

# Second Generation Organizational Conflict Management Systems Design: A Practitioner’s Perspective on Emerging Issues

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## I. INTRODUCTION

The first book about Dispute Systems Design (“DSD”), *Getting Disputes Resolved*,<sup>2</sup> was published in 1988. On the twentieth anniversary of the birth of DSD as a distinct field within the alternative dispute resolution (“ADR”) family,<sup>3</sup> and in the context of addressing the “second generation” of DSD,<sup>4</sup> it seems fitting to identify the emerging issues we face as a discipline.

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

3. The nomenclature “conflict management systems design” (“CMSD”) is used to emphasize the importance of managing conflict, preventing disputes, and accepting conflict as inevitable. This is in contrast to “dispute systems design” (“DSD”), which tends to focus more exclusively on intervention once the conflict has escalated into a dispute. For purposes of this article, CMSD will be used to encompass both DSD and CMSD. It should also be noted that the term Alternative Dispute Resolution (“ADR”) is used generically to encompass a variety of processes and disciplines, such as mediation, arbitration, systems design, and various hybrid and collaborative problem-solving methods.

4. The ideas expressed in this article are taken in part from the author’s presentations at the Harvard Negotiation Law Review 2008 Symposium and the Ohio State Journal on Dispute Resolution 2008 Symposium. Cathy A. Costantino, Presentation at the Harvard Negotiation Law Review 2008 Symposium: Dispute Systems Design Across Contexts and Continents (Mar. 7, 2008) (“Harvard DSD Symposium”); Cathy A. Costantino, Presentation at the Ohio State Journal on Dispute Resolution 2008 Symposium: The Second Generation of Dispute Systems Design: Reoccurring Problems and Potential Solutions (Jan. 24, 2008).

This article identifies ten emerging issues in conflict management systems design (“CMSD”) in the organizational context.<sup>5</sup> The intent is to identify and frame those issues that merit exploration as we move into the next generation of CMSD practice. This article does not prescribe answers or make pronouncements, but rather, offers an invitation for dialogue.<sup>6</sup> It is also important to disclose at the outset that the article is written from the viewpoint of a practitioner—from a perspective of real-life design challenges. Finally, the author wishes to acknowledge the many stakeholders who have invited us into their systems and allowed us the privilege of working with them.

Viewed from a practitioner’s perch, the ten emerging issues in organizational conflict management systems design<sup>7</sup> are intricately interwoven and interrelated. However, for purposes of discussion, they fall into three broad categories: the Process, the Practitioner, and the Profession. First, with regard to the *Process*: (1) Who is the client? (2) What is the purpose of the design? (3) How do conflict management systems fit with other processes and initiatives within an organization? (4) Are organizational conflict management systems sustainable? Second, with regard to the *Practitioner*: (1) What is the role of the designer? (2) Should the designer be impartial? (3) Should the designer advocate to change the conflict management culture of the organization? (4) What knowledge, skills, and competencies should designers have? Finally, with regard to the *Profession*: (1) What ethical issues do designers face? (2) What standards of conduct should designers follow? These ten areas are explored more fully below.

## II. EMERGING CMSD PROCESS ISSUES

DSD has two components: a *system*, which is a coordinated set of processes or mechanisms that interact with each other to prevent, manage, and/or resolve disputes, and a *design*, which is a deliberate

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5. Although this article looks at these emerging issues with regard to CMSD in the organizational arena, many of these topics are also relevant for the CMSD profession as a whole and in other CMSD practice contexts.

6. As Professor Moffitt noted, “it’s more likely that DSD will gain prominence in the academy if DSD presents itself as a set of questions to be explored, rather than a set of principles to be promoted. And . . . that’s a lot harder to do than it might sound.” Posting of Michael Moffitt to Dispute Systems Design Symposium 2008, Panel 5: Emerging Issues in DSD, <http://blogs.law.harvard.edu/hnmcp/2008/03/03/emerging-issues-in-dsd/> (Mar. 8, 2008, 16:24 EST).

7. Although there are issues other than these ten that are relevant to the CMSD field, the author has chosen to explore these ten areas because they are based upon actual problems the author has encountered in practice.

and intentional harnessing of resources, processes, and capabilities to achieve a set of specified objectives.<sup>8</sup> As such, CMSD is the *process* of working with a system to make choices about the *substance* of managing conflict and resolving disputes. While much of the literature has focused on the substance choice of ADR methodology, less attention has been devoted to the design process itself. This section explores four emerging CMSD process issues.

#### A. *Who Is the Client?*

Important implications flow from the designation of an individual or entity as the “client.” For example, in the legal and mediation contexts, certain protections attach to client relationships, such as the attorney-client privilege, attorney work product privilege, mediation privilege, mediation immunity, or mediation confidentiality protections. To date, CMSD practitioners and CMSD clients do not enjoy any of these privileges, immunities, or confidentiality protections. In some sense, CMSD in its present state may be less like the legal and mediation professions and more akin to the management consulting field, in which confidentiality, privacy, and proprietary information are often negotiated and protected within written contracts or retainer agreements, which may include non-disclosure provisions.

