ASPEN COURSEBOOK SERIES

N. Rogers • R. Bordone • F. Sander • C. McEwen

Designing Systems and Processes for Managing Disputes

SECOND EDITION

Nancy H. Rogers, The Ohio State University Frank E.A. Sander, Late of Harvard Law School Robert C. Bordone, Harvard Law School

Designing Systems and Processes for Managing **Disputes** features a hands-on, interdisciplinary approach with wide-ranging practical applications. Seven real-life case studies and numerous examples have students designing and implementing a process for resolving and preventing disputes where traditional processes have failed. This is a must-read for students and practitioners alike.

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- The addition of a seventh central case study related to processes following the Trayvon Martin shooting in Sanford, Florida
- A new appendix with an overview of mediation for students who have not taken a prior course in mediation
- An interesting new story by a Brazilian judge who used Designing Systems and Processes for Managing Disputes to create new processes to resolve multiple cases, some pending over 20 years, arising from lands taken to create a new national park
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- Cathy A. Costantino, Adjunct Professor in Dispute System Design at Georgetown, George Washington, and NYU law schools, in "Hitting the Trifecta," Negotiation J. 477

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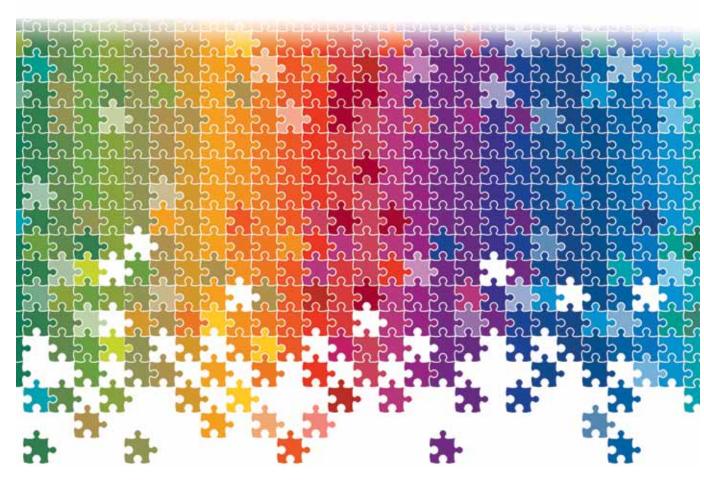
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Designing Systems and Processes for Managing Disputes

SECOND EDITION





SECOND



DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES

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Second Edition

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In fond memory of one of the most innovative and thoughtful designers,

Frank E.A. Sander,

and to the many individuals who take on the challenge of designing or redesigning processes and systems for managing and preventing disputes and who, in doing so, make workplaces better, increase the effectiveness of organizations, and improve the lives of individuals, communities, and nations.

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Preface

We hope this book will aid in preparing and encouraging a new generation of individuals to bridge differences. In writing it, we have sought to equip readers who already have a basic knowledge of dispute resolution with the tools they will need to help build into organizations, institutions, companies, schools, and communities—within this nation and elsewhere—a fundamental "hard-wiring" for creative problem-solving and the dynamic management of conflict. It is our belief that tomorrow's professionals and leaders would do well to understand how to design dispute management processes and systems that:

- help identify and capture opportunities for mutual gains;
- build and enhance relationships between individuals, constituencies, and communities;
- advance the cause of justice;
- promote peace and reconciliation;
- support appropriate structural reform as indicated by advancing the rule
 of law, meeting the interests and the rights of less powerful stakeholders, or
 curing systemic deficiencies in currently prevailing dispute management
 practices; and
- · adapt to changing times and needs of stakeholders.

Early in our discussions of this second edition, we lost our friend and co-author, Frank Sander. Frank participated in the visioning for this next edition, which adds a story of designers who used their expertise to help Sanford, Florida leaders and residents deal with an immediate crisis and then continue working on identifying and resolving long-term problems to bridge racial divisions. While working on this edition, we recalled Frank's voice urging us to take something out when we add something new. As a result, this new edition maintains the size of the first edition.

Responding to professors who wanted to teach their students facilitation skills, we re-vamped Chapter 15 to meet this need. New stories are scattered throughout the book, and a question has been added in Chapter 5 for professors who want to focus discussion on court dispute resolution programs. The appendix now has a

quick review of mediation in addition to negotiation and arbitration, though readers new to the field should also read a dispute resolution textbook.

This edition maintains and updates the references to research and theory from the dispute resolution and law field as well as from political science, sociology, psychology, behavioral economics, and other related disciplines. It also includes valuable and creative examples of dispute management processes and systems. It incorporates our own experience as dispute systems designers in various contexts as well as insights and advice from many scholars and practitioners who have written about designing processes and systems.

The Teacher's Manual and course website direct professors to video and other resources related to these examples. It also directs faculty to the documentary "Endgame," which many instructors will find brings to life the example of Michael Young's secret meetings to design a process for the South African president and Nelson Mandela to negotiate an inclusive form of democratic governance for South Africa. This is one of the seven primary illustrations of DSD we discuss at length throughout the book.

In this book, we aspire to do more than simply synthesize theory, research, and practice. We also hope to expand upon past work. For example:

- (1) The book underscores the importance of taking what we term "design initiative"—the decision to take a more proactive role in creating systems and processes to deal with current disputes or even latent and unaddressed conflict. In fact, rarely do clients approach designers with a request for a new process or system. Instead, would-be designers often find themselves asked to resolve a particular dispute, perhaps through mediation or litigation, and then recognize the possibility for a broader and more systemic reform of an organization's dispute resolution system. One inclined to take design initiative might then offer, for example, to help a community think more holistically how it might handle ongoing tensions related to racial, ethnic, or religious issues (Chapters 3, 5, and 8).
- (2) The book also examines a broad set of contexts in which designers work. The over 200 design examples come from courts, organizations, churches, schools, and informal communities. We sample widely systems designed for a few individuals and those designed for entire nations because we believe that the breadth will help stimulate your creativity, raise aspirations, and challenge you to identify the core questions that arise across contexts as well as the need for uniquely tailored answers in different contexts.
- (3) The book focuses on the opportunities and potential that designers have to help people enhance their relationships and improve their ability to manage ongoing differences between them. The approach that a designer takes in working with stakeholders can sow the seeds for this constructive approach or, alternatively, can sow the seeds for future dissension and discord. We examine the role that the designer has in enhancing relationships not only

- within the design of the system or process, but also in the manner that the designer uses to build the system (Chapter 8).
- (4) The book presents the challenges that designers face in managing competing interests in their design work, such as those of justice and reconciliation, or those of resolving the immediate dispute and achieving deeper change. Such dilemmas, if not dealt with carefully, can undermine the perceived legitimacy of a system over time. We discuss these dilemmas pervasively throughout the book (*see, e.g.*, Chapters 1, 2C, 3D, 4B5, 4E, 7B, 8, and 12C).
- (5) Because this book is written with the idea of the lawyer-as-designer in mind, we suggest how a lawyer's expertise can be leveraged in design, particularly with respect to confidentiality and implementation, including the use of contracts before disputes arise and the pros and cons of changing laws as a means to implement a design (Chapters 7, 12, and 13).
- (6) The book also introduces designers to some of the practical tools and skills helpful in design work (especially "practice notes" in Chapters 4D, 7C, and Chapters 14, 15).
- (7) And the book offers an approach to evaluating whether a design is achieving the aims set for it (Chapter 14).

