THE SEVEN ELEMENTS OF DISPUTE SYSTEMS DESIGN

Lisa K. Dicker[*] & Neil McGaraghan[**]

ABSTRACT

In this article, clinical instructors at the Harvard Law School Dispute Systems Design ("DSD") Clinic propose adapting an old analytical framework — The Seven Elements of Interest-Based Negotiation — for a new context, dispute systems design ("DSD"). A relatively young field, DSD is the "applied art and science of designing the means to prevent, manage, and resolve streams of disputes or conflict."[1] DSD can feel broad and opaque to newcomers and thus is in need of a foundational framework, especially for beginners. The Seven Elements of DSD — alternatives, interests, options, criteria, communication, relationship, and commitment — can serve a helpful guiding framework for practitioners, scholars, and students alike in assessing, evaluating, and making design recommendations for dispute systems. The authors explain each of the Seven Elements and their application as tools of DSD and offer context for each element based on lessons learned from DSD practice.

*. Lisa K. Dicker is a Clinical Instructor in Harvard Negotiation & Mediation Clinical Program's Dispute Systems Design Clinic and Lecturer on Law at Harvard Law School.

**. Neil McGaraghan is Senior Clinical Instructor in Harvard Negotiation & Mediation Clinical Program's Dispute Systems Design Clinic and Lecturer on Law at Harvard Law School.

1. *See, e.g.* LISA BLOMGREN AMSLER, JANET K. MARTINEZ, & STEPHANIE E. SMITH, DISPUTE SYSTEM DESIGN: PREVENTING, MANAGING, AND RESOLVING CONFLICT 7 (2020) (One of the most robust textbooks on DSD and it was published just four years ago in 2020).

INTRODUCTION

"Okay, but what are we looking *for*? And, what do we do once we know that?"

These are questions that many of our students in the Dispute Systems Design Clinic at Harvard Law School have as they enter the semester. Compared to other areas of dispute resolution — such as negotiation, mediation, or arbitration — dispute systems design ("DSD"), as a unique field that can be taught and studied, is a relatively recent development.[2] DSD is both the "applied art and science of designing the means to prevent, manage, and resolve streams of disputes or conflict,"[3] and the product of that design process, i.e. a system designed to prevent, manage, and resolve disputes or conflict.[4] Dispute systems include eviction diversion programs, workplace grievance processes, court-connected mediation programs, transitional justice processes, board decision-making rules, and mediated peace negotiations.[5] Although DSD is often thought of as belonging in the alternative dispute resolution realm, even litigation is an example of a dispute system. DSD is the study and practice of how systems aimed at preventing, managing, and resolving disputes or conflicts should be created, structured, analyzed, evaluated, and improved.[6] DSD asks the question, "how can systems be designed to better resolve disputes?" rather than the question many of the aforementioned dispute resolution ("DR") fields ask, which is, "how do I better operate within a dispute resolution system to help the participants in that system achieve better outcomes?" For example, while mediation literature may examine how a mediator can improve their practice to achieve better outcomes for participants during a mediation,[7] DSD literature would examine how court-adjacent mediation programs can be structured to achieve better outcomes for participants who go through the

2. *Id*; NANCY H. ROGERS ET AL., DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES (1st ed. 2013) (May have been the first textbook published on DSD and was published in 2013.).

3. AMSLER, MARTINEZ, & SMITH, *supra* note 1, at 7.

4. *Id.*

5. *See, e.g., id.* at 39-61; ROGERS ET AL., *supra* note 2, at 13–15 (both books giving examples of the range of dispute resolution systems).

6. *See* AMSLER, MARTINEZ, & SMITH, *supra* note 1, at 1

7. *See generally, e.g.*, DAVID A. HOFFMAN ET AL., MEDIATION: A PRACTICE GUIDE FOR MEDIATORS, LAWYERS, AND OTHER PROFESSIONALS (2013); JENNIFER E. BEER ET AL., THE MEDIATOR'S HANDBOOK (2012).

mediation process.[8] Considering that DSD is both broad in that it focus on principles that apply in any type of dispute system and narrow in that a practitioner might study a specific dispute system through a design lens, it can be a difficult field for scholars and students alike to grasp.

The conceptualization of a field that aims to study and design better mechanisms for preventing, managing, and resolving disputes far predates the coining of the term "dispute systems design." Mary Parker Follett's scholarship in the early 1900s on organizational design, management theory, and negotiations — which was based on her background in social work — discussed how government and workplaces could be structured to function more effectively and collaboratively, bolster positive relationships and communication, focus on needs, and avoid and resolve conflicts.[9] Parker Follet's work sparked much subsequent research and writing on bettering the individual practice of DR.[10] Countless books, articles, lecture series, syllabi, workshops, and more have described skills to use and frameworks to analyze negotiation, mediation, arbitration, facilitation, community conferencing, and other areas of dispute resolution. These works teach a common language that helps students, instructors, and practitioners alike analyze engagement, best practices, areas for improvement, debates in the field, and more. Despite academic advancements in many areas of dispute resolution, DSD scholarship has lagged behind.

DSD may have first appeared as a term in the late 1980s when William Ury, Jeanne M. Brett, and Stephen B. Goldberg began writing on the theory of designing interest-based systems to address corporate industry disputes.[11] Others soon followed,[12] initially focusing largely on DSD in

8. *See* AMSLER, MARTINEZ, & SMITH, *supra* note 1, at 199–209 (Examining USPS's employment mediation program, its outcomes, and lessons learned from the program's design).

9. *See generally* MARY PARKER FOLLETT, THE NEW STATE (Martino Publishing, 2016) (1918); MARY PARKER FOLLETT, CREATIVE EXPERIENCE (Forgotten Books 2018) (1924).

10. *E.g.*, Lisa Blomgren Amsler, *The Dispute Resolver's Role Within a Dispute System Design: Justice, Accountability, and Impact*, 13 U. ST. THOMAS L.J. 168, 170–71 (2017); *See* AMSLER, MARTINEZ, & SMITH, *supra* note 1, at 8–9.

11. Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 124 (2009); *See* WILLIAM URY, JEANNE M. BRETT, & STEPHEN B. GOLDBERG, GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT (1st ed. 1988).

12. *See* Lisa Blomgren Amsler, *The Dispute Resolver's Role Within a Dispute System Design: Justice, Accountability, and Impact*, 13 UNIV. OF ST. THOMAS L. J. 168, 171 (2017).

organizations,[13] business,[14] and labor issues.[15] As the field continued to expand, scholarship also began to engage with some of the more meta challenges in DSD, such as ethics[16] and creating an analytic framework for DSD.[17] In more recent years, as DSD courses are now taught in law schools, several textbooks[18] have been published by prominent academics in the field and have, in our experience, greatly aided student learning. However, compared to other areas of dispute resolution — especially areas focused on individual practice — literature on DSD remains lean.

The authors of this article teach students and supervise their work in Harvard Law School's Dispute Systems Design Clinic.[19] One significant challenge of learning and teaching DSD is the relative scarcity of resources to guide students in DSD fundamentals and terminology. Where other areas of DR have developed very basic tools, a clear lexicon, and base-level frameworks to serve as an entry point for beginners, DSD largely lacks these fundamentals. This can be an immense hurdle to students entering the clinic as they struggle to understand what a system is, how to evaluate a pre-existing system's strengths and shortcomings, how to analyze the system's outcomes, and how to consider new designs or improvements. Where there is a challenge, though, there also lies an opportunity to add to the emerging body of DSD scholarship and draw connections between concepts that are familiar to DR students, instructors, and practitioners, and to provide a bridge to essential elements of DSD practice.

13. *See* DAVID B. LIPSKY, RONALD L. SEEBER, & RICHARD D. FINCHER, EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR DISPUTE RESOLUTION PROFESSIONALS (2003).

14. *See* CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS (1996).

15. *See* Mary P. Rowe, *Disputes and Conflicts Inside Organizations: A Systems Approach*, 5 NEGOT. J. 149 (1989).

16. *See* Carrie Menkel-Meadow, *Are There Systemic Ethics Issues in Dispute System Design? And What We Should [Not] Do About It: Lessons from International and Domestic Fronts*, 14 HARV. NEGOT. L. REV. 195 (2009).

17. *See* Smith & Martinez, *supra* note 11, at 124.

18. *See, e.g.*, NANCY H. ROGERS ET AL., DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES (2d ed. 2013); *see also* AMSLER, MARTINEZ, & SMITH, *supra* note 1.

