

TAKING STOCK: ADR RESPONSES IN POST-DISASTER SITUATIONS

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INTRODUCTION

As the use of innovative dispute resolution processes becomes more widespread and diverse, it is understandable and perhaps even inevitable that dispute resolvers will continue to explore ways to apply their knowledge, skills, and expertise in new and challenging settings.¹ One of the contexts that dispute resolvers have paid increasing attention to since September 11th² has been post-disas-

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¹ See, e.g., BERNARD MEYER, *BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION* (2004).

² September 11th refers to the terrorist attacks of hijackers on September 11, 2001 who used four hijacked commercial passenger jets to crash the planes in three locations: One jet was flown into the Pentagon in Arlington, Virginia, two jets were flown into two of the towers at the World Trade Center in New York City, and one jet was crashed in a Shanksville, Pennsylvania field when passengers and crew members attempted to take control of the plane. As a result of the attacks, fatalities occurred at all three locations with nearly 3,000 people killed and extensive physical damage occurred at the Pentagon and at the World Trade Center where both towers, plus a third World Trade Center building, collapsed and damaged surrounding buildings. See generally 9/11 Commission Final Report available at <http://www.gpoaccess.gov/911/index.html> (last visited Feb. 1, 2008).

ter situations.³ Despite this observation, however, dispute resolution experts continue to struggle with how to respond.⁴ While many professions, particularly those which provide emergency or essential rescue, evacuation, recovery, relocation, repair, rebuilding, and survival-related services have readily identified roles in post disaster situations, such is not the case for dispute resolvers. September 11th and Hurricane Katrina⁵ have raised provocative questions and served as a wake-up call about the role and relevance of dispute resolvers in responding to disasters.⁶

Since September 11th, my research on ADR⁷ responses to post-disaster situations has been guided by the following question: *What do dispute resolvers do as dispute resolvers in response to disasters?*⁸ This Article will examine the dispute resolution field

³ For information on ADR response to disasters see 13 *DISP. RESOL. MAG.* (2006).

⁴ Maria R. Volpe & Staci Strobl, *Dispute Resolvers in a Post-September 11th World*, 3 *PRAC. DISP. RESOL.* 1 (2003); Maria R. Volpe & Staci Strobl, *Responses to 9/11 Reveal Opportunities and Barriers for Commercial ADR*, 23 *ALT. TO HIGH COST OF LITIG.* 93 (2005); Maria R. Volpe & Staci Strobl, *Restorative Justice Responses to Post-September 11 Hate Crimes: Potential and Challenges*, *CONFLICT RESOL. Q.* 527 (2005); Maria R. Volpe & Staci Strobl, *Conflict Resolvers' Response to 9/11*, *ACResolution* 37 (Fall 2004); Maria R. Volpe, *Restorative Justice in Post Disaster Situations: Untapped Potential* 8 *CARDOZO J. CONFLICT RESOL.* 611 (2007).

⁵ Hurricane Katrina refers to the Atlantic hurricane that hit the Gulf coast area of Louisiana, Mississippi and Alabama on August 29, 2005 causing large loss of life, immense destruction of property, and massive displacement of residents. In New Orleans, the storm led to levee breaches which resulted in flooding conditions that submerged large portions of the city.

⁶ See, e.g., Maria R. Volpe *Looking Back, Looking Ahead: The Role and Relevance of ADR Responses to Disasters*, 13 *DISP. RESOL. MAG.* 5 (2006); see *supra* note 4.

⁷ ADR, an acronym for alternative or appropriate dispute resolution, is used in this article as an umbrella term to refer to a variety of non-adjudicatory intervention processes in response to conflicts or disputes including negotiation, facilitation, conciliation, mediation, and arbitration among others.

⁸ My research interest in ADR responses to post disaster situations grew out of two first hand experiences in the aftermath of 9/11. The first involved inquiries from dispute resolvers from around the world who asked how they could assist New York dispute resolvers in responding to the terrorist attacks at the World Trade Center. In fact, dispute resolvers in NYC had no way of even communicating with each other prior to 9/11. The second experience involved a request I received from the City University of New York faculty leaders to help prepare our faculty cope with the aftermath of 9/11 in the classroom. The challenge for me was to identify what it is that dispute resolvers do that could be shared in the form of useful tips. What became clear is that what all dispute resolvers do is try to Make Talk Work®. Since then, the City University of New York has trademarked the phrase Make Talk Work® with the U.S. Patent and Trademark Office, and undertaken a variety of Make Talk Work® projects to enhance the public's understanding of dispute resolvers' work. Among the projects have been Make Talk Work® tipsheets, training programs, a large scale exhibit, and two projects funded by the JAMS Foundation, namely twenty-four Make Talk Work® bookmarks and an International Make Talk Work® Video Competition for sixty second videos based on the Make Talk Work® bookmarks. Information is available at <http://johnjay.jjay.cuny.edu/dispute> (last visited Feb. 3, 2008).

within the post-disaster context, post-disaster dispute resolution responses that have been undertaken, and lessons learned.

