

# An Analytic Framework for Dispute Systems Design

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## I. OVERVIEW

The use of the trial as the dominant form of dispute resolution is diminishing,<sup>2</sup> yet law schools continue to train young lawyers as if the courtroom will be the principal venue for addressing legal conflicts. The historically narrow focus of legal curricula on litigation and appeals is insufficient to prepare young lawyers for the world that awaits them.<sup>3</sup> While clients will continue to need attorneys who are effective in court, lawyers are increasingly called upon to play a much wider range of roles.

Law graduates now serve not only as litigators, but also as general counsel, CEOs of for-profit and nonprofit entities, legislators, government counsel, diplomats, and policy advocates. In these roles, law-trained professionals often must work “upstream” in the life of conflicts. They must understand how to prevent conflicts, manage

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2. See Marc Galanter & Hon. William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 73 (2006).

3. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARING FOR THE PROFESSION OF LAW 24 (2007).

them more effectively and efficiently at an early stage, and successfully resolve those that ripen into legally-framed disputes.<sup>4</sup> They are called upon to be organizational problem solvers as members of multidisciplinary teams. And—most interesting to us—attorneys in these broader roles sometimes have the opportunity to help organizations create or improve *systems* that prevent or address conflicts before and after they evolve into full-fledged disputes.

Twenty years ago, Ury, Brett and Goldberg articulated the notion of dispute systems design. Their work focused primarily on systems that included interest-based procedures for resolving industry-related disputes.<sup>5</sup> Systems have since been created and applied in an ever-widening variety of venues.

Specific systems design courses are taught in a number of law schools,<sup>6</sup> but more commonly, systems design is addressed in a class or two during an alternative dispute resolution (ADR) or civil procedure course. We believe the utility of systems analysis and design bridges many of the silos of law school curriculum, including civil procedure, contracts, remedies, commercial law, administrative law, employment law, international human rights law, decision making and problem-solving, and professional responsibility.

This article proposes a framework for analyzing dispute systems. The framework should be useful to attorneys practicing in a wide spectrum of settings who may need to diagnose or design a dispute system, as well as to professors of law who wish to incorporate dispute systems analysis and design into their curricula. In the course we teach, we have applied the framework most often to help students understand dispute systems design in three contexts: 1) Analyzing a system historically to understand its evolution, functioning, and impacts (as might be done by an academic or a system design advisor); 2) Advising on the best process to create the design, or more likely redesign, mechanism for a system; and 3) Designing (or redesigning) a system itself.

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4. But note that not all conflicts should be prevented. See Deborah M. Kolb and Susan S. Silbey, *Enhancing the Capacity of Organizations to Deal with Disputes*, 6 NEGOT. J. 297, 297-304 (1990); Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1, 1 (1993); David Johnson et al., *Constructive Controversy: Value of Intellectual Opportunities*, in THE HANDBOOK ON CONFLICT RESOLUTION: THEORY AND PRACTICE 69, 69-77 (Morton Deutsch and Peter T. Coleman eds., 2nd ed. 2006).

5. WILLIAM L. URY ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* (1988)

6. Including the law schools at Stanford, Harvard, Penn State, the University of Missouri, Ohio State, and Marquette, to name a few.

The fact is, attorneys are rarely faced with the need to design a system from scratch. More often, they must improve existing, flawed systems, or adapt an existing system to a new context. Systems analysis skills may thus be used in situations as diverse as:

- An attorney who negotiates contracts for joint business ventures as they select and draft language for the processes that will be used to prevent, manage and resolve conflicts that may arise;<sup>7</sup>
- A general counsel or outside counsel who revamps an employee grievance procedure or designs a payout system connected to the settlement of a multi-party class action;
- A legal advisor or diplomat who counsels a country emerging from conflict on how to create multi-tiered justice systems that address punishment as well as reconciliation in an effort both to achieve justice and prevent future violence;<sup>8</sup>
- A judge or court administrator who develops multiple settlement and case management processes to better serve litigants<sup>9</sup>;
- A legislator or legislative staff member who develops new policy with enforcement mechanisms and an implementing regulatory scheme.

In short, dispute systems analysis is an essential skill in systems design, and one that we believe should be widely taught in law schools and better understood by attorneys.

This article includes an introduction to systems design concepts and terminology as a foundation for the proposed analytical framework. A case discussion involving the health care provider, Kaiser Permanente, illustrates how the framework applies; a series of shorter case studies highlight and expand upon aspects of the framework. The concluding section considers the choices and tradeoffs faced by designers and emerging issues in this evolving field.

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7. See Robert Scott and George Triantis, *Anticipating Litigation in Contract Design*, 115 *YALE L.J.* 818, 823-25 (2006).

8. See discussion of transitional justice, *infra* at IV.E.

9. See discussion of US District Court for the Northern District of California case, *infra* at IV.A.

A. *What is Dispute Systems Design?*<sup>10</sup>

A *dispute system* encompasses one or more internal processes that have been adopted<sup>11</sup> to prevent, manage or resolve a stream of disputes connected to an organization or institution. Under this definition, a system may involve only one formal process, such as a binding arbitration program, or multiple processes, such as the multi-option ADR program at the US District Court for the Northern District of California. In fact, rarely if ever is just one process available. In most cases, multiple formal or informal process options are available within an organization or institution. At the same time, external actors may offer dispute resolution services—for example, courts and administrative bodies in the public sector, and business, community, and religious associations in the private sector.

The available processes that may make up a given dispute system are manifold and increasing in number. Ury, Brett, and Goldberg divide the universe of dispute resolution processes into three ways by which disputes are resolved: according to the parties' interests, their rights, or their power.<sup>12</sup>

*Interests* encompass whatever the parties care about, including economic, relational, political, and social values.<sup>13</sup> Disputes resolved according to interests are usually negotiated among the affected parties directly or with the assistance of a third party, and these processes tend to yield the highest satisfaction with outcomes.<sup>14</sup> These approaches, however, can require a significant investment of time. Interest-based process options include mediation and the use of an ombuds. Resolving disputes on the basis of *rights* requires a neutral third-party to apply agreed-upon rules to a set of facts to determine who prevails. Rights-based processes—including binding arbitration and the traditional court trial—value procedural justice,

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10. The controversy continues over the terms “conflict” and “dispute” when discussing systems design. We favor the term “dispute” for conflicts that have evolved into defined, focused disagreements, often framed in legal terms, with “conflict” encompassing a broader category. See, e.g., Jennifer Lynch, *Beyond ADR: A Systems Approach to Conflict Management*, 17 NEGOT. J. 207, 215 n.3 (2001). We use the term “Dispute Systems Design” in recognition that it has become the term of art and because a more inclusive term, such as “Conflict and Dispute Prevention, Management and Resolution Systems Design” would be cumbersome.

11. These processes may have been created at one time or over the history of an organization. Organizational systems also could include informal behaviors never consciously “designed”. See, e.g., Mary Rowe, *People Who Feel Harassed Need a Complaint System With Both Formal and Informal Options*, 6 NEGOT. J. 161, 172 (1990).

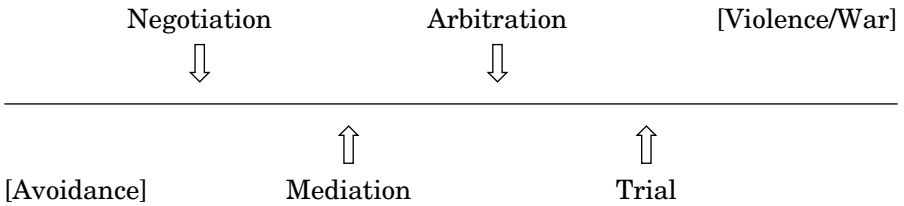
12. See URY ET AL., *supra* note 5, at 3-9.

13. Vindication of rights can also be an “interest.”

14. See URY ET AL., *supra* note 5, at 14.

but due to their limited remedies, they may not address the full range of interests that are important to the parties. Disputes resolved according to *power*, e.g., strikes and lockouts (or at the extreme, violence or war) weight the outcome to the party with the most leverage, status and resources, but they may be costly in terms of relationships (and human life) or failure to vindicate rights.

The dispute resolution spectrum below provides another way to think about this array of process options. The spectrum is bounded by extreme responses to conflict: avoidance and violence. Between these extremes are options arranged according to the level of control the disputants have over process and outcome. Negotiation, on the left, does not involve a third-party neutral, and the parties retain control over both the process and outcome. Toward the middle, mediation, involves a third-party neutral who does not have the power to impose a binding decision. The processes on the right end of the spectrum, arbitration and trial, involve a third-party neutral who has the power to render a binding decision.



As you follow the spectrum from left to right, the processes generally become increasingly formal; there is increasing control of a third party over the outcome, as well as the process; processes become more expensive in time and resources; and there is an increasing focus on the disputants’ rights as opposed to their interests.<sup>15</sup>

**B. *Assessing the Quality of Dispute Systems***

How can we know if a given dispute system is a “success,” or at least discern which systems are superior to others that address similar types of conflicts? The literature on systems design proposes a number of ideal goals, principles and criteria for judging the quality of an organizational system. Susskind highlights the attributes of

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15. There are a number of additional process options, such as Early Neutral Evaluation (ENE), as well as hybrids and variants of these basic processes, including med-arb and arb-med, many of which are described more specifically in the glossary in the Appendix.

fairness, efficiency, stability, and wisdom of outcomes.<sup>16</sup> Ury, Brett, and Goldberg focus on transaction costs, satisfaction with the outcome, relationships among the disputants, and recurrence of the disputes.<sup>17</sup> Costantino and Merchant synthesize these qualities as: efficiency, effectiveness (e.g., durability, nature of the outcome, and effect on the organizational environment) and satisfaction with the process, relationships, and outcome.<sup>18</sup>

Commentators on dispute systems design have since proposed a number of characteristics that bear on whether these criteria can be met. They propose that the best systems involve:

- Multiple process options for parties, including rights-based and interest-based processes<sup>19</sup>
- Ability for parties to “loop back” and “loop forward” between rights-based and interest-based options<sup>20</sup>
- Substantial stakeholder involvement in the system’s design<sup>21</sup>
- Participation that is voluntary, confidential and assisted by impartial third-party neutrals<sup>22</sup>
- System transparency and accountability<sup>23</sup>
- Education and training of stakeholders on the use of the available process options<sup>24</sup>

The quality of a system may also be judged by whether it conforms with or diverges from legal and societal norms. Experts often address the importance of “justice” or “fairness” in a system, but how those terms are defined ranges widely. “Justice” in a general sense conveys a sense of fairness, rightfulness, and validity, or, more narrowly, an

16. LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* 21-32 (1987).

17. URY ET AL., *supra* note 5, at 11-13.

18. CATHY COSTANTINO & CHRISTINA S. MERCHANT, *DESIGNING MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS* 168-89 (1995).

19. *See, e.g.*, SOC’Y OF PROF’LS IN DISP. RESOL., *DESIGNING INTEGRATED CONFLICT MANAGEMENT SYSTEMS- GUIDELINES FOR PRACTITIONERS AND DECISION MAKERS IN ORGANIZATIONS* 10-14 (2001), available at <http://digitalcommons.ilr.cornell.edu/icr/2>.

20. *See, e.g.*, URY ET AL., *supra* note 5, at 52-56 (on loop-backs for power and rights contests).

21. *See, e.g., id.* at 69-72.

22. *See, e.g.*, SOC’Y OF PROF’LS IN DISP. RESOL., *supra* note 19, at 17.

