer of us are hired, who will teach students what we think they need to know? I think this is time to really reflect on what it is we think we do that is so important. I would love to chat more about these issues at the upcoming ABA SDR conference or elsewhere.

3. Hopeful – For myself, I think the most valuable part of our enterprise is that we teach a different and far more complete approach to lawyering – one that considers the disputants and their needs / wants, and how to communicate, persuade, make decisions, etc. To me, that aspect of what we do matters a lot more than learning about particular forms of dispute resolution, though of course that is important in order to give disputants broader choices. To some extent, legal academia is moving in this lawyering direction – incorporating more psychology and "soft skills." But for sure, this move is not happening fast enough! I think we need to use our skills in communication / persuasion etc. to further reform our schools, courses, the bar exam, etc. Onward!

Thank you, Doug, for raising so many important issues and for all the great work you have done over the years. I know you will continue to do great things, even in retirement.

Doug: Jean, I couldn't agree more with your take on legal education. So, what's the best way to teach these skills and modes of thought? Maybe it isn't necessarily through ADR courses anymore. The "lawyer as problem-solver" thing didn't seem to get enough traction on its own. Time to be more subversive? I haven't been as active in national meetings so I've missed some of the discussion to which you referred, but I'd love to hear where others think all this is going.

Jean: We are on the same page once again!

I have been teaching some of it in a course called Psychology and Lawyering, but I think there are lots of ways – clinics, externships, lawyering courses Med schools are doing way better than law schools on this people skill stuff, ironically.

Doug: My son is in his third year of med school and I've been blown away by the thoughtful and clever ways that people skills are progressively integrated into the curriculum. I've always liked the med school model but law schools seem hesitant to make radical changes in pedagogy. No secret why. Clinics are expensive and time-consuming for the faculty, particularly in light of scholarship demands.

Until the non-clinical tenure-track faculty sufficiently value these skills and the science behind them and more schools in the elite and mid-levels are willing to invest and

experiment, I don't see much progress broadly in legal education. At the end of the day, if not enough influential faculty members really "own" a program, it won't survive.

Increasingly, the profession gives lip service to the importance of soft lawyering skills but the economics of practice push hard the other direction. Ironically, our ADR position at GSU was sacrificed partially in favor of a position in law / tech / legal analytics, which is cool and certainly part of our students' futures, but people skills are certainly not at the forefront. Unfortunately, applicants to law schools aren't knowledgeable enough to demand such training.

My dean polled deans on the AALS dean listserv about whether ADR (just as an example of a people skills delivery mechanism) attracts students. My understanding is that she got a resounding "no," except perhaps for a couple of LLM programs targeting mostly foreign students and a couple of Moffitt's "islands." This partially informed her decision to spend resources elsewhere. If it doesn't put students with good GPAs and LSATs in seats, then most law schools can't afford to do it. All the rational counter-arguments and idealistic principles I might muster have little weight if enrollment is the stated goal.

John: I appreciate Doug and Jean's thoughtful comments, which I agree with.

The situation at Georgia State and Creighton are not isolated outliers, as reflected by the responses on the dean's listserv and the widespread recognition at recent events that our field is no longer the trendy new, bright shining object.

Doug referred to Michael Moffitt's (Oregon) article, [*Islands, Vitamins, Salt, Germs: Four Visions of the Future of ADR in Law Schools \(and a Data-Driven Snapshot of the Field Today\)*](#). Michael suggested that law schools have four metaphorical approaches to ADR. In schools with ADR "islands," ADR is touted as an important, robust part of their programs. In "vitamin" schools, every student is required to "take at least the recommended dosage of ADR." "Salt" schools consider ADR as a "vital seasoning for many different offerings, but never consumed on its own." In some schools, individual faculty members "intentionally, but quietly, incorporate ADR as germs into their courses."

Shifting metaphors, ADR in legal education may have been a tide coming into shore, creating a rich ecosystem of ADR programs and activities. Is the tide going out, so that parts of the system are washing away completely or deteriorating from islands into salt or maybe just germs?

What is happening and why? What, if anything, can we do to preserve the benefits of our work and insights, perhaps by changing our approaches?

At the 2009 Ohio State symposium where Michael presented his ideas, Jean and I discovered that we independently had similar ideas about what our field might do and so we collaborated on an article, [*The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*](#). "It takes a sober look at the hurdles reformers face when trying to make significant curricular changes and proposes a modest menu of reforms that interested faculty and law schools can largely achieve without investing substantial additional resources."

Building on the ideas in that article, many colleagues in our community collaborated in the [*Legal Education, ADR, and Practical Problem-Solving \(LEAPS\) Project*](#) of the ADR in Law Schools Committee of the ABA Section of Dispute Resolution. We developed a rich website with resources to help faculty incorporate what we called "practical problem-solving" into a wide range of courses, including doctrinal, litigation, transactional, and ADR courses. I'm not sure how much impact this had or whether it would make much difference now.

There are a lot of barriers to changes in legal education. Jean's and my article noted a series of ABA and other reports going back more than a century that recommended incorporating more practical instruction. Although there has been some movement in that direction, it has been slow and limited. Following a symposium at Missouri on legal education, I summarized a long list of pressures on law schools suggested by the presenters in [*Reforming Legal Education to Prepare Law Students Optimally for Real-World Practice*](#). I reproduced the list in this [blog post](#). Considering the multiple and cross-cutting pressures, innovative change is likely to be hard, slow, and perhaps not promoting the things we value.

Jean noted above that the "most valuable part of our enterprise is that we teach a different and far more complete approach to lawyering – one that considers the disputants and their needs/wants, and how to communicate, persuade, make decisions, etc."

I absolutely agree. In a post, [*What is \(A\)DR About?*](#), I wrote that we "could think of DR as processes of planning, managing, and/or resolving disputes or something like this. This would include pretrial litigation and trial because DR isn't limited to processes that are private or involve party self-determination." Doug pointed me to a piece he wrote for mediate.com's Mediation Futures Project, [*Re-conceptualizing the Work as Something Bigger than Ourselves – Reconciliation*](#), in which he argued that we shouldn't focus on the mediation process but rather on a goal of conflict resolution.

As Noam Ebner (Creighton) noted, [*our field is changing, in part because individuals and institutions are changing in major ways*](#). Recognizing these changes, we need to [*skate "to where the puck is going to be, not where it has been,"*](#) as hockey star Wayne Gretzky said.

As all this shows, our community recognizes that major changes are underway and that we need to respond effectively to avoid having the values we provide get washed away with the upcoming tides. (Mixing lots of metaphors, I know.)

We Need an Inventory of What We Are Teaching

[Chris Honeyman](#) is concerned about slow "takeup" of multiple large-scale efforts over the past 15 years to find more diverse sources of wisdom in our field and make them easier to access and use in teaching and in practice. If your perception is the same as Chris's, would an effort to compile a cross-section of syllabi and compare them to what *could* now be taught be possible? Would it help? Chris is Managing Partner of Convenor Conflict Management.

Some Projects Producing Knowledge About Dispute Resolution

My perspective is a little peculiar for this group, as I rarely teach, and never in typical courses. However, I've been involved for decades in efforts to enlarge the intellectual basis of teaching in the field.

Several of these come to mind in the current context. For one, in 2003, more than 100 hand-picked scholars and practitioners met at Penn State University's Dickinson law school for a weekend's discussion of something which had troubled everyone involved. What we called "capitulation to the routine" resulted in a [full special issue of the Penn State Law Review](#) the following year, with 17 articles. Essentially, these identified threats to the field of negotiation and conflict management resulting from routinization, in both practice and teaching settings.

About the same time, in a separate initiative, Andrea Schneider and I started the [Canon of Negotiation Initiative](#), which has been active ever since and has by now produced three books, along with a special issue of the Marquette Law Review. Again, more than 100 highly selected scholars and practitioners – with some but far from total overlap with the Penn State project – have written for an effort which has sought throughout to identify forms of knowledge and expertise about negotiation which should be generally known, and widely applied, but which had been "siloed" in narrow streams of expertise.

And in a third iteration of the same general kind of effort to broaden our perceptions in the field, in 2007, Jim Coben, Giuseppe De Palo, and I started the [Rethinking Negotiation Teaching Initiative](#). Similarly to the other two projects, but on an even larger scale both geographically and in terms of output, we enlisted well over 100 prominent scholars and practitioners – again with some "repeat players" from the other two projects, but with many new participants too. That effort sought to broaden our understanding of how to teach negotiation and related subjects, to address (among other things) the fact that US culture imbued the field "from soup to nuts," but was not necessarily that helpful as an organizing frame when working in other countries. The team as a whole produced four books and several special issues of journals over six years.

Along with the key scholars, and a few emblematic practitioners, who were repeat players across more than one of these efforts, there were enough new participants each time that in all, probably 200 or more people have been significant contributors in this array of projects. Those who wrote for these projects (or even better, co-authored at least one book chapter or article with people from a different field or culture or both) have included a number of rising stars in their specialties, and beyond that, a remarkable percentage have been truly distinguished in their careers. In other words, the participants were people who, in some sense, might reasonably be regarded as influential in our field.

What Are We Teaching – and What *Should* We Be Teaching?

But the extent to which their influence has been **felt** in the practical contents of new or revised courses since then, or the effectual use of all this new knowledge among practitioners is, I think, an open question. To what degree do we know whether any of this writing has had a real and widespread effect? I do know for a fact that certain courses, such as one being taught each year by Sharon Press at Mitchell Hamline, and another developed in the last year by Josh Stulberg at The Ohio State University's law school, are deeply influenced by these writings. Literally yesterday as this is being written, we learned of the newest such use, for 96 students at Columbia Law School. But is there any analysis out there of what shifts there may have been in the bulk of the courses being taught?

In some ways, the daunting array of roadblocks in "[The Biz](#)," which Jim Coben and I wrote as the 2013 Epilogue to the whole Rethinking Negotiation Teaching series, seems to be even more present today than we thought it was then. In particular, one element we observed – the rapidly growing percentage of courses taught by overworked and underpaid adjunct teachers, who even then were showing little enthusiasm for the astonishing range of new knowledge the project had developed – seems, if anything, to have gotten worse.

I could cite chapter and verse for the more optimistic propositions that I think still stand, to the effect of how the complexity of our field and its richness are growing. Personally, I think these factors should be recognized in a larger number of more subtle courses, particularly advanced-level courses, and those courses should be taught by the best teachers money can hire. But are we getting there? I'm advised that some at the recent Pepperdine meeting registered some related concerns, so I may not be alone in this.

But at the same time, I recall someone (Jim Coben again, I think) twenty-plus years ago compiling a list of courses taught around the field, at least in law schools, along with a cross-reference of the books each course relied on. I personally found that compilation inspiring when I was working to convince the Hewlett Foundation – along with, nontrivially, the then Hewlett Theory Centers – that a new effort was called for. The

result became known as the [Theory to Practice](#) project. Perhaps there's a seed of an idea there that might be useful today.

What if a suitable panel of scholars mounted a modest effort to compare what is actually being taught today with what we now know **could** be taught effectively in negotiation, mediation and related courses? It seems to me the comparison may prove quite stark, and support arguments to the effect that we need to ramp up sophistication as well as resources devoted to teaching right across this field.

And such a panel might even suggest some more adventurous steps. For example, it should be standard that students of law, business, and government will learn negotiation side by side. They will, after all, be working side by side for the rest of their careers.

Responding to Disruption in the Legal Profession: Teaching Interpersonal and Process Skills Across the Curriculum

[Lisa Blomgren Amsler](#), J.D., argues that law schools should focus on the sophisticated knowledge that lawyers and their clients need and that technology cannot provide: interpersonal communication and voice about what matters to us as human beings. She is the Keller-Runden Professor in the Indiana University Paul H. O'Neill School of Public and Environmental Affairs.

Disruption Is Happening All Over – Including in the Law

It happens: "Disruption" by technology. It happened to taxi drivers. It happened to video stores. It happened to cable TV with streaming – big movie studios have new competition from Netflix. Social media have disrupted our democracy. Lawyers must face it, too. Technology and related outsourcing are disrupting the practice of law.

Black letter law – legal reasoning on how rules and cases evolve, or so-called "substantive or doctrinal law" – is increasingly subject to artificial intelligence (AI) and logarithmic analysis. Big data has changed discovery, making it both more complex and automatable. Technology is replacing lawyer jobs because anyone globally can access and analyze data. [Deloitte](#) reports that lawyers are slow to adapt to the "convergence of information, communication and artificial intelligence technologies," including the cloud and [blockchain](#) ("self-verifying record of transactions between parties that requires no intermediaries and no institutional record keeper").

Increasingly, clients can exercise agency without paying lawyers – they resort to affordable streamlined or automated alternatives on the internet. Some legal scholars argue this disruption of law practice may improve access to justice and have longer term benefits.¹ If people can get access to the law directly through technology, what else can lawyers offer them?

The disruption of law requires law schools to adapt their curricula by teaching material and skills that "Big Tech" cannot not easily automate. Law schools must make legal education more meaningful by teaching students that which is hard to do through big data, AI, blockchain, or outsourcing.

¹See e.g., Raymond H. Brescia, Walter McCarthy, Ashley McDonald, Kellan Potts, & Cassandra Rivaïs, *Embracing Disruption: How Technological Change in The Delivery of Legal Services Can Improve Access to Justice*, 78 ALBANY LAW REVIEW 553 (2015).

Deficiencies in Law School Curricula

Law schools train students to pass bar exams. Law school curricula generally do not reflect the fact that lawyers play key roles managing conflict related to government across the policy continuum: upstream in the legislative branch, midstream in the executive branch, and downstream in the judicial branch. Lawyers work in government or represent clients in relation to problems entailing government.

Law schools have substantial gaps in their curricula. They teach administrative law or code courses like tax and environmental law but there is little, if any, instruction on handling conflict upstream involving policymaking, public participation or comment, or dialogue and deliberation. Midstream there is conflict implementing policy through networks of public, private, and nonprofit actors or collaborative public management. Yet, despite the growth of collaborative governance, there is little focus on multiparty collaboration in law schools.

The training that law students get is mostly related to the downstream part of the policy continuum, for example, in family or civil mediation, commercial or international arbitration, and ADR programs in the quasi-judicial work of administrative agencies. Given the shrinking role of labor law in the curriculum, law students are less likely to learn anything about the employment relationship, a key arena for managing conflict.

Law schools fail to sufficiently teach students about human voice in conflict management. Instead, they primarily teach lawyers how to substitute their voice for that of their clients in advocacy, moot court, and legal writing and research courses.

Declining Role of ADR in Law Schools

The 1970s to 1990s saw the growth of alternative or appropriate dispute resolution as a field of scholarship and teaching in law schools. Many law schools hired full-time tenured or tenure-track ADR faculty. However, since the Great Recession in 2008, many leading dispute resolution scholars like Frank Sander have retired from law teaching or passed on.

Law school faculty focusing on dispute resolution have worked long and hard to integrate hard-to-automate communication skill sets into their teaching and scholarship. Despite the fact that courts and the bar have institutionalized ADR across all areas of substantive law, law schools are hiring few, if any, new full-time tenure-track faculty in negotiation and dispute resolution. Increasingly, dispute resolution courses have been labeled "practice skills" instead of doctrinal or substantive law, and are taught by clinical professors or adjunct faculty. Moreover, ABA law school accreditation does not require ADR curriculum. At best, negotiation or mediation courses count toward clinical and experiential learning requirements.

Law Schools Should Teach the Great Value that ADR Offers: Human Voice

Law schools should concentrate on what lawyers need and can market – and what ADR offers: human voice in conflict management and dispute resolution.

There is extensive scholarly literature in social and cognitive psychology, communication, and organizational behavior about human behavior and decision-making in negotiation, mediation, and adjudicative processes. This is substance, not "practice." The outdated distinction between substance and practice in law is a false dichotomy, much like the mind-body distinction in psychology and philosophy.

Decades of research on procedural and organizational justice have taught us that human voice in conflict matters. We are social animals. Whether members of our social group listen to us and treat us with dignity and respect makes a substantial difference in whether we experience justice. We can help law students and lawyers adapt to technology's disruption of legal practice by requiring law students to learn the range of human communication skills in the increasing diversity of forums that legal clients can or must use.

For decades, negotiation and dispute resolution faculty have tried to incorporate ADR across the law school curriculum. ADR faculty offer courses in negotiation, mediation, and arbitration, new electives in dispute system design, and related intensive trainings. Law students face a forced choice between these and bar-exam related courses.

It is time to refocus and **make central** to what law schools offer the sophisticated knowledge lawyers **and their clients** need, and that technology cannot provide: interpersonal communication and voice about what matters to us as human beings.

We Should Teach More About the Connection Between Theory and Practice as well as Dispute System Design

Ben Cook encourages continued efforts to narrow the gap between theory and practice, and more opportunities for law students to learn about and practice dispute system design. He is Associate Professor of Law at Brigham Young University.

As a relatively young ADR professor (in experience not necessarily in age!), I am more eager to learn from the veteran colleagues in our community than to take up much space with my limited perspective on the best way forward. And I recognize that in weighing in, I risk repeating, rather than originating, ideas that might advance the cause. As one of my colleagues has complained of our often-longwinded faculty meetings, "Everything has been said, but not everyone has yet had a chance to say it." So instead of any grand new theories of change, I'd like to offer my modest (but enthusiastic!) endorsement of two developments in preparing students for the real-world of practice that seem to be helping our field progress in the right direction.

The first is greater attention to the narrowing of the gap between theory and practice. I occasionally find myself thinking about something Roger Fisher wrote back in 1984 as a response to James White's critique of the then-recently published *Getting to Yes*: "To some extent, I believe, White is more concerned with the way the world is, and I am more concerned with what intelligent people ought to do." That notion has framed the teaching of negotiation for a very long time, as we've focused on whether to teach students in a way that prepares them to negotiate "the way the world is" or to teach them what "intelligent people ought to do," usually focusing on the latter.

Over the past 10-15 years, we've observed a welcome shift from this binary way of thinking about and teaching negotiation to a more nuanced and, in my view, useful approach. Concepts such as the "negotiation as jazz" analogy that a number of people in our community have advocated, and activities like the Stone Soup initiative spearheaded by John Lande and others, seem to be moving ADR teaching in the right direction. Of course, negotiation often is neither strictly competitive nor solely cooperative, so our move toward teaching this complexity is helping better prepare students for the negotiation realities they will encounter in practice.

The second development is the teaching and practice of dispute system design. As technology takes over many legal tasks, the idea that lawyers should be problem solvers seems increasingly like a necessity in teaching future lawyers. The pioneering creation of Harvard's Negotiation and Mediation Clinical Program, followed by other clinics and courses teaching dispute system design (including the Negotiation and Conflict Resolution Clinic that I direct at BYU Law) are important developments in

anticipating future legal needs and preparing law students to play a leadership role in the way we approach conflict and serve clients.

A former student of mine who excelled in a dispute system design project in my clinic created a conflict transformation company that is utilizing DSD concepts and technology such as artificial intelligence in way that is valuable, forward-looking, and poised to significantly expand the ways we think about and practice ADR. I'd love to see more DSD clinics and opportunities for law students across the country (and around the world).

With those two modest endorsements, I want to conclude with a note of gratitude to this ADR community. I benefit immensely from your ideas and experience, and I look forward to working together as we continue grappling with the difficult and exciting issues that lie ahead.

We Need to Make Negotiation a Central Focus of Legal Education Especially in Divided Times

Grande Lum argues that negotiation is central to lawyers' work and is especially important in today's polarized environment. He advocates making negotiation a central part of the legal curriculum. He is Provost and Vice President for Academic Affairs of Menlo College and previously served as Director of the Community Relations Service in the US Justice Department, Director of the Divided Community Project at Ohio State Moritz College of Law, and Director of UC Hastings College of Law's Center for Negotiation and Dispute Resolution.

Negotiation is Especially Important in Our Polarized Environment

Many people are questioning our field in this time of great social division. However, there is an especially important need for our field's contributions in this polarized political moment. We bring something special to this moment, and we should not give up on the courage of our convictions. It is more important than ever to serve the greater good by helping people understand others who they strongly disagree with and by building consensus.

Our field often is seen as neutral and soft in ways that diminish the perceived value of our work. For example, the use of confidential settlements in negotiation and mediation sometimes has harmed victims and benefited powerful wrongdoers. But many of our colleagues have spent much of their careers focused on improving dispute resolution systems and the overall legal system. We need to combat the perception that we are maintaining the power structure as is.

As society increasingly grapples with various identity issues such as racial, gender, and political issues, that perception of our work is even more problematic. It can make social justice advocates suspicious of our work.

We need to tackle this challenge head on. The skills we teach are essential to bridge divides and find common ground. Negotiation is a key advocacy skill for all lawyers and should never be left out, especially for those in pursuit of justice. Community mediation and facilitation have roots in race relations and community empowerment. Successful negotiators essentially are "code-switchers" because they build rapport, empathize, make difficult conversations easier, and persuade through fairness and facts.

Robert Mnookin's book *Bargaining with the Devil* is instructive in this moment. There are times when we should not negotiate with evil people, particularly when there are more effective ways to promote justice, such as litigation and isolation. On the other

hand, sometimes we can promote a greater good by using ADR processes – even with such people.

It is important to emphasize the value of negotiation because of its universality and contribution to advocacy. Some of the major gains of civil rights advocacy, for example, occurred through negotiation before, during, and after demonstrations. We need to help people appreciate how our work can facilitate advocates' work to promote diversity, increase inclusion, and ensure equity. We do this in our work on restorative justice, reconciliation, civil rights, and community mediation.

Nuanced negotiation theory and practice involves persuasion without coercion, enables disagreement without being disagreeable, and is essential for these divisive times. Mahatma Gandhi, Nelson Mandela, and Andrew Young exemplify the most skilled negotiators of the 20th century. They demonstrated a strong, principled, and humane advocacy approach that we should teach law students and lawyers. As Gandhi reportedly said, "An eye for an eye leaves the whole world blind."

We need to tell the story that our field is critical both for individuals' professional success and for promotion of more equitable and just communities. ADR was developed to address weaknesses of litigation and to increase self-determination and fairness. We should clearly convey that narrative. Our work is necessary for lawyers to manage complex human interactions, and it is particularly valuable when they work in polarized environments.

Importance of Teaching Negotiation in Law School

We should recognize our tremendous success in preparing law students to become more successful and satisfied lawyers. In my view, this is one of the most important accomplishments of our field in the last forty-plus years. Many of us can share numerous anecdotes about how transformative our classes have been for our students and the lifelong impacts that we have made.

As Lisa Amsler described, [legal practice and education are in the first stages of game-changing disruption](#). After three decades of growth, ADR has been on the decline at law schools in the last decade. Given the ominous warning signs about our field's future, we must leverage our major accomplishments. To deal with looming threats to our field, we need to be at the forefront of coming changes. Lawyers have played – and will continue to play – important roles as negotiators, representatives, and leaders. Positioning our field is critical for enhancing its relevance. Future ADR academics need to create new opportunities much as Silicon Valley entrepreneurs do by anticipating and addressing future needs.

[Negotiation should be the point of the ADR spear](#). We need to renew the centrality of negotiation throughout the law school curriculum. Negotiation is the ADR course with

the most general law student appeal and it is the gateway course for all other ADR courses. Negotiation academics have done a superb job of making negotiation a core foundation of the business school curriculum; negotiation is the [most popular course at business schools in general](#). This also is true at some law schools.

This is not a fixed pie. Increasing negotiation's centrality within legal education raises all other ADR teaching and scholarship "boats" by addressing mediation, facilitation, and leadership in a variety of courses.

Strategies for Increasing Negotiation Instruction in Law Schools

How do we get there? I love the [all-hands-on-deck strategy](#). Here is a three-pronged all-hands-on-deck strategy to accomplish the goal of increasing preparation of all law students in indispensable negotiation skills.

Turbocharge the Basic Negotiation Course. It's in our joint interest to increase negotiation's law school market share. We should collaborate in enhancing the basic negotiation course in every law school in the country. We should scale up cross-school negotiation exercises. We should incorporate technological innovations as part of a core negotiation competency by fully [integrating ODR](#) and artificial intelligence and by using virtual reality simulations. In addition, we should equip students to extend their negotiation skills to help communities deal constructively with their divisions.

Collect and Disseminate Data about the Indispensability of the Skills We Teach.

We should focus on persuading prospective law students, law school deans, and accreditation officials to recognize the importance of negotiation for lawyers. For example, we might organize a conference focused on this issue, encourage more research in this area, and convene a critical mass of colleagues to conduct a joint "moonshot" research project on the importance of negotiation.

Start Negotiation Revolution 2.0. We have the benefit of deep and long relationships with each other, and we can leverage that by working together to enhance the field as a whole. We should connect it explicitly to inclusion, equity, and technology. We need to keep focusing on institution building, i.e., ADR organizations and centers. We should take a page from strategies of organizations like the Federalist Society and the NAACP that work consciously and strategically toward achieving concrete measurable goals.

Preparing Law Students for the Real World Through Mediation Advocacy Training and Realistic Negotiation Simulations

Debra Berman encourages continued efforts to expand mediation advocacy course offerings and opportunities for students to engage in more real-world negotiation training. She is Assistant Professor of Clinical Studies and Director of the Frank Evans Center for Conflict Resolution at South Texas College of Law Houston.

Importance of Training Students in Mediation Advocacy

Many law students are eager to become mediators. I know this because countless students have told me that they "drank the mediation Kool-Aid" and would love to develop a career as a mediator. I am always very upfront about how difficult it is to enter into the field. It is common knowledge that most successful mediators in civil cases are retired judges or attorneys with significant experience. Most aspiring mediators cannot even get opportunities to mediate for free let alone get paid for their services. Markets are saturated with mediators (particularly in large cities), and mediators compete even to do volunteer mediations at community dispute resolution centers.

Considering the realities of the market, we should be cautious not to train a generation of students with unrealistic expectations about the potential for getting work as a mediator, especially soon after they graduate.

Instead, we should focus on training students on the skills they will need in their day-to-day practice, which inevitably includes representing clients in mediation. Of course, law schools should continue to train students in the extremely valuable skills of serving as neutrals in mediation. However, law schools should also emphasize advocacy in mediation courses. In addition to focusing on advocacy skills in mediation courses, basic mediation advocacy could be incorporated into various classes where mediation is common practice such as family law, employment law, and probate. Certainly, clinics should include a similar component.

Although negotiation is a standard course at most law schools, the skills needed for effective advocacy in mediation are more nuanced than in unmediated negotiation. First and foremost, there is a glaring difference in client involvement. Client counseling and preparation is a critical component of any effective mediation. In mediation, clients must be prepared for what to expect about the roles of mediators, attorneys, and parties. For example, in mediation, there is the issue of whether clients will participate in a joint session (if any). What questions should clients be prepared for? How much information should be divulged? Moreover, attorneys need to know how to effectively use mediators to their advantage. For example, when is the right time to suggest a bracket or a mediator proposal? Drafting an effective pre-mediation submission also is

an important skill that differs considerably from what students learn in negotiation as well as legal writing and pre-trial advocacy classes.

If law schools have the budget, students also should be encouraged to participate in mediation advocacy competitions such as the ABA Representation in Mediation Competition, the International Chamber of Commerce Mediation Competition, and the St. John's Securities Dispute Resolution Triathlon.

Importance of Using Realistic Negotiation Simulations

Many of the simulations that law students do in their negotiation courses aren't as realistic as they might be. Students primarily practice negotiation skills by engaging in face-to-face simulations during a narrow time frame of a short class with students they know (and are often friends with). The structure is similar in extracurricular competitions.

In real life negotiations, lawyers generally don't negotiate by sitting down across the table from one another for the entire negotiation. They don't have artificially tight time frames as in our simulations. They generally aren't negotiating with their friends. They aren't trying to "get points" for things like using the blackboard, being first to make an agenda, or having a scripted self-analysis.