I. DISPUTE RESOLUTION LANDSCAPE

The dispute resolution field has shown significant growth since the early 1970s. Dispute resolution processes have become more readily recognizable and their use more popular, widespread, diverse and even accepted in a variety of contexts.⁹ A quick inventory of the dispute resolution landscape reveals a rich and well stocked field crowded with many tools, processes, and practitioners.¹⁰ There are countless textbooks, journals, newsletters, research studies, theories, codes of conduct, trained practitioners, academic coursework, training programs (including those held in unique settings, for example, on cruises – Mediation at Sea Cruise),¹¹ as well as conferences – with such variety that on many days one can choose from a wide range of interesting conferences around the world.¹²

Quite simply, when dispute resolvers look in the mirror, they can see overwhelming tangible evidence that ADR has gained traction in a wide range of contexts. Despite the fact that significant work remains to be undertaken to shape the field, there is no shortage of resources and opportunities from which to choose. However, when dispute resolvers look out the window, the dispute resolution landscape presents a much more challenging picture. The aforementioned well-stocked scenery that can be viewed in the mirror does not get translated into a well understood field. The gap arises from both the internal state of affairs of a fledgling field that remains a work in progress and the external state of affairs of a field that remains largely unknown to the public.

⁹ See *supra* note 1.

¹⁰ For a quick inventory of the range of the vast amount of scholarly and applied activity in the field, see CONFLICT RESOLUTION INFORMATION SOURCE, www.crinfo.org, and MEDIATE.COM, www.mediate.com (last visited Jan. 31, 2008).

¹¹ See NYC-DR archives at <http://listserver.jjay.cuny.edu/archives/nyc-dr.html> (last visited Jan. 31, 2008) [hereinafter *LISTSERV*]; Mediation at Sea, <http://www.mediationworks.com/mti/cruise2008/index.html> (last visited Jan. 31, 2008).

¹² For example, in New York City, it is common to hear dispute resolvers suggest creation of a master calendar to keep track of all of the events that are held. Many of the announcements for upcoming events are posted on listservs or websites which require individuals to keep track of events.

While conflicts are universal and managing them is as old as humankind, the field of dispute resolution is not well understood by the public. The varied dispute resolution processes are not sufficiently explicit and remain underutilized, especially when parties are given a choice.¹³ While increasingly dominated by the legal field, people from all walks of life representing a broad range of disciplines continue to be attracted to it as scholars and practitioners. For the practitioners, currently there are no universally- established professional criteria, standards, or career paths. There is no clear guidance about how to get in, stay in, or move up. The employment opportunities that do exist are low paid or pro bono.¹⁴

In sum, while tremendous strides have been made, much work lies ahead for the dispute resolution field. One research participant in another study described the dispute resolution field as a “gated” community where people can not see what is going on behind the high wall.¹⁵ This perceived impenetrability in turn has implications for those operating within the wall. To date, this has often meant limited opportunities or challenging circumstances for those aiming to do dispute resolution-related work. Of particular note, the challenging conditions that exist under normal circumstances become exacerbated in the aftermath of disasters.

II. DISASTERS AND THE DISPUTE RESOLUTION FIELD

Disasters, whether they are manmade or natural, are intricate if not impossible phenomena to manage. Their infrequency and unpredictability contribute to the complicated circumstances in their aftermath. Crises emerge over how to best handle immediate rescue, evacuation, recovery, relocation, repair, rebuilding and survival-related efforts. Disaster responses require readiness, credibility, expertise, and coordination to address a variety of urgent issues

¹³ See, e.g., Alan E. Gross, *Conflict Resolution in the Aftermath of World Trade Center Attacks: A Family Mediation Program*, 9 *CARDOZO J. CONFLICT RESOL.* 317 (2008).

¹⁴ See The CUNY Dispute Resolution Consortium, available at http://johnjay.jjay.cuny.edu/dispute/docs/Compensated_and_Pro_Bono_List.pdf (last visited Mar. 28, 2008) (for a compiled a list of mediation programs/providers in the New York City Metropolitan Area to help identify those mediation programs/providers which offer compensated and/or pro bono mediation opportunities). See also Andrea Chasen, *After Disaster Strikes: Do I Volunteer As A Mediator?* 13 *DISP. RESOL. MAG.* 21 (2006).

