William L. Ury, Jeanne M. Brett,
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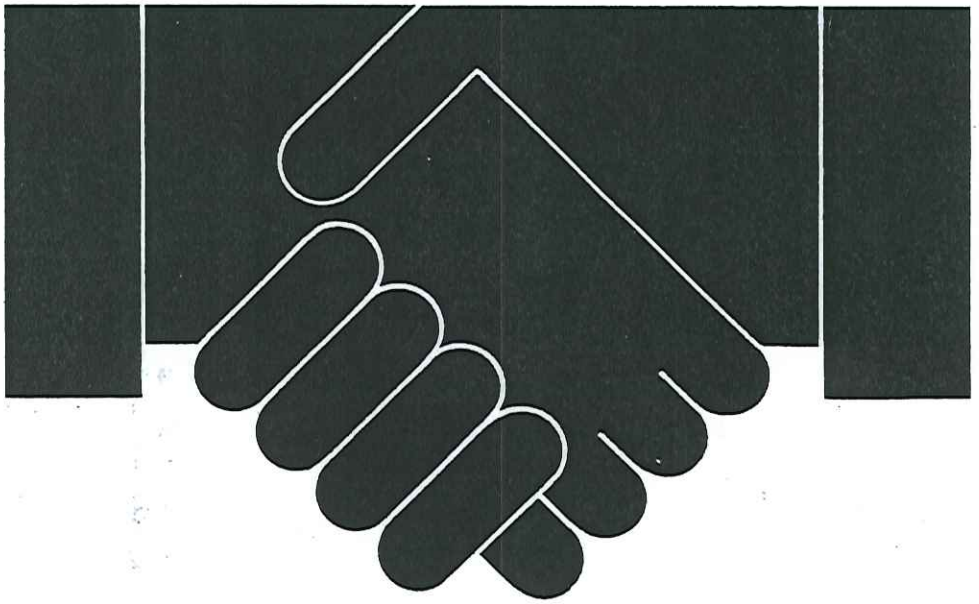

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Chapter 3

Designing an Effective Dispute Resolution System

Two oil companies, about to engage in a joint venture, agree in advance on a dispute resolution system. They will try to resolve all disputes in a partnership committee. Failing that, they will refer disputes to two senior executives, one from each company, both uninvolved in the joint venture. The executives' task is to study the problem and, in consultation with their respective companies, to negotiate a settlement. They thus act as mediators as well as negotiators. If the "wise counselors" cannot reach an agreement, the dispute will be sent to arbitration. Litigation will be avoided.[1]

A statewide fire fighters union and an organization of cities and towns in the state are unhappy with the delay, unsatisfactory outcomes, and damaged relationships resulting from state-mandated arbitration to resolve disputes about the terms of fire fighters' collective bargaining contracts. They consult a dispute systems designer, who proposes that a joint committee of labor and management officials use mediation to break impasses. Both groups accept his proposal and successfully lobby the state legislature to add mediation to the statute. Arbitration remains available for disputes that cannot otherwise be resolved, but the favored procedure is to be mediation.[2]

At the Catholic Archdiocese of Chicago, school administrators, looking for better ways to resolve disputes about teacher dismissals and student suspensions, designed a multistep dispute resolution procedure that requires negotiation between disputing parties; provides advice from a school conflict management board composed of teachers, parents, and principals from other schools; and offers the services of a trained mediator.[3]

In each of these situations, a dispute resolution system is designed to reduce the costs of handling disputes and to produce more satisfying and durable resolutions. This chapter discusses how to design such a system—how to create an interests-oriented system, starting from a diagnosis of the existing system as outlined in Chapter Two. This chapter presents six basic principles of dispute systems design:

1. Put the focus on interests.
2. Build in "loop-backs" to negotiation.
3. Provide low-cost rights and power backups.
4. Build in consultation before, feedback after.
5. Arrange procedures in a low-to-high-cost sequence.
6. Provide the necessary motivation, skills, and resources.

Principle 1: Put the Focus on Interests

The first principle, the subject of Chapter One, is the most fundamental: Create (or strengthen) ways of reconciling the interests of the disputants. The model of a dispute resolution system presented in Chapter Two suggests four complementary ways to do this: design procedures, strengthen motivation, enhance skills, and provide resources.

Designing Procedures

Various procedures can put the focus on interests.

Bringing About Negotiation as Early as Possible. At International Harvester during the 1950s and early 1960s, the number of grievances and arbitrations skyrocketed. In

response, management and union introduced a new procedure: the oral handling of grievances at the lowest possible level. When an employee raised a complaint, every effort was made to resolve it on the spot that very day—even if it meant senior management and union officials coming down to the shop floor. As the manager of labor relations put it, "We don't want paper [written grievances] coming up in the organization, we want people going down; we want to avoid the litigation approach of the past and adopt a problem-solving attitude."[4] The results were impressive: the number of written grievances plummeted to almost zero. Union and management officials did not spend more time handling disputes; if anything, they spent slightly less time.[5] The International Harvester example shows the value of applying problem-solving negotiation to disputes as early as possible.

In the wildcat strike study described in Chapter Five, Brett and Goldberg found that superintendents at mines with few strikes spent far more time underground listening to miners' complaints and suggestions than did their counterparts at mines with many strikes. The lesson is clear: a manager who is accessible may be able to resolve a situation in interests terms before it escalates into a rights dispute or a strike. Simply hearing someone out and acknowledging the validity of the complaint can help defuse a grievance even if little can be done to redress it.

Establishing a Negotiation Procedure. An established negotiation procedure becomes increasingly useful as the number of parties to the dispute grows, the complexity of the issues increases, and the parties grow larger and more bureaucratic. Such a procedure will designate, for example, who will participate in the negotiation, when it must begin and end, and what happens if it is unsuccessful. Such negotiation procedures exist in a variety of realms, from collective bargaining between labor and management to negotiation of federal environmental and safety regulations.

One example is mandatory negotiation about the location of hazardous waste treatment facilities. The siting of such facilities is a recurring problem in many states, often

resulting in extensive litigation, legislative battles, and even power contests. When faced with the decision of a state agency to place unwanted waste facilities in their community, some local residents have obstructed highways, threatened to dynamite existing facilities, and taken public officials hostage—all to vent their anger about policy-making processes that failed to adequately address their concerns. Faced with this recurrent problem, one state has provided for compulsory negotiation between a prospective developer and representatives of the community. The goal of the negotiation is to minimize the detrimental effects of the facility and to compensate the community for whatever damage or risk remains. In the event that interests-based negotiations fail to result in agreement, the state may compel arbitration.[6] The goal of the legislation, however, is to create a negotiation procedure focused on interests and thus to avoid not only arbitration but also costly litigation and power contests.

Federal agencies looking for better ways to deal with conflict over proposed federal regulations have come up with another creative way to substitute interests-based negotiation for litigation. Typically, an agency publishes a proposed rule, interested parties comment on it, and the agency then issues a final rule. All too often, parties dissatisfied with the rule challenge it in the courts. In an effort to reduce such litigation, some federal agencies have developed a new negotiated approach to making regulations (often referred to as "negreg") in which the agency and the affected parties participate in mediated negotiations designed to produce a consensus:[7]

> Together the parties explore their shared interests as well as differences of opinion, collaborate in gathering and analyzing technical information, generate options, and bargain and trade across these options according to their differing priorities. If a consensus is reached, it is published in the *Federal Register* as the agency's notice of proposed rulemaking, and then the conventional review and comment process takes

> over. Because most of the parties likely to comment have already agreed on the notice of proposed rulemaking, the review period should be uneventful. The prospects of subsequent litigation should be all but eliminated.[8]

Agencies using this procedure typically provide resources to support it, primarily third parties who coordinate the negotiations and provide mediation services.[9]

Designing Multiple-Step Negotiation. In multistep procedures, a dispute that is not resolved at one level of the organizational hierarchy moves to progressively higher levels, with different negotiators involved at each step. One example is the contractual grievance procedure in the coal industry: step 1 is negotiation between the miner and his foreman, step 2 is negotiation between the mine committee and mine management, and step 3 is negotiation between the district union representative and senior management.