In real life, lawyers do the majority of their negotiations via email or on the phone, over a significant period of time, and with clients and opposing counsel they may not necessarily know. Yet we ask our students to engage in negotiation skills training that does not necessarily reflect reality.

For students to get more realistic training, they should engage in exercises with people they don't know, without overly stringent time restrictions, and across various modes of communication. This should be a regular component of all negotiation skills courses.

This concern prompted me to initiate a nationwide program that provides students this exact opportunity. Instructors can use this approach without much extra work. [Click here for more information about this program.](https://ssrn.com/abstract=3533324)

Law Schools Should Teach Students to Think Strategically – That's What it *Really* Means to Think Like a Lawyer

[John Lande](#) argues that law schools should teach law students to think strategically when representing clients. He recommends that law schools offer courses in strategic case evaluation and management that integrate elements of interviewing, counseling, pretrial litigation, negotiation, and mediation in a coherent practical framework. He is the Isidor Loeb Professor Emeritus at the University of Missouri School of Law.

[Randy Kiser](#)'s and [Deb Eisenberg](#)'s excellent pieces reminded me that I had proposed a course on strategic case evaluation and management (SCEM) based on insights from my study, [Good Pretrial Lawyering: Planning to Get to Yes Sooner, Cheaper, and Better](#). Some law schools may offer courses like this, though I suspect that most don't. The proposal wasn't adopted at my school but I invite you to propose it at yours.

In my study, I interviewed respected lawyers about how they handled the cases they settled most recently, and I noted common themes in their accounts. Since most litigated cases are settled, good litigators prepare for negotiation at least as much as for trial. The lawyers described how they prepare for both possibilities. They recommended taking charge of their cases from the outset, which includes getting a clear understanding of clients and their interests, developing good relationships with counterpart lawyers, carefully investigating the cases, making strategic decisions about timing, and enlisting mediators and courts when needed. They overwhelmingly suggested starting negotiation at the earliest appropriate time.

An SCEM course might cover the following topics:

- conducting initial client interviews
- developing and refining a legal theory of the case
- developing an investigative strategy including a discovery plan
- developing a good working relationship with counterpart lawyers
- using experts as consultants and/or witnesses
- estimating likely court outcomes
- estimating tangible and intangible costs of litigation
- developing a goal and strategy for possible negotiation

- using mediators, arbitrators, or other neutrals
- communicating effectively with clients

It might seem odd to teach students to develop good working relationships with their counterparts, but lawyers in the study repeatedly emphasized how much this affects the handling of cases. Having a bad relationship can cause problems for lawyers and the parties, possibly making a case one's "own private hell." On the other hand, having a good relationship can prompt both lawyers to take actions leading to better results for their clients.

Although there might be some overlap between SCEM and pretrial litigation courses, the focus of this course would be on strategic planning whereas pretrial litigation courses often focus on using procedures in the execution of such a plan (such as conducting discovery and litigating summary judgment motions). Indeed, an SCEM course would be an excellent introduction to pretrial litigation. Ideally, students might take SCEM before pretrial litigation, though that would not always be possible given the challenges of student enrollment constraints.

An SCEM course also would overlap somewhat with courses on interviewing, counseling, negotiation, and mediation. All of these courses focus on important elements of representation. An SCEM course would integrate them and pretrial litigation into a coherent practical framework.

The activities listed above are in the litigation context. An SCEM course might include transactional matters, either as part of a single course or as a separate course. To address transactional matters, there would be counterparts or variations for many of these topics and some topics without counterparts in litigation.

Ideally, the course would involve a lot of documents that lawyers use in their case files. Indeed, instructors might edit documents from actual case files to remove names, other identifying information, and extraneous detail. This would give students the chance to have hands-on experiences with the kinds of documents that they will regularly encounter in practice. Many of the reading assignments might involve documents from case files.

Classes might involve some combination of lecture, discussion, analysis of case documents, and simulations. Students might complete a take-home exam in which they are given documents from a case file and asked to address issues relevant to the course.

It probably makes sense for this course to be taught by adjunct faculty, perhaps by two adjuncts or co-taught with a regular faculty member.

Most of legal education is like teaching someone to drive a car by parsing an operation manual for the car. An SCEM course would give students a chance to practice driving, integrating various maneuvers needed to get from Point A to Point B.

You Can Give Students Great Learning Experiences Through Encounters with the Real World

[John Lande](#) describes how you can take advantage of all the resources of the Stone Soup Dispute Resolution Knowledge Project to help your students learn from encounters with the real world. He is the Isidor Loeb Professor Emeritus at the University of Missouri School of Law.

Scandalously, you can get licensed as a lawyer in the US without ever encountering a real client or lawyer or ever stepping into a lawyer's office, mediation conference room, arbitration hearing, or courtroom.

Not so in other advanced countries, where licensing requires a 6-12 month period of "[articling](#)" or "[pupillage](#)" of experiential training after students complete their studies.

American law schools offer clinical and externship courses that provide experience with actual cases, but students generally can graduate without ever taking such courses. Even when students do take these courses, they constitute a small proportion of their studies.

Students often complain that their studies are too theoretical, and they hunger for real-world experiences. In 2017, my colleague, Rafael Gely, and I organized the [Stone Soup Dispute Resolution Knowledge Project](#) encouraging faculty to use course assignments that would expose students to real-life experiences relevant to their courses.

Most of the Stone Soup assignments involved interviews of advocates, neutrals, or parties, though some assignments involved observations of ADR or court proceedings instead of or in addition to interviews.

In its first year, the Project engaged almost 1000 students in 40 classes covering 12 subjects, taught by 32 faculty from 25 schools in 3 countries. Most of the courses were traditional ADR courses, but faculty also used Stone Soup assignments in access to justice, evidence, relational lawyering, resolving community civil rights disputes, and trusts and estates courses.

Faculty consistently reported results that have been outstanding, far exceeding expectations. Stone Soup has provided many benefits including:

- increasing students' exposure to the real world of practice
- helping students develop critically-important interviewing and analysis skills

- identifying how theory does and doesn't map well onto actual practice
- supplementing faculty's knowledge, especially for faculty who haven't practiced in the subjects they are teaching – or haven't practiced at all
- increasing students' and faculty's enjoyment of the courses

Faculty have great discretion to tailor courses to fit their goals and circumstances, including deciding:

- whether students will be assigned to conduct interviews and/or observe cases
- who will be interview subjects or what types of cases will be observed
- whether students will focus on specific cases and/or general practices and philosophies
- whether all students will be required to do Stone Soup, it will be one option for completing a required assignment, or it will be an optional, extra-credit assignment
- whether faculty will give students wide discretion in their choice of topics and questions or whether faculty will require them to focus on certain issues
- whether students will complete assignments individually, in small groups, or as part of a class-wide project
- whether to require students to write a paper and, if so, the length of the paper
- the deadline for completing assignments
- whether faculty will discuss students' experiences in class
- whether the assignment will be graded and, if so, the proportion of the grade
- whether faculty will use "[focus group classes](#)" in which they have structured conversations with guest speakers

Some classes got a lot of benefit out of even a limited assignment. For example, in her ADR course, [Andrea Schneider](#) required students to interview someone about a recent conflict, including whether it could have been resolved through the law, and what the interview subject learned from the experience. Students wrote ungraded 1-2 page papers and discussed them in class early in the semester. Andrea said that students

had to think of conflict and negotiation broadly, not just as "an activity of lawyers in a dark room on behalf of clients."

In his arbitration course, [Brian Farkas](#) required his students meet with arbitrators by the second class. Students discussed the interviews in class as each student "presented" his or her arbitrator to the rest of the class. The students did not write papers summarizing the interviews and Brian did not specifically grade the assignments. He said that the assignment helped "unravel some of the mystery about arbitrators and arbitration from the outset of the course."

On the other end of the spectrum, [Fran Tetunic](#) made Stone Soup a major part of her dispute resolution clinic course. Students were assigned to write papers based on structured interviews with lawyers about representing clients in mediation. Following a mediation training at the beginning of her course, she asked students what they wanted to know, and she used their questions to develop an interview protocol. She said that, "Student participation in deciding what they wanted to learn and devising their questions worked well in that they 'owned' the assignment and enthusiastically set about accumulating the information they sought. Further, it allowed me to learn what they wanted to learn."

Here's a [document with an extensive set of resources](#) for using Stone Soup in your courses, including model documents to develop Stone Soup assignments, advice about how you might use Stone Soup in a wide range of courses, descriptions of various Stone Soup assignments, a collection of faculty assessments of their Stone Soup experiences, and more.

Obviously, a Stone Soup assignment in a single course won't fully remedy the problem of minimal clinical instruction. But it's a step in the right direction. And there could be a significant cumulative effect if students take multiple courses with Stone Soup on the menu.

Please take advantage of these resources. Having developed these resources and enlisted colleagues to demonstrate how well Stone Soup can work, Rafael and I aren't recruiting colleagues to use Stone Soup assignments.

You don't need us to do this anymore – you can do it yourselves. Your students will be grateful and you all will enjoy the learning experience.

"Where the Puck is Going" – and What Faculty Should Do to Help Students Get There

Cynthia Alkon, Noam Ebner, John Lande, and Lydia Nussbaum led a program at the ABA Section of Dispute Resolution Legal Educators Colloquium in 2016 entitled, "Preparing Students for the Future of Dispute Resolution: Skating to 'Where the Puck Is Going, Not Where It's Been.'" This summarizes the presentations and audience suggestions. Cynthia is Professor and Director of Criminal Law, Justice & Policy Program at Texas A&M University School of Law. Noam is Professor of Negotiation and Conflict Resolution in Creighton University's Department of Interdisciplinary Studies. John is Isidor Loeb Professor Emeritus at the University of Missouri School of Law. Lydia is Professor and Director of the Saltman Center for Conflict Resolution and the Mediation Clinic at the UNLV William S. Boyd School of Law.

The title of the session was based on a quote by hockey star Wayne Gretzky, who said he always tried to skate "to where the puck is going to be, not where it has been." Analogizing the puck to the legal and dispute resolution fields, this program addressed where we are going and how, as legal educators, we can best prepare our students to "skate" there. The speakers gave brief presentations about their expectations about the future and then audience members offered their own suggestions.

Overview

Over the past 10-20 years, we have become used to technological changes. However, far less attention has been dedicated to anticipating broad social changes in the future.

Most of us probably don't spend a lot of time wondering what the future will be like and what we need to do today to prepare for it.

The status quo bias – our tendency to assume that things will generally stay pretty much the same – might easily affect us. For example, when planning our daily to-do lists, we generally plan to do things assuming that things won't be much different from last week, last month, etc. People have made very embarrassing predictions of the future in general, with one particular subtype are predictions that assume that "everything will stay the same."

Even though the future is hard to predict, change is likely. As a result, the speakers suggest that anticipating change should be more central to how and what we teach. Anticipating change, we might revise our ideas of what is important and what we should be doing and teaching. Change-anticipation is a form of thinking that might be beneficial, at least each time we prepare our syllabus for the coming semester.

We prepare our students for professional work in the legal and dispute resolution fields. To what extent do we prepare them to fill the roles we have been familiar with in the past or to provide the services that we view as being currently typical of these fields? And to what extent are we forecasting the future of these fields and preparing students to engage in the fields as they will be after our students graduate and throughout their professional careers?

Wayne Gretzky explained that he owed his own prowess at hockey to his ability to skate where the puck was going, and not to where it had been or currently was. As legal and dispute resolution educators, are we preparing our students to skate to where their puck is going?

Noam's Take

When I consider preparing my students for the future, I have the following futures in mind, all of which involve change from the current state of affairs or existing paradigms:

The right-now future: Conversations held around a physical table will continue to decrease as the default mode for engaging in negotiation and dispute resolution. Professionals need to be proficient in online communication systems ranging from the currently familiar (such as email) to future, emerging technologies.

The 3-5 year future: Online dispute resolution systems will be embedded in court systems and in claims systems. Students familiar with this field and the types of platforms it currently uses will be able to find their professional place in this new state of affairs easily. Students who are unprepared will be left behind.

The statistical real-life future of my students: 11.2% of law school graduates do not work as lawyers in their first year out of law school (ABA 2013). 30-50% (or perhaps more, depending on which data you look at) will stop practicing law at some point 2, 5, 10, or 30 years into the future. Students need to be prepared to use the skills we can teach them in a wide variety of contexts, not just in the context of legal or formal ADR practice.

The present-future in which ADR is the mainstream: I suggest that the battle for mainstreaming mediation and other dispute resolution processes has been won, and that we can lose the 'A' in ADR. It might only be there currently because we ourselves are used to having it there. We were brought up on the uphill-battle narrative, and engaged heavily in mainstreaming efforts over the course of our careers. And, of course, everybody would rather be David than Goliath. Still, in terms of skating to where the puck actually is and certainly in terms of where it will be, I think the time has come to stop treating ADR as an uphill battle, recognize that we've won, and move on. Doing so will change much of the tone in which we describe dispute resolution's

history, current practice and future with our students – and help prepare them for the dispute resolution practice they are more likely to encounter.

The post-LawPocalyptic future: There are many reasons why the existing paradigms of legal practice probably will not continue in the future. The practice of law has not yet been fundamentally disrupted by technology and globalization (as, say, publishing has been) – but there are many who anticipate that it will be. [Richard Susskind's](#) *The End of Lawyers* and *The Future of the Professions* offer one picture of what this fundamental shift in the demand for, and offering of, legal services will look like.

Organizational practices will change, and lawyers might find themselves engaged in very specific elements of legal processes, as opposed to the full-service model that has always characterized the profession.

In this future, specific expertise is important, but in addition, soft-skills, tech savviness, people skills, conflict skills, and problem-solving are going to be our students' bread and butter or their ticket into other jobs. In this future, ADR and ODR, in different forms, are far more prevalent than they are now and perhaps much more prevalent than the 'bespoke' method of lawyering.

This anticipated overall disruption of the legal field – which I call the 'LawPocalypse' – might occur far sooner than we might imagine. I think we would do our students a service by beginning their preparation for it today.

Cynthia's Take

When I started law school, some things seemed beyond change, and this limited my view of what lawyers might do. For example, few thought that the Soviet Union would change in any meaningful way beyond maybe allowing a little more emigration. In November of 1989, the wall separating East and West Germany fell. This sparked changes that few could imagine.

For lawyers, new markets opened and a field that had barely existed, rule of law development, took off. These changes swept a group of American lawyers into countries they never imagined visiting, much less living and working in. I was one of those lawyers and saw how what I learned in law school and practicing law (in truth more my skills from practicing law) helped me to adapt to new jobs and new fields, and to recognize new opportunities.

But are we preparing our law students to be able to cope with or, better yet, seize the opportunities that will come along with the next change that we can't see coming? It is clear that doctrinal law will change, which is one good reason to support legal education moving far beyond simply teaching legal doctrine. But what else can or should we be doing to prepare our students for inevitable change?

One telling example of limited views of the future is Star Trek. Star Trek has consistently done a great job predicting where technology will go. Star Trek had communicators decades before the first cell phone. In the early 1990s, Star Trek, the Next Generation, had what looked suspiciously like iPads. Likewise, I think we as individuals, and as a field, find thinking about changes in technology easier. What snazzy new research tool will be developed? How will electronic discovery or big data change the practice of law?

Star Trek, however, did a much poorer job of predicting how human relationships might change in the future. In the original Star Trek, the only woman on the bridge of the Starship Enterprise was basically answering the phone (although we all knew Lt. Uhura was capable of so much more). Although Star Trek had a hopeful view of a multi-racial future, there was still a tendency to fear aliens and respond with violence as the first course of action. Captain Kirk was not known for his negotiation skills.

I have no doubt that negotiation skills will be something that our students can take with them and adapt to changing environments and opportunities. But I worry that I may be falling into the Star Trek trap of teaching about the world I know and not adequately preparing my students for one fact we can count on: the world will keep changing and how lawyers and dispute resolution professionals work will also change.

Lydia's Take

There have been and will continue to be changes in legal norms, the structure of our legal system, and the delivery of legal services. We have already seen the impact of no-fault regimes in family law and I predict there will be additional statutory changes that override traditional common law doctrines and, in some instances, streamline the issues available to dispute.

Relatedly, changes to our legal system such as increasing formalization of law through statutes and regulations and the growing adjudicative role of regulatory agencies have already, and will continue to, change the venue for dispute resolution and challenge the traditional role of the judiciary as society's locus for resolution of legal disputes.

And, further, the delivery of legal services will continue to change rapidly and, as a consequence, require lawyers to pivot nimbly and adapt their orientation to clients.

I predict that, in a world where technology has enabled people to engage in greater self-navigation (for better or worse – try googling "what is this skin rash?"), individuals will be able to take themselves further along in addressing their legal needs. This means lawyers may have a more supervisory role with some clients but it may also mean that lawyers' attention will be more directed to those clients who cannot self-navigate and need bespoke, professional advice – those clients with legal questions that require in-depth expertise or savvy and creative problem-solving skills.

Taken together, the streamlining of legal norms, the decentralization of dispute resolution venues, and the shifting balance of power and responsibility between lawyers and clients will continue to change dispute resolution work of the future. Buckle up!

John's Take

As Yogi Berra said, it's hard to make predictions, especially about the future. In a sense, each student will encounter a different future, especially given the multiple forces of change and different practice settings.

I interviewed a lawyer in Kansas City who described having formal (but friendly) interactions with a counterpart there with whom he had worked on many cases. He contrasted this with a story about a case he had in a rural area, where he had never worked with his counterpart before but everyone in his office was informal and they spent a long time telling war stories before getting down to business.

This suggests that the future of legal dispute resolution practice may be different in urban and rural areas. The future may be different for different types of cases such as criminal, family, high-end commercial, intellectual property etc.

And there is no one right way to practice for all lawyers and other dispute resolution professionals – this varies depends on individuals' values, goals, personalities etc. So, while there will be forces that will affect the future of practice generally, each practitioner will have a different future.

This suggests that law schools should do at least two things to help students prepare for their professional future. First, law schools should focus on teaching general skills that will be needed in virtually any area of practice. In particular, written and oral communication, legal research, client interviewing and counseling, working with counterpart lawyers, and negotiation should be important for virtually all lawyers.

Second, law schools should help students plan for their own particular futures. Given all the variation in practitioners' futures and the likelihood that there will be some changes, students will need to identify their own educational needs and continue to learn throughout their careers. So it is particularly important to teach them how to learn to learn most effectively. I elaborate these themes in my [Last Lecture article](#).

The Group's Ideas

We asked the audience to address three questions and the following is a summary of their responses.

What Changes Do You Anticipate in 5-20 Years that May Affect Legal and Dispute Resolution Practice?

Lawyers of the future need to think about preventing problems, e.g., building strong communities and helping prevent today's conflicts by addressing up-stream social justice issues.

Online dispute resolution is just the beginning. Technology may make rules of evidence completely irrelevant, e.g., there will be recording devices everywhere, even in our own brains!?

Automated dispute resolution (artificial intelligence...and robots!) will have a major impact. Big data algorithms will be integrated into legal dispute resolution. Programming A.I. will be the dispute resolution!

The climate will be a "party" in any dispute: food law, tort, property, etc. It will be a third party interest that will have to be addressed as part of any dispute resolution.

Cultural norms will be more varied. Lawyers will not be able to assume that disputants will have as much commonality as they now do.

Lawyers will go back to bespoke lawyering – like learning how to pickle!

How Might These Changes Affect Legal and Dispute Resolution Practice?

Lawyers will use technology to identify "hot spots" and then deploy dispute resolution and prevention resources.

The dispute resolution field is cross-professional, thematic, inter-disciplinary. Dispute resolution skills are not uniquely ours: we have to learn how to work with other professionals. (Gasp!)

There will be new legal / dispute resolution jobs in artificial intelligence. Lawyers and dispute resolution professionals will be needed to construct the new "apps" that people will be using in the future.

Lawyers will have to analyze all the data we will be gathering.

Lawyers will be more involved in conflict management though dispute review boards in various contexts.

There will be renewed pushes to separate dispute resolution as a separate field – formalization through licensing – and those efforts will fail.

Lawyers will need to be better counselors, adding value to parties with (legal) disputes.

How Might These Changes Affect Your Teaching and the Skills That You Emphasize?

Society should reform the public school system to help young people develop emotional intelligence and conflict resolution skills.

Faculty should teach that creativity, flexibility, adaptability, and being problem-solvers as the essential skills that lawyers will need in the future.

Faculty should teach students the skills to perform tasks that are NOT provided by the technology, e.g., creativity, empathy, and ability to cross boundaries.

Students will need to develop technological fluency, learning how to assess and master what new technologies are introduced in the future.

Lawyers will work with other professionals so law schools need to offer multi-disciplinary approaches including such things as neuroscience, linguistics, and psychology.

Faculty should engage students around core ethical principles to help them develop the resilience and ethical responsibility they will need when facing the inevitable ethical challenges of the future.

Faculty should help students look at past conflicts to learn how to prepare for conflict in the future.

Instead of welcoming new students to the legal profession, maybe we should welcome students to a profession associated less with practicing law and more with fundamental qualities of being a professional of law and justice such as being a fiduciary and an engaged citizen.

Faculty should encourage students to take on the wider problems that impact their communities and wider society.

Faculty need to be better at counseling students about where there might be new jobs, possibly such as in local government.

Law schools will be engaged in life-long education of lawyers as they increasingly practice in unbundled capacities, such as contract employees. These lawyers, in particular, will miss out on the traditional mentoring and apprenticeship that has been a component of the legal profession.

Move Over Moot Court. It Is Mediation's Turn: Increasing the Number of Students Interested in ADR Courses

Rebekah Gordon, reflecting on her experience as a law student, urges law school faculty to inform students about ADR from the very beginning of law school and provide more opportunities for students to learn about ADR. She is a third-year student at Northwestern Pritzker School of Law.

Don't tell anyone I told you this, but there are some people discouraging students from registering for your ADR courses. These people are telling us that we need to take federal jurisprudence, securities regulation, or any other lofty seven-word-titled non-bar related course to get a high paying job at a law firm. And we shouldn't even dare bring up the desire to take more than two ADR courses. Those people give us the side-eye and the ever-so-audible shaking of the head accompanied with these words, "If you want to get a job, make sure you get in one of those classes."

Now, I'm not going to be a complete troll and disclose who these folks are. But I guarantee that if you asked some of your students about what "the word on the street" is about dispute resolution courses (primarily if your school is not known for them), most may not even know they're available. For those that do, you'll probably be able to read between the lines when they tell you, "Well, I'll see if I can get to it during my last year in law school." An empty promise. But I get it. When I converse with students about the great benefit of taking ADR courses, they are surprised that their school even offers the option. Even worse. There is not enough marketing to the student population about why taking an ADR course is advantageous even if they have no desire to pursue a career in the field.

So, here is the goal I want to address in this piece: increasing enrollment in ADR courses in law schools. Now, let me burst this bubble early on in this writing. This paper addresses all schools, even those who have a dispute resolution term in its title or program name. This shoe is one-size-fits-all. We know that some schools are defunding and diluting ADR programs and I have a personal problem with this.

And here's why. (And maybe it's more efficient if I start to translate my professional vent into solutions now, rather than later.)

SOLUTION: We need to market to students that there are benefits to ADR courses as a component of their legal education. You all know it and advocate for it as professors and professionals. I've read some of your blogs and articles on integrating ADR into the curriculum. However, an incoming 1L student doesn't know it. An incoming 1L student rarely is ever told about the advantages of taking an ADR course.

Here's how I found out about the negotiation and mediations courses offered at my school. (This is a confession. One I've never made publicly.) I was planning my 2L fall semester and I was looking for a course that satisfied my desire to go to school only Mondays through Wednesdays. Then, when I learned that the mediation course was on Tuesdays at 4 pm, I clicked the description and found out that upon completion, I could become a certified mediator in Illinois. The first thought that came to my mind was, "Hmm. This would look good on my resume." And to dispel any superficial impressions of that thought, I then said to myself, "How cool would that be? To graduate with a certification in something like this? How awesome would it be to get practice and impact the community before I even graduate?" The only reason I had a ticket to get on this train of thought was that I found a class that perfectly fit a time slot on my schedule.

No one told me about the Center on Negotiation and Mediation at Northwestern, which I later found out housed some of this industry's greatest contributors in Leonard Riskin, Lynn Cohn, and Alyson Carrel. No one told me that the skills I'd learn are transferable into any field or context, which I later realized automatically kick in at a Thanksgiving dinner table with a large family. No one told me that the technique to uncovering needs and interests would be an asset for the clients I worked with and could be applied in future litigation work at a law firm. It was literally by chance. And, boy, am I glad that class was on Tuesday at 4 pm. That class and the others after it gave me a definition of what my career can be. Those classes and many opportunities after that brought me to you.

Now imagine the number of talented, willing students who can keep this field alive, and no one has engaged them at the door. Well, here's how you can do that:

Participate in orientation, and do more than have a table or five-minute presentation. Work with your student affairs department and administration to host a mock ADR class. Instead of giving incoming students a long case to read before the welcome week, provide them with a simulation! Facilitate a workshop on needs and interests. Connect the dots between theory and application. Translate the ADR terms into transferrable communication skills. Find ways to make ADR palatable and interesting. I guarantee you, even if 100% of those students don't take an ADR class, it is possible that 100% will walk away with another set of tools in their tool belts. You will equip them with something that can make them better citizens in the academic community. Imagine a world with law students who become better communicators!

Make enrollment in an ADR course a graduation requirement (if you have the power to do so). Again, to my first point, imagine law students, first-year associates, partners, public service attorneys, and private practice legal professionals with better conflict resolution skills. With different ways to settle a case instead of running into adversarial universes. With more self-awareness when they encounter clients who are not like them. With more empathy when they work with clients who come from an

underrepresented demographic in the legal field. This statement might sound flowery, but if you do these things, I believe our industry would have a more collaborative and compassionate tone than the dog-eat-dog image that is frequently projected.

Match that same energy as all of those emails that students get about mock trial.

I can't even begin to tell you how much email I delete daily about moot court, mock trial, write-on, etc. I just searched my inbox and trash folders: a fine collection of 179 emails about those things – within three weeks. And not nearly enough about negotiation or mediation training, events, or opportunities. And sure, we hear about the negotiation competitions. I've participated in one. But I'm talking about more than that. Can you provide workshops for the whole student body (and even faculty and administration) on mindfulness? Is there a way to make attendance in a conflict resolution event or ADR related activity as important as everything else? Sure, everyone is vying for our attention. But we need to turn the heat up some more when it comes to ADR offerings.

Get law firms involved. Any time I go for an interview or I submit my resume for a great opportunity, nine times out of ten, I know there will be a question about my experience as a young woman of color who is also a certified mediator. I bet on it. I believe the skill sets me apart from the rest of the pool. Now imagine those job-thirsty law students hearing this insider tip from recruiters at those networking receptions before on-campus interviews: "We are looking for people we can trust our clients with." And if I'm off, please tell me. But I remember interviewing for a summer associate position. I was not a mediator at that time, but my work experience came up. The skill to deal with clients, work with clients, and communicate with clients was a massive plus for me. That, in addition to my work ethic, gained me two job offers. Imagine if law firms promoted their desire for law students who have a more well-rounded education and not just a 4.0 GPA. The message would be loud and clear.

In closing, be not mistaken. I am not petitioning to get rid of the traditional, doctrinal course load at all. I believe the phrase we have on our banner is "Yes, and." **Yes**, have those courses, **and** promote ADR ones just as much. They are more powerful together. There's nothing like working with juveniles in criminal court as a prosecutor knowing that their need was money and survival, and therefore you may be more lenient on a sentencing recommendation. There's nothing more valuable in a divorce settlement conference when you notice that one of the parties wanted to be heard and doesn't care about the money. ADR courses sharpen the soft skills that make lawyers great ones – and all law students need a dose of that before they are thrown into the field. We'd all be better for it.