In the organizational context, who is the actual design client? Is it the person or entity within the organization engaging or hiring the designer? Is it the one who pays the designer’s fees? Is it the ultimate decision-maker—the CEO, the president, a director, the board of directors? Is it the stakeholders themselves as individuals—executives, managers, supervisors, employees, vendors, customers? Or perhaps the system is the client—with both its internal and external constituencies? Or is the design process itself the client? If one views the design process as the mediation of a system,<sup>9</sup> then the implication may be that the designer’s duties run to the process itself and not to the

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8. Robert C. Bordone, Introduction to Dispute Systems Design, Presentation at Harvard DSD Symposium (Mar. 7, 2008).

9. It was the initial realization that although there were models for interest-based negotiation and interest-based mediation, there were no similar interest-based models for CMSD, which led to collaboration and the writing of *DESIGNING CONFLICT MANAGEMENT SYSTEMS*. In that context, the concept of an interest-based mediation of a system emerged. In consulting with organizations and in teaching and speaking, this author often explains the CMSD process as the mediation of a system: using an interest-based approach to reach a resolution that is acceptable to all the stakeholders. The concept of “mediation of a system” involves a designer acting as a facilitator to assist an organization and its stakeholders in deciding how they want to manage conflict and resolve disputes on a systemic basis.

outcome, organization, or individual participants.<sup>10</sup> Even this last model invites questions about the nature and scope of the designer's role. It also raises issues about the designer's duties to the client (no matter who the client is) to ensure the conduct of a fair design process and, some would argue, the creation of a fair conflict management system.

### B. *What Is the Purpose of the Design?*

Another threshold issue concerns the purpose of the design and the resulting conflict management system. Is the purpose to control outcome, to minimize economic or legal risk, to maximize publicity, to decrease organizational cost, to avoid litigation, to empower stakeholders, to improve relationships, to ensure fairness, to foster closure, to level the playing field? Each purpose raises in turn a unique set of issues. Indeed, in the CMSD context, the person who decides the purpose of the system often determines whose interests will be served or not served. The struggle over the purpose of the design has collateral implications not only for the organization as a whole, but also for the stakeholders as individuals. The key inquiry here is: Who is the system designed for and why?<sup>11</sup>

CMSD intervention and the introduction of ADR processes into an organization can be seen by some as less a symbol of innovation and empowerment, and more a choice by those in power to mitigate risk and protect the organizational entity. There is often a tension or even a discrepancy about the stated purpose of the conflict management system, its perceived purpose, and its actual purpose. For example, the implicit purpose of the CMSD intervention may actually be managerial control, and not employee empowerment as explicitly stated. The introduction of ADR may mask true organizational intentions by diverting stakeholders from external, rights-based public processes to internal, interest-based (and confidential) resolution.

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10. For a conflicting view, see Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 18 (1981) (mediator should ensure that stakeholders are adequately represented and protected, that agreements are fair and stable, and that agreements are interpreted as intended by the community). For a response to Susskind, see Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85 (1981).

11. See Video: Dispute Systems Design Symposium 2008, Panel 1: Dealing with the Inevitable: DSD in the Institutional Context, <http://blogs.law.harvard.edu/hnmcp/2008/03/03/dsd-in-the-institutional-context> [hereinafter Panel 1 Video] for a discussion of this issue at the Harvard DSD Symposium. In particular, Mary Rowe, the Ombudsman at the Massachusetts Institute of Technology, has emphasized the importance of both the target audience and the ultimate purpose of any conflict management system.

National Institutes of Health Ombudsman Howard Gadlin has postulated that design systems in organizations may simply be structures imposed by management “so that employees and managers voluntarily conduct themselves in the way management would like them to with a minimum of surveillance or coercion, but backed up by the twin threats of discipline or social disapproval.”<sup>12</sup> According to Gadlin, DSD and ADR can be packaged to the employees as “improvements geared toward employee needs and interests.”<sup>13</sup>

This raises the collateral issue of ownership—who “owns” the design process? There are several models one could use to view the ownership issue. One might use a management model and posit that the process is owned by the decision-maker, executive, or manager who brings the designer into the organization. A financial model would suggest that the entity paying for the process owns the process. Or, one might look at the ownership question through a governance lens and posit that the process is owned by representative groups within the organization, such as the union or collective bargaining unit, the board of directors, middle management, or some other representative group of stakeholders (a group, in fact, whose members may not have monolithic interests). Another viewpoint would be a consumer model in which the end users—that is, the employees, supervisors, vendors, contractors, or others who access conflict management services—are the owners of the process. One also could take a functional approach and see the system as owned by the designers and implementers, because they create, maintain, and shape the process within the larger organizational context. Whatever the approach, ownership colors all aspects of the design process. Because of its tremendous implications for rank, power, and privilege the topic of ownership is one that we as a discipline need to explore and address in a more direct and transparent manner, both in research and in practice.

As designers, we sometimes lose sight not only of the ownership issue, but also of the role and importance of the *individual* stakeholder; we sometimes focus our efforts on the *institutional* stakeholder. During the design process, there can be a tendency for the designer to focus on the implications of the new or revised system for the organization, rather than for the actual end-users of the processes and procedures. As our profession has grown up, we have at times seemed to forget that the process is about the stakeholders

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12. Howard Gadlin, *Bargaining in the Shadow of Management: Integrated Conflict Management Systems*, in *THE HANDBOOK OF DISPUTE RESOLUTION* 371, 380 (Michael L. Moffitt & Robert C. Bordone eds., 2005).