19. *See Who We Are, What We Do*, HARVARD NEGOT. & MEDIATION CLINICAL PROGRAM, https://hnmcp.law.harvard.edu/ [https://perma.cc/F39C-325A] (last visited Apr. 7, 2024) (Explaining our program and the Dispute Systems Design Clinic. We encourage the reader to click on the relevant tabs to learn more about our clients and project work.)

Through our work with students, we have found that the Seven Elements of Interest-Based Negotiation[20] — alternatives, interests, options, criteria, communication, relationships, and commitment — can be repurposed into the Seven Elements of DSD and serve as a framework for understanding, analyzing, evaluating, and designing dispute systems. When retooled for application to DSD, the Seven Elements can serve as a foundational tool from which more complex DSD theory can be better grasped. In this article, we explore how to use the Seven Elements of DSD as an entry point to understanding systems and design work. To do so, we draw on our experience as clinical instructors and the lessons learned from our pedagogy including anecdotes from our work in the Dispute Systems Design Clinic and analysis of well-known case studies of dispute resolution processes.

This article begins by exploring some of the challenges we see in DSD's lack of foundational frameworks for beginners, drawing from our own experiences working with students. Then, the article presents the Seven Elements of DSD, explaining each element in turn. Finally, the article concludes by providing lessons learned from our experience and what we view as opportunities for the continuing growth in use of the Seven Elements of DSD.

I. CHALLENGES PRESENTED BY DSD'S LACK OF FOUNDATIONAL FRAMEWORKS FOR BEGINNERS

We have found that DSD is so far afield from most students' prior experience that it can feel opaque and inaccessible — until a designer has done the work, it is exceedingly difficult to picture what "the work" actually means.[21] The idea that systems for resolving dispute are the product of intentional design — or that designing such systems could be a legitimate professional pursuit — is a revelation to many. Even the commonly used moniker — dispute system design — is mystifying or at best unevocative. "You want us to design a system of disputes? What?" The hours (more

20. Katie Shonk, *What is Negotiation?*, HARV. L. SCH. PROGRAM ON NEGOT.: DAILY BLOG (Feb 1, 2024).

21. It strikes one of the authors as similar to the experience of enduring the opacity of the Federal Rules as a first-year law student in Civ Pro, without the benefit of having ever drafted a complaint, answer, set of discovery requests, or a motion to intervene (or a motion to do anything, for that matter).

accurately measured in days or weeks) we have devoted to developing our website to give students and potential clients a digestible explanation of DSD would confound all but those who have undertaken a similar effort.

No wonder, then, that even basic DSD building blocks — conflict assessment, assessment planning, and system, power, and stakeholder mapping, to name a few — can feel daunting to students and even practitioners. Imagine being a U.S.-based student at the threshold of a DSD project to develop a mediation program for Brazilian judges managing complex and sometimes violent disputes between landowners and communities that have been established for years on remote private land. How does one make sense of that vast system, its stakeholders, and their needs? Layer on questions of power[22], achieving a measure of justice[23], critical DSD,[24] and a host of potentially thorny ethical dilemmas,[25] all of which are implicated in the design process and recommendations, and the situation becomes a massive undertaking even for seasoned practitioners.

To grapple with these issues and bring a structured approach to the many DSD challenges faced by veterans or neophytes alike, an analytical framework is invaluable.[26] An effective framework helps shape essential inquiries to understand an existing system and its stakeholders, guide a culturally appropriate design process, and inform system design choice.[27] Consistently applied, a framework gives designers a way to draw comparisons across design projects, and to carry forward lessons learned from the experience of any given project.[28]

We are not the first to propose an analytical DSD framework. Lisa Blomgren Amsler, Janet K. Martinez, and Stephanie E. Smith propose a framework that focuses on (i) the goals of the dispute system (e.g., efficiency, user satisfaction, just outcomes, etc.), (ii) understanding the stakeholders, (iii) context and culture, (v) the structure (i.e., the process options), (v) the resources to be devoted to the system and (vi) measuring

22. *See generally* PHYLLIS BECK KRITEK, NEGOTIATING AT AN UNEVEN TABLE: DEVELOPING MORAL COURAGE IN RESOLVING OUR CONFLICTS (2d ed. 2002).
23. *See* AMSLER, MARTINEZ, & SMITH, *supra* note 1, at 14–15.
24. *See generally* JENNIFER ESPOSITO & VENUS EVANS-WINTERS, INTRODUCTION TO INTERSECTIONAL QUALITATIVE RESEARCH 12–22 (2022).
25. *See* Menkel-Meadow, *supra* note 16, at 207.
26. Smith & Martinez, *supra* note 11, at 12.
27. *Id.* at 14–15.
28. *See, e.g.*, BRUCE PATTON, HANDBOOK OF DISPUTE RESOLUTION 280 (2005).

success and accountability.[29] Similarly, Nancy H. Rogers et al. suggest an analytical framework centered on identifying stakeholders, their goals and interests, and context, including organizational culture, structure, and customary practices.[30]

Our aim is not to supplant these broad frameworks. Indeed, the textbooks from which they are drawn are required reading for our students, and they heavily inform our thinking about our proposed framework. Approaching DSD from different perspectives and through multiple analytical lenses allows designers to develop a fuller, more complete understanding of a dispute system. Rather, our experience with students — in clinical and classroom settings — shows that they will benefit from an even more focused and familiar framework that leverages the negotiation background that many of them bring to DSD.

We see a valuable analog in the Seven Elements framework for managing negotiation, which was developed at the Harvard Negotiation Project[31] and traces its roots to *Getting to YES* by Roger Fisher and William Ury.[32] The Seven Elements framework commonly appears in law school and other graduate level negotiation courses, executive education seminars, and reviews of negotiation theory and practice.[33] The Seven Elements have become cornerstones of negotiation practice and teaching and are familiar to DR students and practitioners (and generally familiar to anyone who has read *Getting to Yes*[34] since it was first published in 1981). The framework

29. AMSLER, MARTINEZ, & SMITH, *supra* note 1.
30. ROGERS ET AL., *supra* note 18, at 69.
31. PATTON, *supra* note 28, at 280.
32. ROGER FISHER & WILLIAM URY, GETTING TO YES (3d ed. 2011).
33. *E.g.*, Pon Staff, *Seven Elements,* HARV. L. SCH. PROGRAM ON NEGOT. (April 13, 2009), https://www.pon.harvard.edu/glossary/seven-elements/ [https://perma.cc/MZ7J-NB9A] ; Zach Church, *Seven keys to effective negotiation*, MASS. INST. TECH SLOAN SCH. MGMT. *f*https://mitsloan.mit.edu/ideas-made-to-matter/seven-keys-to-effective-negotiation [https://perma.cc/EV3L-H645] (last visited April 8, 2024); *Alternative Dispute Resolution*, GEORGETOWN L., *https*://curriculum.law.georgetown.edu/jd/alternative-dispute-resolution/ [https://perma.cc/KA5D-BATT] (last visited April 8, 2024); MICHAEL WHEELER, NEGOTIATION ANALYSIS: AN INTRODUCTION (2000), Jeff Weis, Vantage Partners, Preparing & Conducing Effective Negotiations: Using "the Seven Elements" 1 (January 22, 2013), https://arpa-e.energy.gov/sites/default/files/documents/files/Weiss%20Negotiation%20Presentation%20ARPA-E%20January%202013%20%28for%20distribution%290.pdf; PATTON, *supra* note 28, at 279–99; TANYA ALFREDSON & AZETA CUNGU', NEGOTIATION THEORY AND PRACTICE 1, 17 (2008), https://www.fao.org/3/bq863e/bq863e.pdf.
34. ROGER FISHER & WILLIAM URY, GETTING TO YES (1st ed. 1981).

was developed to serve many of the same purposes we seek to achieve in DSD: making sense of complex terrain, defining goals and making wise process and substantive choices, navigating varied cultural contexts, and incorporating learning over time.[35] And so, we introduce. . .The Seven Elements of Dispute System Design.

II. THE SEVEN ELEMENTS OF DSD EXPLAINED

We reframe the Seven Elements of Interest-Based Negotiation — alternatives, interests, options, criteria, communication, relationships, and commitment — into the Seven Elements of Dispute Systems Design to create a framework to assist designers, including our students, in understanding, analyzing, evaluating, and designing dispute systems. As such, the Seven Elements of DSD are relevant in the assessment, evaluation, and recommendations[36] stages of DSD. We introduce the Seven Elements of DSD to students after we have already taken the initial steps of DSD, including taking design initiative, identifying what types of disputes make up the conflict stream and the stakeholders involved in the system.[37]

In practice, the Seven Elements of DSD are used collectively, and we will discuss how they fit together at the conclusion of this paper. However, for clarity's sake, we introduce each of the seven individually and provide a case study highlighting each particular element in the system.

