

NEW YORK MOVEABLE FEAST: BOUNDARIES TO PRACTICE

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[Special thanks to Robert Collins,¹ Michael Lang,² Gary Morgerman,³ Susan Romer⁴ and Dan Weitz⁵ for serving as recorders of small group discussions.]

Following the first flush of enthusiasm, it is becoming apparent that the dispute resolution field, like its predecessor professional fields, is vulnerable to the incentive structures and practice barriers built into both academic and practice careers. Also, what many of us think of as a national (or international) movement may be increasingly affected by local cultures. In collaboration with scholars and practitioners in a variety of cities, the Broad Field Project⁶ (“Broad Field”) has been convening a number of dialogues about related issues, including a small series particularly focused on the local cultures of dispute resolution.

Dispute resolution work is still often thought of as “wide open” because there are very few formal barriers to entry, such as explicitly required degrees or certification. The field rests on a multi-disciplinary foundation, and practitioners frequently pay homage to the openness inherent in fostering creativity and diversity of approaches. Yet is the field really open? Are there, in fact,

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⁶ The purpose of this national project is to create a robust cross-fertilization across the many, and all too separate, domains and specialties of conflict resolution and to ensure that there will be an integrated body of work whose contributors draw from each other’s contributions and innovations. Further information about Broad Field at <http://www.convenor.com/madison/broadfld.htm> (last visited Mar. 9, 2004).

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significant or even insuperable boundaries to practice? For example, are there geographic, professional, political, racial or gender barriers that are driving the development of careers in the field? If so, how do they operate in a field that thus far refuses to adopt some of the most commonly applied boundaries from other fields? In addition, if such boundaries in fact exist, how can our field, which is focused on building bridges and valuing diversity, overcome these barriers? Or, perhaps, are some barriers and boundaries actually constructive?

The New York metropolitan area is an environment featuring virtually every kind of professional, social, religious, and demographic group that exists — all operating on the island, or the sister boroughs and neighboring states (whose citizens often feel disregarded in Manhattan). Consequently, it was an ideal place to question whether the “wide open” image requires revision and whether existing momentum in certain directions should be acknowledged.

Broad Field, along with its predecessor, Theory to Practice,⁷ has sought ways of developing discussions that include both experienced scholars and experienced practitioners. The present discussion is thus not an isolated experiment, but part of a larger effort to foster greater cooperation across a variety of domains within the broad field of conflict resolution. The successive projects have now held a series of “moveable feasts”⁸ on an expanding range of topics. A “moveable feast” is a model for an informal working meeting that does not require a major commitment of funds and time to convene. It is also a meeting to which only experts are invited, at which many points of view are represented and which produces a tightly focused product.⁹ These discussions take place on an inti-

⁷ As predecessor to Broad Field, the purpose of Theory to Practice was to develop more sophisticated and consistent linkages between those who conceptualize new ideas for handling human conflict and those who practice as neutrals—and advocates—throughout this field. Further information about Theory to Practice at <http://www.convenor.com/madison/t-t-p.htm> (last visited Mar. 9, 2004).

⁸ The term “moveable feasts” refers to the title of Ernest Hemingway’s memoirs of his time in Parisian café culture during the 1920’s.

⁹ As an example, the first foray addressed the need for “protocols” to inform the relationship between a researcher and a practitioner group. The result of that discussion was published in the Fall 2001 issue of Conflict Resolution Quarterly (“CRQ”). See generally Christopher Honeyman, et al., *Not Quite Protocols: Toward Collaborative Research in Dispute Resolution*, 19 CONFLICT RESOL. Q. 75 (2001). If you do not subscribe to CRQ, an electronically reproduced copy is available at <http://www.convenor.com/madison/not.htm> (last visited Jan. 30, 2004). Subsequent “moveable feasts,” most of which have also resulted in published articles, have addressed a variety of topics, including: how to identify “practical theory;” cultural errors being committed by U.S.-based dispute resolution practitioners and scholars working abroad; development of short training exercises out of a ma-

mate dinner-party scale, conducted in tables of six. Each table has a “rapporteur,” and each table is asked to consider somewhat different aspects of the underlying problems.

Our discussion, a collaborative effort of both Broad Field and Yeshiva University’s Benjamin N. Cardozo School of Law was constructed along these lines. In this short article, we will attempt to do justice to the group’s tentative conclusions.