13. *Id.*

and end users, not the design or the designer. There can be no design process—and no designer—without clients, consumers, customers, stakeholders, and others who access and use the conflict management system. Often, discussions about CMSD occur in the vacuum of seminars, symposia, and articles, without any input, contact, or dialogue with actual stakeholders, be they institutional or individual. Sometimes “our” designs occur without input from “them”—individual stakeholders or actual end-users. As we move into our third decade as a discipline, we should aspire to be more inclusive, more mindful, and more open to inviting the stakeholders to join us at the table both as we design and as we engage in dialogue and discourse about emerging issues such as purpose and ownership.

C. *How Do Conflict Management Systems Fit with Other Processes and Initiatives Within an Organization?*

With the expansion of organizational management models, theories, and principles, CMSD is but one modality in an ocean of initiatives: process redesign, performance-based pay, risk management, diversity, inclusion, change management, succession planning, etc. Many practitioners are now seeing “initiative fatigue” in organizations—there are too many new programs and too many new processes for stakeholders to acknowledge, absorb, or access. Similar to sensory overload, stakeholders (either consciously or unconsciously) tend to “block out” the noise of all the initiatives that compete for their limited time and attention. Unless there is coordination among the various systems and leverage among multiple programs, stakeholders often choose the path of least resistance by opting for the status quo, or “lumping it.”<sup>14</sup>

Designers may share some of the blame by focusing at times on conflict management components without paying attention to or collaborating with other systems and initiatives within the organization. In the next generation of CMSD, we could incorporate change management principles from other disciplines (for example, critical path charting and force field analysis) which might increase the likelihood that the introduction or revision of a conflict management system will succeed.<sup>15</sup>

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14. The concept of “lumping it” was first suggested by Ury, Goldberg, and Brett. See URY ET AL., *supra* note 2, at 9-10.

15. The question of what constitutes a “successful” conflict management system and how success is or should be measured is beyond the scope of this article, but is a topic of increasing interest and importance in the CMSD field. Indicators of “success”

Many organizations have a range of dispute resolution processes and access points available to stakeholders. How these sub-systems interact with each other, and whether they dovetail with or detract from effective and efficient conflict management, is another topic that deserves further study. Such inquiry might ask how organizations and stakeholders deal with multiple access points *within* a single conflict management system. Under the guise of Integrated Conflict Management Systems (ICMS),<sup>16</sup> organizations now routinely offer a range of ADR options. These might include an ADR Office, an Ombudsman, a Human Resources Office, an Equal Employment Opportunity Office, a collective bargaining grievance process, and others. It may be that the challenge going forward for systems design is not *whether* there are processes in place within an organization to manage conflict and resolve disputes, but *how* the multiple processes operate, overlap, complement, or constrain each other.

#### D. *Are Organizational Conflict Management Systems Sustainable?*

With the multiplicity of processes available to manage conflict and resolve disputes within organizations, is it reasonable to expect that these procedures will stand the tests of time, cost, leadership, crisis, and fatigue? Can conflict management systems remain sustainable and adaptable? “Sustainable” here is not synonymous with “static”—systems can be sustainable but still evolve and adapt to changing circumstances and demands. Some components of the system may become permanent fixtures in the organizational culture; others may have a built-in lifecycle or planned obsolescence.

In looking at the concepts of sustainability, adaptation, and evolution, several questions emerge. Are there mechanisms in place for the system not only to address new challenges but also to embrace revised or emerging ADR architecture as necessary? Can the system adapt in order to ensure that the ADR processes in place are valuable, purpose-driven, and functional for the intended purpose? Does the organization have the attributes of a biological system, a mechanical system, or an ecological system?<sup>17</sup> Is the organization an open system capable of and willing to take in new data, draw on new forms

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might include utilization of the system, efficiency, effectiveness, cost, satisfaction, improvement of relationships, or durability of resolutions.

16. See, e.g., Soc’y of Prof’ls in Dispute Resolution, *ADR in the Workplace Initiative, Designing Integrated Conflict Management Systems: Guidelines for Practitioners and Decision Makers in Organizations* (Cornell Studies in Conflict & Dispute Resolution, No. 4, 2001).

17. See, e.g., GARETH MORGAN, *IMAGES OF ORGANIZATION* 6, 64 (1997).

of sustenance, and adapt to new environments? As designers, what can we do during the design to facilitate the introduction of adaptive mechanisms to assist and perhaps even encourage the evolution of the conflict management system over time?

One area for additional exploration in the next generation of CMSD may be to conduct longitudinal studies of the “lifecycles” of particular organizational conflict management systems. By looking to other disciplines to help understand the sustainability of systems, we might discover that some conflict management systems resemble ecological models: they struggle to take root, sprout slowly, flourish, rest, perhaps lay fallow, and then start the cycle anew. Or, some may follow a statistical model: the usage of the system resembles a parabola or bell curve—a slow ascent as the system is created, a peak in usage as the system is publicized and embraced, and a slow descent in usage as the system becomes institutionalized or as the “noisiest” disputes get resolved. Some systems may reflect a sociological model, following an S-shaped process by which an innovation is “diffused” or communicated through certain channels in a social system.<sup>18</sup> Ecology, statistics, and sociology are but three of the many disciplines that offer us models for studying the sustainability of organizational conflict management systems.

