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Post Disaster ADR Responses: Promises and Challenges

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POST DISASTER ADR RESPONSES: PROMISES AND CHALLENGES

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INTRODUCTION

Disasters are complicated phenomenon, often unpredictable and sui generis.¹ They can be either natural or manmade. And, when they occur, all kinds of response efforts take place to assist in the rescue, recovery, evacuation, repair, rebuilding, relocation and related efforts addressing the physical and emotional needs of victims.² For the public, among the most common and recognized first responders are police, fire fighters, and emergency medical personnel.³ Depending on the disaster, however, a diverse range of other responders is called upon to play a crucial role including many who bring necessary specialized skills, knowledge, and/or equipment to respond to specific situations such as demolishers, carpenters,

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1. *See generally* FEDERAL EMERGENCY MANAGEMENT AGENCY, www.fema.gov.

2. Depending on the context and the nature of the disaster, response efforts can be very diverse. For an overview of some of the most high profile response efforts, see *id.*

3. It is not surprising that these responders are the ones who the public is most familiar with since they are accessed through easy to reach emergency numbers like 911 and more often than not wear recognizable uniforms and arrive in recognizable vehicles. *See id.*

clergy, electricians, plumbers, insurance agents, appraisers, towers, and grief counselors to name a few.⁴

This article will examine the Alternative Dispute Resolution (“ADR”)⁵ post-disaster response landscape experienced by conflict and dispute resolvers,⁶ one of the newest and perhaps least well known type of responders.⁷ For purposes of this article, the terms “dispute resolvers” and “conflict resolvers” will be used interchangeably. Included as part of the ADR response efforts are facilitators, negotiators, conciliators, mediators, and related interveners who vary in their specialty of conflict or dispute resolution related work.⁸ Albeit quite varied in their approach, the

4. Since disasters are varied, a vast assortment of experts can play a role in the aftermath of any disaster. *See id.*

5. A definition of ‘Alternative Dispute Resolution’ can be found at DOUG YARN, DICTIONARY OF CONFLICT RESOLUTION, 17-20 (1999); *What is ALTERNATIVE DISPUTE RESOLUTION?*, THE LAW DICTIONARY, <http://thelawdictionary.org/alternative-dispute-resolution/>.

6. The definitions of ‘Dispute’ and ‘Conflict’ can be found at Yarn, *supra* note 5, at 113-117; *What is DISPUTE?*, THE LAW DICTIONARY, <http://thelawdictionary.org/dispute/> and *Conflict*, DICTIONARY.COM, <http://dictionary.reference.com/browse/conflict>.

7. *See generally* 13 DISP. RESOL. MAG., no. 1, Fall 2006 (Fall 2006) (an issue devoted to ADR responses to disasters); *see also* Maria R. Volpe & Staci Strobl, *Dispute Resolvers in a Post-September 11th World*, 3 PRAC. DISP. RESOL. 1, (2003) [hereinafter Volpe & Strobl, *Dispute Resolvers*]; Maria R. Volpe & Staci Strobl, *Responses to 9/11 Reveal Opportunities and Barriers - for Commercial ADR*, 23 ALTERNATIVES TO THE HIGH COST OF LITIG. 93, (2005) [hereinafter Volpe & Strobl, *Responses to 9/11*]; Maria R. Volpe & Staci Strobl, *Restorative Justice Responses to Post-September 11 Hate Crimes*, 22 CONFLICT RESOL. Q. 527, (2005) [hereinafter Volpe & Strobl, *Restorative Justice*]; Maria R. Volpe, *Looking Back, Looking Ahead: The Role and Relevance of ADR Responses to Disasters*, 13 DISP. RESOL. MAG., no. 1, Fall 2006, at 5 [hereinafter Volpe, *Looking Back*]; Maria R. Volpe, *Taking Stock: ADR Responses in Post-Disaster Situations*, 9 CARDOZO J. CONFLICT RESOL. 381, (2008) [hereinafter Volpe, *Taking Stock*].