23. *See, e.g.*, URY ET AL., *supra* note 5, at 61-62 (on post-dispute analysis, feedback and fora for discussion); SOC’Y OF PROF’LS IN DISP. RESOL., *supra* note 19, at 24-26 (on evaluation and monitoring); COSTANTINO & MERCHANT, *supra* note 18, at 64 (on feedback) and 168-88 (on evaluation).

24. *See, e.g.*, URY ET AL., *supra* note 5, at 78-79; COSTANTINO & MERCHANT, *supra* note 18, at 134-50.

outcome pursuant to the authority or administration of law. Bingham highlights a range of “justice” terms that cover a very broad array of fairness concepts, including distributive, procedural, organizational, informational, interpersonal, corrective, retributive, deterrent, personal, and social dimensions.<sup>25</sup>

## II. A DISPUTE SYSTEMS ANALYTICAL FRAMEWORK

The balance of this article proposes a framework for organizing and guiding the analysis and design of dispute systems. This framework focuses on five key elements: what are the *goals* that motivate the system? What is the system’s *structure* in terms of its process options and incentives for use? Who are the *stakeholders* of the system? How is the system supported in terms of financial and personnel *resources*? How *successful* and *accountable* is the system?

### A. Goals

The element of *goals* consists of two parts: to identify which types of conflicts the system seeks to address and what goals the system intends to accomplish. A dispute resolution system within an organization may address one, few or many categories of conflicts. For instance, a company could design a system intended to resolve only internal employee disputes. Alternatively, the company could design a broader system that addresses disputes with external actors, such as clients or suppliers. At its most extensive, an integrated conflict management system (ICMS) could address all or almost all of an organization’s conflicts, among internal stakeholders and between internal and external actors.<sup>26</sup> The more integrated approach could include goals on prevention and management as well as resolution, and provide multiple access points for process intervention.<sup>27</sup>

Once the scope of conflict is defined, it is important to consider what the system intends to accomplish. Desired outcomes, and the

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25. Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. ON DISP. RESOL.1 (2008).

26. See Mary Rowe, *Dispute Resolution in the Non-Union Environment: An Evolution Toward Integrated Systems for Conflict Management?*, in WORKPLACE DISPUTE RESOLUTION: DIRECTIONS FOR THE 21ST CENTURY 79 (Sandra E. Gleason ed., 1997); SOC’Y OF PROF’LS IN DISP. RESOL., *supra* note 19, at 8-9.

27. The concept of ICMS is to pursue a systematic approach to preventing, managing, and resolving conflict, including to: advocate a problem-solving approach into an organization’s culture; provide options for all kinds of problems; provide multiple access points; provide both rights-based and interest-based options for addressing conflict; provide systemic support for coordinating the multiple access points and options. See SOC’Y OF PROF’LS IN DISP. RESOL., *supra* note 19, at 10.

priorities among them, need to be established, both to clarify the policy direction *ex ante*, and to assess the system's success *ex post*. The range of possible objectives is extensive:

- Conflict prevention? Management? Resolution?
- Efficiency/resource savings: Minimize time of stakeholders, institution and/or neutrals; Minimize cost for institution and/or stakeholders? Reduction of number or type of conflicts?
- Relational: Transform or restructure relationships? Whose?
- Safety: Prevent violence against parties? Protect property?
- System operation: Enhance access to the system? Decrease caseload?
- Public recognition: Protect privacy? Provide public vindication? Create precedent?
- Substantive outcome: Increase "justice"? How defined?
- Fairness: Procedural? Substantive?
- Reputation (of individuals, organization)?
- Compliance: To sanction or punish? Deter future disputes?
- Satisfaction: Of all, or fewer than all, stakeholders? Durability of resolution?
- Organizational improvement: To identify institutional weaknesses or injustices and correct them?

Ultimately, the designer of the system<sup>28</sup> has the power to define the goals of that system and their relative priority. The trade-offs required among competing goals may affect the quality of the resulting system. A significant tension can be one between the goals of efficiency and fairness or justice.

### B. *Processes and Structure*

The second element of the framework involves *process options and structure*. Which processes are used to prevent, manage, and resolve disputes? How are those processes defined, and how do they relate to each other within the context of the institution? It may be useful to consider how the system has evolved over time. Further, it is important to examine how the system is reinforced or constrained by external systems, including the formal legal system,<sup>29</sup> and what

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28. Or the employer of the designer, if an outside designer is used.

29. All private systems exist within the context of society's public dispute resolution mechanisms, most notably the court system, which interacts with private systems in at least two important ways. First, courts provide public dispute resolution mechanisms (trials, appellate processes and sometimes ADR procedures) that will be options for disputants in some, but not all, cases. Second, courts have the authority to rule on whether the private systems, in whole or in part, are acceptable under the law of the jurisdiction.



incentives and disincentives (financial, relational, legal or other) exist for using the system.

As discussed previously, many different types of processes can be used to prevent, manage and resolve conflicts. Some organizations offer one formal process, such as mediation or arbitration, while others develop a range of processes for one or more types of disputes. If multiple options are offered, those options may be linked together in an integrated system or they may exist ad hoc, as discrete, unlinked processes that evolved in different parts of the organization over time, often without centralized or strategic thought. Either way, the available processes may have different incentives (financial, timing, or other) that encourage or discourage their use by different stakeholders.

An organization's freedom to design its internal conflict prevention, management, and resolution processes as it wishes may be constrained by courts, legislatures or administrative bodies. Existing law may prohibit use of certain processes or require that specific due process elements be included. Once designed, an organization's dispute system may be challenged in a court or legislative body if some stakeholders believe the processes included run afoul of legal or other societal norms.

### C. *Stakeholders*

The third element is identification of various *stakeholders* and their relative power. For existing systems, it will be worthwhile to learn which stakeholders were involved in the system's design and whose interests are represented.

Stakeholders may be the immediate parties in conflict, individuals or entities subsidiary to or constituents of those parties, or others directly or indirectly affected by the dispute's outcome. In creating a system, it is usually best to identify as many stakeholders as possible in order to understand and create a system that takes into account all significant interests, has legitimacy, and is therefore more likely to garner credibility and produce durable outcomes. System dysfunction can often be attributed to failure to adequately involve and acknowledge the interests of key stakeholder groups.

### D. *Resources*

A vital concern is the extent to which the system has adequate *resources* to operate. How is the system financed, and is its funding level adequate to achieve the stated goals? What impact do the

amounts and sources of funding appear to have on the results of the system? On the human resource side, are neutrals adequately trained to provide high quality and ethical services? Do other personnel in the system (internal and external to the organization) have sufficient skills, training, and supervision?

A system can only achieve its goals if it is adequately supported. To avoid creating an elaborate set of processes with inadequate resources, however, may require making hard decisions that as noted above can have impacts on fairness, justice, and likelihood of success.<sup>30</sup>

Also central to understanding the funding issue is the question of who pays. Financing of the system by some parties and not others may create bias or a perception of bias. While having only one side pay increases the risk of bias, imposing financial costs on lower income parties may create burdens that effectively deny access in some cases.

#### E. *Success and Accountability*

The last element to assess is *success*. At the first level, one can ask to whom is the system accountable? Is the system transparent in terms of its operation, access to processes, and its results, and to whom? Second, does the system include an evaluation component, and if so, what is studied, when, and by whom, and to whom are the results made available? Finally, is the system successful when measured against its intended goals, as well as other relevant legal and societal norms?

A system's success is best judged if outcomes are made available to and studied by independent evaluators. Unfortunately, barriers such as cost, privacy concerns, difficulty, and wariness to exposure often preclude meaningful evaluation from taking place.

Evaluation is important in three primary respects. First, evaluation is necessary for system operators to ascertain whether the system is functioning effectively. Are key stakeholder groups staying out of the system? Are costs proving to be far in excess of projections? Are neutrals failing to deliver quality services or violating ethics rules? Are users satisfied with the options and services provided? Second, ongoing evaluation enables improvement of the system. Without ongoing evaluation, system operators would be unable to

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30. Even if a system begins with adequate funds, subsequent budget reductions can radically alter the chances of success. See discussion of transitional justice, *infra* at IV.E.

identify shortcomings in an organization's dispute resolution processes. Third, it is important for users to understand how and how well the system operates. Transparency increases credibility and therefore participation, and encourages further feedback from participants to system operators.

At a minimum, evaluation should begin with internal monitoring, including some combination of data collection on usage, surveys, and focus groups designed to obtain candid feedback from key stakeholder groups. Of course, independent external review is preferable and provides more detailed and objective assessment.

Below is a graphic summary of the framework we have described. Following this summary is a series of case studies using this framework.

**THE ANALYTIC FRAMEWORK<sup>31</sup>**

**1. Goals**

- a) *Which types of conflicts does the system seek to address?*
- b) *What does the system's designer seek to accomplish?*

**2. Processes and Structure**

- a) *Which processes are used to prevent, manage and resolve disputes?*
- b) *If there is more than one process, are they linked or integrated?*
- c) *What are the incentives and disincentives for using the system?*
- d) *What is the system's interaction with the formal legal system?*

**3. Stakeholders**

- a) *Who are the stakeholders?*
- b) *What is their relative power?*
- c) *How are their interests represented in the system?*

**4. Resources**

- a) *What financial resources support the system?*
- b) *What human resources support the system?*

**5. Success and Accountability**

- a) *How transparent is the system?*
- b) *Does it include an evaluation component?*
- c) *Is the system successful?*

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31. Maude Pervere and Stephanie Smith developed the original version of this analytic framework in 2002, derived from their experiences in designing and analyzing a wide range of systems and from concepts in the literature of that era.

## III. CASE ANALYSIS: KAISER PERMANENTE

A. *Background and Overview*

In 1997, Kaiser Permanente's<sup>32</sup> binding arbitration program was thrust into crisis. Six years earlier, Wilfredo Engalla, a Kaiser member, had filed a medical malpractice arbitration claim against Kaiser alleging negligent failure to diagnose his cancer at an earlier stage. Mr. Engalla died from the cancer 144 days later, long before the arbitration hearing had even commenced.<sup>33</sup> Mr. Engalla's estate withdrew from the arbitration process. Several months later the estate filed a malpractice suit in Superior Court and opposed Kaiser's petition to compel arbitration on the grounds that Kaiser had committed fraud by failing to provide a fair and timely arbitration process.

As a condition of its medical service agreements, Kaiser required binding arbitration to resolve medical malpractice claims.<sup>34</sup> The process fit the standard private arbitration model: a three-arbitrator panel, with limited discovery, issuing a binding award subject to an extremely limited right to appeal. Kaiser's written materials reflected its belief that arbitration was superior to litigation on the dimensions of speed, cost, protection of privacy, scheduling flexibility of parties and expert witnesses, finality, decisions that were "more fair and sound," and ability to ensure adequate compensation.<sup>35</sup> Kaiser's arbitration agreement stated that following the filing of an arbitration claim, "party arbitrators 'shall' be chosen within 30 days and neutral arbitrators within 60 days, and that the arbitration hearing 'shall be held within a reasonable time thereafter.'"<sup>36</sup>

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32. In California, what most people refer to as "Kaiser" is comprised of four entities: the Kaiser Foundation Health Plan, Inc. (the HMO); Kaiser Foundation Hospitals (the hospital group); and The Permanente Medical Group, Inc. and Southern California Permanente Medical Group (the doctors' entities). For purposes of this article, these groups will be referred to collectively as "Kaiser."

33. *Engalla v. Permanente Medical Group, Inc.*, 64 Cal. Rptr. 2d 843, 852 (Cal. 1997) (Mr. Engalla died on October 23, one day after the selection of the neutral arbitrator for the case and "almost three months more than the 60 days for the selection of the arbitrators represented in the Service Agreement . . . .")