¹⁵ Maria R. Volpe, Robert A. Baruch Bush, Gene A. Johnson, Jr., Christopher M. Kwok, Janice Tudy-Jackson & Roberto Velez, *Barriers to Participation: Challenges Faced By Members of Underrepresented Racial and Ethnic Groups Entering, Remaining, and Advancing in the ADR Field*, 35 *FORDHAM URB. L. J.* 119, 139 (2008).

involving shelter, food, health, environmental cleanup, transportation, communication, as well as people's emotions.

As a result of the uncertainty that disasters present, considerable time, energy and resources need to be dedicated in order to suitably prepare for disaster response efforts. Public and private entities routinely create complex infrastructures to get ready for the time when they may need to rush into action on virtually no notice.¹⁶ Many professions have clearly identified roles for disaster response situations, particularly those professions which provide emergency or essential rescue, evacuation, recovery, relocation, repair, rebuilding, and survival-related services.¹⁷ Moreover, there is a constant need to assess what works, what does not, and what needs improvement.

In contrast to the type of infrastructure needed to respond to disasters, the dispute resolution field remains without solid infrastructure. There is no identifiable infrastructure in place to provide leadership or support for all those who express enthusiasm, interest, willingness and ability to respond. There is no entity that has become the face, voice, or benefactor¹⁸ of dispute resolution disaster response efforts.

Since the dispute resolution field has gained extensive prominence through community-based dispute resolution efforts, many who do dispute resolution work are unpaid volunteers. Even when dispute resolution efforts occur in a variety of legal contexts, dispute resolvers are called upon to provide pro bono or low fee services. Those interested in pursuing a dispute resolution career are routinely advised not to make hasty judgments about career moves. Moreover, without universally-defined criteria for identifying practitioners, it is not easy to identify those who refer to themselves as dispute resolvers or to assure the content or quality of services provided.

In sum, while dispute resolution work can be challenging under optimal conditions, disasters can be truly daunting. It is not

¹⁶ For examples of the well known entities which respond to disasters, see the American Red Cross, www.redcross.org, The Salvation Army, www.salvationarmyusa.org, and FEMA, www.fema.gov.

¹⁷ For example, among the well known professionals who respond to disasters are: Police officers, fire fighters, emergency medical personnel, engineers, insurance adjusters, mental health professionals, and religious personnel.

¹⁸ Of particular note, the William and Flora Hewlett Foundation, which provided extensive funding and support for the dispute resolution field in general for twenty years, ended its conflict resolution program in 2004. For information about past Hewlett funding, see <http://www.hewlett.org/Archives/ConflictResolution/> (last visited Feb. 23, 2008).

surprising then, that dispute resolvers have struggled to find ways to respond to disasters and are not inclined to specialize in post disaster dispute resolution.

III. ADR RESPONSES TO SEPTEMBER 11TH AND HURRICANE KATRINA

Two of the most high profile recent disasters, September 11th and Hurricane Katrina, have provided numerous opportunities to examine ADR responses to situations occurring in markedly different contexts. The most horrific of the September 11th terrorist attacks occurred in New York City where a large dispute resolution community exists.¹⁹ Hurricane Katrina, which impacted the Gulf area, especially Louisiana, Mississippi and Alabama, occurred in an area with fewer dispute resolvers.²⁰ Regardless of context, data on ADR related efforts are very difficult to collect since there is no clearinghouse or other way of knowing what efforts are undertaken. In some instances, it is difficult to distinguish between the general activities engaged in by dispute resolvers from their more ADR-focused responses. For example, after September 11th, dis-

¹⁹ For an overview of the large number of dispute resolution programs in New York City, see the CUNY Dispute Resolution Consortium's website where links to all of the programs in New York City have been listed at <http://johnjay.jjay.cuny.edu/dispute> (last visited Jan. 31, 2008). While there is no clearinghouse for data on dispute resolution experts in the New York City area, all of the community mediation programs which receive state funding, must report their staffing data on annual basis. In the 2005-2006 Annual Report, the total number of mediators for the New York City metropolitan area counties [New York, Kings, Richmond, Bronx, Brooklyn, Suffolk, Nassau, Rockland and Westchester] is 773, a total arrived at by adding up all of the mediators in each of these counties. See Community Dispute Resolution Centers Program Annual Report 2005-2006, THE NEW YORK STATE UNIFIED COURT SYSTEM DIVISION OF COURT OPERATIONS, OFFICE OF ALTERNATIVE DISPUTE RESOLUTION AND COURT IMPROVEMENT *available* at http://www.courts.state.ny.us/ip/adr/Publications/Annual_Reports/AR05-06.pdf (last visited Feb. 1, 2008). This number does not begin to reflect all of the inactive mediators, private mediators, and those who mediate in a variety of other programs which do not receive state funding. See *id.*

²⁰ For a list of mediators who are available in the Gulf area, see www.mediate.com (last visited Feb. 1, 2008). In the aftermath of Hurricane Katrina, Laurel Kaufer, a California based mediator, began the Mississippi Mediation Project:

to empower residents of targeted Mississippi Gulf Coast communities with new capacities to work collaboratively through the use of positive problem solving, effective communication skills, Mediation services and other Alternate Dispute Resolution ("ADR") processes, in an effort to diminish the conflicts which are impeding the resiliency and recovery of Gulf Coast residents and communities following Hurricane Katrina.