8. *See generally* THE HANDBOOK OF DISPUTE RESOLUTION (Michael L. Moffitt & Robert C. Bordone eds., Jossey-Bass: A Wiley Co. 2005) [hereinafter Moffitt & Bordone]; *see also* THE HANDBOOK OF CONFLICT RESOLUTION, (Peter T. Coleman et al. eds., Jossey-Bass: A Wiley Co. 3rd ed. 2014).

one thing that all of these professionals have in common is the ability to work with disputing parties regarding some aspect of their incompatibility.⁹ They usually get involved with individuals who are experiencing differences and are in need of assistance in communicating, sharing perspectives, sorting through options, reaching agreements, and moving on.¹⁰ Depending on the nature of the disaster context, these professionals can work with most anyone involved in a disaster, including victims, offenders, responders, government officials, policy makers, and the business community, among others.¹¹

The fact that dispute resolvers have shown greater interest in responding to disasters is not surprising. Since the 1970s, thousands have been trained in a variety of intervention processes,¹² and many, particularly mediators, have sought innovative and interesting ways to respond to new and diverse contexts.¹³ Their desire to pursue new arenas for intervening is driven not only by their need to find new revenue generating opportunities, but because their knowledge and skills are indeed invaluable and can assist in the management of situations that might otherwise be ignored, allowed to fester, or result in the use of much more expensive and time consuming methods.¹⁴

9. While arbitrators are also considered part of the ADR landscape, unlike dispute resolvers such as facilitators, negotiators, conciliators, and mediators, the type of informal approach arbitrators use is evaluative and results in third party decisionmaking.

10. See, *supra* note 8; For post 9/11 efforts, see *projects*, CUNY DISPUTE RESOLUTION CENTER, <http://johnjayresearch.org/cdrc/projects/>; and *about*, CUNY DISPUTE RESOLUTION CENTER, <http://johnjayresearch.org/cdrc/about-drc/>.

11. See Maria R. Volpe, *Restorative Justice in Post Disaster Situations*, 8 CARDOZO J. CONFLICT RESOL. 611 (2007).

12. See Urska Velikonja, *Making Peace and Making Money: Economic Analysis of the Market for Mediators in Private Practice*, 72 Alb. L. Rev. 257, 263 (2009).

13. See generally Bernard Meyer, *BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION* (Jossey-Bass: A Wiley Co. 2004).

14. See Andrea Chasen, *After Disaster Strikes, Do I Volunteer as a Mediator?* 13 DISP. RESOL. MAG., no. 1, Fall 2006, at 21.

Since 9/11, I have been conducting research on post disaster response efforts undertaken by dispute resolvers.¹⁵ While many dispute resolvers report engaging in disaster response related activities like volunteer work in soup kitchens, as grief counselors or assisting with evacuations,¹⁶ these are not activities unique to the work of dispute resolvers. The central question for my research has been, ‘What do dispute resolvers do *as dispute resolvers* in response to disasters?’¹⁷ Evidence of increasing interest in the relevance and preparedness of dispute resolvers by the dispute resolution field itself, particularly in the aftermath of some of the recent devastating disasters, is gaining visibility.¹⁸ In her article on FEMA’s ADR

15. See Volpe & Strobl, *Dispute Resolvers*, *supra* note 7; Volpe & Strobl, *Responses to 9/11*, *supra* note 7; Volpe & Strobl, *Restorative Justice*, *supra* note 7; Volpe, *Looking Back*, *supra* note 7; Volpe, *Taking Stock*, *supra* note 7.

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

17. See Volpe & Strobl, *Dispute Resolvers*, *supra* note 7; Volpe & Strobl, *Responses to 9/11*, *supra* note 7; Volpe & Strobl, *Restorative Justice*, *supra* note 7; Volpe, *Looking Back*, *supra* note 7; Volpe, *Taking Stock*, *supra* note 7.

18. For example, Cardozo Law School held a Symposium in 2007 titled “ADR in the Aftermath Post-Disaster Strategies” and devoted most of 9 CARDOZO J. OF CONFLICT RESOL. (2008) to the topic. The New York State Dispute Resolution Association, the American Arbitration Association, and Fordham Law School similarly co-sponsored a panel discussion on March 5, 2014 titled “Storm Sandy Mediation Program: Lessons Learned.” See *News: Archived News*, NEW YORK STATE DISPUTE RESOLUTION ASSOCIATION, INC., <http://www.nysdra.org/news/166526/NYSdra-eNews—Winter-2014.htm>. The CUNY Dispute Resolution Center and the Association for Conflict Resolution most recently devoted their April 2014 NYC-Dispute Resolution Roundtable Breakfast to “Disaster Mediation: Storm Sandy Insurance Claim Dispute Resolution.” See *NYC-DR Roundtable: DISASTER MEDIATION – STORM SANDY INSURANCE CLAIM DISPUTE RESOLUTION*, CUNY DISPUTE RESOLUTION CENTER, <http://johnjayresearch.org/cdrc/events/disaster-mediation-storm-sandy-insurance-claim-dispute-resolution/>. The ABA devoted an issue of their Dispute Resolution Magazine to ADR topics. See DISP. RESOL. MAG., *supra* note 7. Many other conferences have included sessions on post disaster ADR efforts. See e.g., *60th Anniversary Annual Meeting New Orleans - Annual Meeting Program*,

services, Mazur concludes, “ADR is a growing phenomenon in the disaster arena.”¹⁹

