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GETTING DISPUTES RESOLVED

*Designing Systems to Cut
the Costs of Conflict*



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Preface

How can you persuade people or organizations to talk more and fight less? If they regularly deal with their problems by going to court, striking, threatening to break off the relationship, or physically attacking each other, how can you encourage them to negotiate their differences instead? If the relationship or organization is new—a marriage, a corporate joint venture, or a company—how can you help ensure that future disputes are handled effectively and cooperatively?

You may be a manager faced with an ongoing series of disputes with or among employees, with customers or vendors, or with other departments. You may be a lawyer wondering how to draw up a partnership contract to ensure that disputes will be negotiated not litigated. Or you may be a dispute resolution professional—a mediator, court administrator, or family counselor—working with people who are continually doing battle at high cost to themselves and to the community. You may be involved in the disputes yourself or you may be an outsider.

Whatever your situation, the costs of disputing—lawyers' fees, lost wages and production, physical and emotional injuries—are often too high. In addition, the outcomes of disputes are generally unsatisfying: people do not get what they want or need, relationships are strained, agreements collapse, old disputes reemerge. The consequences of such dis-

puting patterns may be severe: in a business, lowered productivity and profitability;¹ in a marriage, unhappy children and divorce; among nations, bloodshed and war.

While some disputes can be prevented, many cannot. Disputes are inevitable when people with different interests deal with each other regularly. Those different interests will come into conflict from time to time, generating disputes. These disputes can have constructive consequences if the parties air their different interests, make difficult trade-offs, reach a settlement that satisfies the essential needs (if not aspirations) of each, and move on to cooperate in other realms. This process can help people and organizations grow and change.

If disputes are inevitable, what can you do to get them resolved satisfactorily? In a particular dispute, you might be able to step in and personally try to settle it. But even if you succeed, the underlying conflict of interests that generated the dispute will remain. New disputes will arise, and the parties may go back to fighting. If you want to have an impact beyond a single dispute, the challenge is to develop procedures that the parties will use, even in your absence, to resolve disputes more satisfactorily and at lower cost.

This was the challenge facing union and management officials at International Harvester in the early 1960s. At that time, few employee grievances were being settled by negotiation, and many were being taken to costly arbitration. Finally, the permanent arbitrator, David Cole, urged union and management officials to work together on new procedures designed to resolve grievances orally on the day they arose. The improvement was dramatic: at one plant, for example, the number of written grievances dropped from 450 to 3 per month. Throughout the entire company, grievances took less time, relations between labor and management improved, and a strike over the terms of a new contract was averted for the first time in twelve years.²

A similar challenge faced IBM and Fujitsu in the 1980s. The two computer giants had wrangled for years over hundreds of disputes in which IBM charged that Fujitsu had

stolen IBM software. At an impasse, IBM and Fujitsu, with the help of arbitrators Robert Mnookin and John Jones, negotiated a set of procedures allowing Fujitsu to examine and use IBM software in exchange for adequate compensation. The result: future disputes about use are to be resolved by a neutral technical expert; future disputes about compensation are to be resolved by the arbitrators.³

A similar challenge arose at Bryant High School in New York. Troubled by tensions and violence, the school instituted a mediation program in the early 1980s. Dozens of students, teachers, administrators, and parents were intensively trained in mediation skills. These new mediators resolved disputes ranging from student-teacher and student-parent problems to student fistfights. The number of suspensions for fighting dropped drastically, and the school's overall climate improved. The successful program was extended to other high schools and has since been used nationwide.⁴

In many families, conflicts between parents and their rebellious teenagers are handled through confrontation and fighting, often ending up in court. Even if the particular problem that brought the family to court is resolved, the underlying conflicts are not, so the cycle of confrontation, fighting, and court continues. In an effort to break this cycle, the Children's Hearings Project in Massachusetts taught families to use negotiation and avoidance to deal with their problems rather than confrontation and fighting. Six to nine months after the hearing, two-thirds of the participating families reported less arguing and fighting, and almost half said they handled conflict by talking things over.⁵

Each of these examples illustrates how changing the procedures for dispute resolution can reduce the costs of disputing. Changing procedures alone, however, is not enough; disputants must have the motivation, skills, and resources to use the new procedures. The challenge is to change the dispute resolution system—the overall set of procedures used and the factors affecting their use—in order to encourage people and organizations to talk instead of fight about their differences.

Designing a dispute resolution system is somewhat like designing a flood control system. Like rainfall, conflict is inevitable. Properly controlled, it can be a boon; too much in the wrong place can create a problem. The challenge is to build a structure that will direct disputes along a low-cost path to resolution. *Getting Disputes Resolved* addresses this challenge.

Aims and Audience

This book is based on our own experiences as designers of dispute resolution systems in the coal industry and the experiences of others who have designed systems for corporations, government offices, schools, churches, neighborhoods, families, and nations. In this book, we attempt to distill the lessons we and others have learned from these experiences and offer a detailed case study of our own efforts in the coal industry.