### III. EMERGING CMSD PRACTITIONER ISSUES

Although the mediation literature teems with discussions about the role of the mediator, the mediator’s neutrality, the mediator’s respect for the parties’ self-determination, and the core competencies of mediators, the same is not true of the CMSD literature. As CMSD practitioners, we perhaps have not been explicit—either with our clients or with ourselves—about *what* we do and *how* we do it. The entry and contracting stage of our design work, which is where expectations are set, may at times be crisis-driven, hurried, murky, or non-existent. To use the parlance of a sports-equipment company, sometimes as designers we “just do it”<sup>19</sup> without defining the “do” or the “it.” In the second generation of CMSD, a more deliberate and mindful focus on some of these practitioner issues is warranted.

#### A. *What Is the Role of the Designer?*

A designer has many process roles: catalyst, facilitator, educator, translator, transmitter of information, agent of reality, advisor, and

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18. See, e.g., EVERETT M. ROGERS, *DIFFUSION OF INNOVATIONS* 53, 272-75 (2003).

19. “Just do it” is a marketing slogan of NIKE, Inc.

mediator of a system.<sup>20</sup> But what about roles related to choices of substance: Should a designer be an advocate for a particular ADR method or approach? Should a designer be a subject matter expert—in ADR or other disciplines such as organization development, group dynamics, or behavioral psychology? Should the designer be familiar with the subject matter of the organization itself (e.g., health care, law enforcement, government) or have experience and expertise with similar organizations? What happens when practitioners are asked to play multiple roles? For example, can a practitioner who has worked as an ADR trainer for an organization then act as a designer in that same system? If she has been a designer of a system, can she then act as a mediator of individual disputes within the system? If she has been the designer, can she subsequently act as a facilitator of groups within the system? And if she has been the designer, is it appropriate for her to be the evaluator of the same system—that is, to appraise the system once it has been implemented to determine whether it is utilized, effective, efficient, and successful?

Such “role blending” raises not only ethical issues for the designer, but can also cause confusion for stakeholders about the designer’s credibility, voice, and place at the table. Some argue that these “role blending” dilemmas can be resolved through traditional conflict of interest “cures” such as full disclosure, informed consent, and waiver. Others suggest that these types of role blending issues go much deeper—that they intersect with some of the core rank, power, and privilege issues previously discussed and cannot and should not be “cured.” These boundary issues deserve dialogue in the second generation of CMSD in order to increase clarity for designers, stakeholders, and users.

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20. COSTANTINO & MERCHANT, *supra* note 1, at 82-84.

## B. *Should the Designer Be Impartial?*<sup>21</sup>

The Model Standards of Conduct for Mediators list impartiality as a core value of mediation.<sup>22</sup> As designers, are we impartial, and if so, with regard to what?

One possibility is that we are impartial with regard to the *design principles*. Do we adhere to certain “best practice” design principles—making suggestions with regard to how to conduct an organizational assessment, how to involve stakeholders (including those who may feel disempowered in the process), how to measure success, and how to build in appropriate rewards and incentives? Most practitioners would probably agree that they are not impartial when it comes to basic design concepts. They rely on certain principles to guide their design practice and interventions. Indeed, it is that very process design expertise that clients often seek.

Design principles clearly affect individual designer styles. Clients may hire a particular designer because of his or her reputation, expertise, style, or past experience.<sup>23</sup> Much of the design process involves the use of the designer’s individual skills and style—the “art” side of the design as opposed to the “science” side. As Khalil Shariff has noted, “[t]he shaping of social institutions requires both rationality and imagination and the notion of design is meant to capture both the necessary analysis and artistry.”<sup>24</sup> To use Organization Development (OD) parlance, the designer uses “self as instrument.” That is,

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21. The author initially framed this topic at the Harvard DSD Symposium as respect for the self-determination of stakeholders, a topic which engendered a lively discussion with the audience. Several participants suggested that the larger issue is the neutrality of the designer. See Panel 1 Video, *supra* note 11. Professor Bordone suggested that the issue may not be about being neutral with regard to the parties, but rather with regard to the “process choices and how [the] design gets done.” See Posting of Bob Bordone to Dispute Systems Design Symposium 2008, Part 1: Dealing with the Inevitable: DSD in the Institutional Context, <http://blogs.law.harvard.edu/hnmp/2008/03/03/dsd-in-the-institutional-context> (Mar. 7, 2008, 17:17 EST). In this article, the author has chosen to bifurcate the two issues, addressing “self-determination” in the next section (changing the culture of an organization) and addressing the “neutrality” issue here in terms of impartiality, following the paradigm found in the MODEL STANDARDS OF CONDUCT FOR MEDIATORS.

22. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard II. Impartiality (2005), available at [http://www.abanet.org/dispute/documents/model\\_standards\\_conduct\\_april2007.pdf](http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf).

23. For example, Special Master Kenneth Feinberg developed a reputation based on his administration of the 9/11 Fund. The extent to which a particular design is influenced by the style, persona, and reputation of the individual designer and the use of self as instrument in the design process is an interesting topic and one for additional study.