Integrating Adjunct Faculty in Legal Education

Ava J. Abramowitz moderated a program featuring Tracy Allen, Dwight Golann, and Brian Pappas at the Past-and-Future Conference. The program developed ideas to help adjunct faculty become better integrated into legal education and encourage law schools to take advantage of the value that they add. Ava is a mediator and Professorial Lecturer in Law at George Washington University Law School.

A mixture of full-time faculty, adjunct faculty, and deans attended the program on integrating adjunct faculty in legal education at the Past-and-Future Conference. Everyone chipped into a highly interactive discussion. The questions were simple to ask, but difficult to answer:

- How can we better integrate adjunct faculty members into the fabric of the law school?
- How can we provide them with the pedagogical tools they need to meet and surpass ABA and school standards?
- How can we shift the mindset of tenured and tenured-track faculty to view adjunct professors as "value added" instructors and to involve them accordingly?

As to be expected, the answers differed, in part, depending on speakers' academic status. By and large, it appeared that all attendees found merit in the following observations and suggestions:

- In schools with ADR programs, adjuncts generally feel very much a part of the faculty because they are viewed and deployed as such. By contrast, in schools without ADR programs, adjuncts generally feel the need for more support.
- Adjuncts would appreciate learning more about problems that seasoned faculty encountered when they started out such as what to teach, how to teach, how to measure teaching effectiveness and student learning, and how to handle difficult situations and the people who cause them. Ava pointed out that most schools have a unit on teaching excellence charged with helping any teacher who asks for help with these questions. Brian encouraged full-time faculty to serve as one-one-one champions and mentors for each new adjunct. Dwight urged everyone to check out the Suffolk Law School website with resources for adjuncts, including its [video libraries](#) and [teaching resource materials](#). The website contains roleplays, videos, teaching notes, powerpoints, and other resources available for downloading and use at no charge.

- In some law schools with little or no support mechanism for faculty, adjuncts have created their own support systems. For example, Tracy requires her students to complete a short form after every class, detailing what they learned, what they liked best about the class, what concerned them, and what they really appreciated that day. In Washington DC, a group of mediators who are adjunct faculty have formed a reflective practitioner group which sometimes addresses teaching issues.
- Adjuncts should speak up more to support themselves. Law schools selected them for their expertise in practice. Tenured faculty should make use of that working expertise. Because adjuncts live the law, they know not just today's issues, but tomorrow's too. They have contacts and can use them to help their schools find speakers and help the students find jobs. Most of them make great speakers and could be used by schools as luncheon speakers for students and alumni.

Improving Student Competitions

Tom Valenti has worked on student negotiation and mediation competitions for many years, and he is concerned that we are not doing as good a job as we could in using these competitions to achieve their intended goals effectively. He is a Chicago-based conflict resolution specialist offering mediation, arbitration, and facilitation services and training around the globe.

The threshold question about student competitions is what are the goals of the competitions. I have noticed that the goals differ depending upon whether they are analyzed from the perspective of a student, a coach, an assessor (which may be described as a judge, expert, professional), and a participating university or a sponsoring organization. In negotiation parlance, we may even ask what are the "interests" of each of these stakeholders. Without assigning the interests to any one of the stakeholders, they may include:

- winning
- learning
- brand recognition
- personal recognition
- status
- CV enhancement
- self-promotion

None of these are bad in and of themselves. However, I am concerned that we sometimes create competition structures that unintentionally undermine the primary goal of promoting learning for all. We should agree on the priorities of the goals of competitions and create structures assuring that the highest priority goals are part of every competition.

In planning competitions, organizers should consider the following questions:

- Is the structure of the competition well designed to promote learning?
- Is the structure of the competition well designed to fit the time frame?
- Are the entry qualifications fair and transparent?

- Do the problems test the skills that are the focus of the competition?
- Do the problems fairly challenge the competitors?
- Do the competitions favor students:
 - of upper economic strata?
 - who have coaches?
 - from schools that have existing DR courses?

Are there subconscious biases in assessing performance based on:

- problem content?
- student language skills?
- school reputation?
- relationships between coaches and organizing committee participation?

What quality controls are in place for assessing?

Are the assessors:

- knowledgeable enough in negotiation to assess fairly?
- able to identify the challenges in the problems?
- able to assess fairly across the competitors?

Are the scoresheets appropriate for the competition?

Is feedback more often helpful or confusing?

Are the awards appropriate?

Here are my thoughts about some of these questions, and, most importantly, to prompt discussion of others' views:

- Participant teams should be anonymous.

- Competitions should have workshops for participants that go beyond instructing in the rules of the competition itself.
- Students should draft the problems under the guidance of experts who serve as editors.
- Problems should have a maximum length of 2000 words. Confidential statements should have a maximum length of 1000 words.
- Scoresheets should be re-designed to reward those who exhibit deeper knowledge of negotiation theory and practice.

Assessors should be:

- advised in advance of the challenges posed in each problem.
- selected based upon both mediation and negotiation experience.
- trained in advance of the competition so that they have the same understandings and perspectives of the problems. The trainings should include cross-cultural competencies.
- trained to give feedback emphasizing that feedback sessions should provide specific advice related to the scoresheet rather than simply be playbacks of the session.

I hope that we improve the overall quality of student competitions to make them more focused on promoting learning and that learning components are incorporated into the structure of each competition. In designing the competitions, we should take into consideration the vast differences in students' learning before they participate.

Rekindling the ADR Flame in the Legal Academy: Include ADR in Bar Exams and Hold ADR Symposia at Legal Education Events

Jim Alfini advocates two potential "sparks" to rekindle the ADR flame in law schools that are explored in this essay. The first is the development of appropriate ADR questions for inclusion on bar examinations. The second is to hold ADR symposia at the AALS meetings and other gatherings of law school administrators and faculty. He is the President, Dean, and Professor Emeritus of South Texas College of Law Houston.

Following on John Lande's recent call to action, it is imperative that ADR practitioners and academics encourage, as a prominent goal for the field, the increased recognition, inclusion, and enhancement of ADR subject matters as core pieces of law school curricula. Although I was unable to attend the Pepperdine get-together, one concern apparently was that interest in the ADR field within the legal academy seems not only to have plateaued but is cooling off. I suggest two potential "sparks" to rekindle the ADR flame in law schools.

Include ADR in Bar Exams

One factor that may be contributing to this cooling off phenomenon is that ADR subjects are not covered in bar exams. Because law school administrators have to contend with increased emphasis on bar passage rates by accrediting bodies, they necessarily seek to re-design their curricula with bar passage in mind. ADR subjects thus are becoming marginalized because they are not covered in bar exams.

A principal strategy for rekindling the law school flame therefore would be to develop appropriate ADR questions for inclusion in bar examinations. Although this strategy has been discussed periodically over the past three decades, it has never gotten much traction. Perhaps it has not been seen as necessary because, until recently, law schools generally had been receptive to adding ADR subjects to their curricula. However, as discussed, this trend apparently is in danger of being reversed.

As far as I can determine, the only times ADR subjects have been included on the multistate bar exam were on the Multistate Performance Test (MPT) in 2000 and again in 2010. On the 2000 test, the bar applicants were provided with materials relating to the case of *March v. Betts*, a personal injury case resulting from an automobile accident. The materials included correspondence among the defendant taxicab company, the Taxicab Commission, and the plaintiff's attorney; notes from the plaintiff's attorney's interview with the plaintiff; and an internal memo from the plaintiff's attorney to the bar applicant asking the applicant to draft a "persuasive written mediation statement" that would be filed with the Taxicab Commission's mediator. Appended to

the materials were a relevant state statute and summaries of three relevant state supreme court cases. For the 2010 MPT, the applicant was representing the defendant in a slip and fall case (*Logan v. Rios*), and was directed in a memo to assist in preparing for an "early dispute resolution" conference by preparing part of an EDR statement that required the parties to candidly discuss the strengths and weaknesses of their case.

Since anything resembling an ADR question has apparently been used infrequently (only 1% of the time by a colleague's count), the relevant committee of the National Conference of Bar Examiners (NCBE) might be open to considering MPT questions relating to ADR subjects or using an ADR format. These might include the drafting of a mediated settlement agreement, a negotiation plan, an argument for enforcing a settlement agreement, or an argument to overturn an arbitration award. I'm sure that many of you can come up with even better ideas that you have used in ADR exercises or exams.

Similarly, if we think creatively, we should be able to infuse other parts of the bar examination with ADR subject matter. The NCBE also is responsible for drafting the 200 multiple choice questions on the Multistate Bar Exam (MBE) which now is part of the Uniform Bar Exam (UBE). There are seven committees that cover each of the subjects covered by the MBE and the UBE: business associations, civil procedure, conflicts of laws, constitutional law, criminal law and criminal procedure, evidence, and family law. Many law school faculty members who teach ADR courses also teach one or more of these subjects. They also teach in subject matter areas covered by the Multistate Essay Exam and in subjects covered by jurisdiction-specific components of the bar exams in the 20 or so states that have these state-specific additions.

Although the drafting of relevant ADR multiple choice questions for the bar exam could be challenging, perhaps somewhat less challenging would be the drafting of questions for the Multistate Professional Responsibility Examination. It is a two-hour, 60-question multiple-choice examination that is administered three times per year and is required for admission to the bars of all but two U.S. jurisdictions (Wisconsin and Puerto Rico). Many of us have explored the intersections between the ABA Model Rules of Professional Conduct and negotiation and mediation practices. For example, we have asked our students whether a lawyer-mediator is required to report certain instances of lawyer misconduct during a mediation to state bar authorities, whether a lawyer may misrepresent a material fact during a negotiation or mediation, and whether a lawyer must or may keep certain communications confidential during a mediation.

These bar exam questions could be generated by a new committee or task force of the ABA Section on Dispute Resolution or perhaps a new subcommittee of the Section's Law School Committee. This committee would be charged not only with drafting questions but also establishing and maintaining contacts with relevant individuals and entities within the NCBE and state bar examiners.

Hold ADR Symposia at Legal Education Events

A second strategy for rekindling the ADR flame is to hold an ADR symposium at events for legal educators generally, not only events focusing exclusively on ADR. This could help build support for ADR in law schools.

There were AALS-sponsored ADR workshops in 1982, 1989, 1996, and 2003 but none since then. I believe that these workshops, most if not all of which were held at the time of the AALS annual meeting, encouraged and promoted the adoption of ADR courses in the law schools. I have mentioned this to some of my more youthful colleagues and there appears to be interest in asking the ADR Section of the AALS to move forward with a workshop or symposium, perhaps in collaboration with another AALS section.

Other venues for law school faculty and administrators might also be considered. In recent years, for example, the Southeast Association of Law Schools (SEALS) has become more popular and heavily attended. Therefore, continued ADR programming at SEALS meetings should also be encouraged.

I hope these two ideas for rekindling the ADR flame in law schools will encourage some commentary, criticism, or discussion. As John Lande has so forcefully exclaimed, "We need an [all-hands-on-deck strategy](#) now to maintain the vitality of our field in the future."

Professional Training and Practice

Many of the contributors to the Theory-of-Change Symposium wrote about ways that dispute resolution practitioners can improve their work and how our field can promote such improvement.

Some wrote about basics of our work with important reminders about (what should be) Dispute Resolution 101. In perhaps the most basic – and important – reminder of all, [Michael Lang](#) argues that mediators should consider the particular nature of each dispute in deciding how to intervene instead of reflexively using the same strategy in all cases. He encourages mediators to be flexible and responsive and not dependent on comfortable and familiar routines. [Russ Bleemer](#) identifies deficiencies in mediators' listening behaviors as mediation practice becomes routinized, and he encourages mediators to keep focusing on this critical skill. [Rosa Abdelnour](#) describes the importance of dealing with emotions in mediation, which may seem obvious, but it bears repeating as many mediators act as if emotions are irrelevant. Although these pieces focus on mediation, they are applicable to virtually all dispute resolution processes.

A truism in our field is that preparation is vitally important. Yet we – or we might think that **they**, the rank-and-file practitioners "in the trenches" – often do a lousy job of it. To help remedy these problems, [Michaela Keet, Heather Heavin, and I](#) recommend that practitioners explicitly help parties consider valuable but hard-to-quantify intangible costs of engaging in the litigation process. Consideration of intangible costs is part of a [framework for assessing interests and risks in litigation](#), especially at the outset of a case. [David Henry](#) proposes that courts use "mediation optimization orders" to improve parties' and lawyers' preparation for mediation and thus improve the quality of mediation generally.

We encourage people to anticipate potential problems and plan to prevent them. But do they listen? Too often, not. Three pieces suggest ways for businesses to reap the benefits of taking prevention seriously. [Noah Hanft](#) argues that when businesses negotiate contracts, they should put the subject of developing good relationships on the agenda as an intrinsic part of the negotiation from the outset. [Barney Jordaan](#) advocates greater use mediation for negotiation of transactions, and suggests educating students, business people, and the general public about the benefits of "deal mediation." Based on a study of corporations that developed "planned early dispute resolution" (PEDR) systems, [Peter Benner and I](#) outlined the elements of PEDR systems and steps for developing them.

Several pieces focus on improving mediation of litigated cases. [Michaela Keet, Heather Heavin, and I](#) describe problems with the common **unplanned one-stage** mediation procedure and the benefits of **planned early two-stage** mediations (PETSM). A PETSM process enables parties to carefully consider the issues and make

better-informed decisions, while reducing the risks of "buyer's remorse," renegeing on mediated agreements, and complaints against lawyers and mediators. It also may be more satisfying for mediators. [Jane Juliano](#) recommends that lawyers and mediators engage sitting judges to provide focused assessments in mediation when it would be appropriate and helpful. [Kim Taylor](#) advocates regulation of mediation that helps mediators perform appropriately while leaving flexibility for mediators to use their wisdom, judgment, and creativity to help parties resolve their disputes.

Several pieces suggest ways to improve professional development and assessment. [Rebecca Price](#) analyzes challenges in assessing skills of new mediation trainees and suggests that we develop a common assessment and feedback mechanism. [Scott Maravilla](#) recommends increased professional development of ADR practitioners in the federal government. [Laurie Amaya](#) describes the benefits of participating in reflective practice groups that challenge practitioners to seriously analyze difficult problems in their cases. More generally, [Brian Farkas](#) suggests how our community can cross-pollinate with members of various ABA sections.

Good Mediators Act Out of Choice, Not Habit

Michael Lang argues that mediators should consider the particular nature of each dispute in deciding how to intervene instead of reflexively using the same strategy in all cases. He encourages mediators to be flexible and responsive and not dependent on comfortable and familiar routines. He has been a mediator for more than 40 years and served as the founding director of graduate programs in dispute resolution. He is the author of *The Guide to Reflective Practice in Conflict Resolution* (2019) and *The Making of a Mediator: Developing Artistry in Practice* (2000).

Do you know why you do the things you do ... the choices you make?
(Rick to Merle, *The Walking Dead*)

In mediation practice, there is a growing trend to make use of preset strategies, almost reflexively, without considering the particular nature of each conflict and the unique circumstances of the parties.

I reflected on the use of a predetermined interventions during a recent conversation with a respected and highly sought-after mediator. Defending the practice of conducting mediation primarily through private meetings, she insisted that caucus sessions are essential to bring out all relevant information. In her view, parties are hesitant to disclose information in joint session, while in caucus they are more forthcoming. Here's the essence of our conversation:

Michael: Do you believe parties always are more candid in private and that the information they share is crucial to reaching a settlement?

Mediator: Definitely.

Michael: How can you know whether the information offered in private would not have been shared in a joint meeting?

Mediator: It's just always true – it's human nature.

Michael: How do you decide when to convene private meetings?

Mediator: There's a point in every mediation where things are getting difficult. That's when I separate them.

Michael: How would you describe "things getting difficult?"

Mediator: When they argue and aren't making progress toward an agreement.

Michael: Do you ever explain your reason for shifting to private meetings?

Mediator: No. I tell them in my introduction that it's something I'll probably suggest.

As our conversation ended, there were still so many questions rattling about in my mind. I wanted to ask about the origin of this strategy – how did she come to the belief that parties are guarded in joint session and less restrained when speaking in caucus? Had she come to this through her own experience or did she discover it as a result of readings or educational programs? How does she determine whether information offered privately was critical to a successful outcome? I was curious whether she had ever conducted a mediation resulting in an agreement where there was limited or no reliance on private sessions. I wondered about the role, if any, of the parties (and counsel) in the decision either to remain in joint session or move to caucus, or whether the decision was the hers alone. In essence, how does she know what works and why?

This description amplifies my concern that private sessions may becoming – or perhaps already is – the default method for mediation. Here's a description of the "typical" mediation process:

A mediation session typically begins with a joint meeting of the parties, their attorneys and in some cases, insurance company representatives. ... Following the joint meeting, the mediator will usually separate the parties and begin meeting with them in a series of private, confidential meetings called "caucuses." ... Normally, the mediator will caucus numerous times with both sides until the case either settles or it becomes apparent that settlement will not be reached. (Michael Roberts, [Why Mediation Works](#), 2000.)

Roberts's depiction of the mediation process reinforces what I fear is becoming a trend among mediators: the unvarying reliance on a fixed technique or approach. The technique – in this instance, caucus – is used without consideration for or assessment of factors such as the context, history and nature of the dispute, the behavior of the parties, their capacity to communicate effectively, whether the parties are likely to move through moments when "things get difficult," and is their behavior cautious or candid, timid or self-assured.

I am not anti-caucus, nor arguing against shuttle mediation. I have the same concerns when mediators rely unquestioningly on joint meetings or brainstorming, or any other techniques.

So why am I grumbling? Am I just an "old school" mediator who can't appreciate this different approach? Not at all. I want to make the case that good practice relies on good thinking before acting, that knowing why we do what we do is as critical to our success as the skillful application of mediator techniques.

To act is hard. But the hardest thing...is to act
in accordance with your thinking. (Goethe)

Any intervention approach should be based on a thoughtful assessment of the situation and a clearly defined purpose. Doing the same thing, reflexively, may be effective sometimes or often. However, when we know why we do what we do and when we act in accordance with our thinking, we are operating with the highest level of competence.

At the outset of every mediation, we cannot know whether or when it may be useful to meet jointly or separately. There are exceptions such as when we are aware of circumstances that necessitate the use of private sessions. Deciding to meet privately or jointly requires the mediator to assess the advantages and drawbacks, including an evaluation of factors such as: the benefit to the parties of talking with one another in developing a workable settlement, the parties' capacity (or inability) to talk with and listen to each other, and (perhaps most importantly) the parties' preferences.

I think of Donald Schön's comment about professional practice:

The situations of practice are inherently unstable.... [We] are confronted with an unprecedented requirement for adaptability. (The Reflective Practitioner, 1983).

Not all disputes and certainly not all parties respond to interventions in the same manner. Not all strategies work effectively all the time. Competent and resourceful practitioners carefully assess the pertinent factors then tailor an intervention approach suitable to the parties, their dispute, and their objectives.

Listening for Mediators

Russ Bleemer argues that mediators should focus on good listening practices, noting complaints that mediators haven't carefully considered parties' arguments. These complaints spark questions about whether mediators and mediation program officials are stretched too thin and are too reliant on pre-session preparation. He is the Editor of *Alternatives to the High Cost of Litigation*, a newsletter of the International Institute for Conflict Prevention and Resolution (CPR), a New York-based nonprofit think tank.

Listen Up: One way to move the mediation profession ahead is to re-emphasize the most essential skill the profession needs to thrive: listening.

"Many people are unable to hear you unless they feel heard."¹ In mediation, "We actively listen to the participants by giving them a voice and empowering them in an environment where the core principle is self-determination."²

Excellent listening should be a given for mediators. Generally, people aren't good at listening and don't admit it.³ Mediators believe it is a best practice that they routinely perform.⁴ It should not be an unattainable aspiration for parties to feel heard in mediation.⁵

¹ Brian A. Pappas, *How to Listen for Persuasion*, in [NEGOTIATION ESSENTIALS FOR LAWYERS](#) Ch. 19 (Chris Honeyman & Andrea Kupfer Schneider eds., 2019).

² Robert A. Creo, Master Mediator column, [Back To Basics: The Playing Field](#), 33 ALTERNATIVES TO THE HIGH COST OF LITIGATION 24 (Feb. 2015).

³ See, e.g., Amy Morin, [9 Mistakes That Make You a Bad Listener](#), INC. (Feb. 22, 2016).

⁴ Stephen B. Goldberg, *Research Backs Survey Results: Achieving Rapport Is the Key to Getting Mediation Parties to Reach a Settlement*, 24 ALTERNATIVES TO THE HIGH COST OF LITIGATION 99 (June 2006) ("The primary technique relied upon by the mediators in developing rapport was empathic listening.").

⁵ See [Model Rules for the Lawyer as Third-Party Neutral](#) Rule 4.5.6 (2002) (developed by the CPR-Georgetown Commission on Ethics and Standards in ADR). Rule 4.5.6 states, "The lawyer-neutral shall use reasonable efforts to conduct the process with fairness to all parties. The lawyer-neutral shall be especially diligent that parties who are not represented have adequate opportunities to be heard and involved in any ADR proceedings."

Mediation trainers put listening front and center. They teach that listening means hearing.⁶

[M]ediators who were perceived as good listeners by their disputants were also perceived as more trustworthy. These disputants also reported higher satisfaction with the process, a willingness to recommend that mediator, and perception of fairness from the decision. Carl Rogers, one of the noted fathers of modern psychology, recommended using a mediator who is skilled in listening in order to overcome failures in interpersonal communication. These failures, according to Rogers, are largely caused by people's tendency to judge and evaluate what they hear. A mediator who demonstrates good listening should be able to lay aside personal own feelings and evaluations, listen with understanding to each party and clarify the views and attitudes each holds.⁷

The need for and importance of good listening in mediation is so obvious that listening's essential character may contribute to mediators taking it for granted or overlooking it entirely. Mediators listen – but not always with needed mindfulness or thoroughness.

Get a Load of This: With the development of a genuine mediation culture comes an unfortunate regression. In some parts of the profession, it appears that the same small group of mediators handle the bulk of the cases. Court staffers and elite mediators, in particular, fill their schedules to deal with the flood of requests for their services.

Routinized use of mediation – a very good thing – has been accompanied by routinized procedures. The efficiencies derived from routines mask a troubling evolution that may undermine mediation's strengths of flexibility and creativity.

Procedures ostensibly designed to provide flexibility and efficiency have become a frequent feature of parties' tales about negative mediation experiences. Parties' first contacts with mediation, often through administrators, have become speeches about calendaring procedure and the need to file mediation statements. Court programs push litigants into a queue.

⁶See, e.g., a sample Centre for Effective Dispute Resolution-International Institute for Conflict Prevention and Resolution agenda for [Advanced Mediation Skills Training](#) allowing for an active listening discussion. See also Kathleen A. Bryan, [Use Mediation Training to Be a Client-Centered Lawyer from the Experts](#), CORPORATE COUNSEL (March 6, 2014).

⁷Guy Itzchakov & Avraham N. Kluger, *Changing the Other Party's Attitude with High Quality Listening*, in [NEGOTIATION ESSENTIALS FOR LAWYERS](#) Ch. 20 (Chris Honeyman & Andrea Kupfer Schneider eds., 2019).

The thriving practices of some private practitioners has many in the profession declaring victory by installing mediation into the legal profession and corporate America.

Most cases settle. So all is well, right?

But what about the ones that don't?

Pay Attention: What is emerging is parties – from individuals on budgets with family matters at stake to corporate parties – who say that their positions weren't heard once they get through the doors of mediation.

Mediators usher parties into the hearing. Some parties who do not settle are ushered out, saying they weren't heard. For people involved in conflict, it's not an unusual reaction.

But still.

Some dissatisfaction isn't a lack-of-preparation problem. In fact, the problem may be the opposite: a reliance on advance preparation that has been promoted as best practice.

Is preparation **hurting** mediation? Of course not. But it's also not unusual to hear participants in unresolved cases say that information provided before the mediation session dominated the mediation.

No one is against increasing preparation. Improving preparation is a worthy and important goal for building mediation confidence and use, and it is well represented in this symposium.⁸ It's the bedrock for building the resolution between the parties.

Parties dissatisfied with mediation are frequently reporting – more like muttering under their breaths – that the mediator has sized up the case and is unresponsive to their arguments in face-to-face meetings. The reliance on preparation, according to some disgruntled parties, leads some mediators to rely on their preconceived notions of the case. Parties are complaining about not being heard.

It's not that the advocates and the parties eschew evaluative mediation. Rather, some mediators' reliance on preparation focuses them to move **this** case along – because they have supposedly seen it before – so that they can prepare for the next case.

⁸ See David Henry, [The Case for Mediation Optimization Orders](https://ssrn.com/abstract=3533324).

Am I Really Listening?: To be sure, research shows that "being heard" is, at best, a middle level goal in mediation, both for parties and providers.⁹

Parties often are reluctant to criticize mediation because the process was not as advertised. Perhaps the mediator failed to look at income, one parent's needs, or the other parent's job difficulties. Or perhaps that legendary private mediator said he's seen cases like this and, without carefully analyzing the issues, urged a party to take the deal.

When parties say that the mediator didn't hear a word about their case, they may be whining. Instead of immediately focusing on the litany of the party's case problems, it is time for mediators to ask themselves the following questions about whether the parties were heard in mediation.

- What were my expectations going into the case based on the materials I received before meeting parties in person? How did I reflect that?
- Did I focus too much on process details? How many times did I raise calendar issues before and during mediation sessions?
- Did both parties discuss the case in caucus with me? Did I give them a chance to make their case and not just present offers? What did I bring to one side based on discussion with the other side in caucus?
- Did I analyze the parties' statements with them, face to face? Did I give them a chance to express their feelings?
- Was the process an open exchange – or a box with overly-strict time limits?
- What, exactly, did I hear about the parties' cases in those matters that didn't settle?
- How much of it was them, and how much of it was me?

Be Clear about This: Ultimately, most parties are simply acquiescing to the mediation, the provider's calendar, and the program's structure. They are accepting the mediators' expertise, which research shows is at or near the top of the reasons for their selection.

But they are not necessarily endorsing any of it, at least not when they walk into the mediation room. They think that's what mediators need to do. They want a substitute

⁹ International Mediation Institute, [Global Pound Conference Series, Cumulated Data Results March 2016-September 2017](https://ssrn.com/abstract=3533324) (2017).

for court. They want a process that gives them a chance to air their views and have them listened to.

Sophisticated advocates and parties want to see their side's case on the table. And their adversaries'. Discussed and analyzed. One-time users have even less reverence for the mediator's resume, structure, and schedule.

Mediators' failure to listen adequately shouldn't be the reason why parties fail to reach agreement. Mediators can easily explain their role and why they are not backing a party's point of view on the case.

If parties wonder why mediators didn't listen or comprehend the party's position, then the mediators' process skills need work. If parties leave their mediations feeling that they weren't heard, their mediators have undermined their professional responsibility to provide good a mediation process.

When lawyers and litigants start swearing off mediation as just an extra step in litigation, mediators need to ask why – and what they should do to improve their process.

Did You Listen? Did You Hear?: This symposium emphasizes many important points about the business of mediation. Over time, mediators and mediation programs have been quite successful in building it into litigation.

This symposium is a marvelous look forward with suggestions for change. This contribution suggests that it's time to reinvigorate mediation by focusing on a basic skill that makes mediation work and instills confidence in the users.

Some parties always will be unable to reach good agreements in mediation, and some cases always will wind up in court. It happens.

But it's mediators' responsibility to make sure that it doesn't happen because they failed to hear the voices in the room.

Mediators Need Skills in Handling Difficult Emotions

Rosa Abdelnour argues that knowledge of and the ability to deal with the psychodynamics of conflict are key to being a good mediator. These should be the main focus of mediation trainings. She is a lawyer, mediator, arbitrator, and trainer in Costa Rica.

What's most important for you to do as a mediator when parties and their lawyers are at an impasse, someone shouts, emotions rise, biases dance everywhere, and all participants stare at you? Lawyers fight in front of their clients to impress them about how tough they are. You think, "What should I do next?"