1. HAS GEOGRAPHY POSED BARRIERS IN THE NEW YORK DISPUTE RESOLUTION COMMUNITY?

To the surprise of some others, the subgroup that was asked to focus particularly on this question reached a conclusion of “no.” Distinctions in many geographic facets of the New York alternative dispute resolution (“ADR”) community were noted, but none were felt to be so wide as to present a barrier to overall health or growth. “While there may be a New York City (“the City”) snobbery (and fees to match) by its hometown ADR practitioners,” versus the rest of the area, and while some assert that there is better training in the City and environs compared to the outer areas (and evince some personal hang-ups about traveling to New Jersey, no matter what the reason), “these are distinctions, not barriers.” The group felt that movement within, or into, any facet of ADR in the New York area could be achieved without real difficulty. “It’s up to the individual to make his or her way. That’s why New York is New York.”

The group also noted the existence of strong institutions (such as Cardozo, Columbia, Fordham, Hofstra and Touro Law Schools’ dispute resolution programs) and other mechanisms (such as Professor Maria Volpe’s¹⁰ monthly mediation breakfasts and her e-mail network) that support a real sense of a professional community in New York.

for but lengthy work of scholarship; and defining and analyzing “dispute streams” in health care. In each case, the group assembled has had specific knowledge of the issues from a variety of perspectives. These discussions have led to a variety of follow-up steps. Most of the publications that resulted have been reproduced electronically and are available free of charge at <http://www.convenor.com/madison/t-t-p.htm>. See also <http://www.convenor.com/madison/broadfld.htm> (last visited Mar. 22, 2004.)

¹⁰ Maria R. Volpe, Professor of Sociology, serves as Director of the Dispute Resolution Program at John Jay College of Criminal Justice, City University of New York, and Convenor of the CUNY Dispute Resolution Consortium, a university-wide project funded by the William and Flora Hewlett Foundation.

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Another table, however, briefly discussed this issue and concluded that there is no single New York dispute resolution community. Instead, this group perceived many communities — divided by focus, specialty, and “the highly evolved New York sense of geographic parochialism, in which other boroughs, and even certain neighborhoods, are viewed as impenetrable alien territories to New Yorkers who neither live nor work in them.”

2. ARE THERE BARRIERS INVOLVING RACE, ETHNICITY, GENDER, SEXUAL ORIENTATION, RELIGION OR DISABILITY, IN THE NEW YORK DISPUTE RESOLUTION COMMUNITY?

The general consensus was that, regrettable as this may be, the New York dispute resolution community is primarily Anglo, middle-class and educated. Its individual members are likely, at least, to be analytical thinkers (or claim to be), believers in the application of logic to the resolution of problems, and articulate in the English language.

Gender balance within the community was seen as good, with women holding many leadership positions. Except where publicly announced, the sexual orientation of members seems not to be a factor, although a stated preference of many gay and lesbian disputants to have a gay or lesbian mediator assigned to work with them was noted. (In Manhattan, a gay and lesbian mediation center¹¹ serves cases that otherwise would go to generic community mediation centers). Despite some individual exceptions, there is a recognized but persistent dearth of persons of color, including African-Americans and Asians, as well as of Hispanics, Hindus, Muslims, and people with disabilities, within the New York dispute resolution community. This phenomenon was given a good deal of attention in the discussion. Some tentative conclusions were offered: perhaps our dispute resolution model, in all its iterations from “transformative”¹² to “evaluative,”¹³ still falls within boundaries, redolent of the dominant culture, that are not sympathetic to peo-

¹¹ For example, the Lesbian Gay Transgender Community Center in Manhattan offers mediation services between roommates, neighbors, landlords, tenants and family members. Mediators are from the LGBT and HIV/AIDS communities. Information about the Center at http://www.gaycenter.org/program_folders/mediation/program_view (last visited Jan. 30, 2004).

¹² See generally ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994).

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ple whose cultural and social foundations are rooted in certain ethnic (particularly non-Western) or deeply spiritual traditions. The group hypothesized that, consequently, such people may not want to participate in a process they view as uncomfortable, alien, or unsupportive of intimately held beliefs. This is not just a matter of the cultural bias of the assumption of self-determination (a concept alien to certain cultures where there typically is deference to an elder or a husband); even standard procedural ground rules (e.g., only one person speaks at a time) may contradict some groups' cultural norms.

Another factor considered was the economics of the field. The dispute resolution field provides only limited economic rewards to the majority of its practitioners. Not surprisingly, therefore, many active practitioners have sufficient resources that enable them to engage in work that does not pay well, if at all. In the New York community, such people are likely to be white and at least middle aged. Some thought that members of ethnic and racial minorities, whose relative absence is evident in the field, often do not have the economic freedom to permit them to devote time and energy to work for which they will be inadequately compensated. Others discounted this explanation, noting that religious and other unpaid community work among many of New York's ethnic groups, by contrast, is a prevalent feature.