A. Alternatives

The first of the Seven Elements is alternatives. In the context of negotiations, alternatives are typically introduced as the walk-away possibilities parties have if they do not reach a negotiated agreement with

35. *Id.*

36. For our students in the Dispute Systems Design Clinic at Harvard Law School, we break the DSD semester down into three phases: assessment, which involves collecting information about the system from stakeholders and through secondary research; evaluation, which involves turning the information collected into findings on the system's strengths, challenges, shortcomings, and opportunities; and recommendations, which involves drafting advice and guidance on designing or improving the system as responsive to the evaluation. *Harvard Dispute Systems Design Clinic*, HARV. L. SCH., https://hls.harvard.edu/clinics/in-house-clinics/harvard-dispute-systems-design-clinic/ [https://perma.cc/545T-X6ET] (last visited March 24, 2024).

37. ROGERS ET AL., *supra* note 18, at 6–7.

the other party or parties.[38] So, for instance, if a tenant is negotiating a lease renewal with their landlord, alternatives are the possibilities the tenant has to meet her interests if she does not reach an agreement with the landlord. These could include reaching an agreement with a landlord down the street or subleasing her friend's apartment. Alternatives are results that can be reached *away* from the negotiation table — the most favorable of these being a party's Best Alternative to a Negotiated Agreement ("BATNA").[39] Common negotiation advice is to have clarity as to your own BATNA — and an idea about the other party's BATNA.[40] To reach a sensible agreement, the deal must be better than your own BATNA, and also better than the other party's BATNA.[41] Otherwise, neither party should agree to the deal.[42]

When translating this element into DSD, we are no longer thinking of alternatives to a negotiated agreement, but rather the walk-away possibilities a party or parties have if they do not resolve their conflict in the system. For example, if the dispute system is a court-connected mediation program for a small claims court, then the alternatives a party may have if their dispute is not resolved through mediation would include proceeding to litigation or dropping the case entirely. Similarly, if the system is a workplace grievance process and the parties' dispute is not resolved, perhaps the employee will leave the job, file a lawsuit, or unhappily remain on the job and negatively affect the workplace from the inside.

When understanding how a system functions and areas where the system can improve, it is important to assess when and why parties might exercise their Best Alternative to the System Outcome ("BATSO"). Certain parties may never enter the system because they do not feel the system is likely to meet their interests, they do not understand the system, or they simply do not know the system exists. Some parties may defect from the system at various stages of the process. Perhaps they originally found the system useful but then, after engaging, determined their substantive interests would be better met through one of their alternatives. Or, the process was moving too slowly and thus their procedural interests were not

38. PATTON, *supra* note 28, at 283.
39. FISHER & URY, *supra* note 32, at 101–07.
40. *Id.*
41. PATTON, *supra* note 28, at 283–85.
42. *Id.*

being met. Or, they did not have the advising support they needed in the process, and they felt lost and powerless in comparison to the other party or parties. Parties could also make it all the way through the system and reach a potential commitment but ultimately decide the proposed solution does not meet their substantive interests well, so they reject the proposed solution and walk to an alternative. There are infinite reasons why a party may choose not to engage in or leave a system; however, as dispute system designers, it is crucial to understand themes and patterns around when and why parties walk to their alternatives to then understand how to improve the system.

i. Case Study: Landlord Participation in Eviction Diversion Programs

Eviction diversion programs are systems that consistently face the challenge of overcoming landlords' BATSO of continuing with eviction proceedings in court, because their likelihood of success in court is so high.[43] For instance, in St. Louis in a "study of all landlord-tenant cases that concluded with a trial or default judgment in 2012, only two cases (0.04%) ended in favor of the tenant, while 4,934 cases (99.96%) ended in favor of the landlord." [44] Between 2016 and 2019 in Shelby County, Tennessee — where Memphis is located -- court data shows that landlords were successful in 80% of eviction cases while a clear ruling for the tenant occurred in only 1.3% of cases.[45]

If landlords overwhelmingly opt out of eviction diversion programs because they believe they will prevail in court, designers must entice the participation of landlords by demonstrating how eviction diversion programs can meet their interests better than their BATSO. A project for the American Bar Association led by Clinical Instructor Deanna Pantín Parrish of Harvard Law School's Dispute Systems Design Clinic found through

43. *See* Deanna Pantín Parrish, *Designing for Housing Stability: Best Practices for Court-Based and Court-Adjacent Eviction Prevention and/or Diversion Programs*, A.B.A. & HARV. NEGOT. & MEDIATION CLINICAL PROGRAM 1, 35–36 (2021), https://hnmcp.law.harvard.edu/wp-content/uploads/2021/06/Deasigning-for-Housing-Stability.pdf **[**https://perma.cc/BNX4-SZC2]**.**

44. Karen Tokarz & Elad Gross, *Addressing the COVID-19 Eviction Crisis Through Court and Community Mediation*, 67 ST. LOUIS BAR J. 26, 28 (2021), https://usam.com/wp-content/uploads/2021/05/Addressing-the-COVID-19-Eviction-Crisis-Through-Mediation.pdf f **[**https://perma.cc/A7PS-5FXH].

45. Ranya Ahmed, Sarah Abdelhadi, Madeline Youngren, & Carlos Manharrez, *The Effect of State & Local Laws on Evictions*, LEGAL SERVICES CORP. 1, 3 (2021).

nationwide surveys that ">76% of property owners surveyed estimated that evicting a tenant cost them between $1,000-$5,000, not including arrearages or cut offs in rental income."[46] Thus, designers of eviction diversion programs could create robust outreach programs to landlords to clearly explain the costs of eviction and the monetary benefits of participating in eviction diversion programs. Taking a more directive approach, eviction diversion system designers in Philadelphia passed a number of citywide laws and policies to mandate participation, including an administrative order passed by the Philadelphia Municipal Court "requiring landlords to attend mediation, seek rental assistance, and wait forty-five days before filing an eviction action for nonpayment of rent."[47] Whether by incentivizing or mandating participation, to build effective systems designers of eviction diversion programs must consider the parties' alternatives.

B. Interests

Negotiation students learn early on the importance of understanding parties' interests — the needs and desires that motivate the parties to seek a negotiated agreement.[48] Skilled negotiators seek to understand the parties' interests well enough to know how proposed outcomes measure up against available alternatives.[49] A negotiator asks: does a proposed agreement satisfy my needs, wants, motivations as well as possible (or at least better than my BATNA), and does it satisfy my counterpart's interests well enough to be "yes-able" and durable? These questions can only be answered when the process generates a thorough understanding of the parties' interests.[50] Students learn to ask "why," "why not," "what would be wrong with this proposal," "what do you like about that proposal," or "can you say more about why that is important to you". Through curiosity, inquiry, and

46. Parrish, *supra* note 43, at 35–36.

47. Deanna Pantín Parrish, *Just Diversion: Designing Eviction Mediation to Address Incentives and Inequities*, 68 WASH. U. J. L. & POL'Y 63, 80–81 (2022); *See* Order in re: Residential Eviction Moratorium and Exceptions. Serv. Of Writs and Alias Writs of Possession, Philadelphia Mun. Ct. (Apr. 1, 2021), https://www.courts.phila.gov/pdf/regs/2021/15-of-2021-PJ-ORDER.pdf.

48. PATTON, *supra* note 28, at 280–81.

49. *Id. at* 280–81, 283–84.

50. *See generally* FISHER & URY *supra* note 32, at 42–57 (discussing the importance of both parties' interests in a negotiation).

gradual, reciprocal disclosure[51] of interests, the parties develop a deeper understanding of each other and of the various interests that need to be met to reach an agreement.

These concepts map neatly onto DSD, even as the focus shifts. Where negotiation seeks a substantive outcome that meets the parties' interests,[52] DSDers emphasize stakeholders' interests in the dispute system as a process for addressing conflict, and the substantive outcomes of the process.[53] The designer's task then is to design (or redesign[54]) a system that satisfies stakeholders' interests in both the manner and substance of how their disputes are resolved[55] (or does so at least well enough that the system is more desirable than the BATSO). As in the negotiation setting, curiosity and searching inquiry are essential to a designer's ability to unearth, understand, and account for stakeholders' interests. We find that students' familiarity with and experience exploring interests as an element of an analytical framework make it readily transferable to dispute systems design.