Mississippi Mediation Project, <http://www.mississippimmediationproject.org> (last visited Feb. 3, 2008).

pute resolvers reported that they were involved in a wide range of disaster response activities like donating money, food and medical supplies, giving blood, working at soup kitchens and food pantries, aiding in physical rescue, recovery, and rebuilding efforts.²¹ These post-disaster activities are significant, but they are *not* the core work of dispute resolvers or unique to dispute resolvers. It is possible that in some of these efforts, important dispute resolution-related skills like active listening were used, but dispute resolvers who may have used these skills as part of some other activity were not identified as dispute resolvers doing dispute resolution work.

The research I conducted on post-September 11th and Hurricane Katrina ADR responses found both similarities and differences regarding dispute resolvers' responses. Both disasters had an abundance of enthusiastic dispute resolvers ready, willing, and able to respond.²² While Hurricane Katrina was a markedly different kind of disaster from September 11th, some of the responses to September 11th provided a foundation for some of the types of response efforts that occurred after Hurricane Katrina. What follows is a discussion of some of the contrasts and comparisons.

Mediation was used after both September 11th and Hurricane Katrina. However, after September 11th, in New York City there was only modest use of mediation in response to conflicts in a variety of contexts.²³ The Small Business Court Assistance Project was initiated by the Manhattan Civil Court on June 4, 2002 in conjunction with the Association of the Bar of the City of New York, Legal Aid Society, Safe Horizon, local law firms, and JAMS.²⁴ The program was designed to handle the high volume of small business related claims that resulted from many of the thousands of busi-

²¹ See *supra* note 4; Gross, *supra* note 14 (for insights on his efforts after 9/11); Anne Marie Ruff, *Mediation Project Project Spreads Skills to Stressed-Out Gulf Coast*, DAILY J. (Jan. 2007), available at <http://www.mediate.com/articles/hurricane.cfm> (last visited Mar 26, 2008) (for information on Laurel Kaufer's efforts after Hurricane Katrina). On September 20, 2001, the CUNY Dispute Resolution Consortium began convening the NYC-DR Roundtable Breakfast meetings for dispute resolvers to come together to discuss a wide range of concerns post-9/11, including their personal responses. See LISTSERV, *supra* note 12 (for a summary of the roundtable sessions).

²² The interest and availability to respond to these disasters was evident by the large number of emails exchanged on listservs and the postings on the ABA Dispute Resolution Section's website. See Lela Love, *Disaster Relief – Dispute and Conflict Resolution Initiatives*, http://www.abanet.org/dispute/katrina/disaster_relief.doc (Jan. 31, 2008).

²³ Maria R. Volpe, *The Future: What Can the DR Community Learn from Sept. 11?*, 8 DISP. RESOL. MAG. 12 (2002).

²⁴ See Project Announcement: 9/11 SMALL BUSINESS COURT ASSISTANCE PROJECT, available at http://post9-11.crinfo.org/documents/mini-grants/post9-11/Programs/5.02_small_business_press_release.pdf (last visited Feb. 3, 2008).

nesses which were sued by landlords and others due to nonpayment of rent. Mediators received special training by Trial Lawyers Care. Approximately forty-four cases were referred to the Program and twenty-six went to mediation.²⁵ Safe Horizon's initiative to resolve family conflicts arising from the 9/11 Compensation Fund was extensive, but the mediation caseload remained very small. Of the survivors of the 2880 persons killed and the 2680 injured,²⁶ 100 inquiries were received for mediation. Eighty-five were screened, five were mediated, and three resulted in written agreements.²⁷

A few high profile cases were also mediated in New York City. For example, an insurance dispute between Deutsche Bank and two of its insurers, Allianz and Axa, was mediated by former Senator George Mitchell more than two years after the September 11th attacks.²⁸ Another high profile case between Daniel Libeskind, the architect, and Larry A. Silverstein, developer of the Freedom Tower, over a payment for design services was mediated by a court-appointed mediator, Simeon Baum, three years after the attacks.²⁹

The picture was rosier for mediation after Hurricane Katrina, especially for claims involving insurance related conflicts.³⁰ In Louisiana, the Commissioner of Insurance reported that the Louisiana Department of Insurance Hurricane Mediation Program, managed by the American Arbitration Association, had received over 12,000 requests for mediation by November 1, 2007, and about seventy-five percent of these cases settled during the two year prescriptive period.³¹ In Mississippi, the Commissioner of In-

²⁵ See Volpe & Strobl, *Responses to 9/11*, *supra* note 4, at 102.