Many professionals working with others will find much of what is in these pages valuable. While imagining the audience for this book to be broad, we wrote it in a special way to accompany our own teaching in dispute systems design and in running a skills-based clinic on stakeholder assessment, dispute systems creation, implementation, and evaluation in a law school environment. We assume that the readers already understand dispute resolution practice and theory, but professors whose students are taking this as their first dispute resolution course can order a version of this book that incorporates chapters from some of the publisher's dispute resolution textbooks. We target this book toward those with a special interest in conceiving of their roles broadly as creative problem-solvers. Our notion of problem-solving includes the deployment of the law, but goes well beyond traditional legal reasoning or argument recognized by a court or a judge.

Our goal is to offer a systematic series of questions for the designer along with ideas on where to look for answers. We acknowledge that the answers will differ by context. Designing conflict management processes and systems is not a science. As Martin Luther King, Jr. pointed out, science has made the world a "neighborhood," but not a "brotherhood." Bridging differences fits into the "brotherhood" portion—the non-science portion—of the task ahead. We hope to encourage creative

^{1.} Martin Luther King, Jr., Remaining Awake Through a Great Revolution, https://kinginstitute.stanford.edu/king-papers/documents/remaining-awake-through-great-revolution

Preface

thinking, collaborative planning, and iterative implementation accompanied by careful assessment. For that endeavor, this book offers materials for the class discussions and individual student reflection.

N.H.R. R.C.B.

C.A.M.

November 2018

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DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES

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PART ONE

SETTING THE STAGE

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CHAPTER 1

Introduction

- A. Definitions: Designing, Processes, and Systems
- B. An Owner's Guide to This Book
 - 1. For those new to dispute resolution
 - 2. Learning what steps to take
 - 3. Tapping into accumulated experience; searching for ideas
 - 4. Designer practice notes
 - 5. Questions and exercises
 - 6. Using the book as a reference tool

Thoughts Going Forward

A. DEFINITIONS: DESIGNING, PROCESSES, AND SYSTEMS

Colin Rule was running an online dispute resolution company in 2003 when eBay hired him to improve the resolution of disputes among the users of both eBay and PayPal. Over the years, Rule and his colleagues created a structure for eBay/PayPal users to negotiate differences. We think of what Rule did as *designing*. We refer to the structured negotiations and a new online jury trial that Rule established as new *processes*. Rule's coordinated series of processes formed what we call a dispute processing *system*.

In the 1980s, Michael Young, a British mining company executive, strove to find a way to end the racial oppression and violence he had witnessed in South Africa. He began building a secret process for reaching consensus on how to structure formal negotiations even before the government and the insurgents accepted his help. Young's negotiations on how to hold negotiations formed the foundation for the people of South Africa to achieve the change that they sought. We refer to the meetings that ultimately occurred between Nelson Mandela and the government as the *process* that Young and others created through a series of facilitated meetings. We call Young and Rule *designers*.

These two stories are examples of a more general phenomenon—the design of processes and of systems for preventing and managing disputes. Two people can deal with the disputes arising between them in a number of familiar ways. They can enter into negotiations, go to mediation, agree to arbitrate, litigate, try to overpower each other, or separate. In these common situations, people do

not need a designer to create new processes or systems. But suppose people are dealing with many disputes arising from a massive and complex event (such as the September 11, 2001 attacks or the BP oil spill in the Gulf of Mexico in 2010). Or consider organizations, like hospitals, that deal with hundreds of unexpected medical outcomes and the scores of lawsuits that stem from these outcomes. Rather than dealing with these as isolated events, organizations could fruitfully develop systems for learning from, preventing, and responding to recurring disputes. Situations like these call for creative approaches—sometimes new processes or new systems to order existing processes. They present challenging domains for those who design processes or dispute processing systems.

Designing such processes and systems is what this book is all about. The designer might create just one process, as Young did regarding South Africa, or a series of coordinated processes for many disputes or potential disputes—a system—as Rule did at eBay. We use the term "design" with intention. A design is not random or arbitrary. By *design* we mean the intentional creation of a system or a process to achieve some end or set of goals.

This book covers what has become known in the past 30 years as "dispute systems design," but adds significantly to that work. Building on others' past contributions, the book broadens the scope beyond intra-organizational conflicts and conflicts between people with continuing relationships. Two books in particular popularized "dispute system design" and suggested frameworks for those who do it. Though we draw heavily on their insights, these books took a somewhat more limited view than we take in this book. They examined systems for persons who would be interacting frequently over time, almost always within the context of an organization, institution, or industry. William Ury, Jeanne Brett, and Stephen Goldberg's Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict examined employment disputes in coal mines and offered broad design concepts that could guide designs in other settings (pp. 106-110). Catherine Costantino and Christina Sickles Merchant based their book, Designing Conflict Management Systems, on their work within government agencies and other organizations, providing practical ways to work collaboratively with these organizations to create and implement new dispute resolution systems (pp. 391-393). These seminal books stimulated a rich array of design scholarship (see Collected References, pp. 430-451).¹

Perhaps emboldened by this growing body of scholarship, dispute resolution experts have turned increasingly to designing new systems and new processes, sometimes on their own and often with others whose expertise may not be primarily in dispute resolution. What kinds of knowledge, skills, and training do the individuals who do design work possess? Because systematic thinking about design has only emerged in the last 30+ years and because each situation

^{1.} *See also* the annotated bibliography on conflict management systems design, edited by Melissa Zarda, at http://www.mediationworks.com/mti/certconf/bib-systems.htm.

presents different challenges, there is as of yet no established professional path for undertaking this work. That is partially what makes this work so exciting and satisfying.

There is also no final list of required competencies or an agreed-upon knowledge base to qualify one to be a designer. However, during the past quartercentury, there has emerged a set of basic skills that most agree are helpful for those who would aspire to be designers on occasion or as a career. Typically, individuals who have some general background in conflict resolution and who also possess a healthy amount of creativity and imagination as well as group facilitation skills will be most likely to succeed in this work (see Appendix A for the autobiographies of four individuals who currently do design work). Active listening, curiosity, effective assertion, and self-reflection aid designers in their work. Designers benefit from sound judgment to guide decisions about when and how to become involved and what viewpoints and expertise ought to be represented among stakeholders, as well as when to take a more neutral stance.² They often possess an openness to interdisciplinary thinking and have some exposure to basic research in social- and cognitive-psychology, sociology, economics, neuroscience, and game theory. The most successful designers also make close studies of past design efforts by looking for repeating patterns and noting the elements of success and failure. In the chapters that follow we recount several of these stories.

Because the presenting problems vary so widely, and the settings in which they arise range so far and wide, it is difficult to come up with many useful generalizations. For example, normally the designer goes to work after the presenting problem has arisen. But sometimes a designer or design team works proactively (as, for example, when the client is a newly established company or organization) or correctively (when an existing community or organization's present way of handling disputes has proven ineffective or unsatisfactory).