34. As of 1997, the *Group Medical and Hospital Services Agreement* provided that arbitration was mandated for any "alleged violation of any duty incident to or arising out of or relating to this Agreement, including any claim for medical or hospital malpractice, for premises liability, or relating to the coverage for, or delivery of, services or items pursuant to this Agreement, irrespective of the legal theories upon which the claim is asserted." EUGENE F. LYNCH ET AL., *THE KAISER PERMANENTE ARBITRATION SYSTEM: A REVIEW AND RECOMMENDATIONS FOR IMPROVEMENT 6-7* (1998), available at [http://www.oia-kaiserarb.com/oia/Forms/BRP\\_Report.pdf](http://www.oia-kaiserarb.com/oia/Forms/BRP_Report.pdf).

35. *Id.* at 8.

36. *Engalla*, 64 Cal. Rptr. 2d at 857.

In 1997, the California Supreme Court, in *Engalla v. Permanente Medical Group*, rejected the Engalla estate's claim that the contract itself was unconscionable, but found that there was "evidence to support the Engallas' claims that Kaiser fraudulently induced Engalla to enter the arbitration agreement in that it misrepresented the speed of its arbitration program."<sup>37</sup> The case was remanded to the trial court to resolve conflicting evidence in connection with the case.<sup>38</sup>

The Supreme Court's opinion cited independent analysis of data collected from 1984 to 1986 to highlight how the system had fallen short of its stated goals in several critical respects. For example, the court noted, "in only 1 percent of all Kaiser cases is a neutral arbitrator appointed within the 60-day period provided by the arbitration provision. Only 3 percent of cases see a neutral arbitrator appointed within 180 days. On average, it has taken 674 days for the appointment of a neutral arbitrator."<sup>39</sup> In spite of Kaiser's promise of a hearing within a "reasonable time" after appointment of the neutral arbitrator, "on average, it takes 863 days-almost 2 1/2 years-to reach a hearing in a Kaiser arbitration."<sup>40</sup>

Faced with fallout from the *Engalla* opinion, Kaiser looked to improve its arbitration system quickly. In addition to the pressure and publicity of the pending case, another likely concern for Kaiser management was discussion in the California legislature of limiting binding arbitration in the health care/consumer context. The speed, cost effectiveness and fairness of Kaiser's arbitration system were all called into question. In this uncertain and pressured context, Kaiser needed to decide quickly:

- What the process scope of the redesign would be — just arbitration or consideration of additional disputing processes;
- Who would take the lead in redesigning the system;
- How many resources, human and financial, would be devoted this project; and
- How quickly these changes needed to occur.

Given the lack of confidence demonstrated by the court in Kaiser's arbitration program, as well as the accusations by the Engalla family and others that Kaiser intentionally delayed arbitrations for its own benefit, Kaiser chose not to handle the design internally.

Instead, Kaiser chose to create and fund a three-person Blue Ribbon Advisory Panel ("Blue Ribbon Panel") of outside experts with a

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37. *Id.* at 865-66.

38. *Id.* at 862.

39. *Id.* at 853.

40. *Id.*

reporter to help organize, shape, and document the process. The panel consisted of:

- Eugene Lynch, a retired federal judge and an arbitrator and mediator for JAMS, a private provider of ADR services;
- Sandra Hernández, a physician and Executive Director of the San Francisco Foundation;
- Phillip L. Isenberg, an attorney and retired member of the California State Assembly.

Kaiser instructed the Blue Ribbon Panel to “suggest improvements” to Kaiser’s arbitration process “in order to provide an arbitration system that is sensitive to the members and fair to all parties involved.”<sup>41</sup> The group met for one day a week for a period of three months. Representatives of various stakeholder groups and experts on health care, arbitration, and ADR were invited to make presentations to the panel and discuss potential system designs. Outside of these meetings, panel members and the reporter also conducted research, obtained written reports, and conducted interviews. In total, the panel received information from over 75 individuals.

The Panel’s recommendations included the following<sup>42</sup>:

- Appointment of an Independent Administrator to manage the Kaiser arbitration process;
- A permanent stakeholder advisory committee;
- A clear statement of goals and communication of those goals to stakeholders;
- A more expedited and efficient process — including calendar benchmarks for completion of cases;
- Encouragement of early settlement discussions;
- Expansion of the pool of arbitrators;
- External audits and evaluation of the new process;
- Written, reasoned decisions by arbitrators; and
- Making information about the arbitrators and their prior rulings available to all parties at the time of arbitrator selection.

The recommendations also included several items beyond the core arbitration issues, including creation of a mediation program and institution of an ombuds position.

Kaiser published the Blue Ribbon Panel Report and subsequently adopted almost all of the panel’s key recommendations.<sup>43</sup> It

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41. LYNCH ET AL., *supra* note 34, at app. A.

42. *Id.* at 31-45.

43. Some changes were implemented by Kaiser prior to the issuance of the Blue Ribbon Panel’s report. These changes included expedited processes for managing cases in which the claimant is terminal and developing and implementing a process

created an advisory group representing the key stakeholder groups. To run the revamped arbitration system, Kaiser contracted with an outside attorney to create an Office of the Independent Administrator (OIA), located outside of Kaiser but funded by Kaiser.

The OIA's protocols and rules were developed in collaboration between the advisory group and Kaiser. As will be discussed further below, the annual reports published by the OIA indicate substantial progress in satisfying the key goals of the redesign, including reduction in the time to arbitration, expansion of the numbers of arbitrators, and increased availability of information on arbitrators, among others. The OIA's activities were substantially more transparent than the previous arbitration process, and ample data on arbitration cases was made available on the OIA web site. Early annual OIA reports tracked the progress of each recommendation, and an independent audit of the OIA was conducted in its fifth year, as proposed by the Panel.

Still, in the first several years after the OIA was established, Kaiser took no action on several of the Panel's recommendations, including those proposing mediation and establishing an ombuds office. Kaiser has subsequently created a hybrid of these two process options within its system.

In the following section we will expand upon the five diagnostic elements (goals, structure, stakeholders, resources and success) and discuss their application within the context of the Kaiser case.

## B. *Goals*

Kaiser was initially focused exclusively on dispute resolution (not prevention or management) for one narrow but important stream of disputes, those falling within its mandated binding arbitration system.<sup>44</sup> In seeking to improve the system, Kaiser's stated goals included fairness and efficiency (in speed and cost) for all parties. Reputational and relationship goals were also present, though not explicitly, as Kaiser sought to maintain and increase the approval of its members and their employers, who were critical to achieving its healthcare delivery mission, and key to retaining current and attracting future members.

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for indigent claimants to obtain relief from payment of some arbitration costs. *See Id.* at app. C.

44. As noted above, the Service Agreement mandated arbitration for several categories of cases. However, the Blue Ribbon Panel concluded that "approximately 90% of all [Kaiser] arbitration cases allege medical malpractice." *Id.* at 7.

Kaiser also had compliance goals, wanting to address the issues raised by the California Supreme Court in the *Engalla* case and the concerns expressed by the California legislature about the fairness of its binding arbitration procedures. Kaiser's compliance goals presumably included avoiding what it perceived as undesirable, externally imposed additional restrictions on its arbitration program.<sup>45</sup>

The Blue Ribbon Panel's stated goals tracked the Kaiser mandate but elaborated further. Although its mandate was to "recommend improvements" in the existing dispute resolution system of arbitration,<sup>46</sup> the mandate was silent as to other possible dispute prevention, management and resolution processes. The Panel chose to explore and ultimately recommend some additional process options, effectively broadening the project goals and the resulting scope of inquiry.

### C. Structure

In the Kaiser case, the initial focus of the formal design project was on one process: binding arbitration. The Blue Ribbon Panel, however, also looked "upstream" in the life of the disputes to explore how conflicts might be prevented or managed at an earlier stage. The Panel noted the existence of an internal grievance mechanism and other pathways for patients to raise concerns about their medical care. Although they did not have time to fully explore these conflict management and resolution options, the Panel did recommend creation of an ombuds program to assist members at the early stages of conflict.<sup>47</sup> They also proposed a focus on earlier settlement of arbitrated cases and creation of a mediation program.<sup>48</sup>

It is worth noting that the potential interest of the courts in the redesign of Kaiser's arbitration system was greater than in the development of most private dispute resolution systems. As arbitration in the United States evolved from commercial transactions among parties of comparable power,<sup>49</sup> private arbitration agreements have historically been given great deference by the courts.<sup>50</sup> However, courts

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45. It also had to be mindful of compliance needs with regard to California state agencies that regulated health care in general and HMOs in particular.

46. *Id.* at 3.

47. *Id.* at 43-44.

48. *Id.* at 41.

49. See JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 112 (1983).

50. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Southland v. Keating*, 465 U.S. 1 (1984).



and legislatures in the United States are increasingly scrutinizing arbitration contracts between parties of unequal bargaining power, as with consumer and health care agreements, and providing more protections for the consumer.<sup>51</sup>

In many dispute systems, organizations will employ incentives to encourage stakeholders to use the internal system. In one sense, Kaiser did not need to offer incentives to use the arbitration system over the court system because the arbitration process was mandatory for resolving members' complaints. Even with only one available option, however, members were faced with the decision of whether to use that process or not pursue the claim at all. Major disincentives to use of the pre-*Engalla* arbitration process by Kaiser members included the high cost of the private arbitrators and the delays in appointment of arbitrators and holding of hearings. Both cost and delay concerns were addressed by Kaiser's new procedures following the Panel's recommendations.

After the Blue Ribbon Panel Report was issued, Kaiser developed a HealthCare Ombudsman/Mediator program, which provided a clearer process focused upstream in the life of a dispute, to try to address problems at the "point of care." The addition of this process provided an interest-based option to supplement the rights-based, binding arbitration process.

#### D. *Stakeholders*

In the Kaiser case, there were numerous stakeholder groups affected by Kaiser's arbitration process. An abbreviated list of stakeholders<sup>52</sup> and some of their interests include:

- Kaiser management—responsible for the nonprofit organization;
- Kaiser doctors—who deliver the healthcare services and some of whom are sued for malpractice;
- Kaiser nurses and other medical staff—in the same roles as the doctors;

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51. See, e.g., Motor Vehicle Franchise Contract Arbitration Fairness Act, 15 U.S.C. § 1226(a)(2) (2002).

52. Some of the stakeholder groups were organized, with powerful representative bodies. Nurses were represented by the California Nurses Association. Plaintiffs' lawyers belonged to groups such as the California Trial Lawyers Association (subsequently renamed the Consumer Attorneys of California.) Patients were not organized, but health-oriented consumer organizations, such as Consumers Union, often promoted their interests. While employers were not organized as a group, CalPERS, the public employees retirement system in California, funded health benefits for a large number of Californians in the Kaiser system.

- Patients (Kaiser “members”) – who use the health services and some of whom become the injured parties;
- Employers (whose employees are Kaiser members) - who select and contract with Kaiser to be a health provider for their employees;
- Plaintiffs’ counsel who represent members in medical malpractice cases - representing the interests of plaintiffs and also deriving their livelihood from these cases;
- Defense counsel who represent Kaiser in medical malpractice cases - representing Kaiser’s interests and also making their living from these cases;
- Arbitrators- who serve in Kaiser cases and derive professional reputations and income.

These stakeholder groups were well represented within the Kaiser process at all three levels: in the membership of the Blue Ribbon Panel, among the individuals whose opinions were sought as part of the redesign process, and in the make-up of the Arbitration Advisory Committee, created to refine the system design and oversee the new arbitration scheme.