24. Khalil Z. Shariff, *Designing Institutions to Manage Conflict: Principles for the Problem Solving Organization*, 8 HARV. NEGOT. L. REV. 133, 139-40 (2003).

each designer brings a different orientation to the designer process, much as each mediator does to the mediation process.<sup>25</sup> For example, some designers may be “transformative” and focus on relationship, growth, and the healing components of systems design. Others may be “facilitative” by identifying stakeholder interests and focusing on both relationship and outcome components. Some may be more “evaluative” and prescriptive in their approach, focusing on outcome and acting as experts. Indeed, perhaps designers develop reputations for their “style” and approach much the same way that mediators do.<sup>26</sup> It is possible for a designer to be impartial with regard to certain design principles, but still have a unique design style—for example, to adhere to best practices when it comes to ADR program metrics, but to be transformative, facilitative or evaluative in how one implements those best practices in the specific design context.

A second possibility is that we are impartial with regard to the *design participants*. Do we favor one group of stakeholders over another? Do we give one group more “air time” or more attention than others? Do we ensure a fair design process and a place at the table for all the stakeholders? This is impartiality in the more traditional sense of how it is understood in the mediation context. Most practitioners would probably agree that we should strive for impartiality toward the design participants.

A third possibility is that we are impartial with regard to *design process choices*. Do we allow the participants to choose the ADR options that best meet their needs by educating and coaching them about different ADR choices? Do we simply let them choose what they think is best? Do we prescribe a set of ADR choices or advocate for a certain type of ADR? Most practitioners would probably admit that they are not completely impartial when it comes to ADR process choices. Designers often counsel stakeholders about the advantages and disadvantages of certain ADR methods, assisting clients with

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25. For examples of different styles of mediation, see ROBERT A.B. BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (2004) and Leonard L. Riskin, *Understanding Mediator Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 25 (1996).

26. See Posting of Bob Bordone to Dispute Systems Design Symposium 2008, Part 1: Dealing with the Inevitable: DSD in the Institutional Context, <http://blogs.law.harvard.edu/hnmcp/2008/03/03/dsd-in-the-institutional-context> (Mar. 7, 2008, 17:17 EST).

“fitting the forum to the fuss.”<sup>27</sup> Indeed, designers are often hired because of their knowledge or experience with specific ADR processes.<sup>28</sup>

Finally, perhaps the most difficult and controversial issue is whether CMSD practitioners are impartial with regard to *design substance or outcome*. Do we advocate (either implicitly or explicitly) for process choices that empower employees not just to resolve disputes but also to manage conflict? Do we use the design process to make the work environment a “better” place? (And if so, “better” by whose definition?) Do we encourage collaborative interest-based processes and discourage rights-based processes? Perhaps, as Professor Amy Cohen has suggested, there is a distinction between our “intent” as designers and the “outcome” of the design.<sup>29</sup> This paradigm of intent versus outcome ties back to several issues discussed earlier: the purpose of the design, whether the designer should be impartial, and whether the designer should advocate to change the conflict management culture. For example, perhaps it is appropriate for us as designers to hope that the design will transform the conflict culture of the organization, but we may consciously choose to refrain from influencing or manipulating the nature of the design to realize that end state or desired result. Others may align intent with outcome and actively choose to influence design process outcome. Still others may sit back and hope that the stakeholders themselves choose an outcome that fulfills the designer’s intent. The topic of intent, outcome, and impartiality is a rich one that deserves study and discussion.

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27. Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994).

28. Professor Bordone has suggested that attorneys become “dispute doctors” who are competent to diagnose conflict problems and recommend ADR treatment choices, and that law students be trained in these skills. See Video: Dispute Systems Design Symposium 2008, Panel 5: Emerging Issues in DSD, <http://blogs.law.harvard.edu/hnmcp/2008/03/03/emerging-issues-in-dsd/>. Such a paradigm seems to have an underlying assumption that designers are not impartial with regard to ADR process choices. Certainly, no one would want a doctor who recommends the same treatment to every patient, regardless of diagnosis, and neither would a patient want a doctor who was not familiar with the most recent medical research and developments. In much the same way, if attorneys (and others, for the CMSD field is not nor should it be limited to attorneys) are to become dispute doctors, they will need to learn the art of differential diagnosis, become and remain ADR-competent, and stay current as to the most recent ADR developments and design architecture (moving beyond the limited negotiation-mediation-arbitration spectrum).

29. This analysis was first suggested by Professor Amy Cohen from The Ohio State University’s Moritz College of Law in informal discussions with the author during the Harvard DSD Symposium.

C. *Should the Designer Advocate to Change the Conflict Management Culture of the Organization?*

Should a designer be a “change agent” during the design process, actively seeking to change the culture of the organization through CMSD intervention? This question raises multiple issues about the appropriate boundary of a designer’s role, and touches on several issues discussed in this article.<sup>30</sup>

The issue of designer as change agent raises many questions. Should the designer attempt to influence the ADR process, substance, and outcome to alter the conflict culture of the organization? Should a designer actively advocate to “transform” the conflict culture of an organization, or instead restrict her design to fit within the institution’s current culture?<sup>31</sup> Is “changing” the culture different from “transforming” it or “evolving” it? And, in some sense, does not every CMSD intervention by its very nature change the organization in some way? For example, addressing conflict that has long gone unmanaged, resolving disputes that have long festered, or introducing new methods of ADR into an organization is bound to alter the institutional culture to some degree. Perhaps the question is not whether designers should be involved in change efforts, but rather, to what degree, in what manner, and for what purpose or intent. And if change advocacy is an acceptable role for a designer, it raises the additional issue of whether the designer has a responsibility to acknowledge her motivation and to make her intentions explicit, transparent, and accountable to all the stakeholders.