Despite these differences, designers take certain basic steps in most situations:

1. *Taking design initiative:* They find a way to assist, using their design expertise. They become engaged in designing because they are retained as designers, they expand the scope of the work they are already doing (such as a lawyer representing a company on employment-related litigation but suggesting a new internal disputing system, or a mediator asked to assist on one dispute but offering broader ideas), or they take

^{2.} The authors are grateful to Michael Young, whom you will meet in the story of the South African negotiations in Chapter 2, who pointed out this characteristic. Young took an active role in deciding to enter, select the participants, and set the initial agenda and then let the participants guide the agenda. He notes the importance of neutrality by the designer "and, as far as possible, the suspension of one's own value judgments" (email to authors, September 3, 2012). *See* the dilemmas concerning a designer's role discussed in Chapters 3, 4.B, 8 and elsewhere in the book.

the initiative to become involved (for example, Michael Young in South Africa). We call this proactive entry or role broadening "design initiative" (Chapter 3).

- **2.** Assessing or diagnosing³ the current situation: They identify those who may have a stake in the outcome, including those directly involved, affected by the conflict, or important to the success of a new design. Using this *stakeholder* list, they investigate stakeholders' interests and the extent to which these interests are met or not met by the current dispute processes and systems. They learn as well about the context—anything pertinent to modifying the system and making it work (Chapter 4).
- **3.** *Creating processes and systems:* They convene a design process that will permit the interested parties to voice their concerns (reflecting the basic conflict resolution principle that any proposal emerging from the active participation of all interested parties is more likely to succeed) and they work with these interested parties to build a process or system (Chapters 5-10).
- **4.** *Implementing the design:* They implement a system, with robust feedback loops that keep the system dynamic and responsive to changes in the needs of the organization, situation, context, or external environment (Chapters 11-14).

The first of the four steps just mentioned—taking design initiative—may seem unusual for lawyers who imagine assuming professional obligations only after clients retain or employ them. But designing often begins differently. While individuals, organizations, or government agencies sometimes ask a designer to assist, most have never thought to do so; they may not even recognize the term "designer" in this context. And, if the designer already is engaged as a lawyer or employee, these entities may not expect a proposed process or system as novel as a designer might suggest.

In most of the stories in this book, the results could not have been achieved had the designer simply waited for those involved to ask for this type of assistance. These varied examples and the broad but often unrecognized need for systemic intervention highlight the need and opportunity not only for design skills but also frequently for some level of assertiveness.

In this book, we will urge you to consider being proactive—what we call taking "design initiative"—when your expertise can make a positive difference. At some point, you may be the best person to help your own community find a way to deal more productively and fairly with a conflict that has produced a bitter divide. Within your organization or your legal practice, you may see clearly how conflict management could be improved.

Put another way, ours is a world that provides limitless opportunities for wise and considered design of processes and systems to prevent and deal with disputes.

^{3.} This book uses "assessing" and "diagnosing" interchangeably.

We hope that the ideas and examples in this book inspire you to take design initiative. We also hope that when you do so, the materials and structure of this book described in the next section will have prepared you to assist ably and thoughtfully.

B. AN OWNER'S GUIDE TO THIS BOOK

You are the primary target for this book if you are a student with a background in dispute resolution and interested in making design a part of your future work and community involvement. If you fit this description and this is not your first dispute resolution course, skip to subsection 2 below.

1. For those new to dispute resolution

We noted that a designer makes principal use of the basic dispute resolution processes—negotiation, mediation, and adjudication—as well as of some of the variants of these processes and the hybrids that they have spawned. Ours is not a dispute resolution textbook, but as a designer, you should read one in addition to this text (*see* chapter-end references).

DESIGNING STEPS

- 1. Design initiative
- 2. Basic planning steps
- Assessing stakeholders, their goals and interests, and contexts
- Creating processes and systems
- 3. Key planning issues (that may arise throughout the planning)
- Planning how to select, engage, and prepare intervenors and parties
- Determining the extent of confidentiality and openness in the process
- Dealing with desires for change, justice, accountability, understanding, safety, reconciliation
- · Enhancing relationships
- Incorporating technology
- Implementing and institutionalizing the system or process
- Implementing
- Using contracts
- Using law
- Evaluating, revising

2. Learning what steps to take

The book parts and the chapters within each part provide an outline of design steps. A box like the one on the left will remind you occasionally where a chapter fits in the overall design process. Chapter 2 begins the widest portion of the funnel approach of the book with an overview of the entire process. The funnel narrows somewhat as The Planning Process, Part Two, examines in more depth how to take design initiative (Chapter 3), conduct an assessment of the current situation (Chapter 4), and create or choose a process or system that fits the situation (Chapter 5).

Key Planning Issues in More Detail, Part Three, is the narrowest portion of the funnel, examining special design problems in detail—how to select, engage, and prepare participants in the newly designed process (Chapter 6); balance openness and transparency with concerns for confidentiality and privacy (Chapter 7); design a system to take into account the desires to do more than resolve a dispute such as the efforts to prevent recurrence, address deeper change, allow people to be heard, and provide justice (Chapter 8); improve relationships among the

people involved in conflict (Chapter 9); and incorporate technology (Chapter 10). Part Four focuses on implementing, including employing informal means such as education and persuasion (Chapter 11) or formal means like contracts (Chapter 12) or law (Chapter 13) and ideas for evaluating the implementation and success of a design (Chapter 14).

One drawback of this structure is that it suggests that designing is a linear activity; it is not. Instead, designers may have to loop back to do a deeper assessment or to reconsider plans (e.g., how open or how confidential?) in light of information discovered later in the design process. We try to mitigate this structural shortcoming in the next chapter—Chapter 2—by first giving you an overview of some of the ways that designers work, replete with many examples, before you embark on an in-depth examination of each part of the design process.

3. Tapping into accumulated experience; searching for ideas

When designers come to a situation, it can be helpful to consider:

- a. Stories of designs that have worked or failed in comparable contexts,
- **b.** Empirical evidence of what works and what does not,
- **c.** Theoretical work that examines many accounts and suggests common themes, and
- d. Your own life experiences.

To ease your reading, we mark some of these resources for easy reference.

a. Stories

We shade the stories of designs that we cover in some depth. As you will see, some of these designers succeeded more than others in achieving the goals for the new design.

The Community Relations Service intervention without invitation: Public policy and other community-wide mediations often fail because at least one key stakeholder refuses to come to the table.

As you read these stories, consider what lessons you might draw from them. Because seven of these stories will be referenced throughout the book, we mark the repeating stories with an icon, so that you will know to remember them especially:



Cure Violence: In 2000, Dr. Gary Slutkin took the initiative to test a new model for violence prevention by creating a nonprofit called Cease Fire Chicago—now named Cure Violence. He drew from his experience with the World Health Organization in preventing the spread of disease to develop ways to interrupt

the spread of violence in high-crime Chicago neighborhoods. The central technique was to employ street-wise interrupters to intervene to prevent retaliatory violence and defuse high-conflict situations. After starting small with one neighborhood, Cure Violence now operates programs in about a dozen U.S. cities, as well as other countries, including Mexico, Honduras, Trinidad, and South Africa.

Chapter 2 introduces each of these seven primary stories.

b. Empirical research

You can find extended discussions of empirical work by looking for text marked like this:

Psychology professor Tom Tyler: "What makes a procedure fair in the eyes of the public? Four factors dominate evaluations of procedural justice.