The group surmised that to increase diversity in the New York dispute resolution community, outreach efforts might need to be focused in non-traditional areas, including churches, unions, and community based "settlement house" institutions, where alternate models of dispute resolution actually utilized by various ethnic and racial groups may be centered. But another discussion noted the influence of the sprawling Community Dispute Resolution Center Program¹⁴ ("CDRCP"), which provides opportunities for involvement of a wide and diverse array of individuals. Like other community mediation programs elsewhere, this program aims to have mediators who reflect the diversity of the populations in which they serve. The CDRCP makes for a greater voice for transforma-

¹³ See generally Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEG. L. REV. 7 (1996) (describing evaluative and facilitative mediator orientations).

¹⁴ The Community Dispute Resolution Center Program was instituted in 1982 to provide conflict resolution services in different communities as an alternative to court proceedings. Since its inception, the CDRCP has assisted more than 75,000 participants. More information on the CDRC at <http://www.nycid.org> (last visited Feb. 9, 2004).

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tive¹⁵ and facilitative¹⁶ mediation, as well as for diversity, than in many other places due to the sheer scale of the program.¹⁷ In the City alone, this statewide program mediated 5,848 cases in the fiscal year 2002-3, and calculated that it served over 22,000 people. Since the dominant practice is facilitative¹⁸ and transformative¹⁹ (even if some observers continue to characterize some mediators in the program as “too directive”), this also provides a real and substantial area of practice that avoids “evaluative”²⁰ mediation. Others, however, noted the economic implication of this preference in the “free” caseload, compared to the emerging dominance of evaluative work in the highly-rewarded corporate mediation caseload.

One of the discussions turned to a different definition of the tremendous diversity of the New York community, where participants can request translators proficient in over fifty languages. This version of diversity raises its own questions not often addressed elsewhere, such as “how best to incorporate the translator in the mediation process” when some translators may see themselves as communicators of cultural content while others may confine themselves to translating words.

3. HAVE EDUCATIONAL DEGREES OR PROFESSIONAL BACKGROUNDS POSED BARRIERS IN THE NEW YORK DISPUTE RESOLUTION COMMUNITY?

This sub-discussion produced several recurring concerns. The first was of the dichotomy of thinking of the work as a “field” versus a “profession”:

“Why not call us a profession? Since we want to assure that the services offered are competent and effective, there was a belief that agreed-upon background characteristics, and perhaps even certain credentials, are needed.”

This group also felt a need for a definition of mediation and of dispute resolution:

¹⁵ See generally BUSH & FOLGER, *supra* note 12.

¹⁶ See generally Riskin, *supra* note 13.

¹⁷ At http://www.courts.state.ny.us/ip/adr/Publications/Annual_Reports/AR02-03.pdf.

¹⁸ See generally Riskin, *supra* note 13.

¹⁹ See generally BUSH & FOLGER, *supra* note 12.

²⁰ See generally Riskin, *supra* note 13.

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“If we cannot reach a consensus on a definition of mediation and dispute resolution, we cannot agree on a curriculum to teach the theory, skills and ethics of our field.”

This, however, immediately brought forth a traditional offsetting argument that credentials can have a negative impact on diversity. The same group felt that the value of diversity in our profession (or field) should cause us to accept the myriad backgrounds of practitioners, and that many believe that a diverse composition provides the essential openness to make our field effective. In attempting to square the circle, the discussion turned to some options for valuing diversity and consensus on qualifications simultaneously:

“Avoid strict pronouncements of credentials.”

“Perhaps in our current stage of development, some ‘loose credentials’ could be implemented to shore up quality and consistency. Convene a more diverse group of practitioners while discussing these issues, because we’re wary of too narrow a group with respect to race, age and education.”