First, the backgrounds of the three panelists and the reporter linked to a significant number of stakeholder groups. Eugene Lynch is a former state and federal judge. At the time the panel was formed, Judge Lynch worked as a private mediator and arbitrator in medical malpractice and other cases. Phil Isenberg is a lawyer and Kaiser member. A former legislator, he had chaired the Assembly Judiciary Committee, which has jurisdiction over legislation that would limit private use of arbitration processes.<sup>53</sup> Dr. Sandra Hernández is a medical doctor and consumer advocate who served as the director of public health for the City and County of San Francisco. Finally, the reporter, Stephanie Smith, a co-author of this article, is an ADR teacher and trainer and a former litigator in a private law firm. As Director of ADR Programs for the US District Court for the Northern District of California, she had helped redesign that court’s ADR program. She had also served as an arbitrator and mediator, though never on Kaiser cases.

In their deliberations, the Blue Ribbon Panel sought information from all relevant stakeholder groups, but the time limitation within which it worked prevented an analysis that was as in-depth as some

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53. Because Mr. Isenberg had only recently ended his position as a member of the California Assembly, he did not make any contacts with legislators or legislative staff as part of the Blue Ribbon Panel process, in keeping with the legal requirements prohibiting contacts within 12 months after leaving office. LYNCH ET AL., *supra* note 34, at 4.

might have wished. The panel and its individual members interviewed over 75 individuals,<sup>54</sup> broadly representing the stakeholder groups identified above. This breadth of outreach was motivated by a desire to gather the best possible information and counsel and to develop credibility for the panel's ultimate recommendations.

The creation of the initial Arbitration Advisory Committee (AAC) also reflected representation of the key stakeholder groups. In the first annual report of the OIA, the AAC members were identified by name, professional affiliation and the names of the stakeholder groups they were representing, including: Kaiser members, consumers, employers who purchased Kaiser plans, plaintiffs' attorneys, defense attorneys, Kaiser physicians, Kaiser nurses, and labor interests of Kaiser's organized employees and union members who are members of Kaiser's health plan.<sup>55</sup>

#### D. *Resources*

All systems must struggle to find sufficient resources to support a quality program. The issue of who bears these costs can influence whether and when the system is used and whether it is fair to the participants. In addition to financial resources, a fair and effective system also requires adequate human resources, including administrators and ADR professionals who are ethical and deliver high quality services.

To address the high cost of arbitration to all parties, the Blue Ribbon Panel urged creating incentives to use a single, neutral arbitrator, rather than the traditional panel of three arbitrators. The Panel concluded that the benefits of adding two party arbitrators did not outweigh the costs. Kaiser followed the Panel's recommendation<sup>56</sup> by agreeing that if the claimant requested a single, neutral arbitrator, Kaiser would pay for that neutral arbitrator, and that if, following that request, Kaiser insisted on a three-person panel, Kaiser would compensate the neutral arbitrator as well as its own party arbitrator.

A major quality concern for critics of the old Kaiser system was the small size of the pool of arbitrators and the risk of "repeat player

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54. For the full list of interviewees, see *id.* at app. E.

55. OFFICE OF THE INDEPENDENT ADMINISTRATOR OF THE KAISER FOUNDATION HEALTH PLAN INC., FIRST ANNUAL REPORT OF THE MANDATORY ARBITRATION SYSTEM FOR DISPUTES WITH HEALTH PLAN MEMBERS 80-81(2000), available at <http://www.oia-kaiserarb.com/oia/Forms%20&%20Reports/annrptyr1.PDF>.

56. LYNCH ET AL., *supra* note 34, at 41-42.

bias” in Kaiser’s favor. There was also a belief among some that Kaiser was in effect blackballing arbitrators who ruled against them, preventing them from serving on subsequent cases. These quality control and fairness concerns were addressed by recommendations to expand the pool of arbitrators, provide parties with more information about the arbitrators, and require written, reasoned, arbitration awards.<sup>57</sup> By expanding the list of providers and making more information available, the system would rely on parties, through the arbitrator selection process, to select the best arbitrators.

Since redesigning its arbitration system, Kaiser has continued to cover the cost of administering the system by contracting with a private attorney’s office to serve as the Office of the Independent Administrator (OIA). Kaiser funds this office through a trust, administered by the Arbitration Oversight Board.<sup>58</sup>

### E. *Success*

Ascertaining whether a system has met its goals requires data gathering and evaluation. In the Kaiser case, the OIA produces public annual reports on the progress of revamping the arbitration program and tracking its outcomes. Independent analysis is provided by the multi-stakeholder Arbitration Oversight Board, which supervises the OIA and publishes its own statement on the OIA annual reports. At year five after creation of the new arbitration system, an independent audit occurred as recommended by the Blue Ribbon Panel.

These reports showed substantial success in meeting a number of the efficiency and fairness goals set by Kaiser and the Blue Ribbon Panel.

#### 1. *Speed, Target Time Line for Appointment of Arbitrators and Holding of Arbitration Hearings*

By the end of the first year of the revamped program, the time of appointment of neutral arbitrators in Kaiser cases had been cut from an average of 674 days, as cited in *Engalla*, to 43 days.<sup>59</sup> By year nine, the average time had increased to 68 days, still substantially faster than in *Engalla*.<sup>60</sup> The California Supreme Court had noted that the time from filing to the *first* day of arbitration was 863 days.

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57. *Id.* at 35-36, 38-40.

58. The Arbitration Oversight Board is the successor to the Arbitration Advisory Committee.

59. OIA FIRST ANNUAL REPORT, *supra* note 55, at i.

60. OFFICE OF THE INDEPENDENT ADMINISTRATOR OF THE KAISER FOUNDATION HEALTH PLAN INC., NINTH ANNUAL REPORT OF THE MANDATORY ARBITRATION SYSTEM

By the end of the first year of the new system, average time to the last day of arbitration hearing had been reduced to 213 days.<sup>61</sup>

2. *Cost - Incentives for Use of One Arbitrator Rather Than a Three-Person Panel*

In the first year of the new system, claimants in 35% of cases chose to shift the cost of the neutral arbitrator to Kaiser. By 2005, the vast majority of cases were being handled by a single neutral, and Kaiser paid that arbitrator's fee in 81% of those cases.<sup>62</sup>

3. *Concerns About Quality and Fear of Biased Arbitrators*

In keeping with the Blue Ribbon Panel's recommendations, the OIA established a large panel, recruiting, screening and approving 323 arbitrators by the end of year one.<sup>63</sup> Fear of repeat player bias was further diminished over the years as very high percentages of neutral arbitrators who made awards of over \$500,000 against Kaiser were selected to serve on subsequent cases.<sup>64</sup>

Kaiser implemented the Panel recommendation that arbitrators be required to render written, reasoned decisions. These decisions, after being redacted to protect the privacy of the parties, were made available to plaintiffs' and defense counsel during the arbitrator selection process to enable them to consider possible arbitrator bias.

4. *Accountability and Transparency*

The substantial amount of data collected annually by the OIA and made available online vastly increased the transparency of the Kaiser system. The reports by the stakeholder advisory group and the external auditor further advanced the accountability and transparency goals.

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FOR DISPUTES WITH HEALTH PLAN MEMBERS 21 (2007), available at <http://www.oia-kaiserarb.com/oia/Forms/9th%20Report.pdf>.

61. OIA FIRST ANNUAL REPORT, *supra* note 55, at i.

62. OFFICE OF THE INDEPENDENT ADMINISTRATOR OF THE KAISER FOUNDATION HEALTH PLAN INC., SEVENTH ANNUAL REPORT OF THE MANDATORY ARBITRATION SYSTEM FOR DISPUTES WITH HEALTH PLAN MEMBERS 128, available at <http://www.oia-kaiserarb.com/oia/Forms/7th%20Exhibits%20H-L.pdf>.

63. Individuals who had "served as attorney of record or as a party arbitrator for or against Kaiser" within the prior five years were not eligible to serve as a neutral arbitrator. OIA FIRST ANNUAL REPORT, *supra* note 55, at 3-4.

64. All but three of the 28 neutral arbitrators who were members of the OIA pool in 2005 and who made awards of \$500,000 or more before 2005 were selected to serve again in 2005. OIA SEVENTH ANNUAL REPORT, *supra* note 62, at 3-4.

## F. Summary

In the Kaiser case, as in many cases, a crisis spurred significant changes to a dispute system. In reaction to the California Supreme Court opinion, Kaiser wisely created a Blue Ribbon Panel that represented an array of stakeholder interests and proceeded to design a process that received input from a broad spectrum of stakeholder representatives. This stakeholder engagement resulted in recommendations and an improved Kaiser system that better met the needs of those stakeholders on the dimensions of fair process, transparency, accountability and cost and delay reduction.

Systems design principles encourage providing multiple process options, including interest-based options, and allowing parties to choose from among them. The Kaiser system falls short of the ideal as it continues to require binding arbitration, not allowing members to pursue their cases in court. But Kaiser improved the quality of its system by adding a mediation/ombuds component, some years after the Blue Ribbon Panel Report, that provides information and an interest-based option for addressing a dispute at an earlier stage.<sup>65</sup>

## IV. SHORT CASE EXAMPLES

The Kaiser case provided a fairly detailed application of the framework we outline in this article, including analysis of goals, structure, stakeholders, resources and success. The Kaiser case arose from a crisis situation in 1997 and focused primarily on dispute “resolution,” specifically the binding arbitration process in the United States. While any number of cases might be similarly analyzed according to the five elements, we will test the framework’s utility by varying critical attributes, examining cases with non-crisis triggers, multiple process options, new technologies and non-U.S. contexts.

The U.S. District Court for the Northern District of California was also focused on a rights-based process, the trial, but had a broader set of goals: to expand the array of dispute resolution options to better serve the citizens who come to the court for assistance. This broader goal resulted in designing an ADR program offering a much wider array of processes than Kaiser, and posed challenges in how to

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65. Since creation of the mediator/ombuds program in Kaiser’s California region in 2002, the number of arbitrations has declined significantly, from 1,053 arbitration filings in 2002 to 823 filings in 2007. OIA NINTH ANNUAL REPORT, *supra* note 60, at iii, 45-46. An interesting question for future research would be why that number has dropped so significantly and whether the mediation/ombuds program played a causal role.

integrate the multiple options into a coherent and efficient structure given resource limitations.

Management at General Electric went beyond Kaiser's goal of dispute resolution to fashion its Early Dispute Resolution Program, moving upstream to try to prevent and manage those conflicts more effectively and efficiently, as measured against company-wide program goals. Here, we examine the perspective of the corporate general counsel whose broader set of goals led to an expanded process structure and an explicit evaluation process.

In the case of eBay, we will use the framework to explore some of the implications of an important change since 1997, when the Kaiser case occurred: the vast growth and increasing sophistication of the on-line universe. The case presents two new issues that the eBay system designers had to address: first, the development of on-line process tools that could be used in a range of disputes, and second, how to select and apply the most appropriate of these tools to prevent, manage and resolve conflicts that arise in eBay's special business environment, where parties often have never met face-to-face and where such meetings would be costly and impractical.

Finally, we move out of Kaiser's US-based context into two fora in the international realm. In Kaiser, and most other US-based cases, the existence of a well functioning, reasonably predictable court system underlies and supports many of the choices system designers make. Such governmental institutions and their processes, almost taken for granted in analyzing US cases, may not exist in international contexts or, if they exist, may not play the same role as their US counterparts.