This book is intended for several audiences. One audience is people who handle disputes as part of their profession: lawyers, mediators, diplomats, judges, arbitrators, union representatives, personnel managers, ombudsmen, court administrators, and family counselors. Another audience is those who, concerned by the costs of conflict in their organizations or relationships, want to design a better dispute resolution system. They may be directors of customer relations seeking to streamline procedures for dealing with customer complaints, CEOs searching for ways to resolve disputes arising in a joint venture, or government officials concerned with endless court challenges to administrative regulations. A similar audience consists of organizational consultants who may be called in to solve another problem, such as low productivity, only to discover that a key part of the solution is changing the dispute resolution system. A fourth audience for this book is scholars, researchers, and students concerned with understanding, developing and evaluating alternative dispute resolution systems.

Overview

We begin this book by presenting the basic conceptual framework underlying our approach. In Chapter One we

distinguish three major ways of resolving disputes: to reconcile the disputants' underlying interests, to determine who is right, and to determine who has more power. Problem-solving negotiation exemplifies the interests approach; going to court, the rights approach; strikes and wars, the power approach. We argue that, in general, an interests approach is less costly and more rewarding than a rights approach, which in turn is less costly and more rewarding than a power approach. The goal, then, is to design a system that provides interests-based procedures for disputants to use whenever possible and low-cost rights procedures (such as advisory arbitration) or low-cost power procedures (such as voting) as backups.

The first step in moving toward such a new system is to diagnose the existing system. In Chapter Two we present a model of a dispute resolution system. The diagnosis focuses on three questions: What types of disputes arise? How are they handled? Why do disputants use some procedures and not others? Pinpointing some of the underlying factors—lack of procedures, motivation, skills, and resources—may suggest what changes to make. Can procedures be devised that meet the same needs at a lower cost?

We set forth six basic principles of dispute systems design in Chapter Three. The first is to put the focus on interests. The second is to design procedures that encourage disputants to return to negotiation—procedures we term *loop-backs*. The third is to provide low-cost rights and power procedures that, if all else fails, can bring about a final resolution of a dispute. The fourth is to prevent disputes whenever possible by building in a consultation procedure and a procedure for constructive feedback after a dispute. The fifth is to arrange the different procedures in a sequence from least to more costly. The final principle is to provide the motivation, skills, and resources necessary to make all the procedures work. The application of these six principles results in a low-cost dispute resolution system.

These principles alone, however, will not necessarily produce a workable system. As we demonstrate in Chapter

Four, designing a dispute system is not just a technical task of making the best changes; it is also a political task of garnering support, dealing with resistance, and motivating people to use the changed procedures. Nor is it just a question of having the right answer and then convincing the parties. Often the participants have useful ideas about what is wrong and what is needed, what will and will not work in their situation. The designer's knowledge must be blended with theirs. Furthermore, the design process may require mediating among parties who disagree about what changes are appropriate. Working with the parties—involving them in the process of diagnosis, design, and implementation—is thus a critical element of dispute systems design.

After we explain the process of diagnosing, designing, and implementing changes in the dispute system, we present a detailed case study in dispute systems design in the coal industry. In Chapter Five we describe Brett and Goldberg's 1978 study of wildcat strikes in the bituminous coal industry, which had reached a level of over 3,000 strikes per year. On the basis of that study, they concluded that a coal mine could operate without frequent wildcat strikes but to do so required establishing a problem-solving relationship between mine managers and the union.

Then in 1980, as we relate in Chapter Six, we worked as a team on what was probably the most strike-ridden mine in the coal industry. Caney Creek mine had suffered thirty wildcat strikes in the previous two years—along with bomb threats, layoffs, sabotage, and the overnight jailing of 115 miners.⁶ The situation was so costly that the company was seriously considering closing the mine altogether. Working with suggestions from union and management officials, we set about diagnosing the problem and designing a program of changes intended to encourage negotiation between miners and managers. We tried to mediate the adoption of the changes, and then we helped the parties put the program into practice. After our intervention, wildcat strikes at Caney Creek ceased for nearly a year. Grievances were negotiated successfully. The mine's productivity increased significantly, and the

laid-off miners returned to their jobs. Eight years later, the improved dispute resolution system remains in use.

In Chapter Seven we describe Goldberg's efforts to take what we had learned about dispute systems design at a single mine and apply it on an industrywide basis. Beginning in 1980 he sought to change the coal industry's system for resolving grievances by introducing interests-based mediation as an alternative to rights-based arbitration. Mediation promised to be faster and less expensive than arbitration and to produce more satisfactory outcomes. This promise was soon fulfilled, but while the mediation procedure has since spread to other industries, it has also met with considerable resistance. This chapter discusses the sources of resistance and Goldberg's efforts to overcome it.

In sum, the book presents a basic conceptual framework for dispute systems design, a variety of lessons and examples for practitioners, and a detailed case study. Dispute systems design is a practical method for cutting the costs of conflict and, at the same time, achieving the gains that come from satisfactory resolutions. The distinctive contribution of a systems approach is that it addresses not just a single dispute but the series of disputes that occur—and will continue to occur—in any relationship or organization.

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