It was agreed that different contexts require different subject matter expertise. For example, the Dispute Resolution Program in the U.S. Court of Appeals for the Second Circuit²¹ is a hybrid of mediation and neutral evaluation, which calls for skills in both areas. Similarly, there are cases that require subject matter expertise, such as construction cases. Yet more than one option was seen to exist for filling these needs — such as a co-mediation model where one mediator is the subject matter expert and the other is more focused on process. Still, the group concluded that our refusal to erect barriers with definitions, standards and qualifications has produced a paradox — a larger set of barriers to overall development of the field’s acceptance and status. The point was made that while some felt the New York community would be unable to reach consensus on a definition, qualifications and standards nationally, a number of states, as well as the Dispute Resolution Section of the American Bar Association²² and the Association of Conflict Reso-

²¹ The Second Circuit’s program, instituted in 1974, provides an array of mediation services for cases on appeal to the Second Circuit. More information on the Program (United States Court of Appeals for the Second Circuit, *Civil Appeals Management Plan*), at <http://www.ca2.uscourts.gov/CAMP.htm> (last visited Jan. 30, 2004).

²² See Dispute Resolution Section of the American Bar Association, at <http://www.abanet.org/dispute> (last visited Jan. 30, 2004).

lution,²³ have issued recommendations or reports on qualifications and standards for neutrals.²⁴

4. WHAT IS DISTINCTIVE ABOUT OUR LOCAL DISPUTE RESOLUTION COMMUNITY?

The group noted that New Yorkers tend to find the City “incredibly diverse, relatively humanistic, and therefore more receptive than many locations to the concepts of dispute resolution.” Yet there are visible barriers within the community that effectively separate people in the field from one another. In a telling example, one of the nation’s most renowned theoreticians, Morton Deutsch,²⁵ and one of its most illustrious practitioners, Theodore Kheel,²⁶ met for the first time only last year even though both have been based in Manhattan for half a century. As with the different experiences of students at small colleges and large universities, the tendency is to become specialized — and therefore isolated — within the larger settings. One participant stated:

“The reaction to an overwhelming number of choices and opportunities may be to become narrow to avoid being overwhelmed.”

An observer new to the City believed that more lateral interaction among different types of mediation would be beneficial. It was observed that we really need to be talking about the dispute resolution “communities” in the metropolitan area, because there are separate and distinct groups. In fact, it took the crisis of 9/11

²³ See Association for Conflict Resolution, at <http://www.acrnet.org> (last visited Jan. 30, 2004). Association of Conflict Resolution (“ACR”) was launched in January 2001, when the Academy of Family Mediators (“AFM”), the Conflict Resolution Education Network (“CREnet”), and the Society for Professionals in Dispute Resolution (“SPIDR”) merged into one organization. ACR’s goal is to aid in the practice and public understanding of conflict resolution.

²⁴ See American Bar Association Section of Dispute Resolution Task Force on Credentialing, Report on Mediator Credentialing and Quality Assurance (discussion draft), available at http://www.abanet.org/dispute/taksforce_report_2003.pdf (last visited Jan. 30, 2004); see also Nancy E. Peace, Association for Conflict Resolution, *ACR’s Four Quality Assurance Initiatives*, at <http://acresolution.org/research.nsf/key/QualAssur> (last visited Jan. 30, 2004).

²⁵ Morton Deutsch is the Director Emeritus and E.L. Thorndike Professor Emeritus of the International Center for Cooperation and Conflict Resolution, Columbia University, New York.

²⁶ Theodore Kheel is the Founder and President of the Foundation for the Prevention and Early Resolution of Conflict (“PERC”).

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for the mediation community to realize that there was no mechanism in place for members of the conflict resolution family to communicate with each other (a problem now better addressed by monthly breakfast meetings and the Dispute Resolution Listserv²⁷ at CUNY). It was thought that the New York dispute resolution community may have developed distinct characteristics because of the hostility of the organized bar, but that this may be less true today, given the increased acceptance of the practice by large law firms and its enthusiastic embrace by at least some corporations.

The group felt that hope for the future of the field could be found in the large number of law students and peer and community mediators being trained, and in the interdisciplinary approach now being adopted by institutions such as Columbia University. What might be helpful to the New York community is a reorientation towards a more interdisciplinary approach, reaching out to theoreticians and practitioners in fields whose work have similarities to that of dispute resolution professionals, but who do not generally characterize themselves as such — an “invisible” dispute resolution community of clergy, peace activists, managers, deans, teachers and other professionals whose work often parallels our own.

It was noted that while New York offers a wealth of resources — ranging from the thousands of people trained in community and peer mediation to the presence of the United Nations headquarters — the community may not be taking full advantages of the resources:

“We ironically have the ability to *affect* a huge population — in the aftermath of 9/11 facilitation training materials went out to forty-two thousand students — and yet *effecting* change can be all the more difficult, because of the relative inaccessibility of decision-makers here in the City compared to smaller locales.”