²⁶ KENNETH R. FEINBERG, 1 FINAL REPORT: THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001 7, available at: http://www.usdoj.gov/final_report.pdf (last visited Feb. 3, 2008).

²⁷ See, e.g., Gross, *supra* note 14.

²⁸ See Charles V. Bagli, *Bank Tower, 9/11 Survivor, To Be Razed in a Deal*, N.Y. TIMES, Feb. 27, 2004, at B3 available at <http://query.nytimes.com/gst/fullpage.html?res=9B00E4DD113CF934A15751C0A9629C8B63> (last visited Apr. 15, 2008).

²⁹ Errol A. Cockfield, Jr., *Developer, Planner Settle Flap: Libeskind to Receive \$370G to End Dispute with Silverstein, an Amount much less than he had Requested*, NEWSDAY, Oct. 7, 2004.

³⁰ The fact that mediation was widely used to process insurance claims after Hurricane Katrina does not mean that there were not issues. See, e.g., Elizabeth Baker Murrill, *Mass Disaster Mediation: Innovative ADR, or a Lion's Den?*, 7 PEPP. DISP. RESOL. L.J. 401(2007).

³¹ See Letter from James J. Donelon, Commissioner of Insurance, Louisiana Dept. of Insurance, to all Authorized Property and Casualty Insurers and Approved Unauthorized Property and Casualty Insurers Regulated by the Louisiana Department of Insurance. (Nov. 1, 2007) available at: http://www.lidi.la.gov/Docs/CommissionersOffice/legal/Advisory%20Letters/AL07_05_CurRequestThatInsurersU.pdf (last visited Jan. 31, 2008).

insurance noted that 3827 mediation requests had been filed through February 9, 2007, and eighty-three percent reached settlement.³²

Facilitation and dialogue were prominent after both September 11th and Katrina. One of the most high profile, large scale facilitation efforts was initiated by America Speaks, a non-profit organization that engages citizens in public decision-making.³³ In New York City, the events were known as Listening to the City, and in New Orleans, as community congresses that were part of the efforts to address the Unified New Orleans Plan.³⁴ In each instance, technology played an important role at the meetings which brought together thousands of citizens to share their ideas about rebuilding with policy makers, key decision-makers, and other interested parties. While ADR experts were used to facilitate in all of these initiatives, the infrastructure for conducting these large scale events was created and implemented by those mainly outside the field.

One of the unique ADR related responses after September 11th was the creation of the 9/11 Victim Compensation Fund, which was directed by a well known mediator, Ken Feinberg.³⁵ The role of ADR processes, especially mediation, in the 9/11 claims resolution process has been widely discussed by dispute resolution experts.³⁶ In a presentation at a joint conference of the International Academy of Mediators and the American College of Civil Trial Mediators that took place in New Orleans in May 2004, Feinberg discussed the role of mediation in addressing the claims.³⁷ First, Feinberg described how mediator skills, like active listening, were crucial in meetings with the victims. Second, he noted that family members who squabbled about distributions were offered mediation with Feinberg himself or referred to Safe Horizon's Mediation Program.³⁸

³² Wally Northway, *Insurance Mediation Milestone*, Miss. Bus. J. (Feb. 2007) available at http://findarticles.com/p/articles/mi_hb5257/is_200702/ai_n20318835 (last visited Jan. 31, 2008).

³³ See America Speaks, www.americaspeaks.org (last visited Jan. 31, 2008).

³⁴ See The Unified New Orleans Plan, <http://www.unifiedneworleansplan.com/home3/> (last visited Apr. 15, 2008).

³⁵ See Gross, *supra* note 14.

³⁶ See, e.g., Margaret Shaw, *Uncharted Territory: Sept. 11 Victim Compensation Fund Presents Massive ADR Design Challenge*, 8 DISP. RESOL. MAG. 3 (2002); Mary S. Elcano & Cynthia J. Hallberlin, *The Claims Process: Procedural Justice, or Just Procedure?*, 8 DISP. RESOL. MAG. 5 (2002).

³⁷ Kenneth Feinberg, *Dear Mr. Feinberg – The 9/11 Victim Compensation Fund and Mediation*, MEDIATE.COM, May 2004, <http://www.mediate.com/articles/feinberg.cfm> (last visited Jan. 31, 2008).

³⁸ See *supra* note 16.