We explore the new frontier of this international realm through two cases. The World Trade Organization (WTO) represents one of many international governance frameworks, created by treaty and not under the control of any one outside judicial or legislative body. The framework will probe the mechanisms that have evolved within the WTO over the last fifty years to resolve conflicts in the legislative, implementation and enforcement phases. In closing, we will explore how the framework suggests issues be considered in societies emerging from war that are designing processes and systems to prevent, manage and resolve disputes. This area of transitional justice involves trying to achieve the goals of justice and reconciliation, which can be in tension, in a context of limited resources. Such systems are often designed amidst chaos in which local courts and legislative bodies are being created or recreated and international tribunals may also have jurisdiction.

A. *The ADR Program of the U.S. District Court For the Northern District of California*

We examine the ADR program of the U.S. District Court for the Northern District of California (“Northern District”) in 1991, following passage of the federal Civil Justice Reform Act of 1990 (CJRA),<sup>66</sup> which encouraged experimentation in ADR and case management in all federal trial courts. Under the CJRA, the Northern District was designated one of five “demonstration districts,” directed to “experiment with various methods of reducing cost and delay in civil litigation, including alternative dispute resolution . . . .”<sup>67</sup>

By 1991 there were already multiple dispute resolution options available in the Northern District in addition to trial. Under the leadership of then Chief Judge Robert Peckham, the court had added non-binding arbitration, early neutral evaluation (ENE),<sup>68</sup> and judicially-hosted settlement conferences to its dispute process array. While some courts’ primary goal in using ADR is reduced caseload, the Northern District was always clear that its goal was to provide additional, high quality process options to better meet the needs of litigants. Magistrate Judge Wayne D. Brazil, the judicial officer who guided and supervised the court’s ADR program in this period, commented on the high cost of litigation and the small number of cases that reached trial or even had significant contact with a judge,<sup>69</sup> and concluded that “free or low cost ADR programs represent one of the very few means through which courts can provide any meaningful service to many litigants.”<sup>70</sup>

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66. Civil Justice Reform Act, 28 U.S.C. §§ 471-482 (1990).

67. Civil Justice Reform Act, Pub. L. 101-650, § 104, 104 Stat 5089, 5097 (1990) (prior to 1991 amendment).

68. In Early Neutral Evaluation (ENE), an evaluator (an experienced attorney with expertise in the subject matter of the case), hosts an informal meeting of clients and counsel to hear each side present its basic evidence and arguments. The evaluator identifies areas of agreement, focuses topics at issue, writes a private evaluation of the case’s prospects and offers to present it to the parties. If a settlement is not reached, the evaluator presents the evaluation, and may help the parties devise a plan for expedited discovery, assess realistic litigation costs, and explore whether a follow up session would help case settlement. See United States District Court Northern District of California, Alternative Dispute Resolution Program, available at [www.adr.cand.uscourts.gov](http://www.adr.cand.uscourts.gov) (last visited March 10, 2009).

69. Judge Brazil cited studies showing that “twenty to thirty-five percent of civil cases leave the federal system without any action by or direct contact with a judge” and nearly three-quarters leave “before a judge holds a pretrial conference.” Wayne D. Brazil, *Should Court-Sponsored ADR Survive?*, 21 OHIO ST. J. ON DISP. RESOL. 241, 244-45 (2006).

70. *Id.* at 245.



Following broad consultation with key stakeholder groups, including the judges, the clerk of the court, the court's ADR staff<sup>71</sup> and the district's CJRA Advisory Group,<sup>72</sup> the court decided to maintain its array of existing ADR options and to add mediation. Mediation was chosen in order to offer an interest-based option with the potential of enabling parties to preserve their relationship, create a broader, more creative array of settlement options than the court could order, reach more durable solutions and reduce cost and delay.

By offering *multiple options* for dispute resolution, the court faced a set of important policy questions and design challenges in how best to determine which cases should be paired with which processes. Questions included:

- What role should be played by parties, their counsel, the judge and the court ADR administrators in deciding whether to use ADR?
- What role should each play in selecting the ADR process option and the timing of that ADR event?
- To what degree should the court encourage or require use of an ADR option?
- Should certain cases be exempt from particular ADR options, or all ADR options?
- Who should pay for these new services, and how much?

The court's solution, christened the "Multi-Option Pilot Program,"<sup>73</sup> required counsel to discuss the court's ADR options with their clients and confer with opposing counsel to try to agree on a process option.<sup>74</sup> If the parties failed to agree on a process or opted against the use of ADR, the new rules required counsel<sup>75</sup> to participate in an "ADR phone conference" with the court's ADR staff. These calls provided individualized attention, educating and advising counsel on the potential benefits and costs of the various ADR options available. If the parties still could not agree on an option, or if they agreed that no

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71. As a demonstration district under the CJRA, the Northern District was able to obtain additional resources to hire several staff, described *infra* n. 79.

72. Under the CJRA, each district was required to form a multi-stakeholder advisory group, including representatives from the bar and litigants.

73. Five judges volunteered to participate in the pilot program. The pilot format provided an opportunity to start small, experiment and refine the system based on experience. Most, but not all, case categories were included in the program. For a discussion of the benefits of starting with a pilot program, see COSTANTINO, *supra* note 18, at 152-67.

74. As an alternative to requesting a court-based ADR option, parties were free to retain a private ADR provider of their choosing.

75. Attorneys were required to participate; clients were encouraged to do so (though it occurred only rarely.)

option was appropriate, the ADR administrator would either recommend an ADR process to the judge or recommend that no ADR was appropriate. The goal was to educate and engage all of the key stakeholders in order to determine which dispute resolution process would be most appropriate.

Although the Multi-Option Pilot Program presumed that every case would utilize one ADR option early in the life of the case, judges could approve requests for delaying ADR or exempt the case from ADR if it appeared the process would not be productive. This approach reflected an effort to balance the court's goals of encouraging parties to make use of helpful processes, while at the same time refraining from pressuring or requiring parties to participate in a program that would likely be a waste of time and money.<sup>76</sup>

*Resource* limitations influence different approaches to creating an ADR operation. Two major staffing models are used in court ADR programs. Courts with a "staff-neutral" model employ specially trained court staff to serve as the ADR neutrals. This model is used in a number of the Federal Circuit Courts of Appeal and a smaller number of district courts. Due largely to cost considerations, however, many courts use a panel model, relying upon private practitioners to serve as ADR neutrals on a court-administered or court-sponsored panel.<sup>77</sup> Although Congress provided limited funds for additional staff under the CJRA, the funding was not sufficient to hire enough staff to serve as neutrals in a significant number of cases.<sup>78</sup> Accordingly, the Northern District elected to expend its limited staff resources to screen, recruit, train and supervise panels of private neutrals for the mediation, ENE and arbitration programs.<sup>79</sup>

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76. A purely voluntary system was thought by some to be unlikely to be used significantly in these early days of court ADR due to the possible resistance of lawyers, then largely untrained and unaccustomed to these procedures, and perhaps concerned about possible loss of income if cases resolved earlier when using ADR.

77. The rough division of court ADR delivery options into these two categories oversimplifies the terrain. For a more detailed discussion of five different models and their strengths and weaknesses, see Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715 (1999). Note that some federal district courts provide no ADR options beyond use of judges, particularly magistrate judges, for court-sponsored settlement assistance.

78. The ADR Director and Deputy Director mediated some cases in these early days. Subsequently, additional court ADR staff time has been devoted to mediation of cases.

79. With CJRA funds, the court hired three new full time staff: two attorneys and an administrative assistant. Additional critical judicial and court staff supported the

Compensation was handled differently for the different ADR processes. The court, pursuant to a statute that predated the CJRA, provided very modest compensation for arbitrators. Judges handling settlement conferences received no compensation beyond their normal salaries. No other public funds were available to pay ADR neutrals.

As a result, the new rules provided that mediators and ENE evaluators would volunteer their preparation time and first four hours of the mediation or evaluation meeting. After this point, if the parties chose to continue the session, the evaluator or mediator could charge for the services.<sup>80</sup> These new rules reflected a compromise between the desire to offer a free service, in the same manner as trials and judicially-hosted settlement conferences, while also acknowledging that the small, but growing, cadre of highly skilled ADR professionals was providing a service that deserved compensation. It was also seen as unreasonable and unrealistic to expect the most highly skilled attorneys<sup>81</sup> to donate the extended numbers of pro bono hours necessary to provide high quality services for the anticipated, expanding caseload.<sup>82</sup>

Prevention Processes	Management Processes	Resolution Processes
	Judicially-hosted case management conferences	Arbitration
	ENE	ENE
	Mediation	Mediation
		Settlement Conferences
		Trial

### Summary

Although the Northern District is an institution founded on the importance of rights-based resolution processes, the court saw the benefit of adding interest-based and other ADR processes to better

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ADR program. Magistrate Judge Wayne Brazil was the judicial officer who supervised and guided the ADR program, in addition to his full-time docket as a judicial officer. Court clerk staff helped administer arbitration and ENE.

80. As of 2009, the mediator or evaluator can charge \$300 for hours five through eight, and a rate of his or her choosing thereafter, if the parties choose to continue. ADR L.R. 6-3(c).

81. Initially only attorneys could serve as ADR neutrals in the Northern District's programs. Subsequently the program was expanded to allow other trained professionals to serve as mediators. See ADR L.R. 2-5(b)(3).

82. For a more in-depth discussion on the "competition" between court ADR and private sector ADR providers, see Brazil, *supra* note 69, at 271-77.

serve the needs of their clientele, federal court litigants. In order to prevent a fragmented, confusing system, however, the Court created an integrated structure to educate stakeholders about the array of available options and involve them all in deciding which dispute resolution process could be most helpful and when. The court's web site, booklet and ADR staff helped parties and their counsel understand how the different processes compared in terms of likely party satisfaction; flexibility, control and participation; improved case management; improved understanding of the case; and potential to reduce hostility between parties. If parties could not agree on a specific ADR process or whether any ADR process was likely to be beneficial, the judge assigned to the case made the decision as part of the court's case management process.<sup>83</sup>

An additional challenge was how to offer quality processes without placing the financial burden on the recipients. Ideally, public funds would have been available to fully support ADR programs as well as trial and trial-related activities. In light of the limited available financial support, trade-offs were required. For the mediation and ENE options, the court's solution was to impose some costs on the mediators and evaluators, by requiring them to donate their preparation time and the first four hours of the process, but thereafter, at the election of the parties, shift the cost burden to the parties if the process proved of sufficient value.

The pilot program proved to be a beneficial first step in dispute system redesign as it allowed experimentation and refinement of the model, created allies of the pilot judges, and increased the comfort level and competence of counsel who appeared before the court. The pilot program was evaluated, pursuant to CJRA mandate, by the Federal Judicial Center, the research arm of the federal courts. The study, led by Donna Stienstra, reported that over 60% of counsel believed that use of the court's ADR options had reduced time to disposition and the cost of their cases, with median cost savings per party

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83. ADR L.R. 3-2.

estimated at \$25,000.<sup>84,85</sup> In 1999, the court refined and expanded the program court-wide, where it is still in use.<sup>86</sup>

## B. *General Electric*

Above, we analyzed the Kaiser case, with its single dispute resolution process that was redesigned in short order pursuant to a court decision. The Northern District case involved the development and integration of multiple processes over time. The General Electric case also involved the development of multiple integrated processes, but broadened from the goal of just resolving disputes, to preventing and managing them as well.<sup>87</sup>

In 1995, P.D. Villarreal, Counsel for Litigation and Legal Policy at General Electric (GE), was faced with mushrooming litigation and a mandate to apply the Six Sigma Quality Initiative to his litigation department. Jack Welch, CEO of GE, had instituted Six Sigma, a management approach rooted in manufacturing with the aim of achieving defect-free process 99.99966% of the time. Litigation management was considered a process, too, and thus needed to be defined, measured, analyzed, improved and controlled.<sup>88</sup> GE was a founding member of the Center for Public Resources,<sup>89</sup> a nonprofit

84. See DONNA STIENSTRA ET AL., REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REPORT ACT OF 1990 17-20 (1997).

85. Evaluation of court ADR programs is difficult and results vary. See, e.g., JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT (1996) (examining federal district courts, not including the Northern District of California).