DISASTERS

Disasters can be difficult to define. According to the Johns Hopkins and the International Federation of Red Cross and Red Crescent Societies, a disaster “implies a sudden overwhelming and unforeseen event.”²⁰ The Merriam-Webster online dictionary defines a disaster as “something (such as a flood, tornado, fire, plane crash, etc.) that happens suddenly and causes much suffering or loss to many people; something that has a very bad effect or result; a complete or terrible failure.”²¹ Whether human-made or natural, disasters are, by their very nature, very difficult to prepare for and challenging to respond to, even by those who are in the full-time business of responding to them.²² Police, fire fighters and emergency medical personnel are routinely trained to respond to a wide range of situations, to the extent that it is possible.²³ They have complex and costly equipment at their disposal, even if some are not the most state

LERA, <http://www.lera.uiuc.edu/meetings/Annual/2008/program.asp> (listing the “LERA Distinguished Panel - Post Katrina: The Role of ADR in Rebuilding and Lessons for the Future”).

19. Cynthia Mazur, *Working Toward Critical Mass, FEMA, ADR and Disasters*, 13 DISP. RESOL. MAG., no. 1, Fall 2006, at 11.

20. THE JOHNS HOPKINS AND THE INTERNATIONAL FEDERATION OF RED CROSS AND RED CRESCENT SOCIETIES, THE JOHNS HOPKINS AND RED CROSS RED CRESCENT PUBLIC HEALTH GUIDE IN EMERGENCIES 26 (2007), available at http://www.jhsph.edu/research/centers-and-institutes/center-for-refugee-and-disaster-response/publications_tools/publications/_CRDR_ICRC_Public_Health_Guide_Book/Forward.pdf.

21. See *Disaster*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/disaster>.

22. See JOHNS HOPKINS AND RED CROSS RED CRESCENT PUBLIC HEALTH GUIDE IN EMERGENCIES, *supra* note 20.

23. See FEDERAL EMERGENCY MANAGEMENT AGENCY, *supra* note 1; see also *supra* text accompanying notes 2-5.

of the art, and the personnel needed to be response ready at all times.²⁴

The ongoing activities needed to be response ready include routine rehearsals of best practices, training with the use of existing and new equipment, consulting with others on integrating lessons learned from their experiences, and experimenting with innovative ideas.²⁵ Some of these preparation efforts can be very focused and situational. For example, in addition to situations for which they are usually trained, those who serve geographic areas near nuclear power plants prepare for potential nuclear disasters;²⁶ those near large bodies of water, prepare for coastal storms, ship wrecks, and other water related disasters;²⁷ and those who provide services to high rise buildings, prepare for responses in the sky.²⁸ The list is endless. Yet, as we know, while a previous disaster can prepare responders to be better equipped for the next disaster, any disaster may in fact be markedly different from any previous one. A nuclear plant explosion is very different from damage resulting from a hurricane, a shipwreck, a massive fire, chemical spill, or hijacked planes flown into buildings.

Regardless of the specific type of disaster, the needs immediately following most catastrophic occurrences usually require some form of rapid response to address physical and emotional needs.²⁹ Given the need for quick responses posed by disasters, there are some basic approaches in providing immediate response assistance. For dispute resolvers, the occurrence of disasters poses additional quandaries.

24. *Id.*

25. *Id.*

26. *See, e.g., Nuclear Emergency*, SAN CLEMENTE, <http://san-clemente.org/government/city-departments/public-works/emergency-planning/nuclear-emergency>; *Emergency Preparedness and Response*, U.S. NRC, <http://www.nrc.gov/about-nrc/emerg-preparedness.html>.

27. *See, e.g., Hurricanes*, READY.GOV, <http://www.ready.gov/hurricanes>

28. *See, e.g., Storm Safety in High Rise Buildings*, NC STATE UNIVERSITY, <http://content.ces.ncsu.edu/storm-safety-in-high-rise-buildings/>.