Some authors have suggested that changing the culture of conflict in an organizational setting is an appropriate role for the designer.<sup>32</sup> Others have argued that culture change advocacy as a

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30. The appropriateness of the change advocacy role is a good example of the interrelationship of all ten issues raised in this article. *See supra* Part I. For example, in some sense, the question of designer as change agent admits the impossibility of impartiality on the part of the designer, and the relevance of intent.

31. The question posed to this author at the Harvard DSD Symposium was: “Cathy: you are the author of *DESIGNING CONFLICT MANAGEMENT SYSTEMS*. In your opinion, should designers attempt to transform the culture of an institution when creating a dispute system, or should they restrict their design to fit within an institution’s culture? What are the challenges of attempting to transform an institution’s culture?” Panel 1 Video, *supra* note 11.

32. Although this author has suggested that “changing the culture,” *COSTANTINO & MERCHANT, supra* note 1, at 218, is an appropriate goal of both the design and the designer, based on experience with various organizations and individual stakeholders since that book was published, that chapter might be titled and written a bit differently today. For example, more attention would be devoted to the scope of the design engagement, the explicit and implicit goals of all the stakeholders, the ripeness of the

component of systems design (and in particular Integrated Conflict Management Systems (“ICMS”) in the workplace) is actually contrary to democratic principles and has become a disguised form of managerial power which forces employees to use certain ADR constructs in the workplace. As discussed previously, some have expressed fears that CMSD in general and ICMS in particular are being used by management and organizational power players to “change culture” by silencing stakeholders, stifling conflict, and marginalizing employees.<sup>33</sup> Frequently, the “decision” to change the conflict culture is not really a decision at all—it is not explicit, it is not democratic, and there may be little discussion or no transparency about the motivations and intentions of those who have initiated the design process.<sup>34</sup>

What is the appropriate balance among the efforts of the individual, the institution and the designer to “change” the conflict management culture? Certainly we would not encourage uninvited cultural change imposed from an outsider on a group in other contexts. So what gives us as designers the right to advocate change in organizational conflict management culture? Who determines whether the change we seek to imbed is “better?” And if it is better, better for whom? Changing the culture of conflict in an organization may ignore the fact that the presence of conflict might actually have positive collateral effects: perhaps it surfaces important inequalities, prompts stakeholders to speak out, or allows people to become more comfortable with the inevitability of conflict and the impermanence of systems. If we adopt a medical model which views designers as dispute doctors, what happens when stakeholders do not want to adopt our efforts to change their culture? Do we label them as “non-compliant,” similar to patients who don’t take their medication? Do we describe them as “difficult” or “resistant” or “afraid to lose power?” Does the answer to whether we should change the culture depend on whether we are working to change the preventative side of the ADR spectrum before conflict has ripened into a dispute,<sup>35</sup> or on the resolution side

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system for a change initiative, and the rank, power, and privilege differentials within the system.

33. See, e.g., Gadlin, *supra* note 12, at 371-85; see also Posting of Michael Moffitt to Dispute Systems Design Symposium 2008, Panel 1: Dealing with the Inevitable: DSD in the Institutional Context, <http://blogs.law.harvard.edu/hnmcp/2008/03/03/dsd-in-the-institutional-context> (Mar. 7, 2008, 16:21 EST).

34. It is often difficult to know what exactly is being “changed” during the design process. For example, the introduction of a new ADR process or program does not always create a “sea change” in the way an organization manages its conflict or resolves its disputes.

35. This author draws a distinction between a “conflict” and a “dispute.” Conflict is an intangible—a process of dissatisfaction, disagreement, or unmet expectations. A

after a dispute has actually erupted? And is it relevant whether we are seeking to prevent disputes, de-escalate disputes, resolve disputes, or manage conflict?

A designer who affirmatively advocates change in the conflict management culture bumps up against the principle of self-determination. In exploring the concept of self-determination in the context of conflict management systems design, it may be helpful to look again to the health care discipline for analogies. The ethical standards for psychologists mandate self-determination and informed consent in the therapeutic relationship;<sup>36</sup> the American Medical Association Principles of Ethics require physicians to make relevant information available to patients to enable decisions based on informed consent.<sup>37</sup> The very first standard in the Model Standards of Conduct for Mediators is self-determination, which is defined as “the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.”<sup>38</sup> Simply put, self-determination presumes that the invitation to change is the invitation to decline to change. It assumes that patients, clients, and stakeholders are allowed to speak and make their own choices, and that professionals honor and respect those choices (assuming they are true uncoerced choices and made with all necessary information).<sup>39</sup> On the other hand, the very request for CMSD assistance suggests that at least some stakeholders (perhaps those who hold power) perceive a need for change.

One possible way to approach this problem is to link the issue of transforming organizational culture to the particular model of design being utilized. This same paradigm has been used in mediation. For example, in “transformative design,” changing the culture could be part of the bargained-for transformation that the designer brings to the table. In “facilitative design,” the role of the designer would be to engage all the stakeholders in a dialogue to identify interests, develop options, and explore alternatives regarding the culture change.