That is not to say that the task of understanding stakeholders' interests is easy or uncomplicated — it is neither. Simply identifying the various stakeholders whose interests matter, how the interests relate to each other, stakeholders' relative influence vis-à-vis each other, and determining whose voice needs to be elevated are all essential and challenging threshold inquiries. As students learn about the various stakeholders, they may find their design process[56] needs evolve to account for stakeholders' interests. For example, they may consider more or less transparency in the design process; preferences about assessment methodologies (e.g., whether the organizational culture embraces open focus groups, one-on-one interviews, or anonymous surveys, etc.); or, regularly informing and consulting stakeholders about progress and proposed designs.

Beyond design process interests, a designer needs to fully understand stakeholders' interests in the structure of the dispute system itself. There are myriad questions to address. At a high level, students might begin to frame their assessment of interests by seeking to understand stakeholders' satisfaction with how conflicts are resolved in the existing system. What has

51. PATTON, *supra* note 28, at 293–94.
52. FISHER & URY, *supra* note 32 at 42–45.
53. *See generally* AMSLER, MARTINEZ & SMITH, *supra* note 1, at 12–13, 25–38.
54. *See* Smith & Martinez, *supra* note 11, at 124.
55. *Id.*
56. *See id.*

worked? Where has the system fallen short? How do system users perceive the benefits of the system for certain stakeholders versus others? What has been their experience trying to access the system? How well has the system served their needs and, where it has, how has it done so? Where it has not, how has it fallen short? Each of these questions should be examined with an eye not only toward the stakeholders' process interests, but also their interests in the substance of system outputs — what are those interests, and how well is the system meeting them?

Developing an understanding of interests should also include learning about organizational or community values and culture. Does the culture tend to value collaboration and relationships, such that stakeholder interests would be best served by interest-based DR processes? Does it prioritize speed and finality of dispute resolution, perhaps militating in favor of arbitration? Is the ability to organize and assert power (e.g., in a labor or activist movement) a key driver of organizational identity?[57] Which stakeholders drive these values and this culture? Are the interests of any stakeholders under- or unrepresented? How do values and culture impact substantive outcomes?

Assuming, as we do, that a dispute system should aim to deliver justice,[58] the designer needs to be clear about how the system will meet stakeholders' interests in justice and what the concept means for different stakeholders. What would "just outcomes" look like to stakeholders? What types of outcomes would feel unjust? How do stakeholders articulate their conception of "fairness"? Is it procedural? Communitarian? Substantive?[59]

As designers consider efficiency interests, they should seek to understand whether stakeholders have patience and time for a design with multiple or layered process options or prefer a narrow, but perhaps speedier DR mechanism. Tracking the connection between efficiency and cost, what are the system sponsor's interests as they relate to cost and resources?

Armed with answers to these questions, the designer must understand and reconcile where possible, competing stakeholder interests. Whose interests prevail? Whose interests should be elevated to account for existing systemic inequality? The choices flowing from these questions, of course, should be influenced by the designer's understanding of the relative

57. *See id.* at 140.
58. AMSLER, MARTINEZ, & SMITH, *supra* note 1, at 14.
59. *See id.* at 75.

importance that stakeholders place on the system's ability to enhance or preserve relationships.

i. Case Study: The 9/11 Victims Compensation Fund

Congress created the 9/11 Victim's Compensation Fund in the immediate aftermath of the 9/11 terrorist attacks on the United States.[60] And while the primary driver of the legislation may have been to avoid potentially catastrophic litigation and damages awards against the airline industry,[61] the legislation also authorized an uncapped compensation fund for victims of the attack.[62] The work of designing the Fund and calculating awards was taken up by a team led by Kenneth Feinberg.

Feinberg's account of their work is detailed in his book "What is Life Worth?"[63], which offers poignant insight into the challenge of discovering, understanding, and balancing the complex, often frustrating and tortured, interests of survivors and family members who were potential Fund claimants. Although the legislation set broad guidelines for determining awards, it also gave Feinberg a degree of discretion, and thus the ability (and weighty responsibility) to engage in more than a strict formulaic distribution.[64] While Feinberg viewed maximizing the awards as an important goal, he also describes seeking to design a process that struck claimants, the public, and the government as achieving a measure of justice.[65]

To be sure, many claimants expressed a clear interest in maximizing monetary recovery from the fund. But beneath that surface, Feinberg found an incredible array of varied and often competing interests, including:[66]

- A process that would make room for feelings and humanity and did not reduce a loved one to cold written forms and applications;[67]

60. KENNETH R. FEINBERG, WHAT IS LIFE WORTH, at XV (2005).
61. *Id.* at 16–19.
62. *Id.* at 21.
63. *See generally id.*
64. *Id.* at 25.
65. *Id.* at 46.
66. *See id.* at 68.
67. *See, e.g.*, *id.* at 140–43.

- A desire to share, on the record, the pain of loss, or the unique wonder and beauty and heroism of a spouse, sibling, parent, or child;[68]
- A system that would determine the priority of competing claims, e.g. between a victim's parents and a fiancée;[69]
- A system that acknowledged the rights of same-sex couples;[70]
- Punishment of someone, some government, God, or the system;[71]
- An award that accounted for the wealthy quality of life that a loved one's job had afforded;[72]
- An award that accounted for the fact that a father's life was not less valuable because he was a Receiving Department manager and not an investment banker;[73]
- And perhaps above all, recognition of the fundamental impossibility of putting a dollar value on a loved one's life.[74]

Feinberg found that for some victims' families, there was no amount of money and no mechanism at his (or anyone's) disposal to satisfy their interest in simply having another day with their loved one.[75] Some families seemed genuinely grateful for a system and award that met their interest in acknowledging the pain of loss,[76] while others felt cheated by a system incapable of meeting that interest.[77] Overall, though, it might be seen as a measure of Feinberg's at satisfying claimants' interests that nearly 100% of

68. *See, e.g.*, *id.* at 93–117.
69. *Id.* at 68-69.
70. *Id.*
71. *Id.* at 52–53 (government), 131 (God), 101 (the system).
72. *Id.* at 52.
73. *Id.* at XVIII.
74. *Id.* at 141.
75. *Id.* at 101.
76. *Id.* at XX–XXI.
77. *Id.* at 143.

the eligible families agreed to participate in the Fund rather than opting for litigation.

C. Options

In negotiations, options are all of the possible agreements or components of agreements.[78] Options are focused on the potential negotiated *outcomes*.[79] In the DSD context, we are similarly outcome-focused — we are looking at the range and quality of outcomes and components of outcomes for a party or parties in the system, as well as the range of potentially better outcomes and components of outcomes the system could reach. What optionality does the system allow to substantively resolve the dispute that came to the system?

Examining options in a system design is closely linked to the element of interests, especially substantive interests, and to the element of criteria. Designers should engage questions such as:

- How well do the outcomes of the system meet the substantive interests of parties in conflict?
- How well do the outcomes of the system meet the substantive interests of third-party stakeholders?
- What substantive interests do the outcomes meet? What substantive interests are not met?
- Whose substantive interests do the outcomes meet?
- What process(s) are being used to generate options that meet substantive interests?
- What other options to meet substantive interests exist but are not represented in the typical outcomes of the system? And, why is the system not producing those outcomes?

In some systems, options are not generated creatively by the parties, but rather are a set menu determined by the system designers. Sometimes, they

78. PATTON, *supra* note 28, at 283.
79. *Id.*

are instead generated by a certain decision-maker or set of decision-makers at a specific stage in the system. In some systems, the parties must agree to the options for a commitment to be reached. In other systems, the options are both generated and imposed by a decision-maker or set of decision-makers. Small claims mediation is an example of the former, whereas arbitration is an example of the latter. When designing a system from scratch to resolve disputes, designers brainstorm the types of solutions or determinations the system can make to address the dispute and meet the substance and process interests of stakeholders. To evaluate an existing system and offer recommendations for improvement, a designer can examine outcomes of the system to see what options the parties typically adopt or what options are otherwise set by the system and the processes in place for creating those options.

For example, if evaluating a small claims mediation system, a designer would review agreements reached by parties to analyze factors, including patterns in agreements, areas where value was left out, which and whose substantive interests were being met, and how the agreements align with relevant criteria. This review allows a designer to assess how the content of the options in a system can be improved to better meet the substantive interests of the disputing parties and improve the fairness and equitability of outcomes.