• "First, people want the opportunity to state their cases to the authorities..."

c. Theoretical work

Scholars sift through the stories and research to suggest over-arching theory for designers. When these are extended discussions, we box them as in this example:

Robert D. Putnam and Lewis M. Feldstein: "[A]nalysts find it helpful to distinguish between 'bonding social capital' (ties that link individuals or groups with much in common) and 'bridging social capital' (ties that link individuals or groups across a greater social distance). Both kind of connections are valuable to us as individuals, but bridging is especially important. . . ."

d. Your own experience

As you become a designer, you will draw on what you have learned throughout your life—especially what you know about conflict and its resolution, justice, culture, organizations and how they work, interacting with people effectively, law, and leadership. The designers you will read about in this book often deliberately deepened their knowledge in these aspects of designing. Consider doing the same and use this book as the beginning of that journey.

4. Designer practice notes

Designers spend much of their time interviewing, facilitating group discussions, and interacting with clients and other key players. Chapter 15, Facilitation and Related Skills for Designers, in Part V, provides ideas and resources for those who want to improve design skills. To augment this chapter, we include "Practice Notes" throughout the book. Look for these marked like the following:

Practice Notes: Interest Mapping

Once a designer has surveyed all of the stakeholders, the designer can organize that information by creating a chart or "map" depicting each stakeholder, their interests, and the intensity of those interests so that they can be accounted for in the creation of any process.

5. Questions and exercises

The chapter-end questions and exercises sometimes ask you to speculate or brainstorm based on only a few facts. We want to ask you many questions and yet spare you from a time-consuming review of detailed fact patterns as you apply what you have read and practice your creativity. Naturally, designers conduct research and analysis before advising a real client, but you can still do thoughtful analysis based on a brief factual prompt.

Your instructor may assign the chapter-end exercises about the fictional Tallahoya University as a way to challenge you to apply what you have learned. These exercises place you in a familiar, though imaginary, setting—a university that encounters some of the problems you might have observed as a student—so that you will probably understand the dynamics of a conflict and the context despite the lack of detailed description. Because the exercise continues throughout the book, you may occasionally have to refresh your memory of the facts by re-reading the first exercise at the end of Chapter 2.

6. Using the book as a reference tool

If you are looking for information for a paper or class project before it is assigned, try checking the following:

- **a.** the table of contents; then turn to the end of these chapters and read the succinct synopsis in a section entitled "Thoughts Going Forward" to decide whether it would be helpful to read further;
- **b.** chapter-end references and collected references at the end of the book;
- **c.** appendix references for those who want to learn more about:
 - i. careers of designers (Appendix A);

- ii. arbitration (an overview by Sarah Cole and Kristen Blankley, Appendix B);
- iii. a primer about mediation and the mediation process (Appendix C);
- **iv.** a primer for teaching stakeholders about negotiation and consensus building (Appendix D);
- v. the Uniform Mediation Act, adopted by eleven states and the District of Columbia (Appendix E); and
- d. the course page for this book, http://aspenlawschool.com/books/ managing_disputes/, with a link to a guide to researching in the dispute resolution field.
- **e.** a video documentary called "Endgame," on the secret South African negotiations referenced in this book, which may be available from your instructor, library, or on Amazon Prime.

THOUGHTS GOING FORWARD

Once you know how to work collaboratively to design a new process or system of processes, you may be surprised by the opportunities you will then recognize to bring about an improvement in the ways that people, organizations, communities, courts, and governments manage their conflicts. This book will offer some structure—a series of steps or questions—plus grist for your decision-making in the form of stories, empirical work, and theory. It will add practice tips and ask you to reflect on justice and policy. To this, you add your own experiences and research, building on this foundation throughout your career. As a designer, you frequently will need to take "design initiative" because people may find it hard to step back to see the potential value of doing things differently and, if they do, may not realize that they might secure process or system design assistance. Ultimately, what you contribute as a designer may improve the quality of life—sometimes even save lives—and represent the most personally rewarding contributions of your career.

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CHAPTER 2

Overview of the Design Process

A. Steps in the Design Process

- 1. Taking design initiative
- 2. Assessing or diagnosing the current situation
- 3. Creating processes and systems
- 4. Implementing the design
- B. Drawing from Other Contexts, but with Caution
- C. Designing Collaboratively

Thoughts Going Forward

Questions

Exercise

In this chapter, we offer an overview of what designers do. By the end of the chapter, you will have a rough sense of the steps in a design process (Section A); where designers find ideas (Section B); and how they work collaboratively with those affected by their work (Section C). In later chapters, we will assume that you have in mind this bigger picture as we examine in more depth each stage in the design process.

We also introduce here seven stories that illustrate the design steps and the innovative and collaborative nature of design work. Like the court opinions that pepper law textbooks, these stories make the issues more vivid and allow the class to have a joint reference. As later chapters examine narrow aspects of design in more depth, they will augment these stories with pertinent details. So, as you read, keep the stories in mind, and we will remind you with the photos or symbols you see below.



South Africa: Just a few years before Nelson Mandela assumed the Presidency of South Africa in 1994, such a peaceful transition to full-suffrage democracy in South Africa seemed beyond reach. Mandela was in prison and the South African government had declared the primary insurgent organization, the African National Congress (ANC), to be an illegal terrorist organization. Its

^{1.} We omit footnotes, for the most part, to promote readability of these stories, but note our sources in Appendix F.



Nelson Mandela (right) as he became the President of South Africa, clasping the hand of his predecessor, F.W. de Klerk.

officers were outside the country or in prison. The government had announced a firm position—no negotiations with the ANC until violence by insurgents stopped. The government nonetheless continued using violence to enforce its own racially repressive policies. In the face of what seemed to be poor odds, Michael Young designed an extraordinary process that ultimately set the stage for these two antagonistic parties to come together for formal negotiations. Young's talks led the government to lift the ban on the ANC, free Mandela from prison, and begin formal negotiations for a peaceful transition to majority rule.



Sanford, Florida: Opposing demonstrations sometimes reached 25,000 in Sanford's community of 55,000 in 2012-2013, sparked by public announcements regarding whether to arrest, prosecute, and convict the neighborhood watch volunteer who killed Trayvon Martin, an African-American teenager, as he walked home with a snack from a convenience store. Thanks to Andrew Thomas, a senior city project manager, and the city manager, both trained mediators, the city immediately called for help from mediators within the U.S. Justice Department. With this help and with Thomas coordinating process design, Sanford was one of a few cities facing major civil unrest that had collaborative processes quickly in place to deal with the immediate issues. Sanford emerged from months of unrest without arrests or violence. Even more unusual, Thomas helped the city initiate processes that have continued over the years to deal with other causes of ethnic and racial conflict, including those that had simmered in that community for over a century.



Cure Violence: In 2000, Dr. Gary Slutkin took the initiative to test a new model for violence prevention by creating a nonprofit called Cease Fire Chicago—now named Cure Violence. He drew from his experience with the World Health Organization in preventing the spread of disease to develop ways to interrupt the spread of violence in high-crime Chicago neighborhoods. The central technique was to employ street-wise interrupters to intervene to prevent retaliatory

^{2.} Nancy H. Rogers, *When Conflicts Polarize Communities: Designing Localized Offices That Intervene Collaboratively,* 30 Ohio St. J. on Disp. Resol. 173 (2015) (some of the material on Sanford is quoted or paraphrased from this article).

violence and defuse high-conflict situations. After starting small with one neighborhood, Cure Violence now operates programs in about a dozen U.S. cities, as well as other countries, including Mexico, Honduras, Trinidad, and South Africa.



eBay: Online purchases on eBay result in millions of disputes with relatively low dollar amounts in controversy. When Colin Rule became Director of Online Dispute Resolution at eBay/PayPal in 2003, the dispute resolution system in place was not meeting either buyers' or sellers' needs. Rule re-structured the interactions between buyer and seller to encourage effective negotiations and reduce reliance on mediation and arbitration, and he invented an innovative new system for handling online disputes that arose on eBay.