Multistep negotiation procedures, common in the labor-management context, are increasingly being used by parties to long-term business contracts. One such procedure was described by an attorney who frequently uses it:

> Lower-level business people—such as project managers from each organization who relate to each other on a day-to-day basis—try to resolve [the dispute]. If they can't, the dispute is passed up to their superiors. If the superiors can't resolve it, the dispute goes up to a vice-president, a senior vice-president, or the CEO, depending on the size of the company. The forces at work here are (1) You don't want your boss to know you failed to solve a problem, and (2) the people at the higher levels tend to have a broader perspective than the day-to-day operating people do.[10]

Another example of multistep negotiation is the "wise counselor" procedure used in the oil industry and described

at the beginning of the chapter. An even broader perspective is achieved because the two "wise counselors," senior executives from each company, are deliberately selected for their detachment from the particular dispute. Using "wise counselors" is the closest one can come to involving a mediator without actually doing so.

In adding more negotiation steps, however, the designer needs to be careful. In some cases, the easy availability of a higher-level person will simply discourage people from reaching agreement at a lower level and will thus make lower-level negotiation a pro forma step.

Strengthening Motivation

Interests-based negotiation is inherently motivating. It tends to provide more satisfying outcomes, more voice, and more sense of control and does so at lower transaction costs than procedures such as litigation or power contests. However, there are frequently obstacles, specific to the situation, that discourage parties from using interests-based negotiation. These obstacles can often be surmounted with the appropriate design.

Creating Multiple Points of Entry. A person with a claim to make may not trust or feel a rapport with the person with whom she should raise the claim. This problem can be alleviated by providing multiple points of entry into the dispute resolution system. At the Massachusetts Institute of Technology, for instance, a student with a grievance can bring it up with the dean of students, the head of the academic department, a university administrator, or an ombudsman.[11] At IBM, an employee can raise a problem with his manager, his manager's superior, or, for personnel decisions, even the president of the company.[12]

Providing a Negotiator with Authority. At Caney Creek, miners were lumping many of their complaints, storing them up until they would erupt in a strike. Miners told us that it was not worth raising a grievance with their foreman since he had no authority to resolve it. Two approaches to this

problem are possible: provide the foreman with the necessary authority, or offer the employee the opportunity to take his complaint to someone with authority. The first approach, decentralizing authority, is no small task; it may require significant organizational change. We suggested this approach at Caney Creek, but it was not carried out. At International Harvester, the second approach was taken: those with authority to settle the grievance came to the shop floor.

Stopping Retaliation. At Caney Creek, miners were reluctant to use the established negotiation procedure because it was generally perceived as an adversarial act, and many miners feared retaliation from their foremen. To allay this fear, management issued a call for miners to bring up their grievances and a public warning that any foreman found retaliating against an employee for filing a grievance would be discharged.

Providing Opportunities to Meet. Sometimes disputants fear suggesting negotiations will convey an impression of weakness. One way to deal with this problem is to provide for mandatory negotiations. Judges do this when they schedule pretrial settlement conferences. Another way is to provide occasions to meet, not explicitly for negotiation but at which negotiations can easily take place. The United Nations serves this purpose for dozens of disputing nations and groups for whom the risks of a formal meeting are too high. The cloakroom in the United States Senate serves a similar purpose, providing informal and private opportunities for senators to resolve their legislative disagreements. The systems designer can provide such occasions for informal interaction by, for example, encouraging managers to wander around the plant, organizing meetings on a topic of mutual interest, or even arranging a regular social gathering.

Providing Skills and Resources

In addition to strengthening the motivation to negotiate, a designer can encourage interests-based negotiation by providing for ongoing training and coaching in negotiation skills. Initial coaching can be provided by the designer and

subsequent coaching by people such as a personnel director or union steward. These topics are dealt with in more detail in Chapter Four.

Providing a Person to Turn to for Help. The designer can also ensure that people are available to assist disputants—to listen to grievances, to represent the disputants, and to manage the process. For example, IBM has a resident manager program in which a senior manager is given the responsibility for listening to the employees in a given area, hearing their complaints and discussing what to do about them.[13]

A variant on this same idea is to hire an ombudsman. The role originated in Scandinavia to investigate the grievances of citizens against government bureaucracies. In the United States, ombudsmen deal primarily with complaints in institutions such as corporations, hospitals, prisons, and universities.[14] A central function of the ombudsman, who typically lacks decision-making power, is to be available to listen to grievances, to direct them to the appropriate person, and to see that they are dealt with expeditiously. Often the matter will be resolved if the ombudsman simply listens or provides objective information; if the complaint concerns salary, for instance, the ombudsman may provide information about average salary rates.

If disputants are unable to acquire the necessary negotiation skills, if the amount at stake is insufficient to warrant the cost of negotation skills training, or if the emotional component of the disputes is great, the designer should consider providing representatives for the disputants. In informal negotiations, a colleague might play this role; in a more formal setting a lawyer might do so.

The greater the number of parties, the greater the necessity for people who can manage the dispute resolution process. In federal rule-making negotiations, the federal agencies typically provide facilitators to bring all the parties together and orchestrate the negotiations.[15] The more complex the issues, the more technical assistance is necessary, particularly for those without technical competence or the resources to acquire it.

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Mediation

One resource, a mediator who helps the disputants reach agreement, deserves separate treatment. Mediation is negotiation assisted by a third party. Negotiations often run up against roadblocks that a mediator can help remove. A mediator may be able to move the negotiations beyond name calling by encouraging the disputants to vent their emotions and acknowledge the other's perspective. A mediator can help parties move past a deadlock over positions by getting them to identify their underlying interests and develop creative solutions that satisfy those interests. Where each side is reluctant to propose a compromise out of fear of appearing weak, the mediator can make such a proposal. Mediators are thus well placed to shift the focus from rights or power to interests. Mediation can serve as a safety net to keep a dispute from escalating to a rights procedure, such as litigation, or to a power procedure, such as a strike.

Mediation is widely used in labor relations—in bargaining over contracts as well as increasingly in resolving grievances. Environmental and community mediation programs are becoming increasingly common. Mediation is used in all kinds of disputes ranging from family quarrels to business problems to international conflicts.