Designers need to understand the existing process for generating options because the process often has a direct impact on the options offered (and adopted) to resolve the dispute. For instance, in a small claims mediation system, is the mediator generating options? Or are the mediators in the system taking a directive option-generating approach while others are taking a facilitative approach, encouraging the parties to generate their own options? What impact does that difference in approach have on the agreements reached? If the parties are generating options, do those represented by an attorney tend to have more of their interests met in an agreement whereas *pro se* litigants have fewer interests met?

Understanding the options that were not adopted or otherwise set by the system is just as important as understanding those that were adopted because it reveals whether changes in processes could produce superior value-creating options that better meet substantive interests and do so in a more fair and equitable manner, or if there are exterior constraints on the system that can or cannot be designed around. In a small claims mediation

system, the designer would want to connect with mediators and former disputants to understand what other options were considered but not included in the agreement, as it is important to know not only the options that reached the final commitment, but also what else was considered and why those options were not selected. Constraints on a system, such as time, resources, lack of understanding of the system, and boundaries set in place by the law can limit the options that are available to the disputants.

Developing knowledge of what other options could exist as outcomes in a system can be difficult for a designer. To overcome this challenge, it can be helpful to use comparative examples of analogous systems in addition to inquiring about options that were considered and rejected in the system in question. A designer for a particular small claims mediation system may review other small claims mediation programs to see what outcomes are reached in those systems, how options are generated, and so forth, to determine what the system they are tasked to design could do better.

Understanding the options currently available in a system and the process for creating options in the system is key to understanding where there are challenges in reaching good, fair, and equitable outcomes for parties in the system and where there are opportunities for improving how disputes are resolved.

i. Case Study: New Hampshire's Felony Settlement Conference (FSC) Program

Settlement through plea bargaining is by far the most common result of criminal proceedings, with more than 95% of cases resulting in a criminal conviction through settlement in a plea bargain.[80] However, scholars have criticized the plea bargaining process for decades, arguing the negotiation process is unfair and coercive to defendants due to the incentives and immense pressures defense attorneys face to settle — such as heavy caseloads and preserving favorable reputations and relationships with judges — which disadvantage their defendant clients and the vastly

80. *See* Jennifer Reynolds, *Plea Bargaining 101*, A.B.A. DISP. RESOL. MAG. (Jan. 28, 2020), https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2020/dr-magazine-criminal-justice-reform/plea-bargaining-101/ [https://perma.cc/7RLH-T8X8].

disproportionate power differential between prosecutors and defendants.[81] Defendants are rarely present during plea negotiations, and thus, they may lack a voice in the process — including in option generation — and defendants may not know if their interests are being accurately represented by their attorneys.[82] This system can result in the options put forward and accepted outcomes primarily reflecting the interests of prosecutors. Moreover, these dynamics can create distrust between defense attorneys, their clients, and prosecutors. There is also rarely room for victims or their advocates to participate in plea bargains, yet they are key stakeholders in the process. These challenges in the plea-bargaining system can result in consistently biased or limited options.[83]

To help balance the power in option generation and consideration in plea bargaining, some jurisdictions have added voluntary mechanisms into plea bargaining processes, such as settlement conferences mediated by neutrals. One such system is the Felony Settlement Conference (FSC) Program in New Hampshire, which was first piloted by the Hillsborough County Superior Court South in 2012 Following an assessment and evaluation conducted by a Harvard Law School Dispute Systems Design Clinic team in 2014,[84] a committee of stakeholders across the state — including defense attorneys, prosecutors, and victim witness advocates — wrote the Felony Settlement Conference Policies and Procedures.[85] This document set forward a voluntary mechanism for parties to use after plea negotiations have begun and a settlement has not been reached.[86] The New Hampshire Superior Court then worked with the Dispute Systems Design Clinic again in 2015 to create an interest-based negotiation training for

81. *See* Rishi Batra, *Judicial Participation in Plea Bargaining: A Dispute Resolution Perspective*, 76 OHIO ST. L. J. 565, 568–70 (2015).

82. *Id.* at 569–71.

83. *See, e.g.,* Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQUETTE L. REV. 183 (2007); LINDSEY DEVERS, BUREAU OF JUST. ASSISTANCE U.S. DEPT. OF JUST., PLEA AND CHARGE BARGAINING (2011).

84. At the time of the evaluation, the clinic was known as the Negotiation & Mediation Clinic, but is now called the Dispute Systems Design Clinic.

85. *See* Rebecca Sigman, *Learning to Listen: An Evaluation of New Hampshire's Felony Settlement Conference*, 35 OHIO ST. J. DISP. RESOL. 193, 204 (2019).

86. N.H. SUPER. CT., FELONY SETTLEMENT CONFERENCE POLICY & PROCEDURES 1 (Dec. 1, 2015), https://www.courts.nh.gov/sites/g/files/ehbemt471/files/documents/2021-06/felony-settlement-conference-policies-and-procedures.pdf.

judges and the criminal bar in New Hampshire, specifically in the context of judge-facilitated settlement conferences.[87]

To initiate an FSC, the prosecutor and defense attorney may request a settlement conference "conducted by retired and senior associate New Hampshire Superior Court judges or active judges who have not had and will not have any contact with the case."[88] The settlement conferences include the judge and both attorneys, and may also include the defendant, the victim, a Victim/Witness Advocate, family members of the victim, family members of the defendant, law enforcement, or other relevant persons.[89] The requesting attorneys must work together to complete a form with this request that also denotes whether they are seeking an evaluative, facilitative, or restorative conference.[90] These conferences generate different options depending on the type: evaluative conferences involve the judge assessing and even recommending options; facilitative conferences involve the judge facilitating "negotiations by asking questions, determining what interests are most important to each party, and helping the parties to find options to satisfy these interests;" and restorative conferences add to the facilitative approach by also focusing on victim impact, defendant accountability, and apology.[91] This structure allows a leveling of the power imbalance between the parties, mitigates prosecutorial coercion, and promotes option generation that can better meet the interests of more stakeholders.[92]

87. Reynolds, *supra* note 80. One of the authors of this article, Lisa Dicker, was a student on the clinical team that created and delivered this training. Lisa Dicker & Clinic Partner, Interest-Based Negotiation Training for Judges and Members of the New Hampshire Criminal Bar (Dec. 4, 2015). Lisa subsequently delivered this training twice more with then-Clinical Instructor Heather Kulp. Lisa Dicker & Heather Kulp, Interest-Based Negotiation Training for Judges and Members of the New Hampshire Criminal Bar (May 13, 2016 & July 22, 2016). Kulp is now the ADR Coordinator for the New Hampshire judicial branch, and new training in 2021. Lisa Dicker & Shane Hebel, Interest-Based Negotiation Training for Judges and Members of the New Hampshire Criminal Bar (Dec. 17, 2021).

88. N.H. SUPER. CT., *supra* note 86, at 1.

89. Sigman, *supra* note 85, at 205; *see also* N.H. SUPER. CT., *supra* note 86.

90. N.H. SUPER. CT., *supra* note 86, at 1.

91. *Id.* at 2–3.

92. Sigman, *supra* note 85, at 229.

D. Criteria

Fairness — procedural and distributive — matters to disputants.[93] People have a very human need to perceive outcomes, and processes that produce them, as fair — at least to their side.[94] But perceptions can be quite *subjective*, and, for example, what feels to a parent like a perfectly reasonable decisional process and allocation of hours with the family car may feel like a sham to their teenager. Hence negotiators search for *objective* criteria against which to measure processes and outcomes, minimizing differences in subjective perception and leading to satisfaction with, or at least acceptance of and commitment to, outcomes.[95] Objective criteria, then, are external, independent standards that negotiators can consult to assess the fairness or legitimacy of an option on the table.[96] In the family car example, how do the teen's friends' families decide who gets to use the car, and when? What are the substantive outcomes of those processes? Are there family counselors who recommend processes to resolve this conflict? Are there national highway safety data that could shed objective light on the range of wise, available outcomes?[97]

Because our negotiation students are accustomed to seeking and applying objective criteria to improve perceptions of fairness, we find this to be a readily transferable inquiry for the DSD context. Indeed, we have found the search for objective criteria to measure fairness to be an especially helpful exercise for the dispute system designer, because of the importance of fairness on at least three different levels.

First, we care about the fairness of the system as it pertains to individual disputants and potential future disputants observing both the process and the outcomes that the system produces. Because fairness matters to disputants, our assessment of how well the system produces optimal outcomes[98] necessarily includes an evaluation of fairness. And because system users'

93. Nancy A. Welsh, *Perceptions of Fairness in Negotiation*, 87 MARQ. L. REV. 753, 753–54 (2004).

94. *Id.* To some degree and in some circumstances, people also care about their counterparts' and adversaries' perceptions of fairness, even if only for self-serving reasons. *Id.* at 753 n.1.