86. Brazil, *supra* note 77, at 721 n.6.

87. Mary Rowe, ombudsman, special assistant to the president and adjunct professor at MIT in Cambridge, Mass., has spearheaded development of integrated conflict management systems in the workplace. See, e.g., Mary P. Rowe, *Specifications for an Effective Integrated Complaint System*, in SEXUAL HARASSMENT ON CAMPUS, 202-13 (Bernice Sandler & Robert Shoop eds., 1996); Mary Rowe & Corinne Bendersky, *Workplace Justice, Zero Tolerance and Zero Barriers: Getting People to Come Forward in Conflict Management Systems*, in NEGOTIATIONS AND CHANGE: FROM THE WORKPLACE TO SOCIETY 117-40 (Thomas Kochan & Richard Locke eds., 2002); Jennifer Lynch, *Integrated Conflict Management Programs Emerge as an Organization Development Strategy*, 21 ALTERNATIVES TO HIGH COST LITIG. 99 (2003).

88. P.D. Villarreal, *Unnecessary Litigation: A System Flaw – GE Launches Zero Defect Campaign*, METROPOLITAN CORP. COUNS., Aug. 1999 at 1, 36.

89. CPR, the Center for Public Resources, is now known as IICPR: the International Institute for Conflict Prevention and Resolution, available at <http://www.cpradr.org>.

association of corporate, law firm and individual members that promotes alternative dispute resolution for litigated cases, and thus supported use of ADR on a nominal basis. Over the next two years, Villarreal transformed GE's management of corporate disputes from ad hoc to a system.

At a general level, Six Sigma required that legal management meet the goal of reducing defects in its legal procedures. At a more concrete level, GE's lawyers needed to learn to think from their clients' point of view by quantifying standards of satisfaction. It wouldn't be enough for a lawyer to win a case for the company, if the time, expense and publicity outweighed the gain. Thus, the *goals* for the client were:

- Quick resolution of disputes
- Inexpensive resolution of disputes
- Minimal waste of executive and management time
- Reduced damage to important business relationships
- Minimized uncertainty of results

As GE probed its options, it expanded its goals beyond efficient handling of specific disputes to include preventing and managing conflict at earlier stages. The *stakeholders* affected by these goals included not only upper and middle-management employees, but GE's inside and outside counsel, vendors, customers, and partners. Overall, GE sought increases in efficiency and relationship preservation in order to advance its corporate profitability.

Over the next few years, GE developed its Early Dispute Resolution (EDR) program. First, in-house counsel prepared an early case assessment and management plan over a period of 60-90 days after the business unit identified a significant dispute. The assessment included a review of the industry and corporate context, abbreviated review of the facts and law, damage analysis (best and worst case scenarios), important principles/precedents, judge/neutral, venue/jurisdiction, opposing counsel, legal fees through stages of defense, non-economic costs and benefits, and a preliminary dispute management plan (including ADR and litigation). At Level 1, the business personnel closest to the dispute would initiate informal business to business discussions. If unsuccessful, the case would move to Level 2, at which point a GE dispute resolution team, comprised of an attorney and manager, would try to work with the other party to utilize an external, third-party neutral (mediator or arbitrator) to resolve the dispute. (Separate processes were provided for employment and product

disputes.) At Level 3, management might elect to try a case for reasons of principle, precedent or cost effectiveness, or because settlement at earlier levels was unsuccessful.

Two other processes supplemented case management: an Early Warning System to proactively identify litigation trends at the earliest stage and an After Action Review by management and litigation counsel to review each case, the lessons learned, and recommend actions to prevent or mitigate future problems. GE created a structure of linked processes to constitute a more integrated conflict management system.<sup>90</sup>

<b>Prevention Processes</b>	<b>Management Processes</b>	<b>Resolution Processes</b>
Early Warning System to identify litigation trends	Level 1: Informal business discussion and direct negotiation	Level 2: Mediation or arbitration
After Action Review: Lessons learned to mitigate future problems		Level 3: Adjudication

The EDR program required a significant *resource* investment in training for both management and legal counsel to synchronize the complex corporate bureaucracy. A pilot effort was instituted with the airline engine division. Offering mediation, arbitration, and a grievance procedure, the EDR program successfully prevented any division cases going to trial. In monetary terms alone, savings were in the many millions of dollars; total savings were likely even greater, if management timesaving and preservation of key business relationships were reflected.<sup>91</sup>

### Summary

EDR has become fundamental to best practice business problem solving at a number of multinational corporations, including Motorola and Schering Plough.<sup>92</sup> GE’s Six Sigma approach helped redefine the legal counsel’s objective from winning lawsuits to preventing and managing conflicts more efficiently to enhance overall profitability. Corporate adoption of EDR required two fundamental shifts. The

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90. ICMS is defined as “a systematic approach to preventing, managing, and resolving conflict that focuses on the causes of conflict within the organization . . . .” *SOC’Y OF PROF’LS IN DISP. RESOL.*, *supra* note 19, at 8.

91. Michael Wheeler and Gillian Morris, *GE’s Early Dispute Resolution Initiative (A)*, Harvard Business School Case 9-801-395, June 19, 2001, at 9.

92. P.D. Villarreal now serves as Vice President and Associate General Counsel for Litigation, Employment Law and Conflict Management at Schering-Plough.

first was to anticipate and prevent disputes through its early warning process, thus moving “upstream” from dispute resolution to dispute prevention and management. The second was a focus on pursuing more interest-based processes for resolving disputes. In these efforts, GE worked closely with its outside counsel, who needed to broaden their skill sets to assist in this expanded role of process counselor and advisor. As major corporate clients, such as GE, increasingly seek outside counsel with this expanded, systems design skill set, the successful law firms will be those that can respond to clients’ growing need for full spectrum representation.

### C. *eBay*

Since 1997, the year of the Kaiser case, the world has experienced an explosion of online platforms to facilitate a myriad of commercial and personal transactions. Emblematic of this revolution is eBay, the leading online auction web site, which employs over 15,000 employees and has more than 200 million users.<sup>93</sup> In 2008, over \$60 billion in total merchandise was traded on eBay, with over 700 million new items listed in the 4th quarter alone, on 20 localized web sites reaching 90 countries.<sup>94</sup> Although less than 1 percent of these transactions generate problems, those that do arise are not easily resolved by traditional litigation due to geography and procedural requirements.<sup>95</sup> From its inception, eBay founder Pierre Omidyar articulated an umbrella of good faith business guidelines and anticipated the importance of creating informational processes to clarify communication and resolve misunderstandings before online transactions became disputes. The case of eBay presents two types of innovation: online techniques that can substitute for previous face-to-face and telephonic commercial interactions, and an integrated structure of online processes for resolving eBay disputes. eBay’s system demonstrates how online interactions have the capacity for increased *transparency* (both in terms of information, and of access), and for increased *accountability*.

eBay’s overall business goal is to maximize the potential for online businesses to thrive. Such business depends on buyers receiving

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93. Colin Rule, *Making Peace on eBay*, ACRESOLUTION, Fall 2008, at 8-11. For early thinking in this area, see generally Robert C. Bordone, *Electronic Online Dispute Resolution: A Systems Approach – Potential, Problems, and a Proposal*, 3 HARV. NEGOT. L. REV. 175 (1998).

94. Interview with Colin Rule, Director of Online Dispute Resolution, eBay and PayPal, in San Francisco, Cal. (Apr. 7, 2009).

95. *Id.*



the goods they intend to purchase, and sellers receiving payment, both in a timely manner. Thus, eBay has been willing to commit its financial and personnel *resources* to provide a dispute resolution system that reflects *goals* of accessibility, low cost, high speed, privacy, voluntariness and independence – all in the interest of increasing its business profits and maintaining trust in the online marketplace. In fact, trust is essential to the long-term success of eBay. Buyers must trust the integrity of the listings, and sellers must trust the predictability of payment, in order for online business to exist.

Potential *stakeholders* are numerous: individual and corporate business buyers and sellers; repeat and one-time traders; eBay's own management, employees, shareholders and directors; third-party vendors (e.g. escrow services); mediators; and insurance appraisal companies. Essentially everything that can be bought and sold at retail is available on eBay. The stakes are clearly high for eBay to mitigate any problems in closing transactions quickly and to the satisfaction of buyers and sellers.

eBay has used information and communications technology to *structure* its system with multiple processes, integrated in eBay's online platform. Disputants have different types of mechanisms available:

The *Feedback Forum* rating system allows buyers to comment on transactions and create a reputation for future transactions, both for individual sellers and the system overall. This automated process allows buyers to get information and set reasonable expectations. After a transaction, eBay buyers can submit feedback by awarding +1 for positive, 0 for neutral, and -1 for negative. If a seller gets too many negative ratings in too short a period of time, that member's account will be suspended, and they will be designated NARU (Not a Registered User). "Detailed seller ratings" enable anonymous feedback, with financial incentives for good performance and penalties (such as being thrown off the site) for bad.

The *Resolution Center* provides a central online hub so that users can see all of their transactional issues in one place, communicate easily with their transaction partners and track them to resolution. A series of processes act like a progressive filter to resolve disputes. Through direct negotiation, parties can communicate via an internet forum to describe issues and possibly agree on resolution. Approximately 60% of filed disputes are resolved at this stage, at no charge. A step ladder of software-assisted processes including mediation, evaluation and arbitration are available if direct negotiation does not lead to successful resolution.

*Community Court* is a pilot program on eBay that allows a seller to appeal a negative feedback rating. Both parties submit materials to describe their perspective on the dispute, which is then reviewed by a jury of randomly-selected eBay members, who vote on whether the feedback was fair.

*Bulletin boards* are available for trading questions, opinions and socializing. The *Answer Center* provides hundreds of expert community members to answer and resolve issues.

The eBay processes described above are not exclusive, but offered as an accessible alternative or supplement to other consumer complaint processes, e.g., credit card chargebacks, small claims court and the Internet Fraud Complaint Center. By making its information and resolution processes accessible online, and by integrating automated enforcement of outcomes, there are temporal and financial incentives to pursue these internal processes.

Prevention Processes	Management Processes	Resolution Processes
Feedback Forum	Feedback Forum	Direct Negotiation
Community Watch		Mediation
Bulletin Boards		Arbitration

### Summary

A key feature of the eBay dispute settlement system is that the processes function in the same technological domain as the underlying business transactions. The *goal* of eBay is to maximize the volume of commercial transactions on the site, so minimizing disputes and expediting their resolution is critical to the business goals. eBay has engaged its *stakeholders* by encouraging continuous buyer/seller feedback. An *evaluation* process has led to design improvements in a structure of integrated processes that are voluntary, quick and low-cost. The heart of most disputes is information exchange, which is vastly facilitated by the benefits of new internet-enabled processes over traditional telephone, face-to-face, or even e-mail communication. As noted, a majority of disputes are resolved amicably through the information exchange facilitated by direct negotiation online, and serve to enhance reputation of the site. These processes could easily have wider application in a range of commercial contexts.