IV. POST-DISASTER ADR RESPONSES:
MOVING BEYOND SPONTANEITY

The good news is that ADR is on the disaster response map. While the responses to September 11th were largely spontaneous, since then a more deliberate, visible interest in post-disaster ADR responses has become palpable. In fact, an online search for dispute resolution-related responses to disaster reveals a variety of dispute resolution-related items, including disaster mediation and hurricane mediation.

Communication among dispute resolvers has improved markedly. When September 11th occurred, almost seven years ago, dispute resolvers in NYC did not have any mechanism for communicating with each other. On September 27, 2001, I established the NYC-DR listserv. This listserv continues to provide a means for rapid communication on matters of interest to dispute resolution scholars, practitioners and administrators in the New York City metropolitan area.³⁹

Communication was more pronounced after Hurricane Katrina. First, shortly after Hurricane Katrina occurred, the ABA Dispute Resolution section established the Post Katrina Working Group⁴⁰ to spearhead response efforts. The Working Group established a listserv and posted disaster relief dispute and conflict resolution initiatives on its website to help facilitate communication.⁴¹ Second, many of the dispute resolvers who came together after September 11th participated in informal Katrina Forum conference calls to discuss possible dispute resolution related response options in the Gulf area.⁴²

There is a growing body of expertise including organizations, programs, and individuals with previous disaster related experience. Pioneers and amateurs in the earlier disasters have accumulated a wide range of knowledge, skills, and experience. For

³⁹ See *LISTSERV*, *supra* note 12.

⁴⁰ The Working Group consisted of Professor Lela Love of Cardozo School of Law, Professor Homer LaRue of Howard University School of Law, Professor Maria Volpe of John Jay College of Criminal Justice-CUNY and Mel Rubin, a mediation professional with extensive disaster mediation experience in Florida. Professors Love and LaRue served as coordinators. See *Hurricane [sic] Katrina Relief and ADR Volunteers*, <http://www.abanet.org/dispute/katrina.html> (last visited Jan. 31, 2008).

⁴¹ See Lela Love, *Disaster Relief Dispute and Conflict Resolution Initiatives*, American Bar Association Section on Dispute Resolution, *available at* <http://www.abanet.org/dispute/katrina.html> (last visited Jan. 31, 2008).

⁴² See *id.*

example, it was much easier to establish phone call networks among dispute resolvers after Katrina than after September 11th.⁴³ Mediators who had experience handling insurance claims in previous hurricanes, like Hurricane Andrew in Florida, were able to provide immediate expertise after Katrina.⁴⁴ Organizations like the United States Department of Justice Community Relations Service sent its mediators to manage “race-related conflicts in areas such as housing, education, community relations, and the administration of justice.”⁴⁵ In 2005, FEMA created a cadre of twenty-five conflict resolution specialist positions to assist FEMA workers at disaster sites with disaster-work conflict. This cadre does conflict-coaching, dispute resolution training, mediation, and facilitation at the disaster field offices across the country.⁴⁶

V. LESSONS LEARNED

Numerous lessons have begun to emerge for dispute resolvers about what works, what does not, and what needs to be improved in post disaster circumstances when the context is dominated by matters of life, death, health, emotions, food, health, communication, and transportation, among others. Some of the lessons reflect the universal concerns of the dispute resolution field that get exacerbated by disaster contexts. Other lessons seem to be more specific to disaster responses. September 11th and Hurricane Katrina, two very different kinds of disasters within a four year time frame, have been instructive about what dispute resolvers do or can do as dispute resolvers. The lessons reveal how complicated post-disaster related work can be. Among the lessons learned are the following:⁴⁷

[1] *Dispute resolution field needs greater public awareness.* That the dispute resolution field needs to pay attention to greater public

⁴³ See *id.*

⁴⁴ See Mel Rubin, *Disaster Mediation: Lessons in Conflict Coordination*, 13 DISP. RESOL. MAG. 17 (2006).

⁴⁵ U.S. DEPARTMENT OF JUSTICE FY 2008 PERFORMANCE BUDGET CONGRESSIONAL SUBMISSION, Community Relations Service, 4, available at http://www.usdoj.gov/jmd/2008justification/office/28_01_justification.doc (last visited Jan. 31, 2008).

⁴⁶ See Linda Baron, *Disaster Basics: The Life Cycle of a Disaster and the Role of Conflict Resolution Professionals*, 9 CARDOZO J. CONFLICT RESOL. 301 (2008); see also Robert W. Scott & Linda Baron, *Embedding Mediators: Benefits and Challenges of the FEMA Workplace Model*, 13 DISP. RESOL. MAG. 13 (2006).