You are in a mediation session and one party begins to complain, cries and blames the other party about what happened. You can't say, "Hey, be calm. I understand you perfectly. I would probably do the same thing in your case." After "I understand" comes a "but" and final "NO." You don't resolve the conflict. You don't have to say who is right.

To handle these situations, mediators need soft skills, emotional intelligence, nonviolent communication, empathy, assertiveness, good humor, and emotional regulation. Mediators need to be good listeners, trying to understand how people feel without judging them. Mediators need to handle people's emotions. General knowledge of the laws "on the books" doesn't solve these problems.

People are units of mind, body, and environment. Mediators need training in psychology and neuroscience and a lot of practice handling the psychodynamics of parties' interactions. This should be the heart of mediation trainings, including in law schools.

Help Parties Consider Intangible Consequences of Litigation

Michaela Keet, Heather Heavin, and John Lande describe intangible consequences of litigation that parties often experience but fail to anticipate or value adequately. The authors suggest techniques to help parties make better litigation decisions by explicitly incorporating and valuing these consequences in their decisions. Michaela is a Professor at the University of Saskatchewan College of Law. Heather is Associate Dean of Research and Graduate Studies and Associate Professor at the University of Saskatchewan College of Law. John is the Isidor Loeb Professor Emeritus at the University of Missouri School of Law.

Conflict can be a royal pain in the neck. And lots of other body parts too. Even when conflict is constructive, people usually find it very stressful. Indeed, people often avoid conflict precisely because of the unpleasant consequences.

But when people engage in conflict (or seriously consider doing so), they often ignore the intangible consequences as they focus on the subject of the conflict. This can be especially problematic in litigation, which can cause many different problems over a long period of time.

Intangible Consequences of Litigation

Individual litigants often suffer "litigation stress" which can disrupt their normal physical, mental, and emotional lives, especially when they have pre-existing physical or mental conditions. It can cause gastrointestinal disturbances, teeth grinding, binge eating, headaches, inability to sleep, nausea, weight loss, and crying spells.

Some parties cut off relationships due to embarrassment. When litigation involves key relationships in their everyday lives – such as a divorce or business dissolution – the strain of litigation can be particularly intense.

Some parties can't think about anything but their lawsuits. Litigation often requires them to repeat detailed accounts of traumatic events. This forces them to focus on the past, reaffirming dysfunction and undermining attempts to move forward. The litigation process can impair their memory and judgment, which can interfere with their ability to litigate effectively.

Anything related to a lawsuit, such as a television program or movie, can trigger thoughts about their cases, resulting in headaches, nausea, sweats, and anxiety.

Organizational litigants also incur substantial intangible costs. Board members, executives, managers, and other employees may worry about their future. Litigation

can increase employee absenteeism, harm employees' physical health, productivity, and decision-making, and stimulate conflict within the organization. Decision-makers can experience a lot of uncertainty, emotion, and pressure, causing them to make bad decisions. Litigation can divert energy away from organizational goals and impede innovation.

We describe these and many other intangible consequences in our new ABA book, [*Litigation Interest and Risk Assessment: Help Your Clients Make Good Litigation Decisions*](#).

How Lawyers and Mediators Can Help Parties

Litigants settle most lawsuits. Lawyers and litigants generally estimate the likely outcome of a trial and use that estimate in developing negotiation strategies. They may adjust their expectations based on their estimates of the probability of getting various outcomes and the tangible costs of litigation (legal fees and litigation expenses). Using these calculations, they set their bottom line – the least they would accept or most they would pay in settlement.

In making these calculations, lawyers and litigants often completely ignore the intangible costs of litigation or don't factor them into the calculations of their bottom line.

Big mistake.

Intangible consequences can be tremendously costly to litigants, rivaling the value of the litigation itself. Failing to consider these costs means that litigants' interests aren't properly valued, resulting in sub-optimal decisions.

Empirical research shows that in most cases going to trial, one side gets a worse result than the other side's last offer. If the statistics reflected the tangible and intangible costs of going to trial, an even larger percentage of parties would do worse at trial than the value of a settlement offer.

Lawyers should ask clients about intangible interests starting early in litigation and whenever the clients need to make decisions such as filing a complaint, responding to the other side, or negotiating. In addition to asking about clients' interests and goals in the subject of the case, lawyers should ask specifically about their interests related to the litigation process such as timing, effect on reputation and relationships, possible physical or emotional consequences, and organizations' consequences for internal functioning and diversion of energy.

When clients need to make decisions, lawyers should hone in on how much particular interests are worth to the client. For example, if a plaintiff could receive a payment

soon instead of waiting a year, how much less would she be willing to accept? How much more would a defendant be willing to pay to settle a case and avoid the risk of an unfavorable trial result? How much would it be worth to avoid the publicity of a trial – or gain the publicity of a trial? Lawyers and clients should discuss these questions in advance rather than waiting until they are in the heat of negotiation or mediation.

Mediators can ask similar questions, though they typically can't delve into them in as much depth.

This client counseling can help clients develop realistic expectations and prepare them for the challenges they are likely to face in litigation. This should strengthen their resolve so that they don't give up in the middle of a case because of unrealistic expectations. And it should help them make better decisions in negotiation and mediation. Our book provides detailed guidance and checklists for having these conversations with clients.

The Case for Mediation Optimization Orders

[David Henry](#) proposes that courts generally use "mediation optimization orders" that order lawyers and parties to prepare for and participate in mediation early in litigated cases. The orders normally require them to attend a second mediation session if they do not settle in the first session. He described these ideas in more detail in [this article](#). He is a Florida Supreme Court-Certified Civil Mediator.

Need for Court Structure to Promote Productive Mediation

There is little doubt that mediation will continue to be a frequent, if not mandatory, feature of dispute resolution in state and federal courts. Recognizing that only two to three percent of filed civil cases go to trial and that most mediated cases are settled in mediation, it makes little sense to delay mediation. In the "overflowing bathtub" of civil litigation and crowded court dockets, we need a better and faster "drain." Mediation is an inexpensive fix compared with hiring more judges and building more courtrooms. Even a modest increase in settlement rates would have a profound effect on the large number of cases that state and federal courts are struggling to manage.

From this author's experience, there is not enough time spent thinking and preparing for success at mediation because (a) there are no rules compelling lawyers to do this in many courts, (b) there is no prejudice to the merits of a case if parties do not settle cases, (c) litigators are inconsistent in their preparation and not inherently settlement "mindful," and (d) mediation lives in the shadow of the more labor-intensive litigation process.

Courts should advance public and private interests by nudging the parties and lawyers to do the groundwork needed to cultivate a mediation environment from which a bumper crop of settlements can be harvested. As they have done in the past, courts can advance the goal of promoting fruitful mediation processes by issuing "Mediation Optimization Orders" (MOOs) to avoid problems resulting from lack of preparation and inadequate communication between the parties prior to mediation. Like a good dinner party, the key to a successful mediation is advance planning. A MOO "sets the table" for more fruitful mediation by ferreting out potential problems that can prevent parties from reaching durable agreements. These problems include things like the absence of key decision-makers, unwanted attendees, surprise damages figures or non-economic terms, undiscovered insurance coverage, and the absence of necessary parties.

MOOs would get more cases mediated sooner. This would reduce the aggregate private and public cost of unresolved conflict in the community, shorten the length of lawsuits, and reduce the volume of cases on the docket over time. The rationale for

MOOs is similar to the "[planned early two-stage mediation](#)" process but would have the benefit of courts nudging and, at times, mandating the process.

How Mediation Optimization Orders Would Work

MOOs would direct the parties to schedule two mediation sessions and prescribe preparation for mediation. Many elements of MOOs involve simple telephone calls or meetings that would not add much expense.

The first mediation session would occur early in the case, after some preliminary information sharing. Because disparity of information is one of the chief causes of impasse, parties need some discovery or informal information sharing before the first mediation session. However, most mediations during litigation occur far too late and after too much time and money has been spent, causing large sunk-cost problems. Formal discovery is not the only way of sharing information. The mediation privilege allows parties to share information "for mediation purposely only." For example, preliminary expert reports can be shared for mediation but those reports are not subject to discovery or use in deposition or trial. Damages information can be shared in this manner as well.

If the parties do not settle in the first mediation session, they can litigate some issues, get new information, and then revisit their strengths and weaknesses, objectives, and anticipated expenses before convening a second mediation session.

MOOs should require lawyers to exchange position statements with each other and not merely provide confidential statements to mediators. This provides an opportunity to educate the other side directly, explain one's case, articulate the problems, and even solicit some empathetic response for the shared plight that all litigants face. Lawyers often resist exchanging position statements, fearing that they would give away "trial strategy" or sound "soft." The objection based on "giving away" secrets is flawed because modern rules of discovery eliminate "sandbagging" during trial, and persuasive pre-mediation submittals go beyond the four corners of the case and evidence.

MOOs can prompt task-saturated lawyers and clients to **transition from an adversarial posture to a more collaborative settlement mode**. Position papers should not be recapitulations of all of the evidence amassed for the purpose of convincing the other side they will lose. In writing position papers for the other side, lawyers should address the opposing parties – not merely the lawyers – to motivate the ultimate decision-makers to consider their interests served by reaching a deal. Pre-mediation submittals can set the tone for themes that the mediator can refer to during the mediation process (e.g., delay, cost, uncertainty of outcome, adverse publicity).

Judicial involvement in fostering effective mediation is normal in many venues. MOOs would not undermine self-determination considering that courts regularly issue orders in managing the litigation and establishing mediation processes and deadlines.

MOOs can be tailored to the facts of cases and can be narrowed or expanded depending on local custom and judicial attitudes toward court involvement in mediation. In Florida, for example, the courts adopted rules of civil procedure specific to conducting mediation, selection of the mediator, and reporting to the court. To permit the free exchange of information prior to and during mediation, states can adopt a robust mediation privilege. For example, see [Florida Statutes Sections 44.401-406](#), the Florida Mediation Confidentiality and Privilege Act.

How to Persuade Courts to Use Mediation Optimization Orders

Change is not likely going to come "by itself." It will require bar associations and lawyers touting the advantages of MOOs as tools for lessening the duration and the private and public expense of litigation. Lawyers and bar associations that have ADR committees typically have judicial liaison committees or "bench and bar" conferences where this idea can be promoted.

Bar organizations or lawyers can approach court administrators to ask them to encourage their courts to regularly use MOOs as a standard procedure. More settlements early in the life of a case means fewer court filings and some relief for overburdened court administrators and less judicial labor.

Model Mediation Optimization Order

Mediation optimization orders would typically include the following terms, which can be tailored to particular cases.

The orders would require counsel to have the "best voice" and final decision-maker (and insurance representatives) in attendance for corporate parties. In some cases, parties do not reach achievable agreements because key decision-makers are not present. In addition, the parties would disclose the anticipated attendance of any non-party participant such as an expert, advisor, or consultant.

MOOs direct counsel to educate clients about their cases to help them develop realistic expectations. MOOs encourage lawyers to provide clients with a report of best- and worst-case possibilities, and a future budget to designated milestones (e.g., summary judgment, mediation, and trial). The parties are directed to exchange pre-mediation demands and position statements with other parties, including non-economic terms that might be part of a larger deal. Significantly, MOOs require defendants and their lawyers and insurers in multi-defendant civil cases to meet prior to the mediation

session to consider possible intra-defendant litigation funding arrangements and pro rata indemnity contributions.

MOOs would set a deadline for a first mediation session early in the case. If the parties do not settle, lawyers would schedule a second mediation session after sufficient time to conduct additional discovery or investigation or after motions that may impact the merits. The second session would be mandated absent some special circumstances or where it might be unduly burdensome to one or more litigants.

MOOs would be largely suggestive and would not create sanctionable offenses for non-compliance. They would not include onerous or subjective terms might invade the attorney-client privilege, undermine purposeful strategies, and interfere with self-determination. Requiring phone calls and communication in broad terms without dictating the contents of the communication is not objectionably invasive.

One of the key benefits of an "order" is that it makes mediation preparation more likely to be thoughtful, consistent, and intellectually elevated so that mediation lies less in the shadow of litigation. As a result, parties and counsel would appreciate mediation as a process not merely a "day" in the life of the case.

Here is a [model MOO](#) for courts and counsel to use and adapt.

Dispute Prevention = Business Collaboration: How Prevention Can Reduce Conflict and Preserve Relationships

Noah Hanft describes the need for dispute prevention initiatives, how they work, and how to overcome resistance to using them. He is the Co-Founder of AcumenADR LLC, a dispute prevention and resolution platform in New York City. He serves as an arbitrator, mediator, consultant, and executive coach. He formerly was General Counsel of MasterCard Worldwide and, more recently, President and CEO of the CPR Institute.

The Need for More Dispute Prevention

After five years as CEO of the International Institute for Conflict Prevention and Resolution (CPR), almost ten years as a neutral, and decades as a dispute resolution "user," I suspect that I share the views of many in the ADR world that great opportunities for ADR lie ahead. We have made significant progress – yet there is plenty of opportunity to go far beyond how parties currently utilize ADR.

Undoubtedly, there will be many changes in the ADR world, and I want to highlight the one that I think may well be the most important. That is a focus not only on the resolution of disputes, but also the **prevention** of disputes. Such a focus will produce more stable and collaborative commercial relationships and enormous cost savings.

For many years, academics and innovative thinkers have opined about opportunities that could be explored to prevent disputes. CPR has been a leader over the years, publishing articles, holding meetings, and forming committees advocating a greater focus on prevention. When I joined CPR and learned about this body of work, my first reaction was to kick myself for not applying it when I was a general counsel.

After a brief period of self-flagellation, I encouraged CPR to take this work to the next level by forming a new committee, the Transactional Dispute Prevention & Solutions Committee. The committee has a twofold mission. First, it will introduce ADR to more transactional lawyers and educate them about the importance of contractual dispute resolution provisions. That mission is particularly important because these are the folks who draft the provisions.

The second objective, and I believe the most important part of the committee's mission, is to drive the adoption of dispute identification and prevention. The committee is laser-focused on how to operationalize dispute prevention by developing terms of reference that can be incorporated in agreements.

Dispute Prevention and Early Dispute Resolution

Dispute prevention should not be confused with early dispute resolution (EDR). EDR programs, which are related to but distinct from dispute prevention, are designed to enable companies to evaluate disputes soon after they become evident. [A thoughtful EDR program includes a strong early case assessment \(ECA\) protocol to review relevant facts and law in the disputes.](#) ECAs help companies to assess the likelihood of liability and the range of potential damages. This review can be undertaken by in-house counsel and/or outside counsel. ECA protocols can take many forms, and their depth and complexity generally should be proportional to the anticipated exposure in a particular case.

ECAs give lawyers and executives a relatively quick and early look at the strengths and weaknesses of a case. Without an early realistic assessment of a dispute, an overly confident evaluation of a case – say, an 80-20 chance of success – can sink to a 50-50 "jump call" after the warts have been revealed.

Support from senior management is critically important to the effectiveness of EDR programs. The unfortunate truth, however, is that very few businesses have implemented EDR and far fewer utilize dispute prevention programs.

But before a company needs to turn to using mediation – and even before EDR and an honest ECA protocol come into play – a dispute prevention program can bring extraordinary value to companies. That is because, if it works, you don't need to get to early assessment or resolution – the seeds of the conflict have been addressed.

Just as forward-looking companies ultimately accepted mediation, I believe that over time, an increasing number of businesses will "see the light" and take advantage of the benefits of dispute prevention programs.

Why am I so convinced? I have never met anyone who listened to the rationale for these programs and rejected the concept. It makes such obvious business sense to invest in a commercial arrangement by creating a mechanism for identifying and addressing problems **before** they become full-blown disputes. These programs can be used in joint ventures, technology agreements, or any other sustained relationship.

The goal is to build into the contract a process to address issues as soon as possible and thereby ward off disputes down the road. The concept is very straightforward. Using a joint venture as an example, where failure rates have been estimated to be around 60%, why would parties **not** build prevention into the process?

How Dispute Prevention Initiatives Work

Parties can incorporate prevention in their projects in many different ways. In any case, these efforts should mesh with the types of businesses and cultures involved.

Perhaps the most obvious approach is to introduce a "standing neutral" (or "relationship facilitator") into the relationship. Parties should use a standing neutral in any relationship that involves a significant investment or one of strategic importance. The neutral's role is to ensure that the parties surface issues promptly, have a forum for addressing them, and resolve disputes efficiently.

Neutrals can play many roles; the more versatile, the better. Ideally, neutrals understand the industry involved, possess business acumen, and have experience in risk management. Equally important, neutrals need soft skills, including the ability to [listen to the parties](#). They also need the [leadership skills](#) to help parties collaborate.

Parties agree on a standing neutral at the outset of a project and the neutral is engaged in decision-making discussions throughout the project. If parties want to avoid the costs of a standing neutral, they can retain a "stand-by neutral" who would stay "on the sidelines" until needed.

Dispute prevention agreements should include several important elements. First, the parties should acknowledge the importance of maintaining a strong ongoing relationship and that open channels of communication are critical to success. Ongoing communication needs to focus on how the collaboration is working and what circumstances must be addressed to avoid serious problems.

Second, parties need to designate empowered, appropriate representatives to monitor performance, oversee the business relationship, and identify any potential or current issue that could result in a disagreement – or worse.

After the early identification of a problem, if the parties are unable to resolve it following escalation to appropriately chosen senior executives and to the neutral, the parties can go through a more traditional mediation process utilizing the neutral. Often, the mere presence of the neutral dramatically increases the likelihood that the parties will avoid disagreements.

If the parties do not resolve the dispute between themselves or with the neutral's intervention, they can proceed to adjudication. In some situations, they may need an expedited process such as baseball arbitration.

Overcoming Resistance to Dispute Prevention

You might ask: if the benefits of such programs are so obvious, why aren't many businesses adopting them? I have heard concerns about cost, delay, variance from the standard or status quo, or simply that these methods won't work. Here are responses to these objections.

Too Costly and Likely to Result in Delays

Parties that have used dispute prevention programs have found just the opposite – they save time and money. With a relatively small up-front investment for the cost of retaining a neutral, companies can realize massive savings. One major company reported that it dramatically reduced the number of its disputes after introducing its dispute prevention program. The company cited greater communication coupled with the presence of a neutral as reasons why it worked. Early elevation of issues led to resolution without the need for law firm involvement, which resulted in a large reduction in legal fees. And the regular discussion of issues actually sped up processes rather than causing delay.

Some people worry that a dilatory party could cause delay in getting a needed resolution. That concern can be addressed by a provision that allows a party to skip steps and proceed directly to arbitration if desired. To discourage parties from inappropriately short-circuiting the process, the agreement can provide for sanctions if the bypassing party loses the arbitration.

Parties Don't Want to Discuss Prevention at the End of Negotiation

Some people note that these provisions are very different from the substance of the transaction, and that many businesspeople don't want to negotiate them after they finally agree on all the other terms. There are several ways to address this concern. One is to discuss dispute prevention early in the negotiation and not wait until the end.

Second, the way we utilize the word "dispute" may contribute to the problem, because it can be a "turn off." To address that concern and more accurately describe these provisions, we should instead use phrases such as "business collaboration" or "business continuity." This can help parties switch from adversarial negotiation to discussion of opportunities, synergies, and success – and do so from the outset. This suggestion probably can apply to all dispute resolution provisions, but it is particularly apt when addressing prevention.

Disputes Are Inevitable and Can't Be Prevented

Of course, no prevention agreement can avoid all disputes. However, by making collaboration and prevention a contractual focus, the parties set the tone for a

constructive relationship focused on surfacing and handling problems as early as possible. The availability of a neutral provides a framework for facilitated discussions that reduces the likelihood that problems will be ignored until they become too toxic to handle amicably.

Dispute Prevention Reduces Opportunities for Mediators

Some may assume that a prevention program reduces opportunities for mediators. I strongly disagree. In fact, I think it opens up entirely new and exciting opportunities for neutrals because, to quote Amit Kalantri, "A good doctor cures the disease, but a great doctor cures the cause."

When an argument appeals to common sense, it's generally worth considering. This one does.

Promoting Economic and Other Benefits of Transactional Mediation, An Under-Researched and Under-Utilised Process

[Barney Jordaan](#) believes that businesses are missing great opportunities to improve their deal-making and that our field should promote transactional mediation to help them gain the benefits that this process can offer. He is Professor of Management Practice at Vlerick Business School in Belgium, and has been active in the ADR field for more than 30 years. He firmly believes, perhaps a little naïvely, that with the right mindset, leadership, and sometimes a little help from peacemakers in business and politics, organisations and societies are capable of profound positive change.

The idea of using mediation to help parties conclude deals is not new. This is variously referred to as "transactional mediation," "deal mediation," or "assisted deal-making." In his seminal 1982 work, *The Art and Science of Negotiation*, Howard Raiffa suggested the use of the process in the context of mergers and acquisitions. In *The Global Negotiator*, Jeswald Salacuse (2003) refers to a "counsellor to the transaction" in a major international merger deal. In his 2017 book, *Negotiation: Things Corporate Counsel Need to Know But Were Not Taught*, Michael Leathes, after highlighting the typical excuses among in-house legal counsel for **not** using third parties in deal making, provides a detailed description of the advantages and workings of the process.

To date, the most thorough and extensive academic treatment of the topic is that of Scott Peppet's 2004 article, *Contract Formation in Imperfect Markets: Should We Use Mediators in Deals?* Since then, nothing of real substance has been written about transactional mediation in academic journals.

Nevertheless, a Google search reveals that the process is being promoted by a variety of organisations and service providers as the next big thing in mediation (see, e.g. [Deal Mediation](#) and [Deal Mediation in Corporate and Commercial Disputes](#)). Hager and Pritchard described the application of the process in international deal-making.

"Deal Mediation" is a new, potentially powerful tool for lawyers who negotiate global deals and for others who seek wise and fair agreements in complex environments.

Some enlightened mediators and parties have realized the value of using mediators to cut deals and this absolutely natural application of mediation is likely to gain traction among those wise enough to realise that they can negotiate more effectively if a neutral person is engaged to manage the process on the parties' collective behalf.

If deal mediation can, as we postulate, reduce the risk of stalemate in negotiations, anticipate conflict, forestall disputes and hence lead the parties to sounder contract

arrangements, there is good reason to recognize and promote a new legal specialist the deal mediator.

Yet there is no evidence of transactional mediation being used on a major scale in business negotiations.

The Benefits of Transactional Mediation

The key difference between transactional and dispute mediation is the emphasis of the former on problem avoidance and prevention. To what extent can the use of a mediator result in better deals in negotiations of franchise, licensing, joint ventures, mergers and acquisitions, or infrastructure project agreements? In other words, would mediation promote deals that are concluded efficiently from a time and cost perspective, add economic value to the parties, and minimise disputes and implementation failure?

Might the use of an impartial mediator have helped, for example, the likes of Renault/Nissan and Fiat/Chrysler, or Bayer and Monsanto with the mergers they were reportedly keen on completing? Could mediation have stopped them early on from investing more time and other resources in deals that were dead from the beginning? And what about the Brexit negotiations? Might the involvement of experienced mediators at an early stage of the negotiations have helped to avoid the current stalemate and the resulting political and economic fallout?

Qualified and experienced transactional mediators can assist deal-making in several ways. They can, for example:

- Assess early on if a deal is possible
- Help parties search for value-creating options
- Manage relational, psychological, and emotional barriers to agreement
- Assist parties in their planning and preparation
- Keep parties focused on the merits while leaving management of the people and process dimensions to the mediator
- Manage deadlock
- Create a perception of fairness through the use of objective criteria or standards to decide between options
- Improve decision-making

- Overcome information asymmetries
- Optimise outcomes
- Mitigate strategic posturing by the parties or their representatives
- Assist in implementation of agreements

In a nutshell, transactional mediation can reduce transaction costs, enhance deal value, and prevent or resolve disputes that might arise early on. The potential broader knock-on effect for the broader economy, although difficult to quantify, should not be underestimated.

Obstacles

Despite these potential benefits, transactional mediation appears to suffer from the same problems as dispute mediation. While the potential benefits of the process – at least from the perspective of the converted – are readily apparent, the uptake seems to remain limited. There has been little introspection within the mediation community about the reasons for the slow growth of transactional mediation in most jurisdictions despite the high volume of Google entries singing the praises of mediation in general.

Talking with mediation colleagues, I am often left with the impression that the blame is being shifted to the users of dispute resolution or deal making services for being blind to the obvious benefits of what mediators can do for them. We ask ourselves, "Why don't they get it?" Seldom do we ask, however, "Well, why should they? What's in it for them? What might be the risks of embracing the process for them?"

Without trying to be exhaustive, here are possible reasons for transactional mediation not "taking off" as predicted:

- Unawareness of the process and its benefits
- Perception in the marketplace that mediation is a process that is confined to the resolution of disputes
- Habit and over-confidence, i.e., deal makers are accustomed to doing it themselves and believe they can do it best
- Preference for "old style" positional bargaining or unawareness of the potential of a mutual-gains approach
- Mediator self-interest, i.e., pricing the service out of the market

- Fear that suggestion of the process could come across as weak or be construed as an admission of inability to do the deal themselves
- Concern that the involvement of a mediator might make advisors and representatives appear incompetent
- Additional costs of involving a third party
- Regulatory problems or uncertainties about the legal status of a mediator involved in the deal-making process (e.g., whether they have to register as brokers or transaction advisors, and whether confidentiality protections would apply)
- Impact of what Professor Frank Sanders called "the deadening drag of stuff quoism" (as quoted by Michael Leathes)

What Could Be Done to Increase the Use of Transactional Mediation?

I believe there are three promising ways to increase the use of transactional mediation. These are influencing the deal-making culture in organisations and among deal makers, creating awareness, and marketing the process.

Influencing the Deal-Making Culture

One option is to include transactional mediation as a component in relevant teaching and training programmes at the university and business school level. Another is to make it part of professional continuing education programmes for deal-makers and their advisors.

Creating Awareness

There are several ways to promote awareness of how transactional mediation works and its potential benefits. Mediation trainers can include it in their training programs. Planners of educational workshops can sponsor programs for deal-makers in organisations and deal-making firms, banks, and other financial institutions. These programs can be provided for employees of businesses and their advisors. Local and international bar and business associations can sponsor educational programs about it.

Marketing the Process

Our field should develop a convincing message that promotes the benefits of the process and addresses deal-makers' specific concerns. This should be addressed both to the deal-makers themselves and those acting in an advisory capacity. Transactional mediation and the role of deal-makers (and their advisors) should be

shown to be complementary. The transactional mediator should not be situated as an alternative to deal-makers or advisors but as someone who eases the work of the negotiators. Mediators should be "counsel to the deal" and not counsel to the parties. Candid messages should not only discuss how the involvement of a third party might help deal-makers but also how it might hinder the process.

If the market for transactional mediation improves, deal-makers would need a steady supply of well-trained transactional mediators. Their services should be worth their fees.

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Use PETSM to Improve the Quality of Decision-Making in Mediation

[Michaela Keet](#), [Heather Heavin](#), and [John Lande](#) describe problems with the common unplanned one-stage mediation procedure and the benefits of planned early two-stage mediations (PETSM). PETSM enables parties to carefully consider the issues and make better-informed decisions, while reducing the risk of "buyer's remorse," reneging on mediated agreements, and complaints against lawyers and mediators. It also may be more satisfying for mediators. Michaela is a Professor at the University of Saskatchewan College of Law. Heather is Associate Dean of Research and Graduate Studies and Associate Professor at the University of Saskatchewan College of Law. John is the Isidor Loeb Professor Emeritus at the University of Missouri School of Law.

Problems with Unplanned One-Session Mediations

There is a strong norm in many practice settings of trying to settle in one mediation session if possible. In cases following the one-session norm, people sometimes endure marathon mediations lasting late into the evening. When parties don't have enough information or aren't ready to make confident decisions, they may feel pressured to settle their cases.