### D. World Trade Organization

The World Trade Organization (WTO), together with its antecedent, the General Agreement on Tariffs and Trade (GATT)—span 60

years of institutional practice in resolving international trade disputes. The WTO now hosts the most frequently utilized international dispute settlement process in the world.

At the end of World War II, as part of the Bretton Woods negotiations on international commercial and financing institutions, 23 countries drafted the GATT treaty to govern trading relations. The GATT's primary purpose was to reduce trade barriers that would impede the free movement of goods and services across borders. The GATT comprises a complex set of reciprocal trade commitments among the contracting parties, along with rules to minimize government actions that limit the importation of products. Parties to the GATT are obligated to limit tariffs, avoid discrimination among nations, avoid discrimination between domestically produced and imported goods, and avoid the use of quotas and other restrictions on imports. Over the next 40 years, the GATT's signatories conducted a series of nine negotiating rounds to expand the treaty's scope of coverage.

The Uruguay Round (negotiated from 1986 to 1994) was not simply a revision of the original GATT treaty, but a fully reconceived institutional structure – the World Trade Organization – plus an elaborate series of rules and remedies, all adopted by consensus as a single undertaking.<sup>96</sup> The designers of the new WTO were the 130+ member-countries who signed the WTO agreements in 1994. What they put in place was a network of decision-making *processes* that differ, depending on the dimension of conflict.

The literature on WTO dispute settlement focuses on the Understanding on Rules and Procedures Governing the Settlement of Disputes (the “DSU”), adopted as part of the Uruguay Round, which resolves disputes at the policy enforcement level. The DSU sets forth specific steps for pursuing a trade dispute through a series of four processes: formal consultation, panel review, appellate review, and implementation of the recommendations for compliance. Here the decision makers are appointed trade-expert panelists, appellate judges, and all WTO members sitting as the Dispute Settlement Body.

From a systems design perspective, we believe a more comprehensive analysis would incorporate how the WTO manages and resolves conflict not only during policy enforcement but also during the

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96. Decision-making by consensus means “the body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.” WTO Agreement, Art. IX.

earlier phases of policy making and policy implementation. Such an analysis would examine the *processes* utilized in each phase and explore whether these processes were or were not effective within the phase, and moreover whether they were effectively integrated with an eye toward achieving the WTO's goals.

In these three phases of WTO activity, the *stakeholders* remain substantially the same, but the *goals* are distinctly different. As with most international organizations, the primary stakeholders are the member nations, their constituent ministries, legislatures and citizens, industry and nongovernmental organizations. At the policy making level, WTO member-countries' delegations participate in ministerial conferences every two years (e.g., as in the currently ongoing Doha Round). The primary *process* used in this phase is direct formal and informal negotiations among the countries to compose an agenda of what issues should be regulated by new policy measures. After the agenda is created, numerous trade negotiation committees struggle for years to integrate a package of provisions into an agreement that can achieve consensual support. Intense conflict to the point of impasse has arisen in the last several years among the 150+ member countries over the scope of new rules, for example on agricultural subsidies. In past rounds, the "Green Room" – comprised of "friends of the chair" of the negotiating committee – often formed the coalition with the most leverage; however, often it was a cross-cutting coalition of middle-sized countries that bridged the gaps to achieve consensus. That consensus has eluded current negotiations.

Between these policymaking negotiations and the policy enforcement measures specified in the DSU, lies an interim phase: policy implementation, wherein each WTO member must translate the international rules adopted in each trade negotiating round into implementing legislation. The Trade Policy Review Mechanism was the *process* established to assist members in understanding and adhering to the WTO rules through a series of mandated periodic country reviews. The WTO staff conducts an in-depth analysis of a country's legal, economic and political systems. The report is distributed to all WTO members, who then have an opportunity to ask the reviewed country questions about its policies. Conflicts can arise over whether the reviewed country has implemented its WTO obligations effectively in national policy, and, if not, what remedies are recommended.

Thus, the key stakeholders, the WTO member-country delegates, sit in multiple capacities: as formal negotiators in the Ministerial Conferences to make international trade policy, as the Trade Policy

Review Body to determine whether countries have indeed nationally implemented WTO policy, and as the Dispute Settlement Body to determine whether a specific country has complied with its obligations relative to a trading partner.

While the *stakeholders* and *resources* are comparable across the three key policy processes examined here, the *goals* and relative *success* vary. In policymaking, the scope of the goals is broadest—security and predictability in multilateral trade relations—yet the process requires achievement of consensus for adoption. The implosion of the Doha Round reflects the overwhelming procedural and substantive complexity of multiparty negotiations that are significantly impaired by the power dynamics between large developing nations and large developed-country parties. Countries with relatively less power cannot impose consensus, but they can block it.

In policy implementation, the goal is more focused: fact-finding and capacity building to enable countries' adoption of already-committed trade measures. The process is regularized, applied to all member countries, and less dominated by the power of individual members. Problems that surface in the process at this stage serve as an early warning, a form of conflict prevention. This process is a partially rights-driven (since it is mandated by WTO rules) consultation on the interests of the target country, its trading partners, and the WTO as an institution.

In policy enforcement, the goal is to preserve the rights and obligations of member countries, with the subsidiary objectives of solving trade disputes while maintaining institutional integrity. Here, the process is primarily rights-driven, but power (in terms of resources to prosecute or defend) is a significant factor.<sup>97</sup> Between 1995-2003, nearly two thirds of disputes filed in the WTO were resolved by the time an arbitration panel was established, but before submission of arguments. This suggests that the legal process provides an important opportunity of public notice, but that the processes of mutual or facilitated consultations can achieve a satisfactory resolution relative to the perceived outcome that would be rendered by a panel and/or appellate review.

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97. In a review by co-author Janet Martinez of WTO disputes from 1995-2003, over half of the 304 cases involved the largest four trading countries as complainant and/or respondent. In nearly half of the cases, the largest industrialized countries were both complainant and respondent. The balance of cases were equally distributed among industrialized versus developing, developing versus industrialized, and developing versus developing countries.

Prevention Processes	Management Processes	Resolution Processes
	Trade negotiation rounds	Dispute Settlement Understanding: conciliation, arbitration, appellate review, implementation
	Trade Policy Review Mechanism	
	Operating Committees	

### Summary

A shift by the WTO to increased emphasis on the policy implementation phase could offer benefits on several fronts: the transaction costs are moderate, relative to the high costs for all countries to engage in policy making and policy enforcement; satisfaction with outcome and processes is likely to be higher with policy implementation to the extent that parties retain relatively more control; and the effect on relationships is positive, which suggests that among the *process* options, a higher emphasis on policy implementation—a rights-interest hybrid—would advance the overall *goals* of the WTO. Systemically, policy implementation relieves pressure on the policymaking process with more practice-based information, and alleviates stress on policy enforcement by anticipating and potentially resolving problems before concrete disputes emerge. Institutionally, the WTO is fairly clear about the goals for each phase – policy making, implementation and enforcement – but has been less explicit about integrating its goals and processes across phases.

In terms of best practices, *process* models from other sectors could be constructively applied by the WTO. Focusing just on the enforcement phase, for instance, there are a number of processes available—negotiation, conciliation, and mediation—that are not fully utilized. Like the Northern District ADR case above, a pilot program that offered interests-rights hybrids might open the door to less costly dispute resolution. The Trade Policy Review Mechanism audits clearly uncover conflicts in their early stages, but the WTO lacks a companion process with third-party neutrals to enhance the WTO's transparency, accountability and compliance. In large industrial countries, there would seem to be sufficient resources and commercial familiarity with domestic ADR processes to pilot such options.

### E. *Transitional Justice*

Application of the framework can help illuminate the choices and trade-offs in a wide variety of system contexts. One emerging system challenge is how best to design transitional justice mechanisms as part of evolving governance systems in countries emerging from conflict. Below is a short introduction to some of the questions faced by policymakers.

A threshold issue in areas emerging from conflict is whether the system designers seek justice, reconciliation, reparations or some combination of these *goals*. Numerous authors have explored the possible tension between truth and justice, and between justice and reconciliation.<sup>98</sup> *Resources* for these transitions are always very tight, requiring difficult choices and trade-offs as to which goals will be selected and which will be given priority.

Designers must address whether they will create one *process* or many to pursue these goals. In an effort to avoid impunity for war crimes, trials will likely be a significant component. However, criminal prosecutions can be pursued in a number of venues, including a national or local tribunal in the country where the crimes occurred, a UN-created special international tribunal addressing crimes within one country,<sup>99</sup> an international-national hybrid court,<sup>100</sup> or the International Criminal Court, which has jurisdiction over disputes occurring in a range of countries. Prosecutions coming out of an extended period of violence may occur in more than one forum.

System design principles would recommend considering inclusion of interest-based *process* options, such as reconciliation or forgiveness processes, in addition to rights-based trials. Many countries, from Guatemala and Argentina, to South Africa and Liberia, have used truth and reconciliation commissions in an attempt to achieve a range of goals, including reconciliation, forgiveness, and healing, as well as fact-finding.<sup>101</sup> In addition, system design principles, as presented in the framework, would also suggest that decisions on which and how many forums should be utilized, and which

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98. See, e.g., PRISCILLA HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY (2001); Alex Boraine, *Truth and Reconciliation in South Africa: The Third Way*, in TRUTH V. JUSTICE 141 (Robert I. Rotberg & Dennis Thompson eds., 2000).

99. These include the International Criminal Tribunals for the Former Yugoslavia and for Rwanda.

100. These include the Special Court for Sierra Leone and the Special Tribunal for Cambodia.

101. Commentators both advocate for the potentially transformative power of truth and reconciliation commissions (see generally Boraine, *supra* note 98) and ask whether in some cases forgiving and forgetting may be preferable to a system that

cases and prosecutions should occur in which venues, should be approached in a coordinated, integrated fashion. Given the multiplicity of *stakeholders* and decision-makers, such coordination is rare.

Application of the framework would also suggest putting some *resources* into prevention and management of future disputes, rather than focusing solely on resolution. In countries devastated by war, prevention and management goals could be met through designing and improving governance processes to provide functioning courts and justice mechanisms, but also by strengthening civil society's capacity to prevent and manage disputes, thereby reducing the need for future attention by the court system or the military.

The *stakeholders* in an area emerging from war will vary with the location and context of the conflict. Representatives from the different combatant groups will always be key stakeholders. Citizen representation will be critical, including key subgroups of victims, which could include women, ethnic or religious minorities, or youth, if for instance they were abducted and forced to become child soldiers. Neighboring countries, regional actors, and sometimes superpowers will have an interest in the conflict, as will countries that become donors or contribute troops to peacekeeping and peace building efforts. Such efforts may be implemented through multinational bodies such as the United Nations, European Union or African Union, any of which may have their own institutional interests and constraints to address. Failure to include all relevant stakeholders can result in systems that lack fundamental fairness and justice, and may also sow the seeds of future conflict if the voices of those groups are not heard and their needs are not addressed.

*Resource* constraints are always an important topic, but are particularly critical in addressing transitional justice issues. Countries emerging from war are usually devastated economically.<sup>102</sup> Multinational and bilateral donors usually bear the cost burden, which can rise into hundreds of millions of dollars for some international criminal tribunals. A clear understanding of *goals* and the *resources* needed to achieve them should help avoid system failures. In the area of transitional justice, and development in fragile states more

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forces citizens to revisit the atrocities committed (*see generally* ROSALIND SHAW, RE-THINKING TRUTH AND RECONCILIATION COMMISSIONS: LESSONS FROM SIERRA LEONE (U.S. Inst. Peace, Special Rep. 130, Feb. 2005)).