⁴⁷ See Volpe, *supra* notes 4 & 6 for earlier discussions of lessons learned.

awareness is neither new nor unique to post disaster situations. While the dispute resolution field has made major strides in educating the public about dispute resolution related processes, none are household words. Of late, a variety of targeted efforts has been underway at the national, regional and local levels to strengthen dispute resolution's recognition. Several examples include the Association for Conflict Resolution's Public Education Task Force which has been addressing what must be done to gain greater public awareness for conflict resolution,⁴⁸ the Maryland Mediation and Conflict Resolution Office's (MACRO) multimedia awareness campaign,⁴⁹ and the City University of New York Dispute Resolution Consortium's Make Talk Work® initiative since September 11th.⁵⁰ For the CUNY DRC's initiative, dispute resolvers in New York City have developed and implemented many Make Talk Work projects aimed at informing the general public about complex dispute resolution principles, processes, and techniques. The phrase Make Talk Work has the potential to change the conversation about conflict. It provides a simple, constructive mental image. The Make Talk Work projects provide tips about what to think and do when experiencing conflict. If individuals cannot Make Talk Work on their own, they can turn to dispute resolvers for guidance and assistance.

To move the public awareness discussion forward, there is much to be learned from others who have to market their efforts. As a general rule of thumb, if there is an existing market, it has to be harnessed; if there is no existing market, it has to be created. To illustrate, Starbucks Coffee Company provides an excellent example of the former, where there is an existing market for its product. Apple, Inc. is an example of an entity that had no existing market for its iPod. As a result, it had to create that market since it was providing people with a product they did not know they needed. For the dispute resolution field, there is a very large market since virtually everyone experiences conflict and could benefit from its tools and techniques. However, educating the public and decision-makers in the midst or aftermath of a disaster is daunting, and perhaps impossible. Such work needs to be undertaken on an ongoing basis so that dispute resolution expertise is an integral part of the disaster response landscape in those instances when it can be used. The use of mediation for insurance claims after Hurricane Katrina

⁴⁸ ACR Task Forces, <http://www.acrnet.org/about/taskforces/index.htm>.

⁴⁹ Maryland Mediation and Conflict Resolution Office, <http://www.courts.state.md.us/macro>.

⁵⁰ See *supra* note 7.

provides evidence that when there is a preexisting understanding of and experience with dispute resolution processes, they are likely to be utilized in post-disaster situations.

[2] *Timing for conflict intervention matters.* There may be little for dispute resolvers to do in that role in the immediate aftermath of a disaster, since the responses often focus on rescue, evacuation, recovery, relocation, repair, rebuilding, and survival-related matters. In some instances, dispute resolvers may have to resign themselves to the fact that their role may not evolve until weeks, months or even years after the disaster occurs. Some of the high profile cases arising out of 9/11 were not mediated until several years later.⁵¹ Perhaps FEMA's model of embedding dispute resolvers at disaster worksites is one way to demonstrate the usefulness of having dispute resolvers initiate interventions and engage parties as conflict situations occur.⁵²

[3] *Creation of essential infrastructure.* Responders to any disaster need to be ready when disaster strikes. They should have the requisite infrastructure, resources, credibility and visibility in place prior to when the disaster occurs. The middle of a crisis is not the time to begin preparing a response.

Despite its highly dispersed and eclectic nature, the dispute resolution field has achieved widespread visibility in the insurance mediation context.⁵³ This was particularly palpable in the aftermath of Hurricane Katrina. It was clear that when structures are in place, they can be tailored to meet disaster needs. Insurance-related matters were readily sent to mediation.⁵⁴ Contrast the experience of mediators in insurance claims with the experience of other mediators who showed up at disaster delivery service sites. Unless the latter had other credentials like social work certification or affiliations with other established organizations like the Red Cross, for the most part, they were ignored.

A viable infrastructure for the dispute resolution field includes a number of other components. Among these components are the

⁵¹ See *supra* note 25.

⁵² See *supra* note 38; Cynthia Mazur, *Working Toward Critical Mass: FEMA, ADR & Disasters*, 13 DISP. RESOL. MAG. 9, 11 (2006).

⁵³ See, e.g., Cindy Fazzi, *Disaster: When It Strikes, ADR Can Come to the Rescue in Resolving Tort Claims*, 53 DISP. RESOL. J. 16 (1998). For information about the American Arbitration Association's initiatives, the Disaster Claims Resolution Services and Disaster Claims Mediation Procedures, see <http://www.adr.org/sp.asp?id=28814> (last visited Apr. 3, 2008).

⁵⁴ See *supra* notes 14 & 28.

ability to communicate with celerity, the availability of *deliverables*, such as articles, tipsheets, videos, training materials that can be quickly accessed and disseminated, and a cadre of individuals with subject matter expertise relevant to the disaster.⁵⁵ It may be challenging to anticipate and identify all of the different types of expertise needed. For example, after September 11th the need was for expertise in dealing with hate related situations toward Muslims; after Katrina, the need was for competency in focusing on race, class and poverty. Overall, the dispute resolution field needs to find a way to be prepared for the different needs that arise from different disaster situations.