Even when mediators avoid intentionally exerting pressure, parties can feel pressed to settle if everyone assumes that mediation normally should involve only one session. This can cause "buyer's remorse," leading parties to renege on agreements, perform them inadequately, file suit to rescind them, or even sue neutrals or lawyers.

These problems generally can be avoided if everyone plans for two possible mediation sessions. People now sometimes have **unplanned** two-session mediations, where they unsuccessfully push to settle in one session and mediate again later. Although this may eventually produce good resolutions, it does not provide the benefits of a **planned** early two-session mediation (PETSM) process of being better organized and more humane.

How Can You and Your Clients Get the Benefits of PETSM?

In a PETSM process, the first session should occur soon after the parties have done some basic fact-finding and legal research.

At the first session, the parties may be ready to settle. If so, a second mediation session would not be needed. If parties plan for the possibility of a second session, they are less likely to feel pressured to settle.

In the first session, everyone could plan "homework" to be completed before the second session. Mediators can identify critical uncertainties and potentially unrealistic assumptions and encourage people to check them out. This should reduce problems from mediators providing their own assessments and pressing parties to settle.

To maximize the benefits of PETSM, participants need to change their expectations about how mediation would work. Mediators can post information on their websites explaining the process and provide materials to help people plan for particular mediations.

Many savvy parties would be happy to take a little more time to get a more deliberate, predictable, and possibly more efficient process. Some mediators would really enjoy managing a PETSM process and might be in demand if they develop a reputation for doing them especially well.

For further detail, see [this post](#) or our book, [*Litigation Interest and Risk Assessment: Help Your Clients Make Good Litigation Decisions*](#).

Creatively Designing Mediation Procedures to Include Judicial Evaluations

Jane Juliano, based on her experience mediating in a federal agency, suggests that mediators consider engaging courts or other tribunals to provide authoritative evaluations when appropriate. She is the Chief of the ADR Unit of the U.S. Office of Special Counsel and Adjunct Professor at the Georgetown University Law Center. The views expressed in this article are those of the author, writing in her personal capacity and not as an employee of the U.S. Office of Special Counsel or Georgetown University Law Center.

Especially since the Pound Conference in 1976, parties have increasingly used mediation in the legal cases. Some theorists and practitioners have criticized the process where mediators express their opinions to the parties about the merits of the cases. In some cases, mediators have enlisted others to give parties their assessments, which preserves the mediators' neutrality and avoids confusion about the mediators' role. In mediations in my federal agency, I have experimented with enlisting authoritative decision-makers to provide assessments to the parties, which, for those who need it, resulted in more efficient and satisfying mediations.

Based on my experience, I encourage parties, lawyers, and mediators in litigated cases to creatively design procedures that provide what the parties need, including authoritative assessments from judges that do not create doubts about the propriety of the process. These assessments may come from other authorities such as arbitrators. For simplicity, references to judges in this piece include others providing authoritative assessments.

Mediation in the U.S. Office of Special Counsel

Mediation has a long history at the U.S. Office of Special Counsel (OSC). I was hired to oversee the mediation program and increase OSC's capacity to mediate complaints filed with our agency. These cases generally are filed by employees against their federal employing agency ("the agency"). The normal path for these complaints is investigation by OSC's investigation attorneys ("investigators") who decide to prosecute some cases before administrative judges at the Merit Systems Protection Board (MSPB).

OSC investigators have a role that is a combination of traditional prosecutor and neutral decision-maker. When investigators find violations, they present their findings to the agency, which may provide a remedy to the employee. Sometimes there is negotiation between the investigator, the agency, and the employee. If the agency refuses to provide an adequate remedy, the investigator can prosecute the case at the

MSPB. In my experience, the OSC assessment usually is a fairly accurate predictor of what the MSPB will decide in most cases.

After investigators complete a preliminary determination that there is evidence of a violation, they begin a full investigation of a case. They may refer a case to mediation after the preliminary investigation or any other time during the investigation. Cases generally are in only one OSC process at a time – mediation or investigation. Mediation is confidential. Investigators generally do not participate in mediation, though we have experimented with having investigators provide their expertise in selected cases, as described below.

Our Experiments Designing the Mediation Process

After we conducted a dispute systems design process and successfully expanded our program, we focused on some very difficult cases that did not settle. Some of these cases were large, complicated, fact-intensive cases that would save enormous amounts of investigative time and lead to better resolutions if we could settle them. Others were less complicated but featured other difficulties such as a party who resisted settlement. For example, we might spend hours to reach a tentative agreement, but then one side had doubts, having a gut feeling of discomfort about settling. On the other hand, these parties usually do not want to wait for a long investigation. Indeed, if we did not settle a case, OSC investigators would engage in the lengthy process of developing evidence and making a decision about whether to prosecute.

Time-honored mediation techniques were not always enough to resolve difficult cases. We focused on the mindset of the decision-makers and those who influenced them. What issues, views, or attitudes were they struggling with? How much of it was emotional or an automatic "gut" reaction against a person or organization? Was there a good faith disagreement about how the MSPB would decide an issue? Based on discussions with my colleagues in the OSC investigative unit, we tried several process experiments.

When parties' decisions in mediation are heavily affected by expectations about judicial decisions and the outcome is highly uncertain, the combination of mediators who have built trust with the parties and authoritative substantive experts can help the parties feel comfortable to reach agreement. By working together, the OSC mediation and investigation units have provided the support the parties needed to reach efficient and satisfying resolutions. In our experience, both units felt the results were better than either path alone would have provided.

In some cases, parties were reluctant to settle because they hoped to "roll the dice" and get a better result in a full investigation or a hearing than the other side's offer, possibly better than reported decisions would suggest. With the parties' permission,

we would ask the OSC investigation unit to provide input. The mediation would engage either the investigator who actually did (or would) conduct the investigation if the parties did not settle or an uninvolved senior OSC attorney to advise the parties as a subject matter expert (SME).

Such sessions are, of course, voluntary and almost always conducted in caucus, which include the OSC investigator, mediator, and party participants. The mediator reaches out to the investigator assigned to the case or an uninvolved SME, taking into account who would be most useful to the party. The investigators on the case might or might not provide an assessment depending on whether (1) they had enough facts to provide an assessment that would be of greater depth and value than an uninvolved SME, and (2) sharing investigative information would compromise further investigation. When investigators provide assessments, they might describe how the evidence looks so far, compare the facts in the case to prior hearing decisions, and suggest the impediments that the party might face when the OSC investigator makes a determination or at a MSPB hearing. The investigators might also explain how the administrative investigation, prosecution, and hearing process would proceed if the parties do not settle. When investigators who would actually conduct the investigation in a case are present, we do not discuss private mediation communications.

When uninvolved SMEs participate, they become part of the mediation and are bound by mediation confidentiality. The mediator briefs the SMEs on the basic facts and issues in the case. The SMEs then provide similar information as the investigators, but cannot discuss the evidence in as much depth as the assigned investigator because the SMEs have not done any independent investigation. On the other hand, SMEs can discuss confidential mediation information with the party, can talk with the party in more depth about their concerns, and help them compare the possible mediation options with their alternative in investigation and prosecution.

In several cases when the parties disagreed about the merits of a fundamental issue, we requested that the investigation unit focus on that issue. After receiving information about that issue, the parties resumed mediation.

If these conversations do not lead to settlement, the mediator returns the case to the investigation unit. Though mediators cannot share with investigators negotiation discussions in mediation, parties often make new settlement offers to the investigators, who can discern impasse issues. The offers typically serve to narrow the issues. The investigators might express an opinion about a critical issue and the parties often can settle their case with that knowledge in hand. In some cases, the investigators must do some additional focused investigative work, after which the parties settle – sometimes in investigation and sometimes back in mediation. Several cases have moved between the processes twice.

In some cases, we offered the use of our senior investigation attorneys to "arbitrate" an issue. For example, in several cases, the parties agreed on the basic settlement terms but not on attorney's fees (which can be an issue because of a fee-shifting statute). The parties agreed that a senior investigative attorney would review the attorney's fees bills and the parties would accept the attorney's assessment of what was reasonable. In these cases, after the parties agreed to set aside the attorney's fees issue, they settled the other issues – and ultimately the attorney's fees issue as well.

Applying These Insights to Mediation in Litigated Cases

In our adversarial system of justice, parties have the obligation to present relevant evidence in court and convince the judge or jury of the merits of their position. By contrast, mediators do not simply leave it up to parties to "make their best argument." We ask about interests, engage in brainstorming, and help parties talk with each other. We can focus intently on what all parties need to settle their dispute and design the process accordingly. In dialogue with the parties, mediators can develop not only **substantive** options but also **process** options that meet their needs.

In some litigated cases, parties would benefit by engaging the court when the parties need authoritative assessments so that they can feel confident to settle. The key is to obtain an opinion from the body that makes the ultimate decision, whether it be litigation or arbitration. This reduces parties' natural tendencies to discount opinions they do not want to accept.

Mediators and lawyers could arrange for this in several ways. If a case has been assigned to a specific judge, one option would be for the participants to meet informally with the judge in chambers to get input about certain critical issues. Alternatively, the parties can request a formal hearing to get a binding ruling on the issues as part of the mediation plan. These options would be analogous to parties getting input from OSC investigators assigned to the case.

Another option would be to seek input from judges who are not assigned to the case. In some courts, certain judges specialize in conducting settlement conferences and would be logical candidates to provide authoritative input. Even when there are no designated settlement conference judges, other judges in the court may be willing to help. This is similar to OSC cases when the parties use investigative attorneys who are subject matter experts.

I hope that many judges would welcome requests to provide this kind of assistance. Judges I have spoken with generally want to help litigants and would be happy to share their experience and insights in an appropriate process. In addition, if courts can avoid the need for a trial, they can save limited judicial resources. Most court-annexed mediation programs are careful to keep mediation and the formal judicial process

completely separate. I am suggesting that we might experiment with integrating the two.

Lawyers and mediators sometimes engage private practitioners to serve as neutral evaluators, which can be very helpful in resolving disputes. In some cases, using sitting judges would be even more effective. Consider it in your cases when it might be appropriate.

Organizations Benefit from Planned Early Dispute Resolution Systems

[John Lande](#) and [Peter W. Benner](#) describe how planned early dispute resolution (PEDR) systems work and how to develop new PEDR systems. John is the Isidor Loeb Professor Emeritus at the University of Missouri School of Law. Peter is a mediator, arbitrator, and dispute resolution consultant serving clients in the Northeastern United States.

What is PEDR?

Litigation undermines many business interests such as efficiency, protection of reputations and relationships, control of disputing and business operations generally, and risk management, among others. So you might assume that it would be a no-brainer for most business leaders to advance these interests by having their legal departments develop planned early dispute resolution (PEDR) systems.

If so, [you would be wrong](#).

But some companies do have PEDR systems.

We conducted a [study of companies that use PEDR systems](#) to enable parties and their lawyers to resolve disputes favorably and with reduced cost as early as reasonably possible. It involves strategic planning for preventing conflict and handling disputes in the early stages of conflict, rather than dealing with disputes ad hoc as they arise.

We found that there is no uniform model of PEDR systems. Each company's system is a function of its line(s) of business, history of disputing, resources, business philosophy and culture, and interests of key stakeholders, among other factors.

Even so, it is possible to make some generalizations based on our interviews. Early case assessment is the heart of the process. It is important to distinguish between early **assessment** of cases and early **resolution**. In a PEDR system, companies routinely assess cases at an early stage but may decide not to pursue early resolution in certain cases. Indeed, the early assessment is critically important in being able to decide how to manage particular cases.

Even if companies decide to vigorously pursue litigation in such cases, this is part of a PEDR system if they make these decisions as part of a **regular procedure rather than simply a case-by-case determination**.

Effective PEDR systems require at least one individual who is responsible for overseeing the system. One lawyer said that it was important to have one person to “own” the system. These individuals often are called the “ADR counsel,” though it would be more appropriate to call them “PEDR counsel” considering the range of functions they may perform, which may include some or all of the following activities:

- helping plan the system
- consulting with ADR experts and colleagues in other companies
- assembling information about the company's dispute resolution experience
- eliciting views of stakeholders in the company about their interests, objectives, and values
- developing recommendations and criteria for early case assessment and determination of optimal resolution processes to accomplish company objectives
- developing materials and providing training for stakeholders
- providing advice to lawyers and clients about handling particular cases
- periodically reporting on the effects of the system
- proposing refinements of the system to make improvements and address any problems

Developing and Maintaining PEDR Systems

In almost all of the examples we studied, inside counsel initiated PEDR systems. An outside counsel who has assisted many companies in developing PEDR systems said that, in his experience, the legal departments initiated and designed the systems. The business leaders, he said, were “brought along” only at the end.

Because many people involved in handling business disputes are comfortable with the status quo and are convinced of its effectiveness, they may resist initiatives to change. Thus developers of PEDR systems must build support for these initiatives.

Proponents can identify interests that PEDR systems can satisfy such as reduction in the time and expense of litigation, achievement of better outcomes, maintenance of business relationships, protection of privacy, protection of reputations, greater control of disputes, reduction of risk, improvement in relationships between inside litigators and business leaders in their company, and improvement in coordination between companies and their outside counsel.

Lawyers who want to institutionalize PEDR in their companies often need to make the business case to the internal stakeholders using data to demonstrate the economic benefits. Case management systems may produce data on costs, cycle times of disputes, and other factors that may help make the case for PEDR.

It is especially important to transform the mindsets of inside litigators. A former general counsel pressed inside litigators in his company to have a cultural and strategic business orientation and not merely a “check-the-box” approach in a formalized system.

For a PEDR system to work effectively, those involved need to be trained so that they understand how to make it work. This begins with inside and outside litigators who need to view disputes as part of a business strategy, not just legal contests.

Transactional lawyers may negotiate [more sophisticated dispute prevention and resolution clauses](#). In addition, they are likely to be the first lawyers who are contacted when contract disputes arise, so they should know how to respond effectively.

Lawyers in this study emphasized that the process of developing PEDR systems is a “cultural project.” For example, in one company, key stakeholders came to appreciate that PEDR provides a more sustainable way to deliver value, so it is now part of their business strategy and legal culture. One lawyer said that the primary motivation for developing his company's PEDR system was that it simply is “a better way to do business.”

In general, developing PEDR systems should involve the following steps:

- designating ADR / PEDR counsel to coordinate the systems
- using dispute system design methods to analyze dispute resolution patterns and problems
- learning the root causes of disputes to develop dispute prevention processes
- developing technical assistance resources for stakeholders
- encouraging law firms and neutrals to advise clients about PEDR
- creating incentives to use PEDR
- making PEDR a valued part of the business culture
- planning for PEDR to survive the departure of initial champions

Although this sounds simple in theory, we found that in practice, many individuals prefer to maintain the status quo. Innovative lawyers and executives need to persevere to overcome barriers inhibiting development of PEDR systems. Our study suggests that businesses that do so can gain significant benefits.

If more companies plan to develop collaborative relationships as part of their transactional negotiations as [Noah Hanft](#) suggests, this could help change their corporate culture to use PEDR systems more generally.

A Goldilocks Approach for Mediation Standards

Kimberly Taylor argues that it is important to maintain flexible mediation standards that provide appropriate guidance for mediators and parties while avoiding over-regulation that would restrict their ability to tailor the process and outcomes to meet parties' needs. She is the Senior Vice President and Chief Legal and Operating Officer of JAMS.

When Frank Sander proposed the "multi-door courthouse" at the Pound Conference in 1976, he probably could not have imagined how widespread the use of mediation would be today in the United States and around the world. As just one example, last year, JAMS mediators handled over 10,000 matters in the United States and abroad.

As the use of mediation has grown across this country and internationally, standards have been developed to guide mediation practice. With the recent adoption of the [United Nations Convention on International Settlement Agreements Resulting from Mediation](#) (commonly known as the Singapore Convention), a question has arisen whether the creation of uniform mediation standards and training guidelines is desirable and practical. I believe that it is important to have standards and guidelines – and that they should be flexible, permitting mediators, parties, and lawyers to decide how to handle each case.

In the decades since the Pound Conference, mediation has become a standard – and also flexible – process throughout the United States. It provides disputing parties greater control over the outcome of their matters and the opportunity to preserve relationships in a confidential process, ideally in a cost-effective and efficient manner. The marketplace has become increasingly sophisticated regarding the selection of mediators. Parties in mediation do not expect or want mediators to adhere to one particular process or approach. Mediators often rely on their creativity and experience to tailor each mediation to meet the needs of the parties.

Mediation in the United States has thrived with flexible regulation of the profession. Standards of conduct for mediators have been developed that guide mediation practice while allowing needed flexibility. For example, the ABA / AAA / ACR [Model Standards of Conduct for Mediators](#) covers topics such as self-determination, impartiality, conflicts of interest, competence, confidentiality, quality of the process, and fees. The [Uniform Mediation Act](#) covers similar topics. The [JAMS Mediation Ethics Guidelines](#) require that all parties are informed about the mediator's role and mediation process and that everyone understands the terms of settlement. They also require voluntary participation, competence of the mediator, confidentiality, and impartiality. And they require the mediator to refrain from providing legal advice, withdraw if the mediation is being used to further illegal conduct, and avoid using misleading marketing.

The Singapore Convention is intended to provide a framework for the enforcement of international settlement agreements resulting from mediation, hopefully leading parties involved in cross-border disputes to use mediation to resolve their disputes. According to Article 5(1)(e), one of the grounds for refusing to enforce a mediated settlement agreement is that "[t]here was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement."

The Singapore Convention does not define "standards applicable to the mediator or the mediation." Organizations such as the American Bar Association, International Bar Association, JAMS, and the International Mediation Institute have promulgated standards. To the extent the mediation community determines that a uniform set of standards is needed for cross-border mediations, these existing guidelines are a good starting point. Where mediation is nascent outside the United States, some form of credentialing or a set of uniform standards may be useful in persuading users that the mediator has been properly trained and vetted, and that users can expect a certain level of quality. Even within the well-established U.S. mediation market, mediators who are just beginning their careers may benefit from some form of credentialing or adherence to uniform standards to assure prospective users of their competence.

As the mediation community discusses uniform standards contemplated by the Singapore Convention, it should consider the risk of over-regulation causing sophisticated users to forgo mediation if it blocks experienced mediators from using their own wisdom, judgment, and creativity to help parties come to resolution. Any standards that are adopted should provide flexibility for mediators to determine the best approach in a given case, permit them to be facilitative and evaluative, structure creative (sometimes non-monetary) solutions, and adhere to generally accepted ethics standards such as disclosing potential conflicts of interest.

In the near term, the Singapore Convention – with or without uniform standards – will most likely not lead to the widespread use of mediation for cross-border disputes. However, it has put the spotlight on mediation and all of its positive attributes, and that will further the development of the profession. In doing so, it is important that mediators, working with their clients, retain the flexibility to structure a process that they believe best meets clients' needs.

We Need to Do More and Better Assessment of New Mediation Trainees

Rebecca Price argues that the ADR community needs to do more to bridge the gap between training and practice. Not only would that help make better neutrals, it would help to level the playing field for newer neutrals and raise the quality of service for those in dispute. She is the Director of the Alternative Dispute Resolution Program at the U.S. District Court for the Southern District of New York. These views are her own and not those of the Court.

The Goal

One of my greatest aspirations for mediation is to improve mediator training and assessment because it is an obvious area where we can do more and better. My goal is to produce competent mediators and identify those who are not yet sufficiently competent to practice independently. Mediators' competence matters a lot for mediation participants – and also has significant implications for public and private mediation providers and for public perceptions of the field overall.

Definitions of "mediator competence" vary. For the purposes of this post, I'm defining it as (1) demonstrably understanding mediation (as distinct from arbitration, adjudication, early neutral evaluation, negotiation etc.), (2) understanding and supporting self-determination, (3) understanding and demonstrating neutrality and impartiality, (4) maintaining appropriate confidentiality, (5) upholding the core values of mediation practice, and (6) being responsive to differences in parties, forums, and subjects. This really is quite a lot.

Most mediation training in which I've participated (as a trainee AND trainer) offers some feedback to trainees through role plays but nothing else to distinguish people who might be competent mediators from those who might not yet be competent. Indeed, awkwardness, collegiality, and/or obliviousness may result in no meaningful feedback from coaches to trainees who seem to lack core mediation skills.

For coaches, there can be a disconcerting self-reflection when observing a trainee who is struggling as the coaches may think, "When I was at the stage of learning she is in now, I made similar mistakes...." These coaches may have been able to advance in mediation (mistakes and all) in part because no further credentialing or mentoring was offered beyond the initial training. Historically, mediators in many settings have been encouraged to "learn on the job" (albeit at the expense of unfortunate parties who, most certainly, were not being told of the service they were providing for the new mediator).

At this stage in the evolution of mediation practice, we don't have to continue to assume that people will learn basic skills and process "on the job." We could, as a

profession, expand existing training and mentoring infrastructures in our communities for new mediators – or create these opportunities if they don't already exist. Some trainers and programs are explicit about "credentialing" prospective mediators. For example, in New York (and probably elsewhere), the community dispute resolution centers programs offer apprenticeships in addition to basic training. In these centers, mediators aren't allowed to take cases until they have completed an apprenticeship and passed an evaluation. The [International Mediation Institute](#) also offers certification for mediators. Many mediators, however, do not seek out and/or cannot afford the time and monetary commitments of this level of training.

We need to create an accessible mechanism to provide mediation trainees good assessments of their strengths and weaknesses. This would benefit a lot of ADR stakeholders, including mediation participants, mediators, and public and private mediation programs that rely on training providers for a pipeline of new mediators.

As a mediation program administrator, I need help in identifying competent mediators for my program. As a field, we need to develop measures of mediator competence that would allow programs to hone in on what we most need – which is good mediation skills and judgment.

In my experience, academic credentials are not necessarily good indicators of what I think are the core qualities of great mediators – creativity, optimism, connection, curiosity, dynamic engagement, persistence, and humility. Considering people's schooling, age, firm affiliation, social and professional networks often replicates existing hierarchies. In addition to being poor indicators of important mediation skills, these criteria screen out diverse people who may not have the same access to, for example, the partnership track, an Ivy League school, or a network of friends and colleagues who already serve as neutrals.

Letters of reference and interviews are helpful, but often not as much as one would imagine. References are written by people who like the candidate, and the writers therefore assume that because they like them, they will be competent mediators. These things are not always the same. Interviews give applicants a chance to talk about mediation techniques, but discussing mediation thoughtfully doesn't necessarily reflect the ability to provide competent mediation services.

A Strategy

So what do I suggest to move this along? That's a hard question and I don't have a complete and definite answer. For now, I would focus on training providers and law school clinics because they are often the on-ramp in this profession. We need a tool that gives trainees a rough assessment of their knowledge and aptitude as a competent mediator at the conclusion of their initial training. Many such tools already exist and one could be developed that might be used nationally.

Training programs should offer the service of implementing the tool, perhaps for a small fee in addition to the cost of the training. It would most likely involve a role-play model and should require something less than what we would expect from someone who has completed a full apprenticeship or has had opportunities to shadow or co-mediate. After completing training, new mediators might opt to do the assessment, the results of which could be included with their applications to public or private mediation panels.

There are a number of formidable challenges to this idea, all of which have been explored in more depth by others. They include the challenges posed by mediation itself, which can be properly practiced in many different ways. It can be hard to develop a valid and consistent process for assessing role-play performances (or live mediation), even with careful training of assessors and careful development of assessment criteria and procedures. An example of such an attempt can be found on the [SDNY mediation webpage](#) under "Mediator Evaluation Program."

As mentioned above, mediators assessing role-plays may feel awkward giving candid assessments and they may make judgments based on their own views about what techniques are appropriate or not. Implementing post-training credentialing may serve as an entry barrier to newer and/or less confident mediators who may be adept at actual practice.

A significant challenge is the opinion of many mediators that the market itself should be the arbiter of effective practice. They may think, "If people hire me to mediate, I must be a good mediator." Another challenge is the risk that mediators with backgrounds other than the law would be disadvantaged by a system giving priority to litigation risk analysis and subject-specific expertise over core mediation skills.

There is no way to perfectly address these and other concerns. However, I believe that it is possible to develop an assessment process that could focus on core skills (such as active listening, open questioning, demonstrating neutrality, and supporting self-determination) that cut across mediation practice styles. In my experience, the question of whether or not a mediator is competent is often answered by an individual's ability to perform these core skills and promote these underlying principles. An assessment process that focused on core skills would be valuable regardless of the mediators' backgrounds, types of cases to be mediated, and court, community, or private context.

In Conclusion

At an ABA Dispute Resolution Section conference, I heard someone thoughtfully and passionately speak out against mediator credentialing. He said (I'm paraphrasing) that credentialing was a way to preserve the status quo, prevent change, and limit access to the field for new mediators. He said that it was as if we were pulling up the entry ramps

to the mediation "boat," which was now filled with everyone who got on before this change would go into effect.

Our field has evolved, and I think that having some accessible national credentialing linked to initial training may have the opposite effect. Instead of pulling up the on-ramp, it may give new neutrals a way to establish a basic level of skill, and may give parties in dispute and mediation programs a basic level of comfort in the process. We all know that mediation training alone doesn't make a competent mediator. We should aim higher.

We Need to Re-Invigorate Federal Administrative ADR

Scott Maravilla recommends increased professional development of ADR practitioners and use of new technologies for conflict resolution in the federal government. He is an Administrative Judge with the Federal Office of Dispute Resolution for Acquisition. The views presented here are solely his own and do not represent the views of his agency or any other organization.

The federal government has actively used and promoted ADR since the 1990s. There has been an increase in the number of retirements from federal service, including many ADR experts. The federal government should address this loss of expertise by hiring replacements, mentoring ADR professionals, and adopting new technologies for dispute resolution.

History and Success of ADR at the Federal Level

The 1990s witnessed a renaissance in ADR at the federal level. In 1996, Congress enacted the [Administrative Dispute Resolution Act](#) (ADRA). Its salient features include:

- Authorizing use of ADR in administrative actions;
- Establishing guidelines for who may serve as a neutral;
- Insuring confidentiality of proceedings; and
- Authorizing the use of binding arbitration.

Two years after ADRA's passage, President Bill Clinton established the Interagency ADR Working Group ("Working Group") to encourage and coordinate the use of ADR across the government. Headed by the attorney general, it was composed of dispute resolution specialists in federal agencies. The Working Group addressed workplace conflicts, public procurement, enforcement, and general litigation.

The federal government rode a nearly twenty-year wave of enthusiasm to increase the use of ADR techniques. The Working Group's 2016 *Report on Significant Developments in Federal ADR* described great success in use of ADR throughout the federal government in resolving administrative-level litigation inside and outside the government. Federal agency ADR includes early intervention in disputes, greater deployment of ombuds, and increased use of new technologies. This is the result of the endeavors of a founding generation of practitioners, agency representatives, and administrative judges. The full text of the report and other valuable ADR resources are available on the [Working Group website](#).

Reduction in Support for ADR

With great success comes the challenge of maintaining it. In 2018, the number of federal employees who retired increased by 12,000 compared with the previous year, including many ADR experts. Federal agencies will have to find suitable replacements who may or may not have the same level of energy for promoting ADR.

The American Bar Association, which has been a major proponent of ADR in the federal government, has witnessed a decline in membership. Its general budget consequently decreased by 22 percent between 2014 and 2018, which also reduces support for ADR in various sections and specialty practice groups.

These reductions may contribute to a perception that we can take ADR for granted and don't need to promote it any more. As a result, it may become less effective. However, ADR practitioners and other stakeholders still need to be educated on how to negotiate and use ADR processes effectively.

Recruiting and Developing ADR Professionals

To address the problems described above, we need to recruit new ADR professionals in the federal government and provide the professional development for them to be effective. They need specialized training and continuing education such as programs focused on practical advice for negotiators and mediators. For example, the Judicial Division of the Board of Contract Appeals Bar Association held an "Ask the ADR Gurus" program that was well received.