National Institutes of Health (NIH): In each of the prior examples, the designer began work when conflict had already surfaced. But a designer working within an organization has the opportunity to build systems that both create the best atmosphere for preventing escalation and deal with conflicts that do emerge. Howard Gadlin exemplifies such a designer. Gadlin worked within the National Institutes of Health, often called simply "NIH," a government agency focused primarily on medical research. Construing his role as "ombuds" broadly, he sought to prevent and resolve disputes and to encourage a working atmosphere in which conflicts among research collaborators and members of scientific research teams are managed effectively.



The "Indian Residential Schools": Imagine being asked to design processes and systems for survivors of residential schools when for over a century thousands of children had been removed from their homes to these government-supported institutions. Once there, the religious staff entrusted with their care had allowed them instead to be neglected and abused. As more members of the general public learned about this, many people wanted the government to respond swiftly. Though this story could be about at least three governments, we focus here on Canada, where the government's first alternative processes were widely criticized. Law professor Jennifer Llewellyn then worked as part of a group including Aboriginal representatives and churches to create a novel series of processes that earned broad support.

^{3.} Ombuds (or ombudsmen or ombudspersons) investigate informally and try to resolve complaints regarding the government or, within an organization, regarding the organization's administration. Ombuds often also mediate and make recommendations for change when they notice patterns of complaints and sometimes take the initiative to act as dispute systems designers for the organizations they serve.



Maryland courts: Two remarkable individuals—the Chief Judge of the Maryland Court of Appeals (the equivalent of Chief Justice of a state supreme court) Robert M. Bell, and Rachel Wohl, the Director of the Mediation and Conflict Resolution Office—decided to offer more access to mediation for citizens of Maryland. They succeeded. The design process they chose involved citi-



Chief Judge Robert M. Bell and Rachel Wohl

zens throughout the state in collaborative planning.

In these seven stories, the designers ask similar questions as they work with stakeholders to assess, create processes and systems, and implement, though they answer the questions differently. We turn now to the common threads in all seven stories—the design steps and the types of questions they asked.

A. STEPS IN THE DESIGN PROCESS

We refer to four roughly sequential steps:

- 1. taking design initiative,
- 2. assessing or diagnosing⁴ the current situation,
- 3. creating systems and processes, and
- **4.** implementing the design, including evaluation and process or system modification.

The real sequence, though, turns out to be much more complicated; it is not linear. A more realistic series of steps might be: assess and analyze the problem and context; plan; take design initiative and become engaged; discover new stakeholders who should be involved; re-analyze, re-plan in collaboration with stakeholders; implement a pilot program; gather and analyze some evidence about how well it works; assess, modify, or implement more widely; re-assess, redesign, and evaluate systematically; perhaps institutionalize and secure a change in law (see Potapchuk and Crocker, 1999). Though implementation is listed toward the end, the best designers have one eye on implementation issues (such as finding resources, building support for the idea, and starting thoughtful data collection) right from the start and try to reduce implementation problems with the first steps they take. Realizing that they will later evaluate success, they

^{4. &}quot;Assessing" and "diagnosing" are common terms for the same stage in the designing process. *See, e.g.*, Ury et al., 1988:20 (using diagnosis); Costantino and Merchant, 1996:96 (using assessment).

also are attentive to gathering information along the way about how the implementation is going "on the ground" and how people and organizations respond.

1. Taking design initiative

The designers we are studying did not hang out a "Designer for Hire" shingle and then wait for clients. They took the initiative. In the first of our stories, the antagonists seemed unlikely to initiate negotiations. Nonetheless, the prospective designer could envision a means to overcome the barriers to holding talks. First, though, he had to create a role for himself; those involved in the conflict did not ask him for assistance until he had already worked for some months. As you read this segment of the story, consider how and why Michael Young took "design initiative."



Setting the stage to end South Africa's apartheid: In the mid-1980s, the Afrikaner-dominated South African government was engaged in a power struggle with most of its people. The government had excluded 90 percent of the South African people from the enjoyment of key rights because of their race, a policy known as "apartheid." ("Apartheid" means separation but referred to government policies to impose, brutally if necessary, racial superiority of whites. "Afrikaners" were persons of Dutch descent.) By 1985, insurgents⁵ opposed to the apartheid regime were throwing grenades or planting bombs several times a month, and police had killed and jailed hundreds of demonstrators.

1985 was also the year Michael Young decided to become involved in the conflict. Young was no stranger to process design in the face of civil unrest and violence. He had intervened in volatile situations in Northern Ireland and elsewhere a few years earlier when he worked for the British government. Now he was an executive with a British mining company that had interests in South Africa. Asked later why he began inviting key people to negotiations when no one could imagine a consensus-based process succeeding, Young responded, "[T]o anyone with half an eye, it was clear that the existing South Africa regime could only end in tears" (PBS, 2009).

In designing a process that would eventually lead to the design of formal negotiations between the government in South Africa and the African National Congress (ANC), Young took into account the reasons why a typical negotiation or mediation process could not succeed in South Africa. First, Young recognized that neither the government nor the ANC wanted the public to know that they were willing to negotiate. To deal with that problem during the planning negotiations, Young sought out people who were sufficiently connected to decision-makers

^{5.} There were a number of insurgent groups, making it difficult for Young to select appropriate negotiators, as discussed further on pp. 58-60, 147-148.

^{6.} For more on the reluctance to negotiate, see p. 419.

on all sides that they could predict what the decision-makers would find acceptable, but who were sufficiently inconspicuous that they could sneak away from their workplaces unnoticed for meetings (Harvey, 2001:ix, 126-127, 130). Over the course of two years, Young met with people who might fit these criteria. Some welcomed his initiative; others flatly refused. By 1987, Young had persuaded enough of these individuals to become involved that he called the first meeting.

There was another major hurdle: the government had banned the ANC; it was an illegal organization in South Africa, and security forces would arrest its leaders if they entered South Africa. Young addressed this barrier by hosting the meetings that included ANC members at a rural mansion retreat in England.

Using this retreat also increased the secrecy of the meetings. Young knew that secrecy was an essential design feature for yet other reasons. First, the negotiators would be in danger if anyone learned that they were meeting with the other side. Second, absent secrecy, the negotiators would need to show a particular public face to constituents, complicating and prolonging the consensus-building process.

The ongoing violence created yet another barrier—the difficulty of focusing on a future that involved shared governance in the midst of bitterness and fear. To surmount this barrier, Young had to find negotiators who cared deeply enough about the future to engage despite the rancor.

Later, Young listed the following as essential elements for his consensusbuilding process:

- sponsorship by a private company not a direct party to the negotiations
- secrecy
- party choice of agenda items
- involvement of persons who cared about the long term, who were not the most visible leaders, and who genuinely represented their constituents (Young, 2009).