Peer Versus Expert Mediation. Mediation procedures come in many varieties. Perhaps the most significant factor affecting the cost of the procedure is whether the mediator is an expert from outside the organization or a peer of the disputants. Using peer mediators is not only less costly (unlike experts, they are typically unpaid) but often provides someone on the spot to intervene informally before the dispute has a chance to escalate. For example, in one San Francisco elementary school program, children are trained to mediate disputes they see brewing on the playground.[16]

One hospital in Texas provides several levels of mediation. A designer has trained large numbers of supervisors so that there is always some supervisor close to the disputants who can mediate. Key individuals in personnel, pastoral care,

and social services have also been identified as expert providers of formal mediation services. In addition, the designer has agreed to provide professional mediators who can be called on for assistance in particularly difficult disputes. Thus, the hospital has three levels of mediation: informal, on-the-spot problem-solving assistance from supervisors, experts from within the organization, and outside professionals.[17]

Enhancing Motivation. Establishing a mediation procedure is not enough. Disputants need to be motivated to use the procedure. The school mediation program at Bryant High School, for instance, began with classroom seminars in conflict resolution on the assumption that students familiar with mediation would be motivated to try it if they had a dispute. In another context, people who go to court are encouraged by court officers or a judge to try mediation.[18]

Properly designed, mediation can meet some of the same needs for emotional venting served by fighting. Particularly in those interpersonal disputes where underlying emotions are a central element, disputants can be encouraged to express their concerns and to acknowledge the concerns of the other side. Consider the account of a Bryant High School girl who became involved in the school mediation program:

> All I ever wanted to do was fight. . . . I came into a mediation session as a disputant with four girls on the other side. I thought, "Who needs this? What am I doing here?" I just wanted to punch these girls out. I figured that the mediator would tell me what I was going to have to do. But she didn't. Instead she drew me out, listened to me. It felt so good to let it all out: then I wasn't angry anymore. I thought, "Hey, if this can work for me, I want to learn how to do it." After my training, the atmosphere around me changed.[19]

Enhancing Skills. Mediators often need training. The classroom seminars at Bryant High School were followed by

intensive training for mediators. The training consisted of lectures, discussion, and mock mediation in which trainees played mediators as well as parties to the dispute. The designer can use mock mediation to introduce the parties as well as potential mediators to the procedure. Disputants and mediators learn what is expected of them and see people like themselves using the procedure to work out an agreement. The grievance mediation program, for instance, provides mediation training not only for mediators but also for union and management representatives who will participate in mediation.

Providing Resources. Mediation programs require institutions to select, train, assign, and evaluate mediators. Neighborhood justice centers have been established to perform this function for community disputes. We have set up the Mediation Research and Education Project to administer grievance mediation. Such institutions can also support mediators, offering feedback on performance as well as refresher courses. They provide continuity as mediators leave and serve as a collective memory, able to evaluate the results of the program and make changes in the mediation procedure. Lastly, such institutions can serve to diffuse the program more widely within the organization or the larger community.

Risks of Mediation. In introducing a mediation procedure, the designer should be sensitive to possible unintended consequences. First, will some group, particularly susceptible to having its rights violated, likely forfeit or lose rights? For example, a corporation operating a publicly subsidized apartment building for low-income people might favor a mediation procedure to resolve tenant complaints. Such a procedure, however, could resolve complaints differently from the way they would be resolved in court. For instance, if a tenant complains about rats in her apartment, mediation might result in the landlord setting rat traps rather than engaging in the full-scale extermination program that a court would require under the city housing code. Despite this risk of forfeited rights, the designer might conclude that a mediation procedure should be made available to tenants because of its generally lower transaction costs (a matter of some concern to low-income

tenants), potentially more satisfactory outcomes, and lower risk of straining the ongoing landlord-tenant relationship. In order to minimize the risk of an unknowing forfeiture of rights by tenants, the designer might include provisions for housing code education and legal counseling for tenants.[20]

A second unintended consequence is that the procedure may deter or encourage change in the distribution of power. For example, introducing a mediation program in a non-union plant may, by defusing some disputes, hinder efforts to unionize the plant. Designers considering new procedures thus should be sensitive to their impact on legal rights and the balance of power. They may want to alert the parties to such consequences and decide whether to support the change.

Principle 2: Build in "Loop-Backs" to Negotiation

Interests-based procedures will not always resolve disputes, yet a rights or power contest can be excessively costly. The wise designer will thus build in procedures that encourage the disputants to turn back from such contests to negotiation. These are what we call "loop-back" procedures. It is useful to distinguish such procedures on the basis of whether they encourage disputants to "loop back" from a rights contest or from a power contest.

Looping Back from a Rights Contest

Some loop-back procedures provide information about the disputant's rights and the likely outcome of a rights contest. The disputants can then use this information to negotiate a resolution. Rights are thus determined at the lowest possible cost, while the resolution remains consensual—usually enhancing the parties' satisfaction, the quality of the relationship, and the durability of the agreement. A brief description of some of these procedures follows:

Information Procedures. In recent years, thousands of claims against asbestos manufacturers have flooded the judicial system. Some innovative designers, working as agents of the court, have set up data bases containing information about

sentatives of the parties who have settlement authority. Ideally, these representatives are high-level executives in their own organizations who have not previously been involved in the dispute. Typically, a neutral adviser, often a former judge, is also present. After hearing the presentations, the executives try to negotiate a resolution. If they have difficulty, they may ask the neutral adviser to predict the likely outcome in court.

This procedure has several strengths. It puts negotiation in the hands of people who are not emotionally involved in the dispute and who have the perspective to view it in the context of their organizations' broad interests. It gives these people information about rights and the likely court outcome, which helps them negotiate a successful resolution.[23] It also provides lawyers with an opportunity to exercise their skills, thereby defusing their potential opposition to the procedure.

The summary jury trial is an adaptation of the minitrial, offering more direct information about likely juror reaction. The lawyers present short summaries of their cases to a mock jury selected from the court's regular jury pool. The jury deliberates and returns a verdict, typically without knowing that the verdict is only advisory. Then, as in the minitrial, representatives of the disputing parties use the information to attempt to negotiate a settlement.[24]

Looping Back from a Power Contest

The designer can also build in ways to encourage disputants to turn back from power contests and to engage in negotiations instead.

Cooling-Off Periods. Rarely does a negotiated agreement look so attractive as when the parties are on the verge of a costly power contest or are in the midst of one. One simple procedure designed to take advantage of this receptivity is a cooling-off period—a specified time during which the disputants refrain from a power contest. The Taft-Hartley Act and the Railway Labor Act both provide for cooling-off periods before strikes that threaten to cause a national emergency.[25] During the cooling-off period, negotiations, while

not required, normally take place. Cooling-off periods are also useful in small-scale disputes. In the Noel Coward play *Private Lives,* a bickering couple agree that, whenever an argument threatens to get out of control, one person will shout "Solomon Isaacs," which will bring all conversation to a halt for five minutes while each tries to calm down.

Crisis Negotiation Procedures. At Caney Creek, the miners often struck without discussing their complaints with management. We recommended two additional steps to avert strikes. Before any strike, union officials would meet with management to consider the miners' concerns. The miners would then discuss management's response and vote on whether to strike.

Negotiation in times of crisis places special demands on negotiators. It may be useful therefore to provide crisis negotiation training—simulations, checklists, and standard operating procedures. It may also be helpful to establish a crisis communication mechanism. In disputes between the United States and the Soviet Union, the hotline serves this purpose. Ury has worked for the last five years with American and Soviet officials to establish "nuclear risk reduction centers"—crisis centers, staffed around the clock in Washington and Moscow, for emergency communications and negotiations aimed at preventing accidental nuclear war.[26] An agreement to set up such centers was reached in Washington on September 15, 1987, and they are now in operation.

Intervention by Third Parties. If violence breaks out during a strike or a family argument, the police intervene to stop the fighting. A form of third-party intervention is thus already built into many dispute resolution systems. In some cases, additional third-party intervention is useful. One example is the Conflict Managers Program in San Francisco schools, which trains children to intervene in playground disputes.[27] Wearing bright orange T-shirts printed with the words "Conflict Manager," the children work in pairs during lunch and recess to spot and try to mediate emerging disputes. On the international scene, neutral United Nations peace-keeping forces separate hostile forces and buy time for negotiation

and mediation. Such efforts require skills training as well as such resources as administrators and third-party intervenors.