Using New Technologies

ADR is changing with the development of new technologies. Federal government ADR should evolve to keep pace with these developments. The Working Group should establish a task force to study and promote using new technologies in ADR. For example, low-cost video teleconferencing technologies can increase the quality of communication compared with processes conducted by telephone, which do not provide valuable information of body language and facial expressions. Using new technologies in ADR can encourage a new generation of tech-savvy ADR practitioners to enthusiastically maintain its prominence in our legal system.

Mediators Can Greatly Improve Your Skills Using Reflective Practice Groups

Laurel Tuvim Amaya describes the benefits of participating in reflective practice groups, where mediators and other practitioners can benefit from deep analysis of challenging problems in their cases. She is a California family law attorney and mediator.

Mediation is fundamentally different than litigation, and so mediators need different ways to improve their skills.

Litigators might ask colleagues about experiences in certain courtrooms, feedback on legal analysis, help with legal authority, and the like. For example, litigators might seek cases that can bolster their legal arguments.

Getting help in mediation is much different. Mediators telling each other how they mediated a case with their clients in the heat of a polarizing argument doesn't necessarily help colleagues even if the situations are similar. Not only are the people, their personalities, and issues different between the different mediations, but mediators also need to consider **their own part** in the interactions. They should consider their own reactions, assumptions, interpretations, and responses as they mediated. Litigators usually don't consider these issues in their work.

Some litigators and mediators participate in practice groups to get help in handling particular cases and generally develop their skills. I have been in groups of litigators and mediators and noticed important differences. Mediation particularly lends itself to the benefit of using reflective practice groups (RPG), although litigators also could benefit from RPG processes.

How Reflective Practice Groups Work

In RPGs, practitioners help each other find their own answers to their practice problems. When a member identifies challenging problems in his or her case, colleagues ask questions to elicit the member's own evaluation of the situation rather than offering their ideas and suggestions. This helps practitioners dig deeper and see things that may have eluded them. This is particularly helpful for mediators, whose personal knowledge, perspectives, and experiences can play such a big part in how they interact with their clients. The RPG process is similar to what many mediators use with clients.

While RPGs can be used in any professional practice, they are especially well suited for family law mediation and collaborative law because practitioners are working in real time, face to face, with two or more people – and our own personalities are part of the mix.

How Reflective Practice Groups Differ from Other Practice Groups

As a family lawyer, I have been a member of various study / practice groups. These groups have provided me with an incredible network of colleagues who do similar work. This is especially valuable for family lawyers because most are solo practitioners who spend hours alone at computers with little interaction with other attorneys. Participation in a study group provides the feeling that there's a colleague down the hall who you can consult when needed.

Traditional study groups in family law practice enable practitioners to convene, share "war" stories, and ask for advice. I created this kind of group for attorney-mediators but often felt that colleagues' well-meaning advice left me seeking answers. I often found that I couldn't apply the advice about mediation from a colleague's experience in the same way I might in litigation.

I didn't see the difference until I joined an RPG. In a more traditional group, I pondered issues about how to best serve my clients, but reflective practice enabled me to delve deeper into my thought processes.

Improve Your Skills by Participating in a Reflective Practice Group

Reflective practice groups help practitioners improve how they meet the needs of their particular clients. If you are not part of a group, you can organize or join one. If you are part of a more traditional study or practice group, you can incorporate reflective practice techniques in your group's process to maximize the benefit for all the members. As mediators improve our skills, we provide better services to our clients, increasing the reputation for mediation as a valuable method for family law dispute resolution.

RPGs are very useful for family mediators, but RPG techniques can be used in other contexts. For example, mediators who handle civil cases and collaborative practitioners can readily use these techniques. Lawyers representing clients also could benefit from these techniques to improve their work with clients, counterpart lawyers, and even judges. Family mediators and lawyers routinely work with professionals in other disciplines, such as mental health practitioners and financial experts, and they all could benefit from "mixed" groups with practitioners from different disciplines (as some collaborative practitioners do).

Try it. You'll like it.

A Modest(ish) Proposal: Enhancing Impact Through Joint Spring Conferences

Brian Farkas argues that our field's largest annual gathering, the **ABA Section of Dispute Resolution's** spring conference, is too insular. To expand the field's impact and broaden our base, he suggests that we should change its structure by collaborating with a different ABA section each year. He is an Adjunct Professor at Cardozo School of Law.

The [goals for the future of the dispute resolution field](#), identified after the Past-and-Future Conference, are ambitious, to put it mildly. My contribution to the Theory-of-Change Symposium is far more modest: an honest discussion on bar associations, conferences, and the way we gather together. Specifically, I'd like to reflect on the field's "Super Bowl" – the American Bar Association (ABA) Section of Dispute Resolution's annual spring conference.

In short, I worry that the dispute resolution field is too siloed and needs more intentional collaboration with practitioners beyond its walls. To address this, I propose a structural shift whereby "our" Section would jointly host its annual spring conference with another rotating ABA section. This shift would promote greater idea-sharing and collaboration across legal specialties, and also grow our Section's audience. Intentional collaboration would create the context in which the substantive goals for the field's future could be most productively addressed. Crazy? Maybe. Let me explain.

Two Disclaimers at the Outset

First and foremost, I want to be clear that this piece is **not** meant to critique any prior spring conference, nor is it meant to critique the (ridiculously) hardworking ABA staff, dedicated volunteers, or devoted Section Council members. Rather, these reflections are offered in the spirit of possible reforms for the dispute resolution field to meet the needs of the future legal landscape. Over the long term, our field cannot be effective unless it grows in tandem with other areas of law, informing their development.

Second, I should disclose that I'm no stranger to the Section of Dispute Resolution. I'm a shameless fan of our Section and its members. My friends constantly tease me for the number of DR Section tote bags that manage to follow me wherever I go. I attended my first spring conference in 2011 as a student at Cardozo School of Law (where I now teach). I've attended every spring conference since then. I read each issue of *Dispute Resolution Magazine*; my bookshelf is filled with Section-published books; and I sit on several Section committees. So this piece is from the perspective of a loyal member and volunteer.

With those disclaimers, let's delve into my perception of the problem and my proposed solution.

Are We Talking to Ourselves?

Lately, I've wondered whether the spring conference provides sufficient cross-pollination of people and ideas. That issue is two-fold: First, are we in the dispute resolution world being sufficiently exposed to happenings beyond our field? Second, are we doing enough to evangelize dispute resolution processes and research to the broader legal community?

There is obvious value to "talking among friends" – those already inside the informed community of dispute resolution scholars, neutrals, lawyers, and other professionals. Sharing the latest dispute resolution practices and research within our family is critical. As our field has matured in recent decades, there is no shortage of opportunities to do just that. Neutrals can attend events organized by the College of Commercial Arbitrators, Association for Conflict Resolution, or International Academy of Mediators (among many other professional groups). Professors can attend the American Association of Law Schools (AALS) Section of Alternative Dispute Resolution events, including its annual Works-in-Progress Conference. Dispute resolution scholars and practitioners regularly mix and mingle at the annual symposia hosted by leading law school dispute resolution programs. This list doesn't even include the countless programs organized across the country by the American Arbitration Association, JAMS, NAM, NAA, and the ABA Section of Dispute Resolution itself.

With all these dispute resolution-themed events, what makes the Section's spring conference distinctive within the field? Yes, the conference is much larger than the events I've just mentioned. Yes, it's informative to meet dispute resolution enthusiasts from beyond our immediate communities. And yes, it's invigorating to see our friends in new cities. (Karaoke night with those friends in new cities is particularly invigorating....)

But is there more value that could be claimed from the Section's role within the American Bar Association? I think the answer is yes.

The Broader ABA Context

Another layer to this is economic. It's no secret that the ABA is [struggling for membership](#) and experiencing dramatic declines in [dues revenue](#). A [recent report](#) by the ABA Division for Bar Services shows similar trends among state and local bar associations.

There are many theories for these trends: a shrink in the overall profession, a preference for online CLE programming, and the high costs of membership.

I won't speculate on these wider trends. Anecdotally, though, I'm somewhat of an anomaly among my millennial friends in my enthusiasm for bar associations (hence the tote bag teasing). I try hard to get friends to join the ABA and (for those who practice litigation) attend the DR Section's spring conference. I pitch the importance of negotiation, mediation, and arbitration. But the reactions are often tepid. Some prefer to complete their CLEs online. Some don't have the bandwidth to travel. Some simply don't want to spend their free time mingling with lawyers (which ... fair enough).

One common response I hear, which is perhaps most instructive, is that their employers won't pay for multiple bar associations and conferences each year. They certainly won't pay for conferences in fields outside of their particular practice area. **We** know that dispute resolution processes transcend essentially all practice areas. But to employers and junior-level attorneys, that value proposition isn't so clear. Attending the spring conference can cost well over \$1,000, factoring in the hotel, the flights, and the registration fees. How can we justify that cost to employers and individuals who aren't full-time dispute resolution professionals? How can we enhance the appeal of the spring conference? And how can we get new voices in the room, both to speak and to listen?

A Modest(ish) Proposal: Hosting Joint Section Conferences

Here's my idea, which is simultaneously bold and modest: Each year, the Section of Dispute Resolution hosts its spring conference in conjunction with another ABA section. Ideally, both sections would hold their annual conferences in a single city, occupying either one large hotel or two physically adjacent hotels. Folks from "our" Section would jointly plan a number of programs with "their" section, holding joint panels and networking receptions. Both conference agendas would have a unified "track" of these joint programs to ensure that attendees spot them. Anyone who registers for one section's conference could attend events of the other without additional charge.

The [Section of Litigation](#) is one obvious group that screams for our collaboration. But the potential options are endless. The ABA has sections dedicated to [Construction Law](#), [Criminal Justice](#), [Environment](#), [Energy & Resources](#), [Labor & Employment](#), and [Family Law](#), among [dozens](#) of others with clear connections to dispute resolution.

I see three primary benefits of this new spring conference model:

- Dispute resolution practitioners and scholars who typically attend the spring conference would benefit from exposure to another practice area. Intellectual benefits would come from joint panels addressing legal issues from different perspectives. Networking benefits could result from exposing practitioners to neutrals involved in our Section, who might then be fresh on their minds when they need to hire a mediator or arbitrator. And economic benefits could result

(from the Section's perspective) by creating greater justification for lawyers to become involved with our events.

- Members of the "other" section would benefit from exposure to dispute resolution processes and procedure. As we all know, lawyers don't always appreciate the methods, research, and best practices that the dispute resolution field has developed. We often lament that lawyers in different practice areas lack basic familiarity with dispute resolution. Well, here's a perfect opportunity. A lawyer who innocently registers for her annual Section of Business Law conference would suddenly find herself invited to various dispute resolution programs. Leading lights from each section would speak on panels together. Members of that section would almost surely come away with greater appreciation for the ways in which dispute resolution processes could influence their day-to-day work.
- Collaborating with a different section would create novelty for each year's spring conference. Right now, the primary novelty (beyond the varied programming and location) is the annual "theme." In my view, the "themes" are a bit silly. They are too general to mean much to the average attendee. Recent themes have included "Innovation, Improvisation, and Inspiration" (2020), "Shining the Light on Parties" (2019), "Dispute Resolution in Complex Times" (2018) and "Developing Skills, Finding Meaning, Pursuing Justice" (2017). Each year, speakers contort their program proposals into somehow reflecting these lofty words. The annual theme should always be "dispute resolution." But the added twist would be the topics, speakers, and practice areas that would spring from the section collaboration. One year might have an emphasis on intellectual property issues in dispute resolution, another year might have an emphasis on insurance issues in dispute resolution, and another year might have an emphasis on criminal justice issues in dispute resolution.

Importantly, not **every** program would be a joint program. Perhaps only 10-20% of the programming in a given year would reflect the collaboration with the "other" section. This limitation will prevent our Section from losing its core membership of dispute resolution neutrals, scholars, and professionals – many of whom may not care very much about the particular section with which we are collaborating. But that 10-20% of collaborated programs would create tremendous new energy and idea-sharing.

We would also still want many aspects of the conference to remain our own. Our award ceremonies, our symposium on ADR in the courts, and our legal educators' colloquium could all remain virtually unchanged. The only addition, perhaps, would be that folks from the "other" section could be drawn into these events as speakers and attendees. For example, imagine that we coordinate with the Section of Litigation. Wouldn't it be terrific to have those who teach trial advocacy and pre-trial practice participate in the legal educators' colloquium? Wouldn't the judges in the [Judicial](#)

[Division](#) have a fantastic perspective at the court ADR symposium? Attracting more people into the room with different perspectives will allow our Section to bolster its impact on the profession.

A Lighter Alternative: Inviting Another Section to Co-Sponsor and Create a Dedicated "Track"

I can already imagine the anxiety that the above paragraphs would cause at the ABA. The logistics of this joint venture would surely put additional pressure on the already-hardworking staff and volunteers. The administrative headaches – finding suitable venues, picking dates, coordinating programming, sharing costs – are not insignificant. Undoubtedly, merging two sections' conferences would be a massive logistical undertaking.

Let me propose another approach that accomplishes the same goals of intentional collaboration with somewhat less effort. (And here I must credit John Lande, who devised this intermediate proposal during our conversations about this issue.) Rather than hosting full-blown joint conferences, we could invite another ABA section to "co-sponsor" our spring conference. A planning committee of "their" leaders could develop a track of programs within our agenda, and the conference would be marketed to members of both sections. With relatively little effort, other than coordinating the volunteers and soliciting program proposals, we could integrate another section into our conference each year.

Similarly, the DR Section could offer to do the same for another section's conference. That is, we could assemble a working group to plan dispute resolution-infused programming during the Section of Bankruptcy's annual conference (for example), collaborating with their members to highlight ways in which our fields intersect.

While not quite as ambitious as joint conferences, this co-sponsorship model would allow healthy cross-pollination with a new section each year.

Challenges and Conclusions

Would this new approach to spring conferences be easy? Certainly not. Coordinating with another section adds a whole host of new challenges. But after some initial growing pains, this new model would force an annual interdisciplinary reflection. Those within the dispute resolution world would need to think anew about how dispute resolution scholarship and practice fits into different areas of law and modes of conflict.

Moreover, this approach would create a pathbreaking new role for our Section within the larger project of the ABA. No longer would it exist primarily to support DR professionals; its mission would expand to more systematically supporting the work of the broader legal profession. Lawyers who don't identify as "dispute resolution

professionals" would learn more about how our work intersects with theirs, and vice versa.

Many participants in this Theory-of-Change Symposium will surely have bigger and bolder proposals on the substantive future of dispute resolution. Admittedly, the configuration of an annual bar meeting isn't the sexiest of changes. But in its own way, shifting the structure of the spring conference could provide the collaborative context to allow us to more holistically address bigger challenges.

Simply put, meaningful and structural collaborations in conferences across ABA sections could have both intellectual and economic benefits. Indeed, it could accomplish what many of us regularly preach in our classrooms: expanding the pie.

Research and Scholarship

The fact that I wrote many of the pieces in this part is a reflection of my lifelong interest in understanding how the real world really works. My skeptical view of official stories started early in my life. At a very young age, it seemed very fishy that there was a society-wide conspiracy to perpetrate the fiction of Santa Clause. Although this was obviously a wink-wink myth, school kids – and adults – are supposed to believe accounts of how our government and courts work. Even as a child, I could see that political partisanship has a huge impact on government policy and that our courts do not provide equal justice for all.

Although the official accounts were distorted, I believed that there was some underlying and knowable reality. In college, I took a lot of sociology and psychology courses where I learned about social science methods to systematically identify and screen out biases to provide a better portrait of reality. I was particularly fortunate to take a sociology of law course that started my serious interest in empirical research about law and dispute resolution, reading many classics in the field, [summarized in this post](#). In particular, I read *Settled Out of Court: The Social Process of Insurance Claims Adjustments*, which provides a very vivid and believable account of how auto insurance claims are handled. There was virtually none of the melodramatic nonsense we see in much of our popular culture but rather the completely convincing logic of how people handle routine cases every day. (This is not to condemn all popular culture because even fictional stories sometimes provide good portrayals of reality, as I suggested in this [recent post](#).)

I later read Stewart Macaulay's classic article, [Non-Contractual Relations in Business: A Preliminary Study](#), which explained why the last thing that businessmen wanted to do was to go to a lawyer when they had a dispute. In grad school, I was fortunate to meet Stewart and hear him tell the story of how his father-in-law, a retired corporate executive, told him that much of the content of law school contracts courses "rested on a picture of the business world that was so distorted that it was silly."

By the time I got to grad school, I had already graduated from law school and practiced law and mediation. Indeed, I went to grad school precisely because I wanted to pursue an academic career to learn more about how mediation and other dispute resolution processes really work – and to use that knowledge to improve and promote these processes. I was very lucky to be in the right place at the right time because there was a growing interest in empirical research about dispute resolution at that time, which is reflected, in part, in the [ABA Task Force Report](#) in this section.

Now, decades later, there is a [sprawling body of empirical research and other scholarship](#) about dispute resolution as I describe in this post. Many disciplines spawn new literature in the US and around the world. Practitioners produce tons of relevant literature, and we even rely on much in the popular press. We are producing literature

at a much faster rate than Lucille Ball had to manage in the chocolate factory. It is overwhelming and way beyond the capacity of any individual to absorb even a small fraction of it.

I highlighted key insights from the impressive 2017 [ABA Section of Dispute Resolution Task Force on Research on Mediator Techniques](#). Collectively, the 47 studies that the Task Force analyzed show that evaluative mediation isn't inherently good or bad and that we can't be confident that any of the mediators' actions they analyzed are going to have particular effects. I argued that although empirical research can't provide strong generalizations about the effects of particular mediation techniques, it can help us improve our conceptual clarity, discover new ideas and develop insights, develop good theories and questions, identify especially important contextual factors that may affect mediation and other dispute resolution processes, and design dispute systems.

In another post, I recommended that we should develop a [common language of dispute resolution](#). This was consistent with the analysis of the [Tower of Babel Symposium](#), finding tremendous confusion in our language and concepts about negotiation as well as the aforementioned ABA Task Force recommendation to develop "more uniform definitions and measurements of mediator actions and mediation outcomes." I also urged researchers to increasingly use qualitative research methods, which can be especially valuable in leading to new discoveries, insights, and perspectives about the real world of dispute resolution.

[Nancy Welsh](#) also has had a long-standing interest in empirical research and scholarship. She chairs the ABA Section of Dispute Resolution's Advisory Committee on Dispute Resolution Research and argues that our field needs relevant, routinely-collected, up-to-date data about the full range of dispute resolution processes. She says that we need more research to hear both good news and bad so that we will know what and how we need to change.

Nancy moderated an excellent session at the Past-and-Future Conference featuring [Roselle Wissler, Howard Herman, Russell Korobkin, and Donna Shestowsky](#). They provided very useful primers about methodologies and terminology for research with a real-world focus, discussing the value of empirical research, the nature of experimental and non-experimental research, the importance of using consistent terminology, the nuts and bolts of conducting research, and suggestions for future research on dispute resolution.

In a follow-up session at the conference, [Doug Frenkel, Michaela Keet, Donna Stienstra, and I](#) discussed questions about empirically studying actual dispute resolution practice. We considered key goals of research, dealing with numerous contextual variables that may affect outcomes, important issues and variables that should be studied in future research, and good methodological approaches.

Another piece elaborates my [encouragement for academics to conduct empirical research about dispute resolution](#). It cautions novice social scientists about challenges of doing quantitative research and describes the advantages and fun of doing qualitative research.

In the final piece in this section, I describe a [quick, easy, no-fuss-no-muss, surefire method to create new knowledge](#). With a little bit of extra effort, speakers at educational programs can generate new knowledge by systematically tapping the experiences and perspectives of audience members.

Sprawling Dispute Resolution Scholarship

John Lande describes the sprawling body of dispute resolution scholarship. He is the Isidor Loeb Professor Emeritus at the University of Missouri School of Law.

Do you suffer from the [imposter syndrome](#) too?

I have been in our field for decades and I know only a teeny tiny fraction of our body of knowledge.

I feel like [Lucille Ball in the chocolate factory](#) as we constantly churn out ever more stuff and I can't keep up.

I generally try to avoid thinking about this but I was on a program about scholarship at the Past-and-Future Conference and I thought it would be nice if I knew something about the subject.

So I perused titles of recent publications to get a feel what we are up to. This prompted me to produce this [table listing articles published in the past two years or so](#).

I started with SSRN and included articles (but not student notes or comments) from the usual suspects – dispute resolution journals from Cardozo, Harvard, Missouri, Ohio State, Pepperdine – as well as Conflict Resolution Quarterly and Negotiation Journal. I also included articles listed in the "SmartCilp" newsletters as well as the ones that Donna Stienstra and Jim Coben summarized last year in their "Research Insights" column in the Dispute Resolution Magazine.

As you will see, this is a lotta stuff.

But that ain't the half of it. This doesn't even include blog posts – or the large body of literature produced before 2016, including numerous books such as the fabulous set of [Mitchell Hamline DRI Press scholarly and applied practice publications](#). Ohio State's Journal of Dispute Resolution sometimes publishes an annotated bibliography of the new publications in the prior year and last year's edition was almost 100 pages. Here's a collection of some [online bibliographies](#) including the reading list generated from the Tower of Babel Symposium. [RSI \(Resolution Systems Institute\)](#) has a ton of stuff in their website. I'm sure that there's other material I don't even know about.

And this is mostly in the legal field. Unlike most other subjects of legal scholarship, the scope of dispute resolution is almost boundless in terms of subject areas and disciplines. For example, Law and Society Review and Law and Social Inquiry regularly publish some pieces related to dispute resolution. Donna and Jim's column illustrates that there is dispute resolution scholarship in a wide variety of social

sciences. There are people in our community who approach conflict resolution from the perspective of arts and culture. A bunch of people focus on neuroscience and perhaps other biological sciences. Now there's ODR and technology. There's dispute resolution all over the world with colleagues from all over the world writing about it.

And what's up with all those crazy article titles, [Pogo](#)? Gadzooks, people!

No wonder I feel so ignorant. [I whined about the challenges of "taming the jungle of negotiation theories."](#) but that's only a small part of the dispute resolution knowledge ecosphere.

Considering the sprawling body of dispute resolution literature that ranges over multiple disciplines, it would be great if some institution created a searchable database to make it easier to disseminate and find our scholarship.

In any case, please do me a favor. When you see me, please play along and pretend that I know what I am talking about.

Lessons from the ABA's Excellent Report on Mediator Techniques

[John Lande](#) highlighted key insights from the impressive 2017 ABA Section of Dispute Resolution Task Force on Research on Mediator Techniques. Collectively, the 47 studies that the Task Force analyzed show that evaluative mediation isn't inherently good or bad and that we can't be confident that any of the mediators' actions they analyzed are going to have particular effects. Although empirical research can't provide strong generalizations about the effects of particular mediation techniques, it can help us improve our conceptual clarity, discover new ideas and develop insights, develop good theories and questions, identify especially important contextual factors that may affect mediation and other dispute resolution processes, and design dispute systems. John is the Isidor Loeb Professor Emeritus at the University of Missouri School of Law.

In 2017, the [ABA Section of Dispute Resolution Task Force on Research on Mediator Techniques](#) released an excellent report really worth reading. It should be of value to anyone interested in mediation. It also provides useful lessons about what we can – and cannot – learn about ADR from empirical research.

Superstar ADR empirical researcher Roselle Wissler is the principal author of the report, which has all the hallmarks of her meticulous work. Gary Weiner chaired the Task Force, which consisted of a remarkable cast including Alysoun Boyle, Matthew Conger, Doug Frenkel, Teresa Frisbie, Howard Herman, Chris Honeyman, Bobbi McAdoo, Craig McEwen, Jennifer Robbennolt, Jennifer Shack, Tania Sourdin, Donna Stiensta, Beth Trent, James Wall, and former members Dwight Golann, Tim Hedeem, and Kenneth Kressel.

The Task Force identified 47 studies from the past four decades with empirical data analyzing effects of particular mediator actions on certain mediation outcomes. Eight of these studies involved a process instead or in addition to mediation.

The studies covered a range of dispute types, including general civil, domestic relations, labor-management, and community mediation as well as other disputes. A majority of the studies involved court-connected mediation and a single mediator, but there was substantial variation in these and other aspects of the mediation context and mediator characteristics across the studies. ... In addition to these differences, the studies also differed in whether they examined specific mediator actions or mediator approaches comprised of multiple actions; how those actions or approaches, as well as outcomes, were defined and measured; and the data sources and research methodology used. This variation

contributed to differences in findings across the studies and made apples to apples' comparisons challenging, making it difficult to draw broad conclusions about the effects of mediator actions.

Findings About Effects of Mediator Actions on Mediation Outcomes

Here are key passages from the Report's executive summary:

The Task Force grouped the mediation outcomes examined in the studies into the following three categories: (1) settlement and related outcomes, including joint goal achievement, personalization of the mediated agreement, reaching a subsequent consent order, or filing post-mediation motions or actions; (2) disputants' relationships or ability to work together and their perceptions of the mediator, the mediation process, or the outcome; and (3) attorneys' perceptions of mediation.

...

The Task Force's review of the studies found that none of the categories of mediator actions has clear, uniform effects across the studies – that is, none consistently has negative effects, positive effects, or no effects – on any of the three sets of mediation outcomes.

...

Looking at the relative potential for positive versus negative effects, while bearing in mind the substantial likelihood of no effects, the following mediator actions appear to have a greater **potential** for positive effects than negative effects on **both** settlement and related outcomes **and** disputants' relationships and perceptions of mediation: (1) eliciting disputants' suggestions or solutions; (2) giving more attention to disputants' emotions, relationship, and sources of conflict; (3) working to build trust and rapport, expressing empathy or praising the disputants, and structuring the agenda; and (4) using pre-mediation caucuses focused on establishing trust. Some of these actions, however, have been examined in a relatively small number of studies and in only a subset of dispute types, primarily divorce, limited jurisdiction, community, and labor disputes.

The potential effects of other mediator actions appear more mixed. Recommending a particular settlement, suggesting settlement options, and offering evaluations or opinions have the potential for positive effects on settlement and on attorneys' perceptions of mediation, but have the potential for negative as well as positive effects on disputants' relationships and perceptions of mediation. Both caucusing during mediation and pressing or directive actions have the potential to increase settlement and related outcomes, especially in labor-management disputes; but pressing actions also have the potential for negative effects

on settlement, and both sets of actions have the potential for negative effects on disputants' perceptions and relationships.¹

The report includes useful tables with three columns identifying studies that found negative, positive, or no effects of each of the seven categories of mediator actions on each of the three categories of effects. The report compiles each of the tables in the text into three summary tables which appear starting at page 52. Looking at these tables, you can get quick overall summaries of the findings, though this glosses over nuances in the different studies.

For example, some tables show a considerable number of studies in all three columns, suggesting that the particular category of actions has no consistent effect on the category of effect in those tables. In none of the tables with a substantial number of studies do all of the studies find that the actions have an effect, either positive or negative.

Practical Implications

If you are a teacher, trainer, student, or practitioner, what do these results suggest that you should teach or do? Based on these empirical studies, can you be confident that mediators will produce a particular effect if they take any of the actions studied?

In short, the answer is no.

Not surprisingly, the report found that some of the more controversial actions – recommending particular settlements, offering evaluations, and pressing parties to settle – have the potential for both positive and negative effects.

In general, the studies found that some generally uncontroversial actions – such as eliciting suggestions, focusing on emotions and relationships, building trust, expressing empathy, praising disputants, and setting agendas – may or may not produce positive effects. The studies generally did not find negative effects from some of these actions, but some studies did.

So you can't be confident that any of these actions are going to have particular effects. Rather, the effects of these actions presumably depend on numerous contextual factors such as the parties' pre-existing relationship, history of the conflict, expectations about the process and outcome, and role of constituents, among many others.

¹ Section of Dispute Resolution, ABA, Task Force on Research on Mediator Techniques 1-2, 4 (2017) (emphasis in original). For a concise summary of the report, see Roselle L. Wissler & Gary Weiner, *How Do Mediator Actions Affect Mediation Outcomes*, 24 DISPUTE RESOLUTION MAGAZINE 26 (Fall 2017).