95. FISHER & URY, *supra* note 32, at 82–93.

96. PATTON, *supra* note 28, at 281–82, 287.

97. Or, in the sale of a business, negotiators might look to prior sales of comparable businesses in the same industry to find relevant, external examples of the earnings multiple that drove those sales, to help settle on an objectively fair multiple to use in their transaction.

98. *See* discussion of "Options," *supra* section III.c.

perception of fairness can differ if left to subjective factors alone, we look for objective measures that would be broadly persuasive to all or most stakeholders. We might ask: What are the criteria causing some users to perceive the processes and outcomes as fair?[99] What criteria cause others to see unfairness?[100] What types of criteria would be persuasive to stakeholders in this system? Among those types, are there examples that could be applied to this system and its outcomes to get a sense of objective fairness? To address fairness, designers should consult external sources the parties could agree are legitimate and relevant to their dispute.

Beyond considerations of fairness at the individual disputant level, a designer keeps an eye toward how well the system is achieving justice, broadly speaking.[101] While justice between disputants is certainly an important inquiry, it may be too narrow when, for example, the outcome of a dispute affects stakeholders who are not part of the process.[102] We need to ask: how are stakeholders forming their perceptions of the just nature of the process and its outcomes? What criteria matter to which stakeholders? What types of criteria for evaluating justice might be persuasive to various stakeholder groups? And, what specific external data might we apply to assess how well the system is achieving a measure of justice, broadly speaking?

99. And of course, not all objective criteria are viewed by all as relevant. For example, employees who tend to receive the highest bonuses within an organization might feel that "because our department generates the most revenue per FTE, it is fair that the company sets our annual bonuses higher than other departments." In this example, "revenue per FTE" is a readily identifiable, objective number that stakeholders receiving larger bonuses view as a fair criterion; but a DSD assessment may well find that employees in non-revenue centers in the business have a very different view of that factor's relevance to bonus determinations.

100. Looking again to the company described in the preceding footnote, stakeholders performing more of a back-office function may find revenue-generation to be an inherently unfair criterion: "Sure that department generates the most revenue per FTE, but that is not a fair bonus determinant. They can't do any of it without our IT support; management is entirely overlooking our critical contribution."

101. *See* AMSLER, MARTINEZ & SMITH, *supra* note 1, at 13–14.

102. Imagine a rural hospital system in which, due to cost constraints and declining pregnancy rates, only one of two member hospitals will retain a labor and delivery ward. The internal process for resolving any dispute about which hospital will give up its practice may well exclude some of the most critical stakeholders – patients!

Finally, as designers seeking to create objectively fair, just systems, students and practitioners alike can use criteria to help mitigate the effects of their own subjective biases and perceptions of fairness. Critical, reflective analysis[103] of the criteria the designers find persuasive and criteria they may be discounting or overlooking is essential.

i. Case Study: E-ppliances.com Defective Product Claims Process

Imagine an on-line retailer of home appliances — dishwashers, refrigerators, ranges, etc. — E-ppliances.com.[104] E-ppliances expects that some products will inevitably be damaged in transit, causing customers to demand a refund or replacement. The company has also found that customers submit claims for damage caused after delivery (e.g., during installation by the customer). To honor the former and protect against the latter, the company's written policy is to replace or refund damaged appliances, provided that the customer opens and inspects the shipment and reports any damage to the freight carrier before the carrier leaves the premises.

E-ppliances's claims department representatives are trained that enforcing this policy protects the company against fraud but are also given discretion to make exceptions for good cause with well-documented supporting evidence. During the COVID-19 pandemic, the company saw an increase in damage claims made without inspection and identification of damage at the time of delivery. There was a corresponding rise in irate customer complaints about claims being denied even when carriers, citing COVID-19 concerns, refused to wait for inspection. These claims were met by: dismissive customer service representatives; opaque guidance about what constitutes good cause; lengthy claims response times and extended back-and-forth with representatives demanding more detailed explanation and supporting evidence; and the absence of an appeal or review process for claims that were denied in full or in part.

An assessment of E-ppliances's system would require a careful look through a criteria-based lens. At the individual disputant level, a designer might inquire about objective data that could help representatives explain,

103. *See* ESPOSITO AND EVANS-WINTERS, *supra* note 24, at 17–20.

104. E-ppliances.com is a fictional company. Any resemblance that the facts described here bear to the actual customer experience of one of this article's authors is mostly coincidental.

and help customers understand, the reasons for the policy. There are also obvious questions about the objective fairness of the standards applied to customers' invocation of the "good cause" exception to the general policy requiring immediate inspection, documentation, and reporting. The assessment should identify whether the guidance is offered to individual customer representatives to define those standards; the source of any such guidance; industry practices that could inform the standards; how customer representatives decide to apply the standards; and how well the standards are communicated to customers.

There also are clear implications for systemic justice that a criteria-based analysis would assess. For example, setting aside whether the exceptions are supported by clear, detailed, objective factors, it would be important to understand differences in how the policy exceptions are applied. Where individual representatives grant exceptions to some customers but not others, a designer should look for patterns suggesting that divergent outcomes stem from subjective biases. They might ask: how does the rate of claims allowed for customers in tony suburban zip codes compare to the rate for rural or inner-city addresses? What patterns emerge from an analysis of the names of customers for whom exceptions are granted versus denied? What could be learned from differences in the background of photos submitted to document a claim? What measures might be employed to eliminate or minimize the risk that objective standards are not frustrated by subjective bias in discretionary resolution of customer claims? The same questions could, of course, be used to assess divergent outcomes generated by different representatives.

Finally, as dispute systems designers gauge the objectivity of criteria for resolving customer claims, it will be important for them to interrogate their own biases as to what constitute objectively fair criteria, objectively applied. They may find industry research helpful in shedding light on the ways in which seemingly "objective" criteria in the customer claims resolution context can be negatively affected by implicit bias, or examples from industry leaders who have paved the way for the elimination of bias in customer service. Even if such resources do not exist or do not help in this particular context, we suggest that the practice of identifying and discussing

with colleagues the biases that might influence the designer's ability to gage "objective fairness" is a vital step in the design process.[105]

E. Communication

The definition of communication in the negotiation context also applies to DSD. Communication is defined broadly as the exchange of thoughts, messages, or information by speech, writing, physical cues or other actions.[106] However, while negotiation analysis and skill-building focus largely on communication between the negotiators[107] (and sometimes on how a negotiating agent communicates with the principal they represent),[108] the lens broadens in the DSD context.

In DSD, when examining the element of communication, designers should ask a litany of questions about communications regarding the system and how communication is manifesting among actors in the system. Such questions often include:

- What is being communicated about the system?
- How is information about the system communicated?
- Who is communicating about the system and to whom?
- Who is communicating within the system?
- How are people communicating within the system?
- What are stakeholders in the system communicating about?
- What is being said and not said?

105. *See* ESPOSITO & EVANS-WINTERS, *supra* note 24, at 17.

106. *Communication*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/communication [https://perma.cc/C7G4-VLR9] (last visited Apr. 7, 2024); Harvard Law School Negotiation Workshop, What is a Good Outcome? (last presented Spring Term 2024) (Slides on file with Authors).

107. *See* PATTON, *supra* note 28, at 284–85; *See, e.g.*, FISHER & URY, *supra* note 32 (a book focused on how to more approach negotiations with a more effective mindset and how and what to communicate more effectively with the other side to reach better outcomes).

108. *See generally* ROBERT H. MNOOKIN, SCOTT R. PEPPET, AND ANDREW S. TULUMELLO, BEYOND WINNING 69–91 (2000) (examining the tension between principals and agents and how agents can communicate more effective with and on behalf of their principals).

These questions often reveal invaluable information. For example, it can reveal individuals' understanding and expectations about the system based on how the system was explained to them; information imbalances in the system; pain points in the system where communication becomes heated or non-existent; effective and ineffective mediums of communication in use; and interpersonal challenges or communication skills deficits. This information typically leads to tailored design recommendations that respond to the specific strengths and challenges of the system in question by transforming the questions into a forward-looking perspective. The same holds true if the system is designed from scratch. Questions to ask in this instance include:

- What needs to be communicated about the system?
- How should information about the system be communicated?
- Who should be communicating about the system and to whom?
- Who should be communicating within the system?
- How should people communicate within the system?
- What should stakeholders in the system be communicating about?
- What should be said and not said?