Principle 3: Provide Low-Cost Rights and Power Backups

A key part of an effective dispute resolution system is low-cost procedures for providing a final resolution based on rights or power. Such procedures serve as a backup should interests-based negotiation fail to resolve the dispute.

Low-Cost Procedures to Determine Rights

Conventional Arbitration. A less costly alternative to court is arbitration—in other words, private adjudication. Like court, arbitration is a rights procedure in which the parties (or their representatives) present evidence and arguments to a neutral third party who makes a binding decision.[28] Arbitration procedures can be simpler, quicker, and less expensive than court procedures. Formal rules need not be followed, strict time limits can be agreed to, and restrictions can be placed on the use of lawyers and of expensive evidence discovery procedures.

Arbitration has long been used to settle a variety of disputes. Today, more than 95 percent of all collective bargaining contracts provide for arbitration of disputes arising under the contract.[29] It is also used to settle some international disputes. Using the term in its broadest sense, arbitration regularly takes place in most organizations. Disputing managers will turn to a superior for a decision.[30] Within a family, children often take their disputes to parents.

Arbitration comes in several forms. Where stakes are low or similar disputes arise regularly, the parties may choose a streamlined arbitration procedure that can handle many cases quickly; this is known as expedited arbitration. Two other types of arbitration are of particular interest because they encourage the parties to loop back to negotiations: med-arb and final offer arbitration.

Med-Arb. The designer who is torn between mediation and arbitration may prescribe a hybrid, med-arb, in which

the mediator serves as arbitrator if mediation fails. One advantage over mediation alone is efficiency. If mediation fails, there is no need to educate another neutral in the substance of the dispute. Another advantage is that the parties will know that the neutral will decide the dispute if they cannot, so they will pay greater attention to her suggestions, including the rights standards she may advance. A further advantage over arbitration alone is that med-arb encourages a negotiated resolution instead of an imposed one. The procedure also gives the third party the flexibility to arbitrate only those issues that the parties cannot settle themselves, so it keeps the determination of rights to a minimum and provides a built-in "loop-back" to negotiation.

Med-arb has several disadvantages. What appears to be a negotiated resolution may be perceived by the parties as an imposed one, thus diminishing the degree of satisfaction and commitment. Moreover, because the parties know that the neutral may decide the dispute, they may withhold information that would be useful in reaching a mediated settlement but that would hurt them in arbitration. Alternatively, they may reveal information to the mediator that should have no bearing on her decision if she ends up arbitrating the dispute. If the dispute must be arbitrated, it may be difficult for the mediator to discount the information and even more difficult for the losing party to believe that she did.[31]

Final-Offer Arbitration. Arbitration can encourage negotiated settlement in yet another way. In final offer arbitration, the arbitrator does not have the authority to compromise between the parties' positions but must accept one of their final offers as her decision. Each is thus under pressure to make its final offer more reasonable than the other's, anticipating that the arbitrator will adopt the more reasonable final offer as her decision. In doing so, each party will move toward the position of the other—in many cases enough so that they will be able to bridge whatever gap remains by negotiation. This procedure is most attractive when there is no well-defined rights standard for arbitral decision, so that a compromise decision is likely. It has been used successfully to

bring about the negotiated resolution of disputes about the salaries of major league baseball players as well as about the terms of public-sector collective bargaining contracts.[32]

Providing Motivation, Skills, and Resources. How can one motivate parties to use arbitration if interests-based procedures have failed? If the likely alternative is court, the advantages of arbitration will supply some motivation. Still, some parties may prefer court, where an adverse decision can be far more easily appealed. Making the arbitration advisory may reassure them, especially if it is advisory for them but binding on the other side. For example, in an effort to persuade dissatisfied consumers to submit their grievances to arbitration, some business-consumer arbitration programs provide that the arbitrator's decision is binding on the business but not on the consumer.[33]

Another means of encouraging arbitration is for the parties to make a commitment in advance of any dispute to use binding arbitration. It is often easier for disputants to agree in principle to arbitration than in the context of a specific dispute. Then, when a dispute does arise, a leader can tell his constituency that his hands are tied; they are bound by contract or treaty to submit the dispute to arbitration.

If all else fails, arbitration can be made mandatory. As previously noted, some courts require disputants to submit their dispute to arbitration before they can take it to court. If negotiation fails to resolve disputes over the siting of hazardous waste facilities, the law mandates arbitration.

All these varieties of arbitration require arbitrators. The designer may need to help the parties select arbitrators. Arbitrators may need skills training; representatives of the parties may need advocacy training. Here an institution, such as the American Arbitration Association, can be helpful in providing training and arbitrators.

Low-Cost Procedures to Determine Power

Sometimes, even when interests and rights-based procedures are available, agreement is impossible because one or

both parties believes it is more powerful than the other, and can obtain a more satisfactory resolution through a power contest. The designer, anticipating this situation, should consider building into the system a low-cost power procedure to be used as a backup to all other procedures. Getting the parties to accept such a procedure may be difficult, since each party is likely to oppose any new procedure that appears to give an advantage to the other. As a result, such a design effort is likely to succeed only when the use of power procedures imposes high costs on all parties. There are a variety of relatively low-cost power contests including voting, limited strikes, and rules of prudence.

Voting. Before the National Labor Relations Act (NLRA) of 1935, disputes about workers' right to engage in collective bargaining were handled through bitter strikes and violence. Some workers were killed; many were seriously injured. The NLRA did a great deal to end the violence by setting up a low-cost power contest—the union election—and by requiring employers to bargain in good faith with a union elected by a majority of the employees.

Limited Strikes. One proposal would reduce the high costs of a strike by replacing it with a mock strike. Take, for example, the 1987 professional football players' strike. Under the proposal, the employees would continue to work instead of striking—the players would continue to play football. But, as in a strike, they would forego their regular salary, and management would forego its usual profits. These sums would be placed in escrow, and a portion, gradually increasing over time, would be given to jointly selected charities. In this fashion, the power contest would continue to take place, but it would not keep the parties from pursuing their mutual goal, promoting the game of football. In the end, the power contests would be less costly to the disputants than a conventional strike because the money remaining in escrow would be returned to them when the dispute was resolved.[34]

This ingenious proposal for a lower-cost power contest has yet to be adopted, but other kinds of low-cost strikes are

used occasionally. One example is the symbolic strike in which workers strike for an hour (or less) in order to demonstrate their power without incurring or inflicting high costs. In Japan, workers sometimes resort to a "stand-up" strike. Work continues as usual, but each worker wears a black armband to signal unhappiness and to keep grievances alive and visible to management.

One of our suggestions for reducing the costs of striking at Caney Creek was for the union to abandon the existing practice by which the first shift to go out on strike was the first shift to return to work, even if the dispute that led to the strike had been resolved in time for an earlier shift to return to work. The union adopted a new policy of returning to work as soon as the dispute was settled; that policy is still in effect eight years later.

As with all power contests, lower-cost contests carry the risk of unintended escalation. Skills training can sometimes help. For example, the leaders of the demonstrations at the Seabrook nuclear power plant were worried that the confrontation might turn violent, so they organized extensive training in nonviolent action for would-be protesters.[35]

Rules of Prudence. The parties may agree, tacitly or explicitly, to limit the destructiveness of tactics used in power contests. For example, youth gangs may agree to use only fists, not knives or guns in their fights. The United States and the Soviet Union observe certain rules of prudence—such as no use (explosion) of nuclear weapons, no direct use of force against the other side's troops, and no direct military action against the other's vital interests—in order to avert the highest-cost power contest, a thermonuclear war.[36]

What motivates disputants to refrain from exercising their power to its fullest extent? Almost always it is the fear that the other side will resort to similar unrestrained tactics and that both will end up incurring heavy losses. One simple rule of prudence is to stay away from the other side if contact is likely to produce a fight. That is why groups as large as nations and as small as youth gangs agree on boundaries and buffer zones.