Each element responds to one of the barriers mentioned above or to one of the implementation issues: the need for resources to hold the talks and the need to let the parties know that success rested with them.

As secret negotiations to plan the official negotiations progressed and the situation changed in South Africa, Young encountered new obstacles. For example, the government began parallel secret negotiations with the admired ANC principal, Nelson Mandela, imprisoned by the government, hoping to take advantage of Mandela's lack of communication with those outside to secure a better deal with him. Those involved with Young's process did not learn of these parallel negotiations until well into their own discussions and managed to get word to Mandela so that neither set of negotiations would undermine the other. Young's flexibility in dealing with these problems that arose throughout the negotiations became another essential element of that process.

In 1990, after three years of meetings in England, the South African government secretly accepted the negotiators' terms of agreement on how to hold

official negotiations to end apartheid. The government then released Nelson Mandela from prison and lifted the ban on the ANC. From their meeting site in England, Young and the negotiators watched with deep emotion the live, televised reports of Mandela walking free after 27 years in prison (*see* http://news.bbc.co.uk/2/hi/7499429.stm).

The subsequent official negotiations between Mandela and the government ultimately led to the transition of power to a democratic government and the creation of a Truth and Reconciliation Commission to deal with the past transgressions and plan for peace (Harvey, 2001). The ANC's lead negotiator from the secret talks, Thabo Mbeki, succeeded Nelson Mandela as the second postapartheid President of South Africa. Mbeki appointed his Afrikaner counterpart in Young's talks, Willie Esterhuyse, as his advisor.

OFTEN-MENTIONED FIGURES IN THE SECRET TALKS INDIRECT INVOLVEMENT DIRECT INVOLVEMENT

Oliver Tambo, ANC Executive
Nelson Mandela, best known ANC
member (in prison)
PW Botha, President (1984-1989)
FW de Klerk, President (1989-1994)
Neil Barnard, Director General, National
Intelligence Service

Thabo Mbeki, ANC Executive Committee
Tony Trew, ANC constitutional adviser
Aziz Pahad, ANC Executive Committee
Professor Willie Esterhuyse
Professor Sampie Terre Blanche
W. de Klerk, brother of cabinet member
who became President

Michael Young used his experience with volatile situations elsewhere to assess the situation in South Africa and build a process to surmount barriers to agreement. Persuading people to work with him took months. Then he had to maintain progress in order to retain their involvement and interest in working with him (*see* pp. 147-148). Clearly, taking design initiative was a crucial and especially challenging step in this process.

In taking design initiative, Young risked rejection, but a joint agreement to invite a designer would have been unlikely. And because Young took initiative, the process succeeded; his involvement averted significant violence.

As you read the examples throughout the book (generally less dramatic than Young's), you will see that designers succeed using varying levels of proactive entry, and that designing by invitation is not necessarily the only or even, at times, the best approach (*see* Chapter 3).

2. Assessing or diagnosing the current situation

One could examine Michael Young's work not only as an example of taking design initiative, but also as modeling the importance of conducting a careful assessment or diagnosis (using these terms interchangeably) before creating the process. From the start, it was obvious that the process would need to build

consensus. But careful assessment was key to fine-tuning the process—who would participate, whether they would meet in person, where they would meet, what would be done about publicity, what would be on the agenda, what role would Young himself take, and so forth.

In other contexts, even the general nature of the process—whether it is to build consensus or adjudicate, for example—is in doubt. Designers tend to ask a series of questions to assess the current circumstances that generate and sustain conflict and that may assist in its resolution as a prerequisite to determining whether designing a new process or system would better fit the varied interests. They might begin with questions like the following:

- What are the problems to be addressed—in what ways are the current processes or systems deficient in meeting needs?
- What might be the deeper or systemic causes of the problems (e.g., management strategies, ethnic tensions)?
- Who will be affected by and who could help implement a new design?
 (We refer to those people whom a conflict affects or who could affect implementation as "stakeholders.")
- How should a designer decide who is or is not a stakeholder?
- What are the stakeholders' expressed goals?
- What unexpressed interests should be considered likely goals as well?
 How could one determine the accuracy of the guesses on these unexpressed interests?
- How does the current process or system (if there is one) fall short of meeting these goals and interests?

Because the likely direction of the design may add stakeholders and implicate more aspects of the context, the assessment also anticipates the next two stages—creating the process or system and implementing. That involves questions such as:

- What other approaches might better meet the varied stakeholders' interests, deal with the deeper or systemic causes, and be feasible, given the context and constraints?
- What will be broadly regarded as legitimate and fair over time?
- What barriers might exist to implementing changes?

As you read the next account, consider how Andrew Thomas might have answered some of the questions above.



An ongoing assessment in Sanford, Florida: In 2011, Norton N. Bonaparte, Jr. became Sanford's city manager, and he noticed divisions among Sanford residents and the alienation of some residents from their government. Bonaparte brought Andrew Thomas, who had been hired by his predecessor to coordinate community block grants, into the city manager's office to assist with community

projects in addition to his prior duties. Thomas had moved to Florida after his retirement, having mediated hundreds of conflicts and directed the Rochester, New York Center for Dispute Settlement for 26 years. Before becoming a city staff member, Thomas had consulted with the Sanford police department, holding workshops, focus groups, and dialogue sessions. With that background, Thomas began listening to community concerns and placed a high priority on building a trusting relationship with law enforcement. Some residents expressed anger because they believed that Sanford had not invested in the predominately African-American parts of the community. Thomas also learned that many African-American residents of Sanford thought the police did not respond quickly if a person of color complained about a violent crime.

In 2012, the anger and distrust erupted into angry street protests when residents learned that the Sanford police did not immediately arrest George Zimmerman, the man who had shot Trayvon Martin. Later, after prosecutors charged Zimmerman, some city officials spoke optimistically about moving past what they viewed as responses to a single incident, but Thomas had a different view as the result of his earlier assessment and experience.

Thomas's first designs were based on his earlier assessment—before the Trayvon Martin shooting—including his review of homicides in Sanford from 2007 through 2012. Recognizing a lack of trust in city government, Thomas worked with the U.S. Department of Justice Community Relations Service (CRS) mediators to form a group of interfaith clergy from various Sanford neighborhoods and schedule regular meetings to discuss the wide variety of viewpoints held by various parts of the community. Called "Sanford Pastors Connecting," these clergy could help Thomas in his assessment of the issues, and they also could be communicators who would be more trusted by some residents than city officials. In fact, later on CRS mediators arranged seats for Sanford Pastors Connecting at the Zimmerman trial, so that they could send out trusted first-hand accounts to parishioners to counteract inaccurate rumors.

At about the same time, the city asked the U.S. Department of Justice Civil Rights Division to investigate the Sanford Police Department's actions regarding the Trayvon Martin case. The Justice Department staff declined, explaining that the evidence of a single incident was insufficient to constitute a pattern or practice of misconduct, which was required for them to investigate. Thomas then began work on a process for dealing with residents' issues with the police. He asked Department of Justice mediators to identify effective and credible leaders from various communities within the city. He chose from this list an advisory committee (referred to as the "Blue Ribbon Panel") to review the police department. A former judge respected in the legal and business community and the chair of Sanford Pastors Connecting became co-chairs of the advisory committee. The police department periodically reported back to the city manager and city commission (council) as it made changes in response to the advisory group's report. For the first time in memory, in 2013 a representative group of



Andrew Thomas and Sanford City Manager Norton Bonaparte. Photo courtesy of Divided Community Project, The Ohio State University Moritz College of Law.

residents participated in the recruitment process for a new police chief.