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dispute is a tangible, concrete product of conflict. Conflicts get managed, whereas disputes get resolved. See COSTANTINO & MERCHANT, *supra* note 1, at 5.

36. ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT, Principle E: Respect for People’s Rights and Dignity, Ethical Standard 3.10 Informed Consent (Am. Psychological Ass’n 2002), available at <http://www.apa.org/ethics/code2002.html>.

37. PRINCIPLES OF MED. ETHICS (Am. Med. Ass’n 2001), available at <http://www.ama-assn.org/ama/pub/category/2512.html>.

38. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 22, Standard I. Self-Determination.

39. Other interesting topics of study for the second generation of CMSD might be the influence of the designer on the ADR substance and process choices made by stakeholders.

And finally, within an “evaluative design” model, the designer might advocate specific change interventions based on her or his expertise, reputation, or style.

Another approach may be to think less in terms of change, and more in terms of evolution and adaptation. Perhaps the stakeholders can work collaboratively to chart out a critical path plan (or step-by-step prioritized roadmap) for a “culture change initiative.” Perhaps it is sufficient if the organization is explicit regarding its views about changing (or not changing) the culture of conflict. At a minimum, we as designers need to be more mindful at the outset and explicit with clients about our philosophies, views, and approaches to changing the culture of an organization.

D. *What Knowledge, Skills and Competencies Should Designers Have?*

The fact that CMSD draws from multiple disciplines and fields of study such as law, business, management, organizational development, public policy, governance, sociology, and psychology provides a rich opportunity for cross-pollination. We now have the opportunity as a profession to draw from the best ideas that other disciplines have to offer—to practice what we preach and become “a learning organization.”<sup>40</sup> For example, we can learn from the field of organization development about how institutions seek and sustain change. We can explore behavioral psychology to learn about group dynamics. And we can look to the law to model rights-based dispute resolution methods.

In addition to these areas of substance and subject matter expertise, effective designers must have core process skills. They must be able to facilitate diverse groups, communicate clearly (both orally and in writing), deliver effective presentations, educate about the range of ADR options, and mediate differences of opinion among various stakeholder groups. Interestingly, there are several different instructional models now being used to teach CMSD in law schools and graduate schools which employ a combination of substance and process learning. Teaching methods may include analyzing actual case

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40. The term “learning organization” was coined by Peter Senge to describe “organizations where people continually expand their capacity to create the results they truly desire, where new and expansive patterns of thinking are nurtured, where collective aspiration is set free, and where people are continually learning to see the whole together.” PETER M. SENGE, *THE FIFTH DISCIPLINE: THE ART AND PRACTICE OF THE LEARNING ORGANIZATION* 3 (1990). See also PETER M. SENGE, *THE DANCE OF CHANGE: THE CHALLENGES TO SUSTAINING MOMENTUM IN LEARNING ORGANIZATIONS* (1999); PETER M. SENGE, *THE FIFTH DISCIPLINE FIELDBOOK: STRATEGIES AND TOOLS FOR BUILDING A LEARNING ORGANIZATION* (1994).

studies and real-life designs, reviewing and discussing CMSD literature and research in other disciplines, using simulations and role plays to assist students to develop design techniques and skills, and partnering with actual organizations and real-life clients with the students acting as consultants and conducting all or part of a design intervention.<sup>41</sup>

In 2000, the Society of Professionals in Dispute Resolution (SPIDR)<sup>42</sup> created a working group of practitioners to study competencies in conflict management systems design in the organizational context.<sup>43</sup> After examining both process and substance skills, the committee identified five knowledge areas, fourteen abilities, and six beliefs<sup>44</sup> that it suggested were necessary for consultants to possess in order to be competent designers. It went further and suggested that organizational leaders looking to hire a systems designer should use the competency checklist to evaluate consultants, with the caveat that some of the skills could be supplemented by other members of the “design team.”<sup>45</sup> The report has not been widely circulated, but may serve as a starting point for a discussion about the expertise that a designer should have and a client should expect.

#### IV. EMERGING CMSD PROFESSION ISSUES

Although this article explores CMSD in the organizational context, the topics addressed look beyond that one niche. The process and practitioner concerns discussed above point to a larger cluster of emerging issues for CMSD as a profession.

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41. Georgetown University Law Center, Harvard Law School, Stanford Law School, and the University of Missouri School of Law are several institutions that offer CMSD courses.

42. SPIDR has since merged with several other dispute resolution organizations and is now known as the Association for Conflict Resolution (ACR).

43. SPIDR'S COMMITTEE ON CREDENTIALS, COMPETENCIES AND QUALIFICATIONS, REPORT ON COMPETENCIES IN CONFLICT MANAGEMENT SYSTEMS DESIGN (2000), *available at* <http://acrnet.org/pdfs/cms-competencies.pdf>.

44. Interestingly, the six beliefs raise some of the role, impartiality and culture change issues discussed in this article. For example, Belief No. 5 states that “While the process of organizational change may present challenges and risks, it can also provide a unique opportunity for building collaborative strength and a healthier work environment.” *Id.* at 8. Belief No. 6 states, “A sound organizational conflict management system will enhance organizational and personal growth, thus contributing to the effectiveness and success of both.” *Id.*

45. *Id.* at 8-9.