Principle 4: Build in Consultation Before, Feedback After

A fourth design principle is to prevent unnecessary conflict and head off future disputes. This may be done through notification and consultation, as well as through post-dispute analysis and feedback.

Notification and Consultation. At Caney Creek, we recommended that management notify and consult with the union before taking action affecting employees. Notification refers simply to an announcement in advance of the intended action; consultation goes further and offers an opportunity to discuss the proposed action before it takes place. Notification and consultation can prevent disputes that arise through sheer misunderstanding. They can also reduce the anger and knee-jerk opposition that often result when decisions are made unilaterally and abruptly. Finally, they serve to identify points of difference early on so that they may be negotiated.

Post-Dispute Analysis and Feedback. Another goal is to help parties to learn from their disputes in order to prevent similar disputes in the future. Some disputes are symptomatic of a broader problem that the disputants or their organizations need to learn about and deal with. The wise designer builds into the system procedures for post-dispute analysis and feedback. At some manufacturing companies, lawyers and managers regularly analyze consumer complaints to determine what changes in product design might reduce the likelihood of similar disputes in the future. At the Massachusetts Institute of Technology, ombudsmen identify university practices that are causing disputes and suggest changes in those practices.[37]

Where a broader community interest is at stake, the designer may include a different sort of feedback: a procedure for aggregating complaints and taking action to protect the community. For example, some consumer mediation agencies keep records of complaints against each merchant and alert the appropriate state authorities when repeated complaints are lodged against the same merchant.[38]

Establishing a Forum. One means of institutionalizing consultation and post-dispute analysis is to establish a regular

forum for discussion.[39] The parties may benefit from meeting regularly to discuss issues that arise in a dispute but whose causes and implications range far beyond the dispute. At Caney Creek, we revived the monthly meetings of the communications committee for this purpose. As Pacific Bell went through the wrenching transition of deregulation, the company and union formed "common interest forums" to discuss ways to work together and to prevent unnecessary disputes.[40]

Principle 5: Arrange Procedures in a Low-to-High-Cost Sequence

The design principles above suggest creating a sequence of procedures from interests-based negotiation to loop-back procedures to low-cost rights and power backups. The sequence can be imagined as a series of steps up a "dispute resolution ladder." The following is a menu of procedures to draw on in designing such a sequence:

Prevention procedures
- Notification and consultation
- Post dispute analysis and feedback
- Forum

Interests-based procedures
- Negotiation
  - Quick, oral handling of disputes
  - Multiple points of entry
  - Established negotiation procedure
  - Multiple-step negotiation
  - Wise counselors
- Mediation
  - Peer mediation
  - Expert mediation

Loop-back procedures
- Rights
  - Information procedures
  - Advisory arbitration
  - Minitrial
  - Summary jury trial

Power
Cooling-off periods
Third-party intervention
Low-cost backup procedures
Rights
Conventional arbitration
Expedited arbitration
Med-arb
Final-offer arbitration
Power
Voting
Limited strikes
Symbolic strikes
Rules of prudence

In creating a sequence, the designer might begin with an interests-based negotiation, move to interests-based mediation, and proceed to a low-cost rights procedure. The sequence used in the oil companies' joint venture described at the beginning of this chapter contains three successive steps: first, try to catch disputes early by resolving them in the partnership committee; if that fails, bring in two uninvolved senior executives to negotiate; and, if that fails, turn to low-cost arbitration rather than to expensive litigation.

The sequence principle suggests filling potential "gaps" in the system. If parties regularly go straight from negotiation to court, the designer will want to consider intervening steps such as mediation, advisory arbitration, and arbitration. In adding steps, however, it is important to think through the possible impact of the new procedures on others already used. Adding a procedure may lead disputants to treat earlier steps as pro forma. The attractiveness and accessibility of mediation may lead disputants to negotiate less. Arranging many procedures in a sequence, each only slightly more costly than the preceding one, may have the paradoxical effect of encouraging escalation. The closer the rungs on the ladder, the easier it is to climb up. This paradox of dispute systems design ought not to stop the designer from building progres-

sive sequences, but it should alert him to possible unintended consequences.

Principle 6: Provide the Necessary Motivation, Skills, and Resources

A final principle cuts across all others: Make sure the procedures work by providing the motivation to use them, the relevant skills, and the necessary resources. In designing a system, for example, to deal with disputes over the location of hazardous waste treatment facilities, as described earlier in the chapter, one state legislature makes negotiation mandatory and provides resources in the form of technical assistance to aid the negotiation process. Without the necessary motivation, skills, and resources, procedures might well fail.

Conclusion

This chapter has laid out six principles of dispute systems design. The first is the most central—put the focus on interests. The second is to provide rights and power procedures that loop back to negotiation. The third is to provide low-cost rights and power backups. The second and third principles thus supplement the first. The fourth design principle is to build in consultation before disputes arise and feedback after they are resolved. The fifth principle is to arrange procedures in a low-to-high-cost sequence. The final principle is to provide the motivation, skills, and resources necessary to make all these procedures work. Taken together, these six design principles constitute a practical method for cutting the costs and achieving the potential gains of conflict.

All this has been written as though the designer were the doctor and the disputants were passive patients. In fact, the parties will—and should—be active participants in all phases of the process. In the next chapter, we look at the relationship between the designer and the parties.

Chapter 4

Making the System Work

Involving the Disputing Parties

However astute the diagnosis and ingenious the design, it is exceedingly difficult to change a dispute resolution system without working closely with the disputing parties. The designer needs their knowledge to tailor his general ideas to the particular situation. Moreover, without the parties' active support, any changes are unlikely to take hold. The process of design is as much a political task of garnering support and overcoming resistance as it is a technical task. We will discuss the process of working with the parties in four chronological phases: getting started; diagnosis and design; putting the changes into place; and exit, evaluation, and diffusion.

Getting Started

The opportunity to design a dispute resolution system most often arises in one of three circumstances: a condition of crisis has developed, an insider has come up with a "better idea," or a new relationship or organization is being established.

A Condition of Crisis

Many people do not consider changing their dispute resolution system until it has reached an acute state of distress—

disputes are costing a great deal of time and money, outcomes are unsatisfactory, relationships are strained, and the same disputes keep recurring. Even under conditions of crisis, when the parties invite an outsider, it is rarely to redesign the system but rather to do something less far-reaching—put on a training program, make recommendations, or resolve a particular dispute. The opportunity to change the system often comes only after the designer has gained credibility and familiarity with the parties. One designer says:

> My sense is that not a whole lot of folks are called in to straighten out institutions. They are typically called in to deal with a specific problem. There is always somebody in power who doesn't see a need or doesn't want the institution changed. They prefer the status quo; they may be fearful they won't be able to adapt to change, that they'll be hurt by it, that they will lose control. They like it better the way it is.[1]

The would-be designer uses the parties' dissatisfaction with their current condition to introduce the idea of redesigning the system. This is what happened in the IBM-Fujitsu controversy. Arbitrators were brought in to decide a large number of disputes growing out of Fujitsu's allegedly unlawful use of IBM software. They soon realized, however, that, whatever their decision, future disputes would continue to arise. Working with the parties, they expanded their mandate to include designing a dispute resolution system.