"Evaluative Mediation"

Since the 1990s, when Len Riskin published an [article featuring his original mediation grid](#), many mediation practitioners and academics have had intense feelings about the appropriateness and value of what he called "evaluative mediation." This single term actually referred to a combination of very different things including assessing strengths and weaknesses of a case, predicting court results, proposing agreements, urging parties to accept a particular agreement, and trying to persuade parties to accept the mediators' assessments. In practice, various evaluative mediation actions focus primarily on the goal of reaching agreement.

Riskin later [identified numerous problems with his original grid and recommended replacing it with a series of new grids](#), which do a much better job of illustrating dynamics of mediation. Unfortunately, the single concept of evaluative mediation still is commonly used despite Riskin's critique of the term, and few people refer to the new grids.

In Riskin's original grid, "facilitative" mediation is the opposite of evaluative mediation. Facilitative mediators help parties to evaluate interests and positions, develop options, and analyze their cases, and anticipate potential court results. Focusing on the goal of promoting party self-determination, mediators identifying with the facilitative philosophy consider it to be real mediation. By contrast, they consider evaluative mediation to be an "oxymoron," as Lela Love and Kim Kovach famously described it.

I am sympathetic with the concerns of facilitative mediation proponents. When I mediated, I tried to provide the best possible opportunity for parties to communicate and resolve their differences, but I was generally fine if they decided not to reach agreement.

I am also sympathetic with mediators who operate in attorney-dominated markets in which there is a great demand by attorneys (and some parties) for mediators to use "evaluative" techniques. In these contexts, mediators who do not use evaluative techniques and have low settlement rates may not survive in the market. More importantly, some parties greatly value evaluative techniques when done appropriately.

Having served on the [ABA's 2008 Task Force on Improving Mediation Quality](#), which conducted ten focus groups of civil mediators and lawyers, I remember hearing the strong feelings of people who felt that evaluative techniques are risky and problematic as well as the strong feelings of those who felt that mediation isn't very helpful if mediators don't use evaluative techniques.

The 2017 Task Force on Mediation Techniques suggests that both sides are right – and wrong. Various "evaluative" techniques have been found to be helpful and also

counterproductive. Although individual studies support each side's views, the overall body of evidence shows that there is no consistent effect.

The upshot is that no one should claim as an empirical fact that evaluative mediation is inherently good or bad. Much depends on the context and the way that people use particular techniques. For example, the Task Force on Improving Mediation Quality identified various factors suggesting when "analytical assistance" might be more or less appropriate.

What Is Empirical Research on Mediation Good For?

If four decades of empirical research on mediation haven't proven the general efficacy (or lack of efficacy) of specific mediation techniques to produce the effects analyzed in the Task Force Report, what the heck good is it? This complaint may be especially compelling for people who want empirical research to validate their views about particular techniques.

Indeed, some may hope that empirical research can provide the basis for the field to establish a consensus on "best practices." That seems unrealistic for several reasons. If there isn't a clear pattern of empirical results based on the extensive body of research reviewed by the Task Force, it seems unlikely that additional research would do so in the future. Part of the challenge is that there are so many contextual factors affecting mediation practice, that we can't be confident that using any particular technique is likely to produce a significant benefit across a wide variety of cases. In addition, "best practices" are inherently normative professional judgments that can't be determined by empirical research. Can you imagine that any amount of future research would resolve philosophical conflicts about the (im)propriety of "evaluative" mediation? I can't.

Although existing empirical research on mediation hasn't provided definitive answers, it can be very helpful in developing good theories and questions.

We can't confidently predict outcomes because there are so many factors that affect mediation across a wide range of situations. The Task Force report includes a very good discussion of difficulties in making general causal inferences.

We can identify some factors that may be significant, particularly in certain contexts. Indeed, [research may help us identify especially important contextual factors](#). For example, the presence and activity of lawyers (or lack thereof) is likely to have major effects on the process and outcomes. So, rather than providing foolproof recipes, empirical research may lead to helpful checklists of factors to consider.

It also can identify some factors to ignore – those that are assumed to be significant but have little or no explanatory value. One of the Task Force's great contributions is to prompt us to reconsider some plausible but inaccurate assumptions.

Empirical research can help us discover new ideas and develop insights. For example, observing mediations and interviewing participants can lead people to learn things defying their expectations by "seeing" things they hadn't seen before. Thus it can open people's minds to better understand how mediations actually work and develop theories about why things work as they do. This is the goal of the [Stone Soup Project](#).

Empirical research also is useful – and, indeed, necessary – to design particular dispute systems well. Rather than seeking to make broad generalizations, such research is tailored to describe specific situations and consider possible effects of different design choices. [It is impossible to develop perfect empirical knowledge](#), but it can help to make plausible inferences that can help to design dispute systems.

Empirical research also can help us improve our conceptual clarity. Just as there is a "[Tower of Babel](#)" about negotiation, the Task Force report identifies a similar one for mediation as well. It noted the multiplicity of terms used to describe analogous or related behaviors and it recommended follow-up efforts to increase uniformity. Improving conceptual clarity would be especially helpful about the thorny set of concepts related to "evaluative" mediation. Developing more uniform concepts could not only produce clearer and more comparable research results, but it also could help clarify communications among ourselves and with the multiple constituents of mediation practice. That, in turn, could contribute to more effective mediation practice.

Roselle, Gary, and all the Task Force members deserve our appreciation for moving our field another step forward.

Understanding Actual Dispute Resolution Practice and Communicating Clearly About It

[John Lande](#) recommends that to engage the real world of dispute resolution, we should develop a common language of dispute resolution and increasingly use qualitative research methods. He is the Isidor Loeb Professor Emeritus at the University of Missouri School of Law.

We Should Set a Top Priority to Develop Clearer Common Language of Dispute Resolution

The [Tower of Babel symposium](#) described problems with our jargon in negotiation theory and the [ABA Section of Dispute Resolution Task Force on Research on Mediator Techniques](#) identified problems in comparing research results because of differences in concepts used in various studies.

The Task Force recommended that we "[s]upport and/or undertake the development of more uniform definitions and measurements of mediator actions and mediation outcomes, as well as the research needed to improve the reliability and validity of the measures and methodologies used so that future studies will produce more rigorous and meaningful findings."

I suggest that we focus on this as a top priority, though not limited to mediation. This initiative could provide numerous benefits not only for research, but also for practice, teaching, training, and collaboration within our field.

Right now, there is a huge disconnect in our field between theory, research, and practice.

Experiences judging student competitions provide a useful indicator of this chasm. With some regularity, practitioners tell students how "things work in the real world" – contrary to what they are taught in school. Practitioners not only have different perspectives from academics but they also use different language. And they rarely read publications written by academics. (Heck, most of us don't have time to read them either.)

Conversely, academics often don't have a good understanding of or empathy for practitioners' perspectives. We usually are overwhelmed with our academic responsibilities and it's hard to invest the time to understand the wide range of things going on in practice. We generally don't have the time or budget to attend practitioner-oriented events, and practitioner-oriented publications generally aren't considered as "scholarship."

The disconnect is reflected in long-standing dilemmas about what to emphasize in our teaching – academic theories, goals, and jargon and/or those used in practice.

Imagine a world where we generally use the same language, particularly language consistent with meanings in plain English that disputants generally would understand. Although people would be free to use any language they want, this initiative would help improve our communication so that everyone involved in dispute resolution could better understand each other.

Developing more uniform definitions would not only help researchers conduct their own research but it could promote collaborations between researchers and practitioners to produce more useful theory and research. For example, a program at the ABA conference about [what theory practitioners would find helpful](#) produced a list of ideas that would have both practical and scholarly value. Having a common language would help us do this work.

Clearer communication could help in many other contexts. For example, focusing on language could be particularly valuable in dealing with disputants and other dispute resolution stakeholders. A program at a recent Section of Dispute Resolution conference demonstrated how the Harvard Negotiation & Mediation Clinical Program helped two court-connected dispute resolution programs assess how parties receive **intended and unintended** messages. The program showed how messaging affects parties' experiences of access, quality, integrity, and effectiveness. By the same token, ODR system designers regularly grapple with the challenge of designing systems that work well for the variety of stakeholders who interface with their systems.

Clearer language could help students in clinical and externship courses navigate the different worlds of practitioners, clients, and faculty. These courses could become more useful laboratories of knowledge at the intersection of academia and practice.

We could develop a standard list of keywords for bibliographic research. This could help authors reach interested readers and help researchers find what they are looking for.

So I suggest that we follow the Task Force recommendation to develop more consistent concepts. This would engage the range of stakeholders who might review academic and practice literature to seek consensus about preferred language. In 1999, Doug Yarn edited the [Dictionary of Conflict Resolution](#), an academic reference of more than 500 pages with more than 1400 entries. To be practical, a new initiative would need to produce a much more concise document with only a small fraction of the terms in Doug's dictionary. But it could be a very helpful resource in the effort.

This initiative might begin with internal discussion and then testing their ideas in focus groups with academics, practitioners, and disputants and in public forums, and by inviting public comments.

Developing some common dispute resolution terminology could be a challenging task because much of our language has connotations reflecting strong feelings about what some believe to be the "right" or "wrong" dispute resolution approaches. Ideally, we could develop more descriptive and less ambiguous, emotionally-charged terminology. We still could have strong philosophical differences but hopefully we would be able to focus more directly on the issues using a shared vocabulary, less distracted by reactions to the language itself. Indeed, using clearer, commonly-accepted language presumably would improve these discussions.

Although it could be challenging to conduct this common-language initiative, it could be practically achievable in about a year.

Getting the Benefits of Qualitative Research

We need better understandings of what actually happens in practice. Qualitative research is particularly well suited to help us learn about this.

The [Stone Soup Dispute Resolution Knowledge Project](#) is intended to promote collaboration by faculty, students, scholars, practitioners, educational institutions, and professional associations to produce, disseminate, and use valuable qualitative data about actual dispute resolution practice.

The Stone Soup website includes a mini-course on empirical research. [This "lesson" in the course describes how many people in our field have unrealistic perceptions of quantitative research](#) as providing real, valid, and accurate reflections of the real world. In reality, as the mediation research Task Force Report demonstrated, even when we have a lot of quantitative research about dispute resolution, it is hard to make strong generalizations. Quantitative research is well designed to produce population estimates and test hypotheses. Generally, it is not designed to discover and explore new perspectives.

Many people also have a bias against qualitative research, thinking that it is merely anecdotal, unreliable, and unscientific. Qualitative research is not intended to provide population estimates or generalizations that quantitative studies can provide. However, it can be especially valuable in leading to new discoveries, insights, and perspectives.

[Take a look at this Stone Soup post with brief summaries of some really cool qualitative studies](#), illustrating its potential. I started reading this stuff in college and I was hooked.

Qualitative and quantitative research have complementary advantages and disadvantages and ideally should both be used. Often it makes sense to do qualitative research first so that you can get a general understanding of the subject and develop good questions for quantitative research to pursue in later studies.

As I describe in my famous post, [What Me – A Social Scientist?](#), qualitative research probably is the better option for you if you would like to do some empirical research and don't have training in social science methodology. Take a look at [this post describing the modest studies I have done, which are models of things you could do too](#). It is harder to screw things up with qualitative methods and doing this research is more fun than a barrel of monkeys.

We Need Good Data to Know Whether What We Are Doing – and Espousing – Is Good

Nancy A. Welsh argues that our field needs relevant, routinely-collected, up-to-date data about the full range of dispute resolution processes. She describes the work of the ABA Section of Dispute Resolution's Advisory Committee on Dispute Resolution Research in developing recommendations about what data should be collected. She is Professor of Law and Director of the Aggie Dispute Resolution Program at Texas A&M University School of Law.

My goal for our field is pretty much the same as it has always been – to know that we are doing something good: that we actually are helping to improve people's ability to solve problems and resolve disputes in a way that they find to be sufficiently fair. We have been successful in institutionalizing many of our processes in the courts and in contracts, but institutionalization does not guarantee we really are contributing to people's lives in a positive way.

Actually, I have to admit that I do not think we can say exactly how successful we have been in institutionalizing our processes because we do not have much data regarding the number of cases referred to or resolved by our processes.

So what strategies would we need to pursue in order to determine that we are doing something good?

We Need Good, Relevant, Routinely-Collected, Up-To-Date Data

For a start, we need data. Data regarding the occurrence, effects, and perceptions of dispute resolution processes. Relevant, routinely-collected, up-to-date data.

If courts begin to collect such data, make it accessible to researchers, and report at least some aspects of it, think about what we could learn. How often are these processes being used? For what kinds of cases? For what kinds of parties? Are certain demographics affected differently than others? What are parties' perceptions of the fairness of these processes and their outcomes? Do those perceptions vary between different demographic groups? Between one-shot and repeat users? Between lawyers and litigants? Between different contexts? How do parties' perceptions compare from process to process? How do outcomes – on an aggregated basis – compare from process to process?

If courts can collect such data, private providers of arbitration and other dispute resolution processes can collect the data as well and make it available for accountability purposes. Again, think about what we could learn. Perhaps most

important, we could see whether there are important variations in the use, perceptions, and outcomes of court-connected, agency-connected, and private processes.

I chair the ABA Section of Dispute Resolution's Advisory Committee on Dispute Resolution Research. Both the Section and its Advisory Committee are committed to the development of cutting-edge information to assist stakeholders in the justice system (including judges, administrators, lawyers, dispute resolution neutrals, policymakers, and litigants) and assure the quality of dispute resolution services.

To meet this goal, the Section and the Advisory Committee are encouraging rigorous qualitative and quantitative empirical research regarding dispute resolution. This requires the collection and reporting of data. One important source of such data can come from court-connected processes, including (but not limited to!) mediation, judicial settlement conferences, early neutral evaluation, non-binding arbitration, and ODR. Very few courts currently collect and report such data.

Planning to Collect Standard Data Elements

In an exciting development, the National Center for State Courts' National Open Court Data Standards Civil Workgroup on ADR invited the Advisory Committee to submit recommendations regarding the data elements that courts should collect regarding ADR. Building on the work done by the ABA Section of Dispute Resolution's Task Force on Research and Statistics more than a decade ago, as well as the more recent work of the Task Force on Research on Mediator Techniques, the Advisory Committee developed preliminary recommendations and submitted them to the Workgroup in July, 2019. Our preliminary recommendations anticipated the regular inputting of data regarding the use of dispute resolution / settlement assistance plus the collection of data from surveys provided to the parties, lawyers, and neutrals. We have since developed version 2.0 of those preliminary recommendations and are now soliciting feedback on them so that we can develop final recommendations. We hope to present our recommendations at the Section's spring conference in April, 2020.

It is significant that our Advisory Committee is not limiting its recommendations regarding data collection to a single process, like mediation. No single process deserves all of our attention or, frankly, unwavering loyalty.

The Advisory Committee also is not recommending the collection of data for a limited time period as in the evaluation of a pilot project. Processes change in response to context. The parties using these processes change. Expectations change. A time-limited evaluation that occurred 20 years ago does not teach us much today. Indeed, that is one reason that the Section's Task Force on Research on Mediator Techniques called for more empirical research and the use of consistent terms, variables, and methodologies that permit duplication and/or testing for validity.

I am cautiously optimistic that courts may decide to collect data regarding dispute resolution. More and more frequently, governors and state legislators are turning to their courts and asking about filings relevant to the incidence of various crises in the news – e.g., gun-related deaths and opioid-related deaths and incidents. Often, courts cannot answer these questions.

If governors and state legislators want answers, they need to provide the funds for data collection and analysis. In at least one state, such funds have now been made available. The New York State Unified Court System, meanwhile, has announced the adoption of presumptive ADR for all civil cases along with plans to collect data to permit evaluation and revision. A relatively small number of private vendors provide case management software to state courts throughout the nation, and these vendors have indicated willingness to incorporate additional data elements important to the courts as long as the ultimate result is a relatively standardized package.

Money remains tight for many state court systems. But these and other developments suggest that we may be at a tipping point regarding courts' ability and willingness to collect and provide data generally. My hope is that this will create an opening for the collection of data regarding dispute resolution.

Opportunities from Research on Dispute Resolution

We need more researchers (both quantitative and qualitative, both inside and outside law schools) to take on our field as their life's work. And we need to be ready to hear both good news and bad from those researchers. It is only by listening to both the good and the bad that we will know what and how we need to change. Because, of course, change is inevitable.

And that seems a very appropriate way to end my contribution to this symposium on my theory of change.

Methodologies and Terminology for Research with a Real-World Focus

[Nancy A. Welsh](#), [Roselle Wissler](#), [Howard Herman](#), [Russell Korobkin](#), and [Donna Shestowsky](#) gave presentations on methodologies and terminology for research with a real-world focus at the Past-and-Future Conference. They focused on the value of empirical research, the nature of experimental and non-experimental research, the importance of using consistent terminology, the nuts and bolts of conducting research, and suggestions for future research on dispute resolution. Nancy Welsh is Professor of Law and Director of the Aggie Dispute Resolution Program at the Texas A&M University School of Law. Roselle Wissler is Research Director at the Arizona State University Sandra Day O'Connor College of Law. Howard Herman is the Director of the ADR Program of the U.S. District Court for the Northern District of California. Russell Korobkin is the Russell C. Maxell Professor of Law at the UCLA School of Law. Donna Shestowsky is the Martin Luther King Jr. Professor of Law and Director of the Lawyering Skills Education Program at the UC Davis School of Law.

This summarizes a program at the Appreciating our Legacy and Engaging the Future Conference, and includes links to the presenters' notes and powerpoints.

The program began with a short discussion of the question, "Why conduct empirical research regarding dispute resolution?" Roselle Wissler used professional baseball as an example of the use of detailed data to improve players' performance – and suggested that courts and parties likely would be interested in similarly enhancing mediators' and other dispute resolution neutrals' abilities.

Howard Herman pointed out that the baseball analogy has its limits. In baseball, the pitcher only cares about making outs. In dispute resolution, we also care about how the outs are made (procedural justice - how the processes work) and who gets to play (access to justice). There are many mediator interventions that could be studied, and they are hard to isolate as independent variables. The context of the research (such as the subject of the dispute) can make a big difference, so we must be careful not to overgeneralize research results.

Nancy Welsh reminded the audience that the ABA Section of Dispute Resolution established a [Dispute Resolution Research Advisory Committee](#), which she chairs. The overall charge of the Committee includes "bring[ing] science to the delivery of conflict prevention and dispute resolution services" and "plac[ing] the Section at the intersection of practice knowledge and know how" in order to "ultimately assist with the development and sharing of cutting edge information that will strengthen the Section's

members, their practices, the profession as a whole, and the people it serves." The Committee also is interested in hearing from researchers and sophisticated practitioners to move both qualitative and quantitative empirical research forward – e.g., identifying research needs, developing common definitions, and sharing research findings. This conference session and the following session represented just such opportunities.

Russell on Experimental and Non-Experimental Research

Russell Korobkin kicked off the individual presentations and provided a [good primer on general social science research issues related to dispute resolution](#).

Dependent and independent variables. Dependent variables are the outcome measures of interest – essentially the desired goals. Independent variables are the factors that may affect the dependent variables. Studies commonly focus on settlement rate as the dependent variable, but there are many other important dependent variables to study including satisfaction with the process, efficiency, division of the "cooperative surplus," and whether the parties created value ("expanded the pie").

Experimental and non-experimental studies. Experimental and non-experimental studies have complementary advantages and disadvantages. In experimental studies, researchers design an environment in which they vary only a few independent variables. This enables them to make stronger inferences about the causal effect of the independent variables, especially when subjects are randomly assigned to the experimental and control groups. The disadvantage of experiments is reduced "external validity" – the ability to generalize the results to the real world. Non-experimental studies conducted in the real world have greater external validity but cannot provide as strong inferences about causal effects of the independent variables because there are many "uncontrolled" variables that could affect the findings.

Russell described his [clever experimental study](#) (co-authored with Michael Dorff) about how the negotiation process for hiring corporate CEOs affects the amount of CEO compensation. Traditionally, after considering several candidates, companies firmly decide who to hire and only then negotiate the amount of compensation. Russell and Michael hypothesized that companies could pay CEOs less if the companies negotiate possible compensation packages with several candidates before deciding which one to hire. They instructed students to negotiate in simulations where the salary negotiations occurred before or after the selection of the CEO, and they found that the CEOs received lower salaries when the companies negotiated the salary before selecting a candidate. Of course, one couldn't do this study with CEO candidates in real life, so it provided insights that wouldn't be possible without doing a laboratory experiment. On the other hand, readers may have doubts whether the dynamics in student simulations would be similar to CEO salary negotiations in real life.

Roselle on How Problems with Language Affect Meaning of Research Findings

Roselle Wissler focused the discussion on [key points from the ABA Section of Dispute Resolution's Mediation Research Task Force Report](#). She was the principal author of the report (which is discussed in [this piece](#), including a link to the report itself). The Task Force identified 47 studies from the past four decades with empirical data analyzing effects of particular mediator actions on certain mediation outcomes.

Roselle noted that there were differences in how concepts were defined and measured in the various studies, what comparison group(s) were used, the data sources, and whether the studies considered whether factors such as the setting or dispute type might have affected the findings. She said that these differences could produce different findings regardless of the actual underlying effects of mediator interventions.

Differences in definitions make it hard to compare results of different studies. For example, various studies defined "pressing" or "directive" actions as:

- Press parties, push parties hard to change positions or expectations
- Urge parties to compromise, concede, or reach agreement
- Advocate for / agree with one side's positions / ideas; argue one side's case; push with bias for / against one side
- Tell parties what the settlement should be; press them toward that solution; try to make parties see things their way
- Control, dominate, direct the session

Some also included: threaten to end mediation; use frequent caucuses; express displeasure with lack of progress; criticize one party's behavior / approach

Some also included aspects typically used to define other approaches, e.g.: analyze strengths / weaknesses; note costs of non-agreement; make face-saving proposals; clarify parties' needs

She highlighted several of the Task Force's recommendations:

- Develop common terminology, definitions, and measures for a core set of concepts
- Conduct research on the best way to study important concepts
- Develop reliable and valid measures and data sources

- Identify important contextual factors (e.g., dispute, setting, timing) that could alter the effects

Howard on Variables, Language, and Future Research

Howard Herman discussed [several issues in his presentation](#). He endorsed the recommendations of the Mediation Research Task Force about the need for improved language. He said that the terms need to be clear, focus on specific interventions and behaviors, match the real world, and not use too high a level of generality. He criticized the evaluative-facilitative dichotomy, which he argues leads to over-simplification of the actual interventions.

He recommended that mediation researchers focus on joint sessions, convening, work done before mediation sessions, mediators' opening statements, use of legal analysis, caucusing, mediator proposals, matching (or mismatching) demographic characteristics of mediators and participants, repeat players, unbundling, and the use of technology.

Donna on the Nuts and Bolts of Conducting Empirical Research

Donna Shestowsky described [nitty-gritty details of conducting empirical research on dispute resolution](#). She cautioned that doing so is hard, requiring help with ideas and funding, approval from one's school, convening a research team, and with no guarantee of publication. Her comments are relevant to empirical research generally, and even more so for the kind of complex quantitative research that she has done.

She listed a number of sources of funding and noted the requirement of getting approval by the school's institutional review board to assure that you are following ethical requirements for human subject research. Getting this approval has the potential to involve many steps and can take some time, so you should plan ahead.

If you will use a survey, you should recognize that this is much harder than one might think, so you should never do this alone. One option would be to use questions that have been vetted, such as ones from model forms (e.g., [RSI/ABA Section of Dispute Resolution Mediation Model Forms](#)) or peer-reviewed articles. Especially if you write your own questions, get feedback on them, and test them in a pilot study or focus group.

You will need a team to help you with various aspects of the research. This might include other academics, students, various professionals (e.g., statisticians), and administrative support. Funding often is needed to cover the expenses associated with such help, or to pay for research participants if you decide to collect your own data. She provided a detailed list of funding sources and methods for learning about new funding sources as they become available.

She listed ideas for promoting empirical research on dispute resolution for universities, courts, dispute resolution professionals, and academics.

As an example, she described her recent article, *Inside the Mind of the Client: An Analysis of Litigants' Decision Criteria for Choosing Procedures*, which is discussed in [this post](#) and [received the award from the AALS ADR Section for the best article of 2018](#).

Studying What Dispute Resolution Practitioners Actually Do

[Douglas Frenkel](#), [Michaela Keet](#), [John Lande](#), and [Donna Stienstra](#) discussed questions about empirically studying actual dispute resolution practice at the Past-and-Future Conference. The questions addressed key goals of research, dealing with numerous contextual variables that may affect outcomes, important issues and variables that should be studied in future research, and good methodological approaches. Doug is the Morris Shuster Practice Professor at the University of Pennsylvania Carey School of Law. Michaela is Professor at the University of Saskatchewan College of Law. John is the Isidor Loeb Professor Emeritus at the University of Missouri School of Law. Donna is a Senior Researcher at the Federal Judicial Center.

A program at the Past-and-Future Conference entitled "Research and Scholarship with a Real-World Focus: Studying What Practitioners Actually Do" was in a conversational format, framed around several questions.

What should be the most important and realistic goals of future empirical research on dispute resolution? For example, should it seek to:

- develop clearer concepts and language
- identify key contextual factors affecting processes
- develop new theories and insights
- develop valid generalizations
- help establish consensus on best / worst practices
- help design conflict management systems

How should we deal with the fact that dispute resolution processes are so complicated and affected by many contextual factors that it is hard to generalize?

Donna: Because you can't do some of things on the list without doing some other things first, my top two priorities would be (1) clear concepts and language, and (2) better understanding of the context. We could have greater consistency across studies if, for example, we used similar definitions of important variables like party type and case outcome. Regarding context, to take courts as an example, many important variables might be affected by whether mediators are compensated, but we can't know if compensation isn't included in a study.

But there's a prior step. We need to stop being in such a rush to do research to change the world – which usually means quantitative research. Well before we draw up a list of variables or design questionnaire, we should take a step back and immerse ourselves in the thing we're studying so we can use the right concepts and develop appropriate measures.

Regarding the complexity of dispute resolution processes and the many contextual factors, there's a quick answer that's hard to execute: experimental study designs. There's also a longer answer that's hard to execute: repeated, in-depth observation in multiple settings over time.

Doug: I would add "best and worst practices" to the list of study priorities for the following reason. We academics have been engaged in an ideological debate for over 30 years about what makes for good / ethical mediation but, in trying to shape those norms, we have gathered little data on what consumers value or how various behaviors operate. For example, we tout the unique mediation process property of participant self-determination. And yet, perhaps ironically, we mostly define that concept in terms of our own preferences, comfort, or values instead of those of users or on what might be learned about the actual impact of various persuasive or other interventions. Those kinds of things can be measured empirically and segmented by contextual variables (e.g., subject matter, lawyered or not, mandatory vs. voluntary participation, etc.)

Audience: We need randomized control studies to help us generalize to different contexts.

John: It's very hard to do randomized experiments about dispute resolution in the real world. That methodology doesn't solve the problem that so many contextual variables may affect the outcomes. If you do an experiment in one context, it won't necessarily generalize to other contexts.

For example, in the 1990s, Donna Stienstra conducted a rare study involving randomized assignment in the US District Court for the Western District of Missouri. Some parties were **required** to mediate (group A), some parties were **given the option** to mediate (group B), and a third set **weren't permitted** to use mediation (group C). On average, group A's cases were resolved faster than both Groups B and C. The same person mediated all the cases, which provides more confidence in the comparison between the groups, but it also raises questions about the generalizability to cases handled by other mediators. In addition, the fact that there were differences between groups A and B reflects the importance of contextual and program design features. All mediation is not the same – even when conducted by the same mediator.

Audience: How problematic is it if a study doesn't include factors that could affect the outcomes?

