Suggested Directions for the Dispute Resolution Community

Theory-of-Change Symposium

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

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

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

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

Rename It. "DR" and "ADR" suffer from a lack of identity, clarity, and appeal. The terms are not "sticky" – they are not immediately understood and remembered, and they do not change something. Concreteness, simplicity, emotional appeal, and credibility are necessary elements of sticky ideas, and DR and ADR are decidedly unsticky. The terms can apply to procedures, systems, philosophies, practice areas, curriculum,

ideology, skill sets, and a body of law. The comprehensiveness and vagueness of DR and ADR eviscerate their meaning.

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

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

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

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

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

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

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

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

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

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

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

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