A Better Idea

Not all change takes place during a crisis; some change is incremental. At times, the power of a creative idea will be enough to spark change. Because of the natural resistance to calling on an outsider, such change is usually spearheaded by insiders. Religious leaders and school administrators have introduced mediation procedures in their institutions. Judges

have been influential in developing and promoting court-ordered arbitration, mediation, and similar changes in the judicial system.[2] Grievance mediation has been effectively introduced by both company and union insiders not because of an existing crisis but simply because it seemed like a better way to handle disputes.

A New System

The ideal time to design a dispute resolution system is at the beginning of a relationship, before disputes occur. The parties will find it easier to agree on procedures before they are embroiled in disputes whose outcomes may depend on the procedures. At the beginning, too, the designer will not have to cope with opposition from those with a stake in the existing system. Even then, however, psychological barriers exist to designing a dispute system:

> Many people find it psychologically difficult to think about possible future conflict when entering into what they hope will be a harmonious relationship. For example, even though about one third of all marriages are likely to end in divorce, few couples (even those marrying for the second time) execute antenuptial agreements specifying how they will resolve disputes between them. In the business context, too, contracting parties are often reluctant to create a potential conflict over the terms of a dispute resolution clause in order to achieve the uncertain benefits of resolving efficiently those conflicts that may arise in the future. Another deterrent to raising the possibility of future disputes is that it may be seen as indicating a lack of commitment to the relationship.[3]

Still, some parties do foresee the likelihood of disputes and develop procedures to deal with them before they arise.

Virtually every collective bargaining contract provides procedures to deal with disputes arising under that contract. Similarly, many joint venture agreements between corporations contain carefully drafted dispute resolution clauses.[4] Nations, too, occasionally make advance provision for the resolution of disputes. For example, the SALT I treaty between the United States and the Soviet Union provides for the establishment of a Standing Consultative Commission, which seeks to resolve disputes over perceived violations of the treaty.[5]

The lesson for the designer is clear: when parties are entering a relationship in which disputes are likely, he should urge them to design a low-cost dispute resolution system *before* disputes arise, not after.

Gaining Acceptance

Whichever way the designer becomes involved—crisis, better idea, or new system—his first problem is gaining acceptance by all parties. Where the designer is already associated with one party, a perception of bias may result. In that situation, the designer may want to identify an ally on the other side with whom he can work, so as to counter the perception of bias. If the designer is an outsider invited in by one side, he may want to consult with the other side about a joint invitation. Making almost simultaneous contact with all parties can be critical; if one party in a conflict situation believes that the designer has become closer to the other, the designer's credibility may be jeopardized.

From the time of first contact with the parties, the designer needs to be especially sensitive, just as a mediator would, to hidden agendas and the conflicts between and within the parties. At Caney Creek, for example, we discovered that we had been invited in by one faction of management that hoped that we would lend support to their views and help them prevail over an opposing faction in the internal management debate about how to deal with the conflict.

The designer who is invited has an easier time being accepted than one who is imposed or who takes the initiative,

but an invitation is no guarantee of acceptance. Invitations by leaders on both sides may provide only token participation on the part of constituents or subordinates. At Caney Creek, although we were invited by senior union and company officials, we soon discovered that we had been imposed on the local union and local management officials. Still later, we realized that gaining acceptance from the local union leadership was not tantamount to gaining acceptance from the membership.

Involving the Parties in Diagnosis and Design

To gather information and support from all parties, the designer should involve them from the outset in the process of diagnosis and design. If the parties are not involved in the process, they are less likely to approve the product, no matter how good it is from an objective point of view.

Several different approaches are available for involving the parties in diagnosis and design: establishing a design committee, engaging in shuttle mediation, and persuading key decision makers or opinion leaders.[6]

Establishing a Design Committee

After identifying all relevant parties, the designer may invite them to select representatives for a committee to help diagnose and design the system. The design committee often serves as a liaison between the designer and the parties. One designer told us:

> We use people who represent different interest groups to help us design a process, give us feedback, keep us on track, and provide a bridge between the designer and the disputing parties. The design committee negotiates out the procedure and then it's not the designer who sells it, it's this group that sells it. If somebody disagrees, a committee member from their side can

> say, "Well, wait a minute, this is why we did it this way." This process creates greater ownership of the process and a higher commitment to joint problem-solving.[7]

As another designer put it, each member of the design committee serves as a "quasi mediator" between the constituency she represents and the other side.[8] Each actively consults with her constituency to ensure that agreed-upon procedural changes will have the support of the eventual users.[9]

Engaging in Shuttle Mediation

When hostility and distrust between the parties threaten to render joint sessions unproductive, shuttle mediation may succeed in engaging the parties. In this process, the designer meets with the parties separately, moving back and forth between them, trying out ideas about changes in the dispute resolution system until either an agreement is reached or the level of hostility diminishes sufficiently that joint meetings can be held. This is a process we used at Caney Creek.

One aid to shuttle mediation is the "one-text" procedure. With this procedure, the designer begins with a single draft containing his own ideas as well as those contributed by the parties. The designer presents the draft not as his formal recommendation but simply as some rough ideas culled from the parties' suggestions and the designer's experience. He does not ask the parties to accept or reject the ideas at this point but simply to criticize: Where do these ideas fail to address the problem of high disputing costs? What would stand in the way of the procedures being used? How could the ideas be improved? What else is needed?[10]

After consultation with the parties, the designer edits and revises the draft, trying to incorporate changes suggested by one side without making the proposed system worse for the other. Then he returns to the parties, again for constructive criticism rather than acceptance or rejection. He goes back to work on the program of changes, and reemerges to

ask for yet further criticism. Finally—perhaps after three rounds, perhaps after twenty-three—he has a design that carries the imprint of all those who offered criticism. Only at that point, after he has done his best to satisfy the parties' concerns, does he submit the design for their formal approval.

Focusing on Key Actors

In some situations, the designer may need the support of key actors with control over the system even more than he needs the support of actual disputants. One example is the process that led to the establishment of the so-called multidoor courthouse in the District of Columbia:[11]

> The original instigator was . . . the founder and director of the Citizens Complaint Center. . . . She brought the idea to the Presiding Judge of the Family Division of the Superior Court, because she saw that getting a key judge involved was important and thought perhaps installation of the multidoor courthouse notion in the domestic relations context was the way to go. However, the Family Division Presiding Judge saw the possibility of a more multifaceted initiative and took it to the Chief Judge of the Superior Court. The Chief Judge in turn convened the D.C. Corporation Counsel, bar leaders, business leaders, and representatives of the City Council and the U.S. Attorney's Office, so that most of the major actors in the system had a stake in the idea from the outset.[12]

Another example of focusing on key actors is our establishment of grievance mediation in the coal industry. We began by securing the approval in principle of the presidents of the union and the coal operators' association. Next we dealt with union district presidents and company labor relations directors. They, too, approved the procedure in principle

but told us that the procedure, even if adopted, would rarely be used unless we could convince local union officers and mine labor relations directors of its merits. Conversely, we were told that if local union and management leaders supported the procedure, individual disputants—miners and their supervisors—would at least try it. Consequently, we worked hard at selling the procedure to local leaders. As predicted, where local leadership was enthusiastic, the procedure got off to a good start; elsewhere, use was sparse.