Because of the resources provided by outside mediators, Thomas could focus on short-term and long-term issues at the same time. Thomas worked with city officials to develop joint goals that would guide communications, police reactions, and process design. Their goals, informed by the early assessment, were to understand concerns, be open to positive change, proceed with inclusion in decision-making that would make all segments of the community feel valued and accepted, and focus on improving stressed areas of the community.

Consistent with these goals, mediators

arranged to meet outsiders as they arrived, helped them to get city permits, and facilitated safe places for them to demonstrate, even arranging transportation for those who might otherwise have been unable to attend a vigil. The city's approach and training for local leaders allowed even rival demonstrations to proceed without any arrests or violence. Thomas and these mediators worked with local residents to develop protocols for dealing with outside groups more intent on confrontation with each other and with local groups. For example, when an outside group marched onto the stage to grab a microphone, the local participants knew what their protocol indicated: they yielded the stage to avoid a confrontation.

As demonstrations occurred periodically for a couple of years, Thomas continued his assessment of the community's issues and his design of processes to deal with them. Community concerns included housing for low-income elderly and disabled residents, and infrastructure issues such as sidewalks, streetlights, and open ditches. At first, residents did not believe that city officials were responsive, especially in neighborhoods with high percentages of African-American residents. The police chief and other city department heads agreed to attend periodic neighborhood meetings, facilitated by City Commissioners and the city manager. After meetings, city officials reported back to that community on any actions taken in response to neighborhood concerns. City officials were able to announce new youth employment programs and training for youth in nonviolent approaches, for example. This process—high-level listening and response—was still in place five years after the Trayvon Martin shooting.

Both the assessment and the implementation of processes in Sanford depended initially on identifying the right leaders who understood concerns of various stakeholders and who would be credible with them. Sanford was fortunate to have an influx of federal mediators who could talk with community members and quickly identify these effective leaders—who sometimes were not the persons who claimed to be leaders or even the officers of key organizations. In time, Thomas supplemented this leader approach with direct conversations with residents.

Determining stakeholders' goals is challenging, as the Sanford story illustrates. For one thing, individuals and organizations are not accustomed to identifying goals for resolving conflict. And when they do identify their goals, these goals might conflict with one another or might shift over time. As a result, it may help to examine the broader interests that give rise to the goals. For this purpose, one might think of the goals as negotiating interests. Roger Fisher, William Ury, and Bruce Patton remind us of the difficulty in separating negotiating positions (here is what I/we want) from interests (why we want what we want). For example, one set of South African negotiators might have "wanted" to avoid discussion of moving to a democracy based on universal suffrage while the ANC saw universal suffrage as essential. The government-leaning group's underlying interest in avoiding that discussion might not be the prevention of universal suffrage, however, but rather protecting the safety, language, and

DESIGNING STEPS

- 1. Design initiative
- 2. Basic planning steps
- Assessing stakeholders, their goals and interests, and contexts
- Creating processes and systems
- 3. Key planning issues (that may arise throughout the planning)
- Planning how to select, engage, and prepare intervenors and parties
- Determining the extent of confidentiality and openness in the process
- Dealing with desires for change, justice, accountability, understanding, safety, reconciliation
- Enhancing relationships
- Incorporating technology
- 4. Implementing and institutionalizing the system or process
- Implementing
- Using contracts
- Using law
- Evaluating, revising

culture of minority group members after transition to majority rule. A designer can be attentive to this distinction between positions and interests in sifting through stakeholders' goals. In this instance, for example, it meant setting an agenda that would address underlying interests—preserving the safety, language, and culture of the minority group members—while also taking up the issues of universal suffrage.

The stakeholders' lack of clarity about their own goals and interests and their failure to parse out short-term versus long-term goals can sometimes lead them to pursue a dispute resolution process not well suited to their needs. For example, initial anger over an injury or set of perceived wrongs, such as a medical error, may lead individuals to seek adjudication even though, over time, they realize their more important interests could have been met with a different approach. Or a public interest group, fearing delay with the court system, may pursue a more expeditious yet private forum only to realize that these processes failed to respond to important interests of public transparency.

The challenge becomes reading between the lines of these goal statements and discerning the underlying interests (*see* pp. 73-78). Designers must persistently deploy skills of artful listening and questioning if they want to help stakeholders understand their own interests better while also building trust with them (*see* Chapter 15 for more discussion of these skills). To translate goals into interests, designers can also draw upon the rich bank of empirical research related to people in conflict, reflect on stories like those in this chapter, and consider design theory.

Using existing research: Psychologists study what they call "procedural justice"—what people in conflict tend to value as part of a process for dealing with disputes (see p. 74). Designers may use the procedural justice research to temper their interpretations of a stakeholder's perceptions (perhaps uninformed) about the "best" process. The research suggests that for many disputants being heard, being treated with respect, and working with a trusted and unbiased third party will likely be highly valued, even if stakeholders do not articulate these process goals (Tyler, 1989:831). Studying this research reduces the chances of miscalculating and learning only later that the stakeholders regretted their choices.

The procedural justice literature is just one example of research that assists in reading between the lines to determine interests. Many fields of study offer research pertinent to designers. In this book, we draw most heavily from sociology, social psychology, and economics. But political scientists and others also offer valuable evidence and commentary. Research currently being conducted in neuroscience and decision-making, for example, can offer lessons to designers about how to best build systems and processes that work and that persuade stakeholders to use them and see them as legitimate (Sunstein, 2011:1349; Birke, 2010:477). You can develop your talents as a designer by studying the research from these additional fields.

Using design experience: Studying past design experience, like studying social science research, provides insights on what matters to people in conflict over time. For example, Cure Violence Chicago's evolving design combined the experiences of Gary Slutkin with the World Health Organization's efforts at epidemic control and the organization's Chicago director Tio Hardiman's experience "on the streets" and with others who mediated gang conflict. Thus, while others viewed the Chicago violence as a social and law enforcement problem, Cure Violence's designers first saw it as a health problem, and then also as unresolved disputes, the latter insight leading to the use of street mediators to help resolve some of these disputes before they escalated to violence.

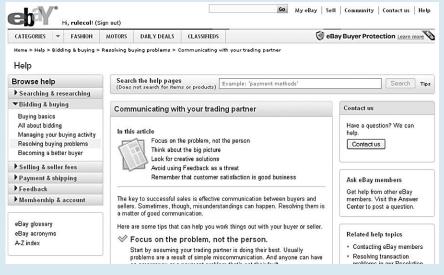
Personal experience implementing new designs can also help designers understand how people will react over time. In the next story, Colin Rule, a conflict resolution expert hired by eBay and its subsidiary, PayPal, drew on his previous online dispute resolution experience to understand how people view online processes. Consider what actions Rule took to determine whether his ideas actually met the interests of those involved and fit the context.



eBay: eBay realized that it needed a dispute resolution process for its users just weeks after it opened its doors in 1995. eBay's rationale was that people would use eBay more often if they had confidence that their disputes would be well handled. Within a few years, eBay had contracted with an online mediation provider that deployed hundreds of mediators to help resolve disputes online.