Finally, availability of organizational capacity to respond is needed. Much can be learned about infrastructure from organizations like America Speaks.⁵⁶ While many dispute resolvers have taken great pride in facilitating sessions in New York at Listening to the City after September 11th and in New Orleans at the community congresses for the Unified New Orleans Plan after Hurricane Katrina, the convening of these large-scale dialogues was external to the dispute resolution field.

[4] *Establishment of external relevance.* Relationships with influential members of the community, like policy makers, business leaders, government officials, and decision-makers need to be established on an ongoing basis. Trying to meet with or influence decision-makers, or even more importantly, expecting them to call upon dispute resolvers in the midst of or immediately after a disaster, is unlikely if they are not already aware of services or practitioners. It is common for people to turn to those who they already know for advice and assistance and use the services of those with whom they are familiar. Evidence of the relevance of mediation is apparent in the recent GAO Report to Congress on coordination between FEMA and the Red Cross in responding to hurricanes. The report states, “Given the lack of progress FEMA and the Red Cross have made thus far in reaching agreement on the operating procedures and that the new hurricane season is beginning, they may wish to use mediation to speed the agreement.”⁵⁷

⁵⁵ These components were identified in the research we have been conducting. See *supra* note 4. Virtually all organizations that respond to disasters have posted a wide range of items that reflect the value of having them available. See *supra* note 17 (for references to the work of the American Red Cross and FEMA).

⁵⁶ See AmericaSpeaks, www.americaspeaks.org.

⁵⁷ UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL COMMITTEES *Hurricanes Katrina and Rita: Coordination between FEMA and the Red Cross*

[5] *Identification of star power or spokespersons.* Celebrities or champions are sought for virtually every cause aiming to get prominent visibility or name recognition for its product or services. The very nature of dispute resolution work continues to be a challenge in finding spokespersons. The dispute resolution field could grow its own star power by promoting someone from within the field, perhaps someone who has been involved in managing a high profile conflict, e.g. Ken Feinberg, whose star power from the 9/11 Victim Compensation Fund carried over to post-Katrina when he was asked to oversee the mediation and arbitration of insurance claims by Zurich North America and Liberty Mutual.⁵⁸

[6] *Creation and maintenance of reliable and accessible databases.* Since dispute resolution work occurs behind closed doors, readily available, reliable data can help to demystify a lot of what goes on. Data can help answer questions like: What works? What does not work? What exists? In a disaster, databases with information about dispute resolution personnel, programs, resources, and expertise can be useful for those who need to access it quickly.

[7] *Dispute resolution does not have boundaries or niches.* The dispute resolution field is like a big tent with no clearly defined boundaries that protect its practitioners. For example, there is no unauthorized practice of dispute resolution.⁵⁹ Dispute resolvers do not have a monopoly on helping to make talk work. They share the management of conflicts and facilitation of a variety of situations with many other professionals who do what dispute resolvers do, including therapists, counselors, lawyers, social workers, psychologists, psychiatrists, media professionals, talk show hosts, self help columnists, etc. Hence, many do the work of dispute resolvers and perhaps more credibly since many other fields certify, license or credentialize their practitioners in ways that gain them recognition and access.

Should Be Improved for the 2006 Hurricane Season 18, available at <http://www.gao.gov/new.items/d06712.pdf> (last visited Feb. 3, 2008).

⁵⁸ See Russ Bleemer, *Mediation Matters: States, Insurers Focus on ADR for Katrina Relief*, 24 *ALT. TO HIGH COST OF LITIG.* 59, 59–64 (2006).

⁵⁹ See John W. Cooley, *The Unauthorized Practice of Law or the Authorized Practice of ADR*, 55 *DISPUTE RESOL. J.* 72 (2000).

VI. CONCLUSION

After each disaster, it is common to hear assessments about what worked, what did not work, and what could be done differently in the future. Both September 11th and Hurricane Katrina have provided evidence that the dispute resolution field has had presence in responding to disasters, but both disasters illustrate the need for the tremendous amount of work ahead. It is crucial that the field be positioned so that potential users can consider dispute resolution among the options available to them. To do so, the field has to figure out how to expect the totally unexpected, since disasters are difficult to predict and each disaster has its own peculiarities. This uncertainty adds another challenge to the list for a field where it is common to hear dispute resolvers caution those who are interested in pursuing dispute resolution work, “don’t quit your day job.” To sum up, while September 11th was the dispute resolution field’s watershed moment, Hurricane Katrina was evidence of the field’s emerging potential as an important contributor to successful disaster relief operations.