The designer is well-advised to focus on key actors where they strongly influence the procedures used by actual disputants. Even in such situations, however, the designer may need to canvass potential users of the system so as to better understand what might motivate them to use new procedures.[13]

The Designer's Balancing Act

If the designer is to get the parties to agree to try a new dispute resolution system, he must be adept at balancing three quite separate roles: expert, mediator, and negotiator. He will wear his expert's hat when analyzing the current system and formulating potential design alternatives, his mediator's hat when working with the disputing parties to construct a system that meets their concerns, and his negotiator's hat when selling design ideas to them. One designer describes how he switches hats while designing a system for a prison:

> I negotiate with the parties to get our [design team's] ideas on the table so we have a framework. Then I can relax a little bit, negotiating only to keep people from undoing the design or doing something terrible. But then you have to go to the administrator to make sure he or she understands what's been done and accepts things thus far. Otherwise you work for two or three months, deliver this wonderful package, and the administrator says, "I can't do this," and

> you've got to take the message back. So there is this mediating between the design committee and the administrator and also negotiating directly with them.[14]

Dealing with Opposition

Even if all parties are involved in the change process, some individuals or groups may actively oppose the new procedures. Some may perceive threats to their roles as administrators or advocates in the existing dispute system. Others may believe that they have been "winning" disputes with existing procedures and that any change would be to their disadvantage.

Dealing with Those Whose Role Is Threatened. Probation officers may oppose a plan to send all juvenile first offenders to a community justice procedure instead of a juvenile court, in part because reducing the number of juveniles who require supervision could decrease the need for probation officers. Labor arbitrators may oppose grievance mediation because it may reduce the number of grievances going to arbitration. Lawyers may oppose court-sponsored arbitration procedures that may result in fewer trials. Sometimes disguised, sometimes overt, the fear of losing work can be powerful. The most effective approach when dealing with this kind of fear is to show opponents that they can play a role in the new procedure. Lawyers have been attracted to the minitrial and the summary jury trial described in Chapter Three, because in those procedures they perform their traditional function of presenting evidence and argument to a decision maker. Similarly, we have pointed out to worried labor arbitrators that their knowledge and experience of industrial relations and the interpretation of collective bargaining contracts make them well suited to serve as mediators in a grievance mediation procedure.

Sometimes a new procedure will inevitably diminish the role of individuals or groups that were important in prior procedures, and no equivalent role can be designed for them

in the new procedure. In such cases, the designer must prepare the parties to expect their opposition and work with supporters of change in planning how to deal with it.

Dealing with Those Who Believe They Have Been "Winning." Why should teachers participate in the design of a procedure that will make it easier for students to raise complaints about their grades? Why should a government agency that has been successful in defending itself against legal claims participate in designing a procedure for reconciling interests rather than determining rights? Understandably, parties who are "winning" with the current system may be unwilling to help change it.

The designer has several available approaches. He might point out that if the winning parties fail to participate in the change process, the new system may ignore their interests. He may also show them that, even if they "win" fewer disputes under the new system, they may be better off overall as a result of reduced transaction costs, less recurrence of disputes, and a better ongoing relationship. This is the point that we make to companies or unions that oppose grievance mediation because in the past they have won a majority of arbitrated grievances. A designer might make the same point to the president of a manufacturing concern that wins most of its lawsuits with its distributors but loses many distributors in the process.

To the extent that opposition rests on unfounded or exaggerated fears, it may be diminished by making changes experimentally. A demonstration can be arranged in one site or for a limited period of time. For example, we encourage disputing parties to experiment with grievance mediation for six months or ten grievances. Opposition based on fear of the unknown typically subsides sufficiently to allow the procedure to be given a short-term trial run.[15]

Putting the Changes into Place

It is a long way from the drawing board to the construction site. New interests are inevitably uncovered as par-

ties who signed off on new procedures nevertheless resist using them. Some parties' reluctance stems from fear that they lack or cannot learn necessary skills. Details of the design that are impossible to specify beforehand may generate obstacles that have a direct bearing on the effectiveness of the total changes. It is unlikely that any system will work without adjustment, whether in procedures, motivations, skills, or resources.

One designer describes the early days of trying to implement a program to mediate interpersonal disputes in a neighborhood:

> We just started out and got a group of about twenty-five people to go through the first round of [mediation] training. We did a couple of [mediation sessions], didn't like what [the mediators] did, asked that they be retrained, trained them again, and saw some more [sessions]. It felt like, "We have to do better than that," so we trained them again and kept changing the training program based on the [mediation] experience. After about a year and a half of that, we realized we had something.[16]

Putting the changes into place involves two tasks: motivating the parties to use the new procedures and helping them develop the skills to do so.

Motivating the Disputants to Use New Procedures

Much of the work of diagnosis and design consists of making new procedures attractive to disputants. Even if the procedures are appealing on paper, disputants may be reluctant to use them. The designer may be able to overcome this reluctance in several ways: by demonstrating the procedures, using leaders as examples, using peers as proponents, setting goals, providing incentives, and publicizing early successes.

Demonstrating the Procedures. In order to overcome potential users' skepticism about a new procedure, the designer can encourage them to talk to others who have been using a similar procedure. Even better, they can be invited to observe that procedure in action. Or, if those experienced with the procedure are not easily accessible, new users can try it out in a simulation. Following such a simulation, one participant said:

> You know, I think I'm going to be able to work with this person. I found out that she was willing to disclose information and willing to consider my interests in the simulation. If she's willing to do that in real life, we've got a capacity to work together.[17]

Using Leaders as Examples. Leaders can also act as role models to encourage parties to adopt a change. At Caney Creek, we recommended that the mine superintendent spend time underground with the miners, talking with them and listening to their grievances. Our aim was to set an example for the foremen—if they saw their boss engaged in negotiation, they might try it too. A leader's approach to grievances sends a strong signal to others in the organization about the appropriate and rewarding way to resolve disputes.

Using Peers as Proponents. People who have been involved in designing or using a new procedure are often best at selling it to others. A designer working in a prison asked design committee members to explain the new procedures to the inmates. She says, "When a high status inmate representative goes around and talks about a procedure he has been part of putting together, the others think then maybe it's worth trying."[18] Likewise, students trained as mediators for school disputes encourage their friends to try mediation, and lawyers trained as divorce mediators encourage their clients to consider mediation.[19]

Setting Goals. One of the most successful motivation techniques is getting the parties to set specific, challenging

goals.[20] At International Harvester, the goal was simple: settle all grievances orally on the day they arise. Previous exhortations such as "settle grievances as quickly as possible" had been difficult to enforce because they were vague. No clear yardstick existed against which progress could be measured. With the help of a clear goal, however, the results were dramatic—virtually all grievances were being resolved orally.[21]

Designing Incentives. To ensure that new procedures are used, the designer may provide for special rewards. He may, for instance, seek to make dispute resolution part of each manager's performance appraisal or make the acquisition of dispute resolution skills part of managers' annual development plans.

Publicizing Early Successes. Publicizing early successes of the new dispute resolution system gives momentum to the change process. At International Harvester, for example, a spotlight was put on success stories:

> Certain ceremonial gestures helped people to identify with the new program. Top officials complimented the local people for their hard work and for their willingness to make a change. A sense of momentum was also created by talking about the success which the program was achieving in other situations. Finally, pictures were taken and people's comments printed in a company magazine. All of these devices created an aura of good feeling about the "new look."[22]

The Designer's Presence. The impact of the designer's presence during implementation should not be overlooked. It can signal to all involved that a major change is under way. The designer serves as a symbol of and a watchdog over the new procedural norms. Without him, it is all too easy for people to fall back into the old familiar routines, particularly under the pressures of immediate crises and deep-seated conflicts. The designer who is present reminds the parties to use lower-cost interests-based procedures whenever possible.

Training and Coaching Disputants

One of the designer's most important implementation tasks is helping the disputants acquire the skills to use the new procedures effectively. Since new procedures will most often be interests-based, this typically means training and coaching in negotiation and mediation skills.