102. And even in the rare cases in which the country in question has resources, they are often difficult to tap in the period of instability, as seen, for example, in the limited success of efforts to use Iraq's oil wealth in the rebuilding of that nation following the U.S. intervention.



broadly, donor countries often commit to give aid, then fail to follow through, decreasing the chances for success.<sup>103</sup>

*Success* in transitional justice can be difficult to measure, depending on the goals selected. If the goal is punishment of war criminals, a key measure is the number of trials and convictions. When the goals are reconciliation and prevention of future violence, the measurement is much more difficult and the time line for determining success becomes attenuated. Assuming that efficiency is one of the goals, the trade-offs become more fraught. As noted above, international tribunals and the International Criminal Court are extremely expensive, with some questioning the vast resources spent to convict a small number of individuals.

A clearer *stakeholder* analysis early in the process design could help clarify whose goals should take priority in determining these resource choices and tradeoffs. The international community, driven by the desire to avoid impunity and expand and enforce human rights norms, may spend substantial sums prosecuting the political leaders who unleashed the atrocities. The affected public may support these outcomes or may have broader goals or higher priorities, such as punishing lower level soldiers who committed the atrocities and conducting indigenous reconciliation efforts.<sup>104</sup> Given the limited *resources* available, the public might even prefer greater investment in the rebuilding of the economy, education system and stable governance.

## V. CONCLUSION

The framework described in this article represents an effort at creating a simple but comprehensive list of issues to consider in designing and assessing systems to address conflict. While not all elements will be equally important or complex in all cases, each should be considered and evaluated in order to map and understand the choices available in structuring processes to prevent, manage and resolve conflicts.

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103. See generally GOOD INTENTIONS: PLEDGES OF AID FOR POSTCONFLICT RECOVERY (Shepard Forman & Stewart Patrick, eds. 2000).

104. At a projected cost of \$212 million, the Special Court for Sierra Leone has issued 13 indictments, resulting in 5 convictions as of March 2008. "The ownership is not there," said John Caulker, executive director of Forum of Conscience, who travels widely in Sierra Leone to speak with war victims. "There's no way you can call that a court for Sierra Leoneans when most Sierra Leoneans can't even access the court." Craig Timberg, *Sierra Leone's Special Court's Narrow Focus*, WASHINGTON POST, March 26, 2008, at A11.

Implicit in our analysis is that the choice of goals makes a difference to outcomes, as does the process or set of processes chosen to implement those goals. In the context of court ADR, a court could design its ADR program with primary attention to the goal of public service, offering options to litigants that better meet their interests with processes that could be more speedy and less costly than a court trial. Or, it could emphasize the goals of docket reduction and efficiency for the court itself, designing a system that pressures litigants into using an ADR process that provides them insufficient benefits, thereby increasing their costs and impairing their access to justice. Similarly, a company seeking to reduce its litigation costs could do so by successfully addressing disputing parties' interests at an earlier stage, resulting in potentially better outcomes, faster resolution and lower costs for all parties. Or, to achieve the same efficiency goal, it could create a system that pressures parties to use a deficient ADR process or prevents or discourages their access to court. The choice of goals, the design of processes to meet those goals, and the level of resources dedicated to the system will affect the quality of the system's outcomes.

The elements of the framework appear to have applicability across a range of organizations and institutions, broadly defined. While this essay primarily addresses the "what" and the "how" of dispute systems design and operation, additional research and experimentation by practitioners is needed to test the goals and assumptions underlying different system design choices and evaluating them for their impact on stakeholders and alignment with organizational and societal values. We welcome a dialogue with other practitioners and academics to increase the utility of this model framework and to refine it based on further empirical and scholarly work.

APPENDIX: GLOSSARY OF CONFLICT RESOLUTION PROCESSES

This glossary is based on definitions from the CPR International Institute for Conflict Prevention and Resolution, available at <http://www.cpradr.org/ClausesRules/ADRPrimer/tabid/340/Default.aspx>; the ADR Program of U.S. District Court for the Northern District of California, available at <http://www.adr.cand.uscourts.gov/adr/adrdocs.nsf/354c0e78f4dde1a6882564e1000be228?OpenView>; Goldberg, Sander, Rogers and Cole, *Dispute Resolution: Negotiation, Mediation, and Other Processes*, 5th ed.; and Douglas H. Yarn, *Dictionary of Conflict Resolution* (San Francisco, CA: Jossey-Bass, Inc., 1999).

**ARBITRATION**

An adjudicative method of dispute resolution in which an independent, impartial and neutral third party (an arbitrator or arbitral panel) considers arguments and evidence from disputing parties, then renders a decision (“award”). Arbitration may be binding (contractual) or non-binding (court-connected), with levels of procedural formality varying according to the parties’ contractual agreement or court rule.

**ADJUDICATION**

The resolution of disputes by a neutral third party vested (by law or agreement) with authority to bind the disputants to the terms of an award or decision. Trial and arbitration are the common adjudicative processes.

**BASEBALL ARBITRATION**

A form of arbitration in which each party submits a proposed monetary award to the arbitrator. At the conclusion of the hearing, the arbitrator is required to select one of the parties’ proposed awards, without modification. (Also known as final offer arbitration.)

**BOUNDED ARBITRATION**

Parties agree that the arbitrator’s final award will be adjusted to a bounded range that the parties have previously agreed upon.

**ALTERNATIVE DISPUTE RESOLUTION (ADR)**

An umbrella concept in conflict resolution embodying a range of processes apart from court trial. ADR includes a wide range of

processes, e.g., mediation, arbitration, ENE and a variety of hybrid processes. (Also called “appropriate dispute resolution.”)

### **ARB-MED**

A hybrid process by which an arbitrator is asked to serve as mediator to assist the parties in resolving the dispute at hand, prior to issuance of the award. Sequentially, the arbitration hearing is held, and the arbitrator determines the award, but does not deliver the decision unless the interim mediation effort does not result in agreement.

### **CASE EVALUATION**

Court-connected process in which a single lawyer or panel of lawyers evaluates cases referred by a judge and provides an advisory opinion to the parties as to their respective case strengths, weaknesses, and value. The term may have different meanings in different jurisdictions, and may be interchangeable with Early Neutral Evaluation (ENE), but the latter includes case management as well as evaluation.

### **COLLABORATIVE LAW**

Collaborative Law provides for an advance agreement entered into by the parties and the lawyers in their individual capacities, under which the lawyers commit to terminate their representations in the event the settlement process is unsuccessful and the matter proceeds to litigation.

### **CONCILIATION**

A process by which the third party, who may or may not be neutral, encourages the parties to settle their dispute. The role of the conciliator varies in neutrality and decisionmaking authority. In U.S. domestic practice, conciliation is more focused on improving communication and clarifying issues between the parties with less emphasis on the substance. In international practice, conciliation is a more formal process that may include both inquiry and mediation.

### **COOPERATIVE LAW**

Cooperative Law is a process which incorporates many of the hallmarks of Collaborative Law but does not require the lawyer to enter into a contract with the opposing party providing for the lawyer's disqualification. Cooperative Law may include a written agreement to make full, voluntary disclosure of all financial information,

avoid formal discovery procedures, utilize joint rather than unilateral appraisals, and use interest-based negotiation.

### **COURT-ANNEXED ADR**

Alternative dispute resolution administered by, or otherwise institutionally affiliated with, a court. Some courts require or urge disputants to participate in various ADR processes, and may require counsel to certify that they have explained ADR options to their clients.

### **DISPUTE RESOLUTION BOARD (DRB)**

A party-appointed panel chaired by a trained neutral, which generally is formed at the start of a construction project and meets regularly to follow work progress and to provide guidance to the parties on differences before they become disputes. In the event that the DRB is called upon to hear a ripened dispute, it can make recommendations, awards that are binding for a period of time, awards that are binding but appealable, or final and binding decisions, depending on the agreement of the parties involved in the project.

### **EARLY NEUTRAL EVALUATION (ENE)**

An ENE evaluator (an experienced attorney with expertise in the subject matter of the case) hosts an informal meeting of clients and counsel to hear each side present its basic evidence and arguments. The evaluator identifies areas of agreement, focuses areas at issue, writes a private evaluation of the case's prospects and presents it to the parties. The parties may attempt settlement prior to presentation of the evaluation. The evaluator may also help the parties devise a plan for expedited discovery, assess realistic litigation costs, and explore whether a follow up session would help case settlement.

### **FACILITATION**

In facilitation, a neutral process expert conducts meetings and coordinates discussions among a group of individuals or parties with divergent views to reach a goal or complete a task to the participants' mutual satisfaction. May be associated with disputes over public resources or public policy in which there are many stakeholders.

**FACT FINDING**

Independent process by which a technically proficient neutral determines the facts relevant to the controversy. The process separates the function of defining the problem from developing a solution.

**INTEGRATED CONFLICT MANAGEMENT SYSTEM**

Form of conflict management within an organization that offers multiple processes for prevention, management and resolution of disputes, and integrates their use.

**MEDIATION**

Mediation is a voluntary, confidential, facilitated negotiation in which a neutral aims to assist the parties in reaching a consensual resolution of a dispute on terms that the parties themselves agree upon. In some forms of mediation, the mediator, if competent to do so and if requested by both parties, may eventually (1) offer an opinion on the parties' likelihood of success in an adjudicated proceeding, and/or (2) offer a proposed "best resolution" that the mediator considers is the fairest, most commercially rational outcome to the dispute. However, the mediator has no authority to impose an outcome on the parties and controls only the process of the mediation itself, not its result.

**MED-ARB**

A hybrid process pursuant to which, by agreement, the parties engage in mediation with the intention of submitting all unresolved issues to final and binding arbitration.

**MINITRIAL**

A hybrid process by which the parties present a limited form of their legal and factual contentions to a panel of representatives selected by each party, or to a neutral third party, or both. The objective is to provide senior party representatives with an opportunity to balance the strength of their claims against the contentions of their adversary, with an eye to resolving the matter on commercial rather than legal terms.

**NEGOTIATION**

A process of exchanging information, interests, positions and proposals through direct communication of the parties in an effort to resolve a dispute.

**NEUTRAL**

An impartial third-party who participates in resolution of a dispute according to the authority granted by the parties (or in the case of a judge, by law) to manage the process and/or determine an outcome.

**OMBUDS (ALSO, OMBUDSMAN OR OMBUDSPERSON)**

A third party within an organization who deals with conflicts on a confidential basis and gives disputants information on how to resolve the problem at issue. An ombuds may also serve as a mediator. (This definition applies to an organizational ombuds, as opposed to the original, “classical” ombudsman.)

**PARTNERING**

Dispute prevention and management process involving team-building activities to help define common goals, improve communication and foster a problem-solving attitude among a group that works together in performance of a contract. Developed and used primarily in the construction industry.

**SETTLEMENT CONFERENCES**

A judicial officer helps the parties negotiate a settlement. Some settlement judges use mediation techniques to improve communication among the parties, probe barriers to settlement and assist in formulating resolutions. Settlement judges may articulate views about the merits of the case or the relative strengths and weaknesses of the parties’ legal positions. Settlement judges may meet with one side at a time, and some settlement judges rely primarily on meetings with counsel.

**SUMMARY JURY OR BENCH TRIAL**

A summary bench or jury trial is a flexible, non-binding process designed to promote settlement in complex, trial-ready cases. The judge will hear an abbreviated presentation of evidence, may offer an advisory verdict, and may offer parties an opportunity to ask questions and hear the reactions of the judge or jury.