### A. *What Ethical Issues Do Designers Face?*

Both the internal consultant (a designer who is also a stakeholder in the system) and the external consultant face ethical issues in the organizational context. In some ways, the internal consultant faces heightened scrutiny for potential conflict of interest by the very nature of her dual status within the system. Whether internal or external to the system, however, all designers face a multitude of practical ethical issues related to role, confidentiality, immunity, and privilege (among others).

A few examples of actual problems faced by practitioners may be instructive here. What does a designer do if she learns that an organization is using the ADR process to keep evidence of systemic discrimination confidential? What if the designer becomes aware that one of the stakeholders (perhaps one without rank, power, and privilege) has been subjected to reprisal as a result of participating in the design process? What if the designer discovers that she is the second (or third, fourth, or fifth) designer to be brought into the organization because the organization does not like what it is being told? And what if she suspects that those in power are “consultant shopping” for a particular result or recommendation? Does it matter whether the organization is consultant shopping with regard to the organizational assessment or with regard to the suggested design product or recommendation?<sup>46</sup> What if the designer uncovers evidence of criminal wrongdoing or fraud during her organizational assessment? What does the designer do if he is later asked to testify about information he learned during the design intervention (and does it matter whether his testimony is sought in the criminal or civil context)? On what basis and under what circumstances can the designer promise confidentiality to stakeholders since there is no designer privilege? What if an entity other than the organization itself (for example, a regulatory body or government agency) initiates the design process—should the designer provide the regulator or agency with information learned during the design process? In the corporate context, what is the interplay between the design process and fiduciary obligations to shareholders or corporate governance bodies? As the CMSD literature develops and as our profession matures, there is striking need for practitioners to begin to discuss these and other ethical dilemmas.

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46. One might also ask whether “consultant shopping” is necessarily “bad” or indicative of nefarious intent. For example, individuals and institutions routinely seek advice from multiple architects or interior designers to commission a variety of “designs” to determine the highest and best use for a particular site or the most flattering decoration for a particular room or space.

## B. *What Standards of Conduct Should Designers Follow?*

Unlike the mediation field, CMSD as a profession has not yet developed standards of conduct to govern its practice. To the extent that CMSD practitioners do follow guidelines that inform their practice, those standards of conduct are often cobbled together from the disciplines of mediation or law. Some practitioners set forth a list of “best practices” or “core beliefs” in contracts or retention letters with stakeholders. Others disclose their theories of practice or philosophic underpinnings at stakeholder meetings. And some choose not to be explicit about the standards to which they ascribe. Although the SPIDR Report on Competencies is useful in that it is the first attempt to address guidelines in the CMSD field, the substance of those guidelines is somewhat troubling. For example, the guidelines use the word “beliefs” to refer to end states which are aspirational, prescriptive, and make assumptions about “constructive working relationships,”<sup>47</sup> “improv[ing] the lives of all persons in organizations,”<sup>48</sup> and “enhanc[ing] organizational and personal growth.”<sup>49</sup> In some ways, the Competencies go beyond a “best practice” approach and seem to suggest a “best outcome” standard. The competencies and core beliefs are not well-known, and perhaps most importantly, have not been subjected to review, scrutiny, or comment.

The issue remains: Do designers as a profession need written guidelines to govern and guide our practice? Some would argue that it is too early to develop standards of conduct since we are still growing as a profession; others would posit that it is precisely because we are still developing as a profession that we need parameters and guidelines to guide us and ensure integrity. Standards of conduct can implicitly serve to not only mold, modify, and monitor the behavior of practitioners, but also to explicitly announce to the public and consumers what they can expect from those in the profession.<sup>50</sup> One compromise might be the development of a set of “best practices” for designers in lieu of full-blown formal CMSD standards of conduct. At a minimum, as we move into the next generation of CMSD, we owe it

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47. SPIDR’S COMMITTEE ON CREDENTIALS, COMPETENCIES AND QUALIFICATIONS, *supra* note 43, at 1.

48. *Id.* at 2.

49. *Id.* at 8.

50. As Professor Bordone has stated, “standards of conduct might not quite answer the question between autonomy of the client and bringing in our expertise.” Posting of Bob Bordone to Dispute Systems Design Symposium 2008, Panel 1: Dealing with the Inevitable: DSD in the Institutional Context, <http://blogs.law.harvard.edu/hnmcp/2008/03/03/dsd-in-the-institutional-context> (Mar. 7, 2008, 16:34 EST).

to ourselves and our clients to begin a dialogue about how we insure accountability, integrity, impartiality, competence, respect, and self-determination.

#### CONCLUSION

The past twenty years have seen an expansion of CMSD in the organizational context: in schools, corporations, government agencies, hospitals, and many other settings. As that CMSD practice has grown, so too have the issues and challenges which face the discipline. We as a profession stand at a threshold. We have the opportunity to make a purposeful choice to “walk the talk” and to engage in transparent and open dialogue about the emerging issues in our profession. We can choose to invite stakeholders and colleagues from other disciplines to participate in those conversations. Second generation CMSD can be a passage to honoring each stakeholder, each practitioner, and each design for its part in the management of conflict and resolution of disputes on all levels—individual, group, community, organizational, and global.