John: Omitting key potential independent variables leaves questions about whether the unmeasured variables are responsible for the observed outcomes. Of course, it's impossible to include all potential variables in any study, especially in the dispute resolution context where so many variables could be influential. That's one reason why we shouldn't rely on the findings of any single study and we need multiple studies that include a more complete set of factors that could affect the outcomes.

Audience: Should we use empirical research to try to distill best practices or identify what practices we clearly should avoid?

John: I think that empirical research could help inform our understandings about what practices may be particularly appropriate and effective or not. Because of differences in context and complexity of dispute resolution processes, I doubt that we can make confident generalizations about the frequency and nature of good or bad practices. Ultimately, this is a judgment by the professional community. Empirical research can identify actual practices occurring with substantial frequency that the community might encourage, discourage, or (by advocating for legal rules) even prohibit.

The world is changing rapidly and dispute resolution practice is changing as part of that. What questions would be important for our field to study empirically? What are new forms of dispute resolution we should study? What are challenges or barriers for improving dispute resolution processes and systems?

Doug: One set of questions worth examining surrounds the in-person behaviors of state court judges in dealing with the overwhelmingly unrepresented body of litigants who appear before them. Do they conform to the classic (largely federal court-based) image of the passive arbiter when dealing with such parties? Do they provide counsel-type assistance? Do they apply the law or mete out "fairness" when adjudicating? Are they "settlers"? As the "ADR" field and court-annexed mediation started in large measure with traditional images of judicial conduct in mind, such current data might inform access-to-justice policymakers, court administrators, neutrals, and judicial trainers going forward. Fortunately, observational and other empirical work has begun in this area in several parts of the country.

One new (to at least half of the states) form of dispute resolution worth studying is parenting coordination in child custody courts. In the growing number of jurisdictions that have adopted such systems, the responsibility for overseeing the enforcement of custody orders is delegated to legal, mental health, or other professionals whose task is to facilitate and, if necessary, arbitrate ongoing disputes in order to free courts from having to micromanage recidivist litigants. But what do these neutrals actually do? How do they balance mediating and decisionmaking roles? Should confidentiality apply to all or part of this process?

Finally, much is being done in terms of harnessing video and other technology in courts and in alternative processes where in-person participation is costly or impractical. But we know little about differences in emotional and other dynamics when conflict communication takes place over a screen. This would seem to be a fertile and important interdisciplinary area for study.

Michaela: In Canada, part of this rapidly changing world is the growing awareness about the justice system's shortcomings: the "access to justice" problem. Since the release of the [Roadmap for Change](#) Report written by a respected Supreme Court justice, priorities have shifted around the country. The report exposes how the justice system is failing average Canadians across socio-economic classes. There is a lot of worry about access to justice in Canada following that report.

Donna: I talked with some people in the courts and in my office to get a sense of the challenges ahead. Here are the things I heard: access to justice, especially for self-represented litigants; declining resources; declining confidence in the courts; and developments in artificial intelligence.

What can research on dispute resolution do to understand and address these challenges? Here's one quick point. We know from recent research that 2/3 to 3/4 of plaintiffs are individuals while 3/4 to 4/5 of defendants are something other than individuals. We also know from this research that outcomes from an ADR process were seen as better than outcomes from bilateral party negotiations, suggesting that ADR could play a significant role in enhancing access to justice.

John: We need to better understand lawyers. I interviewed 32 lawyers asking about the last case they settled, starting from the very first meeting with client. I think that this was very helpful in understanding how lawyers operate and how negotiation occurs during the entire life of a case.

Audience: How can we trust lawyer recollections about meetings taking place 1-2 years before?

John: Problems with recollections can be a problem with many studies of dispute resolution involving every role in dispute resolution. In my study, lawyers described the case they settled most recently, which should have reduced problems of recollection. Also, I was particularly interested in their perceptions of the cases, not "just" the facts. Data from qualitative interviews like these is recognized as a legitimate form of social science data. All data is imperfect and susceptible to various kinds of errors, including human responses to quantitative fixed-choice questions. Researchers and readers should evaluate potential errors in lawyers' interviews as they should for all data.

Audience: We need more direct access to the actual parties. We can't assume that lawyers know what the clients want or think.

John: You're right that lawyers generally have different perspectives than their clients and that we should collect data from parties whenever appropriate and feasible. Unfortunately, there are practical challenges in recruiting parties for studies. And it's important to understand lawyers' perspectives as they manage the cases and influence parties a great deal. They generally are involved in the case from the outset, usually way before mediators are brought into the process in civil cases where parties have lawyers.

Audience: I know of a situation where research findings didn't show positive effects for dispute resolution and the researcher didn't publish the findings.

Donna: Researchers should publish the bad with the good and should be neutral. The ethical approach is to not hide findings.

What factors do you hypothesize to cause changes in dispute resolution – and thus would be important to study?

Michaela: Here again, at least in Canada, access to justice issues are likely to define the future of dispute resolution. Here, for example, are four shocking statistics from the Canadian Access to Justice study: (1) 90% of legal needs are going unmet; (2) only 6.5% of legal problems end up in formal legal system; (3) 65% of people with legal problems think that nothing can be done about these problems, and (4) 50% of Canadians think they will self-represent in legal cases.

For those of us in the dispute resolution field, the assertion that formal legal processes (especially litigation) can't solve all problems' is not a revelation. However, for the first time, dispute resolution processes are **also** under scrutiny. While we have known for a long time that 98% of cases (or much more) do not proceed to a trial, we don't really know why, or where they end up. The *Roadmap for Change* report suggests that a large number are still not getting resolved. And that's true even though mediation has been well-integrated into Canadian courts for up to 20 years.

It's therefore important to study the real journey of these claims – and how people are **qualitatively experiencing** their encounters with dispute resolution processes along the way. What do we do with these statistics as dispute resolution professionals? We know that these statistics come from a world where we already have dispute resolution options. Where is the access to justice?

Audience: We could really use similar statistics here in the US along with the mandate and the money to try to fix things. What would these statistics be if we didn't have dispute resolution options? We know that many people self-represent in the US, which is not good. What role can court ADR play in helping them? Limited scope counsel programs are one idea.

What are good methodological approaches for designing empirical research to get realistic understandings of what happens in the real world?

Michaela: Understanding people's experiences (deeply) is best done through qualitative research. To better understand certain issues, we need to study things differently.

Doug: Some simple designs can yield important results. One that comes to mind is the 2007 fairly large-scale Swaab-Brett Netherlands study of caucuses conducted pre-mediation and, more conventionally, after a joint session in family and labor disputes. Based solely on mediators' responses to post-process questionnaires, it yielded some interesting and potentially important data, especially about the impact and desirable objectives of pre-mediation caucusing.

Donna: We should use multiple methodologies, including focus groups, surveys, interviews, and observations. Convergence of results can give us confidence about our understanding of a particular phenomenon. Over many studies, patterns and generalizations can emerge. On the particular point of experimental field studies, these are tricky in a court setting because judges may be wary of treating cases differently, and random assignment, e.g., of cases to ADR and not ADR, risks taking away from some cases a procedure they've become accustomed to.

Audience: Both qualitative research and quantitative research have value. It all depends on what question you are trying to answer. Randomized experiments are not always the best, either. Again, it depends on what question you are trying to answer.

John: I agree that both qualitative and quantitative research have value. Ideally, researchers would use both approaches in combination. Qualitative research is especially useful in gaining new insights. Quantitative research is especially useful in making population estimates and testing hypotheses.

Audience: It's already hard to publish work on dispute resolution in regular law reviews, but when it's empirical, it is even harder.

John: Articles can combine theoretical and empirical material. So empirical research need not be limited to articles that only report the results of a study. Indeed, good articles reporting empirical results generally do that anyway to some extent. But you can write articles with more of a balance between theoretical and empirical material.

Qualitative research can have fewer challenges compared to quantitative research and may be appealing for law reviews. Qualitative studies have produced juicy quotes that make for compelling reading and have gotten published. It's generally a lot easier to do qualitative research than quantitative research, as I described in [What Me – A Social Scientist?](#) I have done a fair number of qualitative studies and I never had to

write a grant proposal or need funding. Of course, I did have to get IRB approval as with any human subject research, but that wasn't very hard.

What Me – A Social Scientist?

John Lande encourages academics to conduct empirical research about dispute resolution. He cautions novice social scientists about challenges of doing quantitative research and describes the advantages and fun of doing qualitative research. He is the Isidor Loeb Professor Emeritus at the University of Missouri School of Law.

Pop quiz: Which is scientific data – statement A or B?

A. "If I act for the Big Bad Wolf against Little Red Riding Hood and I don't want this dispute resolved, I want to tie it up as long as I possibly can, and mandatory mediation is custom made. I can waste more time, I can string it along, I can make sure this thing never gets resolved."

B. "In mandatory mediation, 18.2% of lawyers try to take advantage of their opponents by unnecessarily prolonging the process."

Correct answer: Statement A. That data comes from Julie Macfarlane's excellent study, [*Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*](#).

What about Statement B? I just made that up. But it sure sounds scientific, doesn't it?

Many folks in our field suffer from the common misconception that scientific data needs to be quantitative – and preferably the result of some large-scale random selection process.

This confusion is not surprising considering that many standard references provide gobbledygook in their definitions of "science."

A [webpage from a University of Georgia geology course](#) is more helpful. Its first definition reads: "[T]he systematic observation of natural events and conditions in order to discover facts about them and to formulate laws and principles based on these facts." The terms "scientific" and "empirical" research are essentially synonymous.

Note that the focus is on systematic methods of observation and there are many methods that can produce very valuable qualitative data. These include interviews, focus groups, observation, and content analysis, among others.

If you want to do some empirical research and are an untrained novice, you should consider methods producing qualitative data, especially semi-structured interviews. Although surveys seem simple, they really are hard to do properly as described below, so don't try this at home without adult supervision.

A Very Basic Primer on Social Science Research

Researchers use inductive and deductive approaches. When researchers use a deductive approach, they start with a theory they want to test. With an inductive approach, they do not have a pre-conceived theory and, instead, seek to develop theories by doing the research. Although this description is oversimplified and researchers may use both approaches, this distinction is useful.

Researchers often want to test a causal theory, i.e., that a change in variable X causes a change in variable Y. Developing a credible causal theory is really, really hard because it involves discrediting "rival" theories. A rival theory is that variables A, B, or C etc. are key factors affecting variable Y, not variable X as the researcher hypothesizes. There can be a ton of rival theories.

To produce a credible empirically-based theory, researchers typically need a series of studies producing consistent results in different contexts. Even then, scientists are cautious about claiming that they have "proven" the theory because there may be rival theories they haven't considered.

Problems with Surveys

Surveys producing quantitative data often are used deductively to help establish a causal theory. Novice researchers may not be conscious of their theory. And they typically don't consider possible rival theories to try to discredit.

For example, in writing a survey about lawyers' abuse of mediation, such researchers might not consider a rival theory that lawyers' actions are caused by scheduling of mediations before lawyers are ready to mediate. If researchers do not collect data to test rival theories, they can mislead themselves and their readers.

Survey research is much more difficult than many novices realize. I have been horrified – repeatedly – to hear very smart dispute resolution professionals suggest doing surveys with all the [naive enthusiasm of teen-aged Mickey Rooney and Judy Garland impulsively deciding to "put on a show" in a barn.](#)

Novice researchers considering doing a survey might consider the keen observation of a character in the movie, *Body Heat*, ["\[Y\]ou got fifty ways you're gonna fuck up. If you think of twenty-five of them, then you're a genius – and you ain't no genius."](#)

I won't catalog all the ways survey researchers can mess up – there are a lot of them – but I will mention a few. Writing good questions is surprisingly hard. Responses to the "same" question may differ greatly depending on the wording. Novice researchers often write questions assuming that subjects will all understand the question exactly as

intended. In practice, subjects often misunderstand poorly drafted questions and different subjects interpret them differently.

Getting a good sample is also much, much harder than novices usually imagine. "Selection bias" can lead to very misleading results. For example, if lawyers who are disgruntled are more likely to respond to a survey about mediation, the results would not provide an accurate estimate of lawyers' views generally.

If you are a novice researcher and you really want to do quantitative survey research, do yourself a favor by collaborating with (or at least consulting with) an experienced researcher.

Great Opportunities for Learning Through Semi-Structured Interviews

Scholars who want to study dispute resolution empirically but have little social science experience should consider using semi-structured interviews. In these interviews, researchers ask subjects a standard series of questions. The interviews are "semi-" structured in that the questions typically are open-ended and serve as a starting point for follow-up questions depending on the subjects' responses. This method involves interviewing skills similar to those used by good lawyers and mediators.

Researchers generally use semi-structured interviews for deductive research, i.e., their goal is to learn new things (rather than test pre-defined theories). I think that new learning is very worthwhile – and exciting – in itself.

Even if you are [angry about some dispute resolution issue and have a theory you want to study](#), semi-structured interviews can be useful by probing for potential rival theories.

There are also fewer ways to mess up semi-structured interviews than standardized surveys.

Semi-structured interviews are especially useful for getting more complete understanding of cases than is possible with surveys. Typically, surveys about cases involve a few multiple-choice questions that can yield only general characterizations of complex interactions. By contrast, researchers using interviews can get much better understandings about what actually happened in cases.

For example, in [one study](#), I asked lawyers to describe the case they settled most recently, starting from the beginning.

In addition to developing an overall narrative of the cases, I asked the subjects: (1) when the negotiation began; (2) who initiated the negotiation; (3) why the negotiation was initiated at that time; (4) the time period between the first communication until final agreement; (5) whether

the subject previously knew the lawyer for the other party; (6) how well the lawyers got along; (7) if the lawyers' relationship affected the negotiation process or outcome; (8) if the parties directly participated in the negotiation; (9) what the lawyers communicated about the negotiation with the client; (10) how the subjects prepared for the negotiation; (11) how much of the negotiation was conducted by phone, email, letter, or in person; (12) if both sides identified their interests or goals early in the negotiation; (13) what the subjects thought were the main goals of each side; (14) if there was any negotiation about the litigation process itself (such as discovery, timing, information sharing, or motions); (15) if there was a series of offers and counter-offers, and if so, how many times the parties exchanged offers; (16) what was the first offer or demand from each side; (17) what was the final agreement; (18) why the parties accepted the agreement that they did (as opposed to some other possible agreement); (19) the extent, if any, that the resolution was based on expectations about the likely result in court or typical settlements in similar cases; (20) whether the subjects thought that the settlement was appropriate; (21) how satisfied they felt about the negotiation process; and (22) how typical this negotiation was compared to their other recent two-sided negotiations of this type of case.

You can read descriptions of some of these cases in Part IV of the study. As you will see, this data provides a much richer account of what actually happened in negotiations than is possible from standardized surveys.

Of course, researchers need not ask all the questions I used. And these methods can be used to focus on different processes, such as mediation and arbitration, or particular parts of processes.

Part of the fun is deciding what you want to study and what questions to ask. I have always enjoyed doing the interviews and virtually all of my subjects have as well.

Researchers often use multiple methods in a study – such as conducting both interviews and multiple-choice surveys – and this can increase the value of the research. Doing interviews before surveys can help researchers really improve the quality of the survey data.

Yes, You Can Be a Social Scientist (Without Getting a PhD)

We really need more qualitative research on actual cases. Much of our understanding of dispute resolution is based on [conventional wisdom](#) and hypothetical cases.

Real life is so much more interesting. And there are so few studies analyzing actual cases. Learning about them is more fun than a barrel of monkeys.

Create New Knowledge with This Quick, Easy, No-Fuss-No-Muss, Surefire Method

John Lande describes how you can create valuable knowledge by systematically eliciting responses from audiences in your educational programs. He is the Isidor Loeb Professor Emeritus at the University of Missouri School of Law.

Have you always wanted to be a font of knowledge? Impress your friends and colleagues? Be the life of the party with amazing new information?

Well, I have just the ticket for you. It's yours absolutely free! No shipping or handling charges. (Sorry, we're all out of the ginsu knives that used to come along with this amazing offer.)

All it takes is an invitation to speak with some sentient adults.

For example, will you be a presenter at a continuing education program? A speaker at a conference? A lecturer in a school or class?

If your audience has experience or knowledge relevant to the topic of your program, you can collect and disseminate it. For example, you can ask what do people really do in practice. What makes sense to them – or not – about dealing with particular problems? Do they use any nifty techniques you haven't thought of? Have they noticed any changes in practice over time? What are their hopes and aspirations? How much do people use dispute resolution theory in practice? What are some problems with the theory? How do they deal with these problems?

This is different than the typical practice of leaving a few minutes for questions from the audience at the end of a presentation.

Instead, you devote a fair bit of time to ask specific questions of the audience that you plan in advance. You might do this at the beginning, middle, and/or end of a program. For example, at the beginning of a program, you might ask a series of questions about people's background and experience, soliciting answers by a show of hands. This not only helps you gear your presentation to the audience, but it helps everyone get a feel for how their experience compares with the others in the room.

At various times during a program, after you discuss some material, you can ask the audience about the topic you just discussed. You might invite people to respond with verbal comments, a show of hands, or even responses to survey questions using "clickers" or cell phones. After discussion of the question, you can proceed to the next part of the presentation and elicit more input if you like.

The result is that you enrich the educational process for everyone by including insights from the audience.

To get the full benefit, you should arrange for someone to take notes of the discussion on a laptop. If students will be in the audience, you might arrange for one of them to take notes. Here are [simple instructions for using notetakers](#).

You might make an audio or video recording but you may have a hard time picking up comments from people who are far from the microphone, so don't rely solely on these recordings. In any case, you should let the audience know that you are making a record of the discussion.

After a presentation, prepare materials to distribute to the audience (and perhaps others). You might weave the notes into a short document similar to a magazine article or blog post, adding your own comments and additional resources. A simpler alternative is just to distribute a straightforward summary.

If you are presenting at a continuing education program, your host may arrange to email your summary to the participants and/or post it on its website. If you present at a conference, you can circulate a sheet for people to provide their legible email addresses, which you can use to distribute the summary.

You could use the audience responses as data in a publication. If you are an academic and your publication is considered as human subjects research, you should get approval from your school's institutional review board.

Yeah, But Is It Real Knowledge?

You bet.

There are common myths that information isn't real "scientific knowledge" unless it is collected in a survey with a large number of respondents – and that survey data validly represents reality.

Everyone should carefully consider what inferences you can make from any data. Although [survey data often presents a useful window on the world, there are many reasons why it may present a flawed view](#). Survey data about dispute resolution is especially tricky because there are so many contextual variables that affect the conclusions that it is [hard to make strong generalizations](#).

You also should be cautious about making generalizations based on data from educational programs. Indeed, if you elicit responses from only a few people in a haphazard way, this wouldn't produce generalizations you can rely on. Even if you are

more systematic and thorough, generalizations should be limited to the population represented in the audience.

But making generalizations isn't the only – or necessarily the most important – goal of empirical research. [Other goals](#) include developing clearer concepts and language, identifying key contextual factors affecting processes, developing new theories and insights, helping establish consensus on best and worst practices, and helping design conflict management systems.

By asking questions at educational programs, you can learn new ideas and perspectives that you hadn't considered. This can change the way that you and others look at the world and the questions that you ask. So you won't produce definitive answers, but you and your audience can learn good questions to ask in the future.

What a concept.

Just Do It

This ain't rocket surgery. You can do it.

Hell, considering all the effort you invest into preparing educational presentations, it needn't take much more to collect and disseminate data from your programs.

Here are examples of knowledge generated from a [short CLE program](#), a [two-day mediation training](#), [multiple conference sessions](#), and a [class presentation](#).

Act now. Satisfaction guaranteed or your money back!

Conclusion

Our dispute resolution movement still is vibrant. There is a substantial infrastructure in the US and growing use of a range of dispute resolution processes in other countries.

The great engagement in the Past-and-Future Conference and impressive responses to the call to participate in this Theory-of-Change Symposium reflect a continuing passion and commitment to our visions and work.

Yet it would be a mistake to be complacent and assume that everything will be just fine if we simply stay on our current trajectory. We can see warning signs ahead. External forces are likely to impede our growth and vitality. Our world is changing at a dizzying pace due to technological innovations, demographic shifts, political developments, and many other factors.

This book is a kind of brainstorming about what goals are especially important and what ideas might best advance our goals. It is not a coherent strategy for our movement overall. Nor do the pieces provide full-fledged theories of change. Rather, they constitute a menu of options to be refined and enacted if desired.

Real theories of change require detailed analyses of the conditions and causal factors necessary to advance valued goals. For example, one might suggest a policy of ordering parties to mediate before going to trial to promote goals such as improving communication, better addressing parties' interests, increasing efficiency etc. This suggestion is not, in itself, a theory of change. To produce a credible theory of change, we would need to identify factors necessary to realistically advance the goals such as a cohort of competent mediators, common understandings about appropriate and ethical mediator interventions, procedural rules well suited to particular practice cultures, and systems to create expectations about mediation by parties and lawyers, among other things.

In essence, theories of change for dispute resolution are exercises in dispute system design. In most situations, these designs need to be flexible enough so that they can be adapted to fit local circumstances. Moreover, the designs need to be the product of collaborative engagement of key stakeholder constituencies rather than simply ideas of individual theorists.

So this book represents a catalyst for serious work ahead. Members of our community would need to invest time and energy to advance ideas such as those expressed here.

People can pursue some of these ideas without collaboration or a lot of additional effort. For example, individual practitioners can work to make more conscious decisions (as [Michael Lang](#) suggests) or listen better (as [Russ Bleemer](#) suggests). To

make a substantial impact, however, we need to engage in collaborative efforts to improve these practices by a population of practitioners.

Small ad hoc groups can pursue some of these ideas such as running realistic negotiation simulations (as [Debra Berman](#) is doing) or developing standard assessment materials for new mediation trainees (as [Rebecca Price](#) suggests).

Some ideas require engagement and leadership from major organizations in our community. For example, developing ODR standards (as [Linda Seely](#) suggests) and redesigning courts (as [Mike Buenger](#) advocates) require substantial efforts with and of major institutional actors.

Some "big picture" ideas involve conceptual changes within our community, such as [Heather Kulp](#)'s call to identify our work as improving people's ability to handle disputes on their own, [Deb Eisenberg](#)'s suggestion to reconceptualize our field as "process strategy," and [Alyson Carrel](#)'s "Delta Model" of three main legal competency areas of the law, business and operations, and personal effectiveness.

The blessing and the curse of our movement is that there is so much we want to do – and that we could do to promote social improvement. This can make it hard to decide how to use our limited resources and coordinate our activities.

Our time is one of our most precious resources as we all have many other pressing professional and personal obligations. Some of the changes suggested in this volume need not require substantial additional investments of time, only shifts in what we would otherwise do. For example, most faculty can increase the emphasis on relationship between theory and practice in their courses (as [Ben Cook](#) suggests and the [Stone Soup Project](#) facilitates). Similarly, lawyers and mediators can improve their procedures in helping clients assess their interests and risks (as [Michaela Keet](#), [Heather Heavin](#), and I suggest).

Other initiatives would require people to undertake substantial activities that are not in the regular "job description." This might include dispute resolution reform initiatives, like [Jill Gross](#)'s campaign to improve FINRA arbitration procedures for low-income parties, or [David Henry](#)'s idea to persuade courts to establish rules authorizing "mediation optimization orders." It would take some initiative and effort to bring about changes in general forms of practice such as incorporating prevention in business transactional negotiations (as [Noah Hanft](#) describes) and mediation to negotiate transactions (as [Barney Jordaan](#) advocates).

[Jim Alfini](#), one of the veterans of our field, wrote about rekindling the ADR flame. Of course, we do not have the same burst of enthusiasm as a generation of pioneers in the early stages of the current ADR era. And, of course, we can't and shouldn't try to recreate the specific circumstances and ideas that energized people back then. But

our movement still is quite vital and we can generate new energy and sense of common commitment based on current conditions and expectations about the future. If we see others in our field participating and taking action, we are more likely to want to do so as well.

I suggested that we adopt an ["all-hands-on-deck" strategy](#). I think that it is particularly important to promote the leadership of junior and mid-career colleagues as senior colleagues gear up to retire. And we need to inspire new generations of students like [Rebekah Gordon](#) and junior and mid-career faculty like [Andrew Mamo](#) because they will be our future.

Yogi Berra is famously quoted as saying that it's hard to make predictions, especially about the future. This book is not about predictions. It's about actionable ideas.

Is being part of the dispute resolution world an important part of your identity? What about it sparks your passion? What actions do you want to take to help achieve your aspirations?

[YOLO](#).

Consider Unbundling Your Life a Bit

[John Lande](#) encourages you to make conscious decisions about your professional life out of choice, not habit, to maximize your personal and professional fulfillment. He is the Isidor Loeb Professor at the University of Missouri School of Law.

I am a failure. At retirement, that is. Or so everyone teases me.

I have ranted and raved about the [common misconception that there are only two choices: working full-time or no-time](#).

Actually, there may be a lot of choices, depending on one's resources and commitments.

I am fortunate to be able to live without a salary because I have an actual retirement plan and I get the benefits of Social Security and Medicare. Of course, not everyone is so fortunate.

In any case, most of us can make some choices, even when employed full time. So my general suggestion is to apply [Michael Lang's advice to make decisions out of choice, not habit](#). He was referring to decisions about interventions as a practitioner and I suggest doing the same in our personal and professional lives generally.

In my case, it would be more accurate to say that I have retired from teaching, faculty meetings, and lots of other things involved in being a good law school citizen. So while it may appear from the outside that I am busier than ever, that's because you can't see all the space in my life that **used to be filled** with teaching classes, grading papers, attending meetings, etc., etc.

Many of us are familiar with the concept of unbundling legal services. It's the idea that clients can retain lawyers to handle certain specified aspects of a case instead of handling the entire case. It's like ordering à la carte at a restaurant instead of a fixed seven-course meal.

You might find it helpful to think about unbundling your life by deciding what you want to do and, especially, what you **don't** want to do. Obviously, there are constraints and we almost never have complete discretion, but you may have more than you assume.

For those of us at or nearing retirement age with the ability to forgo all of part of our employment income, these decisions are more obvious. Some people teach one semester a year instead of two. Some teach half-time all year. Some let go of writing, administrative, or other obligations. Some prefer to continue working full-time til they drop. There are comparable options outside of academia. Some people "retire" but

continue working part-time as consultants for their former employers and/or others. This is not an exhaustive list of possibilities by any means.

Even if you aren't anywhere near ready to retire and, indeed, are raring to go at exciting work projects, you still may be able to make some choices about what to do with your time. I think of an extremely productive colleague who goes crazy at times because of everything she has agreed to do.

The lesson is to be ready to say "no." It can be even harder to say "no" to yourself than to others when you are presented with exciting opportunities. I get it. I have been there. Even though I am allegedly "retired," I still struggle with this at times.

Sometimes, the best choice is to be overloaded for a specified, limited time. However, that's not a good strategy all the time if you can avoid it. Think about what you might not do and carefully scrutinize your assumptions about what you need to do and the consequences of not doing some things.

Less can be more. If you reduce the **quantity** of things you do, you may be able to increase the **quality** of the things that you do do. And you may have more time for the important activities of smelling the coffee, roses, or whatever else safely turns you on.

Unbundling your life also provides the opportunity to consider what more or different things you might want to do as part of the dispute resolution movement. This is hard.

Most of us already have too many things on our plates in our personal and professional lives. Since you are reading this, you probably already devote significant time to our field. In developing the [Stone Soup Project](#), we were very conscious of this fact and suggested ways that faculty could incorporate Stone Soup into their teaching with little or no additional effort – and that colleagues could invest more time if desired.

If you feel called to do more, especially recognizing the need for an [all-hands-on-deck strategy](#) for dispute resolution, you might consider if you want to discontinue some activities so that you have room in your life for others.

I recently saw the acronym YOLO – you only live once – which is susceptible to different interpretations. Some people may use it to suggest letting go of some responsibilities to enjoy life more; there is merit in that perspective. A complementary perspective is that we have only one life to fulfill our aspirations.

YOLO.