The answers to these design questions are quite system-dependent and often build from a foundation of the other Seven Elements. For instance, understanding the interests of various stakeholders often assists in creating a recommendation for what should be communicated about, and understanding the relationships between various stakeholders often assists in creating a recommendation for how people should communicate, including the mediums and assistive resources — like mediators — they should use.

i. Case Study: Conflict in Affiliating Healthcare Charitable Trusts in New Hampshire

The New Hampshire Attorney General's Office[109] recently engaged our clinic students to study conflict in charitable nonprofit hospital systems in New Hampshire. Mirroring a trend across the U.S., hospitals in New Hampshire are undergoing corporate affiliation at an increasing rate.[110] Celebrated for the strategic, operational, and financial advantages they can offer, corporate combinations also present considerable challenges for these complex organizations.[111] In some cases, interorganizational conflict mounts to such a degree that the parties seek to disaffiliate, disrupting the hospitals' ability to serve their charitable purpose.[112] We looked to identify the sources of internal and interorganizational conflict that arise as boards and executives seek to merge and align operations, divergent workplace cultures, institutional identities, community needs, and staff roles and responsibilities.

Communication proved to be an essential window through which to understand stakeholder concerns and conflict between critical stakeholder groups, and to offer general guidance to hospitals joining a larger system. Probing inquiries included:

109. More specifically, we worked with the NH AG's Charitable Trust Unit, which is "dedicated to the oversight of charitable trusts and organizations" in the state. *Welcome to the Charitable Trusts Unit*, N.H. DEP'T JUST., https://www.doj.nh.gov/charitable-trusts/ [https://perma.cc/S6J4-8UF8].

110. *See* TARA NOBLE AND JASON DANIELS, HARVARD L. SCH. DISP. SYS. DESIGN CLINIC, MANAGING CONFLICT IN AFFILIATIONS BETWEEN NEW HAMPSHIRE CHARITABLE TRUSTS, at 4 (2023), https://www.doj.nh.gov/charitable-trusts/documents/hnmcp-rmanaging-conflict-report.pdf; Brent D. Fulton, *Health Care Market Concentration Trends in the United States: Evidence and Policy Responses*, 36 HEALTH AFFAIRS 1530, 1530–31 (2017); NH AG CTU Public Hearing, *Public Hearing on Proposed Transaction Between Valley Regional Hospital & Dartmouth-Hitchcock Health*, YOUTUBE (May 22, 2023), https://www.youtube.com/watch?v=r2V8wgPKoM0.

111. Many healthcare charitable trusts in NH opt to affiliate in a manner that allows each hospital to retain its corporate form but puts one (or more) in the role of subsidiary to a parent hospital. This creates complicated and overlapping fiduciary obligations for boards, increasing the need for effective communication.

112. *See*, *e.g.*, NEW HAMPSHIRE CHARITABLE TRUSTS UNIT, WITHDRAWAL OF LITTLETON HOSPITAL ASSOCIATION INC., FROM NORTH COUNTRY HEALTHCARE 3 (Sep. 13, 2019), https://www.doj.nh.gov/news/2019/documents/20191014-littleton-hospital.pdf.

- the extent to which negotiators communicate about disruptive operational decisions that would need to be made after affiliating (e.g., closing practice specialties, staff reductions, and changes in decision-making authority)
- how effectively management shares information with hospital staff about a potential affiliation, and gathers and accounts for staff feedback, input, and questions
- what channels exist (and how they are used) for executives to hear from staff about their experiences, challenges, and successes, to help surface and address potential conflict as it brews
- what channels exist (and how they are used) for executives to inform their boards about integration challenges that are sources of conflict
- the communication channels and mechanisms that exist for resolving active conflict
- and opportunities that exist for boards and executives of affiliated (or soon-to-be-affiliated) hospitals to connect and communicate on a more personal "get to know you" level

These and related inquiries helped identify ways in which communication gaps — in both substance and form, and in pre- and post-affiliation settings — can be sources of conflict, which in turn can inform recommendations for enhancing communication to better prevent, surface, and navigate conflict.

F. Relationship

Relationship is a vitally important variable in negotiation.[113] We know from experience that strong, amicable relationships between negotiators and parties to a negotiation improve the process and yield better outcomes through effective communication, sharing interests, and generating value-maximizing options. Sour relationships make negotiation much more challenging and lead to worse outcomes. A collaborative negotiation process can build better relationships; an acrimonious process can ruin good relationships or make fraught relationships even worse. Key questions for negotiators include: Which relationships matter? How important are long-term, post-negotiation relationships? What can be done to improve relationships between the negotiators and parties, or at least not make them worse?

These questions and many more are likewise critically important to dispute systems design. A careful assessment requires not merely an identification of the relevant stakeholders and stakeholder groups, but a clear understanding of the nature and state of relationship between and among them. To what degree are strong relationships underpinning effective processes and stakeholder satisfaction with outcomes, and what has helped grow and sustain those relationships? If toxicity is frustrating the effective operation of the dispute system in question, the assessment needs to ask why relationships are fraught. What aspects of the culture of relationships within the system are at the root of the challenge? How does communication (or lack thereof) affect relationships? And, just as perception affects stakeholders' views of fairness, perception can also lead to different understandings of the relative health of relationships in the system. A careful assessment explores the variance between stakeholders' differing perceptions of how relationships affect the system.

The relationship inquiry also necessitates a review of hierarchies and power imbalances in the system, how they affect stakeholders in the system, and how they constrain the effectiveness of the system and the ability of disputants and other stakeholders to achieve their interests.

113. PATTON, *supra* note 28, at 282.

And, of course, relationship implicates design choices. One measure of the effectiveness of a DSD is the extent to which its ability to manage conflicts also improves relationships (or at least does not make them worse).[114] Through a thorough assessment of the relationships between and among stakeholders, and what sustains and what ails them, the designer is equipped to offer system improvements that play to relational strengths and opportunities and limit liabilities.

i. Case Study: Police Force Divorce Mediation Program

Our clinic routinely works with clients to evaluate mediation programs, many of which are highly innovative in design, concept, and approach. Rather than highlight a particular client, we offer here a hypothetical Police Force Divorce Mediation program that draws from various experiences.[115] Suppose that innovators within the police department of a major U.S. city realized the value of offering employees no-cost, on-site, mediation as an alternative to contested divorce proceedings (there is a high divorce rate among members of the force, the strain of which is thought to impede officer effectiveness). The mediators are two senior officers on the force (both of whom are trained as mediators, as they hold community liaison and neighborhood conflict de-escalation roles). Mediations in the program typically involve one police officer spouse and one civilian spouse, and most parties are not represented by counsel. Mediations are conducted in a conference room at police headquarters. It is the only known program of its kind within a police force and the department has engaged a DSD clinic to assess the effectiveness of the program and recommend potential improvements. For the design team, the unique characteristics of an on-site, in-house mediation program raise critical questions of relationship.

For example, there may be issues related to hierarchy. Whether a party is a rookie patrol officer or a senior officer who outranks the mediator, it would be important to understand how established conventions of interpersonal deference and respect for seniority might affect party voluntariness and consent, or mediator neutrality (actual or perceived). If relationship issues stemming from seniority and hierarchy negatively affect

114. AMSLER, MARTINEZ, & SMITH, *supra* note 1, at 37.

115 . Most of our client work is confidential. Where necessary, we have obtained consent from clients we reference elsewhere in this report.

party satisfaction with the process (and therefore outcomes), there are obvious implications for the effectiveness of the program.

The mediators' ability to build trust in their relationship with parties would also be an essential inquiry. The design team would investigate whether the police department setting interferes with effective relationship-building between a mediator and parties. To what extent are members of the force comfortable enough in their workplace that they could trust a department mediator with a matter as personal as divorce? How intimidating do civilian spouses find the police department setting, including their relationships with their spouse's friends and colleagues on the force, and how does that affect their ability to trust the mediator? If a mediator wears their police uniform, would that cause the civilian spouse to mistrust the mediator and the process? To what extent can the mediator afford to build trust through empathy if police department norms prioritize toughness over feelings? Would civilian spouses feel distrustful or suspicious of "inside" relationships between the mediator and the police officer spouse? Would the police officer spouse fear that the mediator might overcorrect and err toward creating trust and relationship with the civilian spouse? What might mediators do to navigate these relational challenges?