When Colin Rule became eBay's and PayPal's online dispute resolution director in 2003, he wanted instead to build dispute resolution into the core processes of their websites. For one thing, parties often had disputes over small amounts, and they balked at paying a filing fee to retain a professional dispute resolver over a \$25 or \$50 disagreement. Rule suggested to management that it made sense for eBay to cover dispute resolution costs as a worthwhile business expense, and the company agreed.

Next, Rule had a hunch, based on his past experiences, that parties arguing over small amounts would rather have a quick decision than an exhaustive process aimed at delivering perfectly fair decisions in every case, and he gathered data that confirmed his hunch. In order to speed up the process, Rule developed software for managing the initial phases of disputes, tailored the software to fit each particular kind of dispute, and offered self-help tools to aid direct negotiation.



From eBay. Used with permission.

Rule also put in place preventive techniques, such as collecting detailed information on the number of times customers returned merchandise and presenting that information prominently to buyers at the point of purchase. This significantly decreased the volume of disputes associated with item returns and replacements.

Knowing the importance of language from his experience as a mediator (on "framing" and labeling, see Korobkin, 2006:305-306, 308-316, 320), Rule modified the language that eBay used in its communications with disputants in an attempt to lessen the likelihood of escalation. For example, eBay replaced the "fraud alert" process with the "item not received" process. "Non-paying bidder" or "deadbeat buyer" reports became "unpaid items." Rule noticed that users began using more problem-solving-focused language in their negotiations with each other after he introduced the new phrases.

eBay continued these and other changes because its in-depth internal analysis showed that user satisfaction increased after their introduction. As eBay reduced customer service contacts, user retention and loyalty improved as a result of the new processes (Rule, 2008:8-10).

Notice that Rule did not rely exclusively on his extensive past experience as a mediator and dispute resolution systems administrator. Instead, he instituted the changes on a trial basis; he gathered data systematically to learn how users reacted, ready to change the practices again to achieve a closer fit with stakeholders' interests.

You will learn more about diagnosis in Chapter 4, but even now you can see how tentative assessments must be, and the importance of gathering information and data about how things are going and continuing to reassess throughout the planning and implementation processes.

3. Creating processes and systems

As noted above, designers consider empirical evidence and factor in their own experience as they are invited in or take design initiative and conduct an assessment. In the same vein, they draw on these resources as they create a process and/or system. At the process- and system-building stage, as well as in earlier ones, designers can also consult a growing body of theory.

Scholars offer theories regarding what people want and will consider fair over time from a dispute resolution process or system. Take the issue of when to create a process that reconciles interests, as did Young and Rule in the stories above. Does the following seminal design theory (discussed more thoroughly in Chapter 5) accurately describe what should be weighed in making that determination?

"In their book, *Getting Disputes Resolved*, . . . William Ury, Jeanne Brett, and Stephen Goldberg assert that in seeking to resolve a dispute, negotiators can focus on interests (the things they want or care about), rights (independent standards with perceived legitimacy, such as law or contract), or power (the capacity to force someone to do something he would not otherwise do). They recognize that the

dynamic of the negotiation may require a negotiator to move from one focus to another during a negotiation, but contend that an interest-based approach is preferable, both because it has the greatest likelihood of leading to a mutually advantageous agreement and because it imposes the fewest relational and financial costs" (Goldberg et al., 2012:15).

Further, Ury, Brett, and Goldberg contend that not just during negotiations but in dispute system design among persons with continuing relationships designers should privilege interest-based processes over rights-based ones (arbitration, litigation) and rights-based ones over power-based ones (voting, striking). In the design setting, just as in the negotiation context, they argue that interest-based approaches are generally less costly, with "costs" broadly defined to include effects on transaction expenses, stakeholders' satisfaction with the outcome, relationships, and recurrence of the dispute. Thus, they suggest making the more costly processes the backup processes to an interest-based one (Ury, Brett, and Goldberg, 1988:4).

As these authors point out, their analysis may resonate in many contexts but not all. Think about their theory as it pertains to a context very different from those that they considered—street violence in Chicago.



Cure Violence: Dr. Slutkin drew upon his experience in and evidence from disease control efforts to approach urban violence in an unconventional way—as primarily a public health problem like a contagious disease. His early process design mirrored that used in public health—employing outreach workers to help young people change their thinking about violence and relying heavily on public education and neighborhood involvement to heighten community disapproval of violence. In theory, this would lead to changes in behavior and norms. Although effective in stemming the spread of diseases such as tuberculosis, cholera, and AIDS, this approach to process did not work as well in preventing violence because the outreach workers had little credibility on the streets.

Then Tio Hardiman, later Director of Cease Fire Chicago, proposed a different process that recognized the centrality of disputes to the spread of violence. He proposed getting workers with their own histories of gang engagement and violence to use their networks to identify and then interrupt interpersonal and gang-related disputes. Hardiman thought a mediation-like process could help young people recognize that their interests could be met by choices other than retaliation and violence, despite their sense that society had left them few good choices. He further believed that these young men and women had the resilience to resist the violent street life, if guided by someone who modeled the choice of a different path.

Slutkin and Hardiman discussed this idea with groups essential to the initiative's success, such as police, neighbors, faith communities, and public officials. With their blessing—sometimes skeptical—Cease Fire Chicago began to select, train, supervise, and support former gang members to become interrupters and to deploy them to engage one on one with shooting victims, friends, and relatives to discourage retaliation.⁷ They also used their contacts to intervene in other situations where conflict seemed likely, such as cases of insults and of competition in street-level businesses.

A key to the workers' success was building relationships of trust with high-risk individuals in neighborhoods and working regularly with them to find alternatives to violence. The workers also developed caseloads to help young men and women deal with substance abuse, build work skills, find jobs, and leave gangs. Cease Fire Chicago collaborated with community groups and leaders, using every available venue to help them drive home the message that violence was unacceptable and that alternatives to violent responses to conflict were possible.

The early work of violence interrupters in the West Garfield Park demonstrated that this approach could work to help some gang leaders and potential shooters find nonviolent ways to manage their anger while protecting their reputations. The incidence of retaliatory shootings dropped markedly, and overall shootings decreased by two-thirds in the first year of operation. A subsequent formal evaluation found that six of the seven Cease Fire Chicago neighborhoods became



Interrupters Kobe Williams and Eddie Bocanegra with Tio Hardiman (right). Photo courtesy of Kartemquin Films.

safer (Skogan et al., 2008). Impressed with this success, health departments and nonprofit groups in 25 other cities in the United States have adopted aspects of the organization's approach (renamed Cure Violence in 2008), as have groups in seven other nations ranging from England to South Africa to Honduras. Later evaluations in new sites have largely replicated the themes of the Chicago results.

In setting up a violence-interruption program, Slutkin and Hardiman were addressing a problem in the status quo—too much violence. It was plausible to assume that the varied stakeholders—including police, neighbors, faith communities, public officials, gang leaders, and community members—shared a strong interest in reducing violence. The challenge for interrupters was to help individuals and groups in conflict to give priority to that interest as compared to others, such as protecting a reputation.

^{7.} A documentary on this process, "The Interrupters," was released in 2011. See http://www.pbs.org/wgbh/pages/frontline/interrupters/.