Training. Successful training programs combine presentation, demonstration, and discussion of appropriate techniques with simulation exercises and feedback.[23] Training the parties together is valuable. Joint training gives participants a common vocabulary with which to discuss alternative approaches to resolving disputes; it instills common expectations about appropriate behavior in interests-based negotiation and provides a safe environment in which to try out new procedures. It also offers an opportunity to jointly set goals for using the new procedures.

The designer must decide whom to train and how intensely. Training large numbers of potential disputants can help, even if the training is brief. In the mediation project at Bryant High School, more than 3,000 students attended classroom seminars on mediation and nonviolent problem solving. As a result, almost any time a dispute arose, several students were present who knew how to use a problem-solving approach to resolve it.[24] Even some parties who seem personally unsuited for interests-based negotiation may benefit from training. Consider the story of "Heavy" told by one designer:

> The first prison we worked in in New York was a big maximum security place, a couple of thousand men locked up. And one of the men on the design committee who later became a committee member was a guy named Heavy. I don't remember what his first name was but they called him Heavy because he just sat there. I don't know how smart Heavy was, he was just a moose of a guy who apparently had a very quick temper, which we saw a little bit of, and who also in his earlier days had been very quick with his fists.

> When we got this thing going, Heavy got the training. Sometime after it started, a grievance clerk said, "I can't believe it. Yesterday Heavy got into an argument and I thought he was going to drop the sucker right in his tracks. Heavy just kept talking to him!" I don't know how much of this you can attribute to the training, but the guy who was talking to us was attributing all of it to the fact that Heavy had learned that he didn't have to drop people in their tracks, he could talk to them and get something out of that.[25]

The designer will also want to provide continuity by establishing an ongoing program for familiarizing and training new people to participate in the new procedures. Both school and neighborhood mediation programs have been successful in sustaining their dispute resolution procedures despite the turnover of mediators. They have done this primarily by periodically training large numbers of mediators so that newly trained people can work side by side with more experienced mediators.

Coaching. Ideally, the designer will coach the disputants through their initial disputes. He will encourage each participant to prepare by identifying interests, creating options, and considering trade-offs. After the negotiations, the designer can debrief participants and give them feedback on their process skills. Such coaching can be provided in person or by telephone.[26] Two risks are associated with coaching: creating the appearance of bias and succumbing to the temptation to mediate. These risks can be minimized if the designer makes his services available to all parties and avoids providing advice on the substantive aspects of the dispute.

Exit, Evaluation, and Diffusion

Exit

The parties may become dependent on the designer for coaching, motivation to use new procedures, and adjustments

to the design. The designer serves as a temporary support in the construction of the system. At some point, however, he must leave and the new structure has to be able to stand by itself. The designer must therefore balance the benefits of managing the implementation against the risks of continuing the parties' reliance on him. At Caney Creek, Ury sometimes had difficulty remembering that he was not there to mediate but to support the parties in implementing a new dispute resolution system. The key is to give the changes a chance. Occasionally, this will mean lending the parties a helping hand. More often, it will mean letting them stumble and learn for themselves.

Evaluation

The purpose of evaluation is to determine whether the changes are working as intended.[27] Are the costs of disputing reduced? Are the benefits being realized? Are there unintended consequences? Evaluation helps the designer fine tune the changes. Moreover, if a designer intends to disseminate the new procedures, it is critical that he learn as much as possible from the initial experiments.

Evaluation focuses on three questions:

1. *Does the new system work?* Are transaction costs lower? Are parties more satisfied with outcomes? Has the quality of the relationship improved? Has recurrence of disputes been reduced? In other words, what changes has the new system brought about? The evaluator also looks for negative side effects of the intervention, both anticipated and unanticipated.
2. *What are the limits on the effectiveness of the changes?* In other words, under what specific conditions will they work? For example, in designing the grievance mediation program we assumed that even experienced mediators would need substantial arbitration experience in order to be successful. Evaluation, however, revealed that mediators with little arbitration experience were as successful as experienced arbitrators.

3. *Why do the changes work?* What are the most important factors that make for success? It may be that the new system succeeds for wholly different reasons than those that the designer imagined. These surprises help the designer to revise his working theory and improve future efforts. In evaluating our grievance mediation program we unexpectedly found that the reduction in transaction costs was most important to unions, while a perceived improvement in the parties' relationship was most important to employers. As a result, in our efforts to spread grievance mediation, we have emphasized the former to unions and the latter to employers.

Who Should Evaluate? Evaluation should take place as the program proceeds. While the designer is familiar with the project and knows better than anyone else what he is trying to accomplish, he may be biased toward finding improvement. Hiring an outside evaluator will reduce the risk of bias. It may, however, increase costs substantially because the evaluator will have to duplicate much of the diagnosis done by the designer.

Whether the evaluation is directed by the designer or by an outsider, the parties should actively participate. They can best identify positive and negative consequences of the change. Eliciting their assistance will also promote their capacity for self-evaluation and help them spot problems early. If the parties learn to recognize when procedures are not working, they may be able to continue the process of improving the system themselves, eventually rendering the designer obsolete.

How Detailed an Evaluation? Evaluation takes time and costs money, but if the designer has any intention of trying to extend the program elsewhere, he will find solid evaluation data valuable in responding to skeptics at new sites. Such data have been central to our efforts to spread grievance mediation. We could talk indefinitely about the capacity of mediation to resolve disputes, but nothing is more convincing than the record of settling 850 of the first 1,000 disputes.

Diffusion (an Optional Step)

The most common form of diffusion is replication—the transfer of a procedure from one site to another.[28] This method is essentially horizontal—across major organizational lines. We have used this strategy for the diffusion of grievance mediation. Goldberg has made numerous presentations on grievance mediation at conferences, written articles for institutional newsletters, and followed up with countless face-to-face meetings to explain the process to particular unions and companies. A simpler and less time-consuming alternative is to spread change vertically within an organization or industry. A decision at the top of a company can extend new procedures from a single plant to an entire corporation. A multiemployer collective bargaining agreement can extend changes from a single corporation to an entire industry.

Government action can also encourage diffusion. To stimulate the use of court-ordered arbitration, some states have adopted legislation authorizing arbitration programs, and Congress has appropriated funds for pilot programs in the federal courts. Congress also has directed states to provide an ombudsman program for senior citizens residing in long-term care facilities.[29]

However diffusion takes place, the designer must always consider whether a procedure that was designed for a particular relationship, community, or institution will transfer successfully to a new location. A procedure that works in one location may not work in another, unless it is supported by motivations, skills, and resources similar to those present at the original site. Moreover, broader environmental conditions may differ: a procedure that works in one culture may not work in another. Rights procedures may be less successful in a culture that places a premium on accommodation, and interests-based procedures may be less successful in a culture with a strong orientation toward right and wrong.

Conclusion

In working with the parties, the dispute systems designer plays the roles of coach, evaluator, and evangelist, in addition to those of expert, mediator, and negotiator. He acts as an expert when he analyzes the current system and considers potential alternatives. Acting as a mediator, he seeks to bring about agreement on changes to the system. In doing so, he also negotiates with the parties to adopt the changes he thinks worthwhile. In helping the parties begin to use the new system, he becomes a coach, working to develop their skills, and sustaining their enthusiasm when agreements cannot be reached. He may also evaluate the system, helping the parties determine how well it is working and what adjustments should be made. If he takes on the task of diffusion, the designer plays yet another role, that of evangelist. In the case study that follows, we played all these roles.