5. HAS 9/11 AND THE THREAT OF TERRORISM HAD AN IMPACT IN DEFINING AND BUILDING THE DISPUTE RESOLUTION COMMUNITY IN NEW YORK?

The impact of the terrorist attacks of September 11, 2001, on the New York area conflict resolution community has been considerable. One almost immediate consequence was a widely sup-

²⁷ More information on Professor Volpe’s Dispute Resolution Listserv at <http://johnjay.jjay.cuny.edu/dispute/fall%202002%20newsletter.pdf> (last visited Jan. 30, 2004).

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ported effort to create dialogue with the object of protecting minorities and communities that were seen as at risk as a result of 9/11. There has also been an extensive collaborative process, with numerous town hall meetings, to develop a plan for Ground Zero — though this has of course existed in parallel, and often in contrast, with the City's normal power politics and big-money streams of related activity. Still, the scale of the effort, including one notable day for which five hundred facilitators were recruited, gave definition to the field and demonstrated the utility of process neutrals to many who had never thought much about it before. In more ongoing activity, CUNY's Dispute Resolution Consortium²⁸ brought together the dispute resolution community to explore 9/11's impacts from many perspectives, and created a very active list-serv²⁹ that is still in operation today.

Other programs springing from 9/11 included a small-business mediation program, developed to help resolve litigation between landlords and tenants affected by the destruction. The large-scale educational effort invoked to get this program started created new exposure to the field, which for many, would not otherwise have occurred. Volunteer mediators were used and bridges were built as a result between JAMS³⁰ and Safe Horizon³¹ — an unusual combination of a commercial business ADR provider and a community dispute resolution center. Since there were lawyers representing these parties in mediation, one result was greater exposure of the field's potential to the legal community. And of course, the innovation represented by Kenneth Feinberg's³² appointment as Special Master of the Victims Fund attracted wide attention to this high-powered variety of ADR.

The question was raised as to whether the atmosphere has changed such that people are less receptive to dispute resolution as

²⁸ Further information on CUNY's Dispute Resolution Consortium at <http://johnjay.jay.cuny.edu/dispute> (last visited Jan. 30, 2004).

²⁹ See Professor Volpe, Dispute Resolution Litsserv, *supra* note 27 and accompanying text.

³⁰ See *JAMS-Who We Are: Mediation, Arbitration and Other ADR Services*, at http://www.jamsadr.com/who_we_are.asp (last visited Jan. 30, 2004).

³¹ Safe Horizon is a victim assistance, advocacy, and violence prevention organization. Safe Horizon's mission is "to provide support, prevent violence, and promote justice for victims of crime and abuse, their families and communities." Safe Horizon Mission Statement, at <http://www.safehorizon.org> (last visited Jan. 30, 2004). Further information on Safe Horizon at <http://www.safehorizon.org> (last visited Jan. 30, 2004).

³² Kenneth R. Feinberg is one of the nation's leading experts in mediation and alternative dispute resolution. He is the managing partner and founder of The Feinberg Group, LLP. He served as the Special Master of the September 11th Victims Fund.

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a consequence of the heightened need for security and “extreme measures” for dealing with terrorism. The group felt that there has indeed been a negative impact on civil liberties, with people of Middle Eastern descent being targeted as a result of community and quality of life concerns, and sometimes merely as an expression of frustration. Arguably, the field of dispute resolution is being invoked more on the fringes of major activity, or in some individuals’ lives (e.g., in landlord-tenant cases), but has been less involved in critical issues on the macro level where policy is being made. This observation in turn raised the question of whether our field collectively has been overlooking an opportunity to create a more constructive dialogue on public policy.

TENTATIVE CONCLUSIONS

While this discussion did not draw many bright lines, it did indicate trends and possibilities. New York may be quite different from other cities (though the parallel discussions from elsewhere are not yet finished). One historically excluded group (women) has now become professionally prominent in New York. This development holds the enticing prospect of doing better for other historically excluded groups. Surely, a city and region that has showed so much creativity in finding ways to use conflict resolution tools and expertise on at least some aspects of recent national troubles is in a better position to expand that usage and develop social capital from those skills than places where much of this work has never gotten off the ground. Yet, of course, the central character of the City as a place where the new has a better chance of getting tried than most places has its corollary — that it is awfully hard to get a majority in New York to do anything. Perhaps it was inevitable that, in a city and area that is in a real sense about a dizzying variety of people, interests and institutions, our broad-ranging discussion would result in conclusions that have a “sometimes yes, sometimes no” quality. That, too, is very characteristic of New York.