Moreover, one aspirational benefit of mediation is the relatively non-adversarial, more personal setting compared to traditional litigation.[116] It would be important to understand whether mediators are creating an environment and process in which the personal relationship of the parties, even though obviously strained, are improved or at least not made worse. How well does the process (and the outcomes produced) equip parties to manage a post-divorce relationship, logistics, custody, etc.?

Organizations and systems are comprised of people in relationship with one another. A quality assessment depends on a thorough understanding of the myriad factors that affect those relationships and how they can hinder or enhance system actors' ability to connect and interact with each other.

116. HOFFMAN ET AL., *supra* note 7, at 1–2.

G. Commitment

The final element of the Seven Elements is commitment. In negotiations, commitments are agreements about what the parties will or will not do.[117] Commitments are the parties' final choices between and among possible options.[118] They are the terms that the parties sign on to—the output of the negotiations. In DSD, the commitment element is similarly focused on resulting outcomes. Are the outcomes resolving the dispute and being implemented by system users? Are the outcomes reached in the system clear, firm, and implementable? Do the parties follow through on the outcomes? Do the parties resolve the dispute, or does it reemerge? Also important is the process of reaching a commitment whether it is an agreement by the parties or a decision-maker determining an outcome for the parties. Further, designs should consider what mechanisms are in place or should be in place to assist with, follow-up on, and, in some circumstances, enforce implementation. If commitments do fall through and are not implemented, what is causing this defection? Are there certain key interests not being met in the commitments made that cause a pattern of the defection of certain types of parties?

Reaching back to the example of evaluating a small claims mediation system, to examine commitment, a designer would review agreements reached by parties to determine patterns in agreements, focusing on how often agreement is reached and the factors that cause parties to walk to their BATSO, the clarity and specificity of the agreements, trends in the agreements that may align with power imbalances or demographics of the disputants, if the agreements were implemented, and if the matter returned to court after an agreement was reached, among other considerations. It would also be important to understand the process of committing to an agreement in the particular small claims mediation process, barriers to commitment for parties, and resources available to help with commitment, such as templates or drafting assistance.

117. *See* PATTON, *supra* note 28, at 284.
118. *Id.*

Commitment is also a crucial area to examine in a system to understand what inequities, injustices, and biases may exist in the system. For example, if the terms of agreements reached in a grievance process for workplace disputes typically favors the interests of the party who is more senior in the company's hierarchy, there may be a flaw in the system.

i. Case Study: Final Reports of Truth Commissions

Typically established in the aftermath of armed conflict, severe political oppression, widespread rights violations, or a combination of such harms, truth commissions are systems that "are official, nonjudicial bodies of a limited duration established to determine the facts, causes, and consequences of past human rights violations."[119] Through investigating violations and understanding harms, truth commissions seek to "identify the patterns and causes of violence, and publish a final report through a politically autonomous procedure."[120] The work of a truth commission often includes activities such as interviewing victims, witnesses, and perpetrators; reviewing documents; and visiting sites such as mass graves and detention facilities to view evidence.[121] Final reports lay out the process of the truth commission's work; the findings of the commission's investigation, including the identified harms and their causes and impacts; and recommendations based on an analysis of the findings.[122] The recommendations "are traditionally oriented towards both root causes and consequences of conflict, suggesting actions and reforms that will ensure the non-repetition of human rights violations, while also aiming to reconcile short and long-term outcomes of these abuses."[123] Final reports may recommend measures such as criminal prosecutions, reparations programs

119. INT'L CTR. FOR TRANSITIONAL JUST., TRUTH SEEKING: ELEMENTS OF AN EFFECTIVE TRUTH COMMISSION 7 (Eduardo González & Howard Varney eds., 2013), https://www.ictj.org/publication/truth-seeking-elements-creating-effective-truth-commission [https://perma.cc/59QK-URF2].

120. Héctor Centeno Martín et al., *Explaining the Timeliness of Implementation of Truth Commission Recommendations*, 59 J. PEACE RESEARCH 710 (2022) (citing ONUR BAKINER, TRUTH COMMISSIONS: MEMORY, POWER AND LEGITIMACY 24 (2016)).

121. INT'L CTR. FOR TRANSITIONAL JUST., *supra* note 119, at 23.

122. Julia Paulson & Michelle J. Bellino, *Truth commissions, education, and positive peace: an analysis of truth commission final reports (1980–2015)*, 53 COMPARATIVE EDUC. 351, 355 (2017).

123. *Id.*

for victims, vetting procedures, public education, and legal, judicial, security sector, and other state institution reforms.[124]

The final reports of truth commissions represent the commitment element of the Seven Elements. An immense challenge for designers of truth commissions is ensuring that the resulting report of the commission is actually implemented, as recommendations are often disregarded by governments, and thus the needs of victims and measures to guarantee non-recurrence of harm are not addressed.[125] Looking at 10 truth commissions in Latin America between 1983 and 2014, for instance, on average, under 39% of the commissions' recommendations were actually implemented.[126]

There are many reasons why final reports of truth commissions may not be implemented, such as members of the former regime who retain positions of power seeking to protect their interests through non-implementation,[127] limited financial wealth and resources of the state,[128] or the politization of the report, with competing political parties split on implementation, gridlocking any follow-through.[129] Knowing the commitment challenges truth commission systems face with ensuring their reports are implemented, designers create implementation safeguards. For example, in Sierra Leone, the mandate of the truth commission stated that the commissions' recommendations would be binding on all parties,[130] and a civil society network monitored the government's implementation of the truth commission's final report, with the network receiving progress reports from the government and being in direct contact with government agencies.[131] Designing truth commissions with clarity on what should happen with the final report and establishing bodies to monitor implementation can assist in overcoming the commitment challenge.

124. Martín et al., *supra* note 120, at 711.

125. *See id.* at 717-18; *see also,* Onur Bakiner, *Truth Commission Impact: An Assessment of How Commissions Influence Politics and Society*, 8 INT'L J. TRANSITIONAL JUST. 6, 17–30 (2014) (discussing findings on factors impacting implementation and non-implementation of truth commission report recommendations by governments, and the societal impacts of non-implementation).

126. Martín et al., *supra* note 120, at 717.

127. *Id.* at 722.

128. *Id.* at 718.

129. *See* Erin Bloom & Lisa K. Dicker, *The Politics of Justice: Analyzing the Politicization of Transitional Justice Processes*, 28 OHIO ST. J. DISP. RESOL. 303, 329–32 (2023).

130. Bakiner, *supra* note 125, at 20.

131. INT'L CTR. FOR TRANSITIONAL JUST., *supra* note 119, at 68.

CONCLUSION

The Seven Elements of Dispute Systems Design can serve as a helpful guiding framework in assessing systems, evaluating systems, and making design recommendations for systems. The Seven Elements of DSD can assist students — and practitioners — in crafting research, interview, survey, and focus group questions as they seek to gather information regarding how the system is currently functioning or to identify the stakeholder views on what a system should be and why. The Seven Elements of DSD can further guide students in organizing information they receive in data collection — an often entirely overwhelming pursuit — to group findings under each of the Seven Elements and thus make sense of the massive amount of raw information they have. This process can lead to recommendations for designing the system or offering design improvements to the system that engage the Seven Elements of DSD to create positive change. Recommendations may not be evenly spread across the Seven Elements for a given system. Indeed, it is instead important for a designer to know where a system is struggling, or what a new design needs to emphasize. Moreover, there may be external impediments to creative option generation and improvement along certain elements in a given system — such as laws that constrain options for outcomes — which is important to assess and then to consider what other elements can be improved upon to alleviate some of the system challenges.

Whereas students and practitioners alike can be overwhelmed when approaching the inevitable complexity of a system, the Seven Elements can provide guidance on what to investigate and why to examine that factor. Additionally, the Seven Elements can be a check on the designer's own biases in evaluation and recommendations. For example, a designer can ask: did that finding or design recommendation link to the information from the assessment of that element or is it simply coming from the designer's own perspective on what is happening and what should happen? The Seven Elements can also offer hope in changing complicated and sometimes rigid systems. Our students — and we as designers — can sometimes get caught up in what is seemingly impossible to change in a system. For instance, time and staffing constraints in a system may be so pronounced such that a complete system redesign is not possible until more resources become available. And still positive system changes may be possible through a more

surgical approach to an individual element, for example by improving internal communication channels. Or, if power imbalances in the relationships are immensely strong based on external factors, there could be a shift along the options element to at least better balance the power to generate and adopt options in this system for all parties, even if it doesn't solve the power imbalance that exists outside of the system. The Seven Elements of DSD can serve as both a lens and a lever for DSD, both in the law school clinic setting and in the practitioner world.