29. *See* FEDERAL EMERGENCY MANAGEMENT AGENCY, *supra* note 1; *see also supra* text accompanying notes 1-4.

The burning question is: ‘How can complex and unpredictable disaster contexts, regardless of the nature of the disasters, utilize the knowledge and skills of dispute resolvers?’ More specifically: ‘What contributions can be made by dispute resolution professionals whose expertise, for the most part, relies on parties’ ability to engage in rational discussions or at a minimum be able to express themselves?’ This is particularly pronounced for processes like mediation where the parties are expected to be ready, willing and able to engage others voluntarily at a time when the individuals may be confused and in need of emergency assistance in the immediate aftermath of disasters.³⁰ For example, Alan Gross noted that in the aftermath of 9/11, paying attention to such matters as burial arrangements, jobs and replacement of possessions were uppermost.³¹

For dispute resolvers in New York City, the attack on the twin towers at the World Trade Center on September 11, 2001 proved to be a wake-up call.³² The contemporary dispute resolution field was still relatively young and untested as far as responding to large-scale disasters outside of hurricane mediation.³³ Many dispute resolvers experienced their first major disaster as dispute resolvers after 9/11.³⁴ At the World Trade Center, two hijacked planes were flown into each of the twin towers, which housed thousands of employees. Within hours, the twin towers collapsed and neighboring buildings were destroyed. The devastation resulting from the attacks had far reaching implications. Nearly three thousand died, thousands fled from the many buildings in the area, fires raged, local residents and businesses were displaced, transportation was halted, and the skyline of lower Manhattan changed forever.³⁵

30. *See, e.g.*, Gross, *supra* note 16.

31. *Id.*

32. *See* Volpe & Strobl, *Dispute Resolvers*, *supra* note 7; Volpe & Strobl, *Responses to 9/11*, *supra* note 7; Volpe & Strobl, *Restorative Justice*, *supra* note 7; Volpe, *Looking Back*, *supra* note 7; Volpe, *Taking Stock*, *supra* note 7.

33. *Id.*

34. *Id.*

35. *See generally* THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE

In the aftermath of 9/11, many dispute resolvers asked how could they respond, and, more specifically, what could they offer as dispute resolvers?³⁶ It was this question that set the stage for my research.

I. THE EMERGENCE OF ADR PROCESSES

Since conflicts are “natural, inevitable, and essential aspects of social life,”³⁷ it is difficult to pinpoint when anyone started responding to conflict situations and what processes and techniques were used.³⁸ Historically, those who engaged in conflict intervention work did so intuitively and using informal procedures.³⁹ Many had excellent people and communication skills and used them to make talk work when they managed conflict situations.⁴⁰ In fact, this

NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES REPORT (2004), *available at* <http://govinfo.library.unt.edu/911/report/911Report.pdf>.

36. A summary of the September 20, 2001 “NYC-Dispute Resolution Roundtable” is available on the New York City Dispute Resolution ListServ. See nyc-dr@listserv.jjay.cuny.edu, *available at* <http://listserv.jjay.cuny.edu/archives/nyc-dr.html> (on file with the author) [hereinafter NYC ListServ].

37. See LOUIS KRIESBERG AND BRUCE DAYTON, *CONSTRUCTIVE CONFLICTS: FROM ESCALATION TO RESOLUTION* (Rowan and Littlefield, 2012).

38. JEROME BARRETT & JOSEPH BARRETT, *A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION* (Jossey-Bass: A Wiley Co., 2004)

39. *Id.* See also, e.g., CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* (Jossey-Bass: A Wiley Co., 4th ed., 2014).

40. In the aftermath of 9/11, the author was asked to share tips with faculty on ways to handle classroom dialogue. After much thought about what it was that conflict resolvers could contribute to a 9/11 response effort on CUNY campuses, I decided to provide tips on how to ‘make talk work’ in the classroom. Simultaneously, the CUNY Dispute Resolution Center was convening dispute resolvers in New York City to discuss dispute resolution related responses to the 9/11 disaster. As part of their ongoing dialogue, they discussed a wide range of initiatives they could undertake. After much discussion about what all conflict resolvers do, they agreed that all conflict resolvers “make talk work”, that is all conflict resolvers use verbal and nonverbal communication to handle

informal approach to managing conflicts has been true of numerous occupations like teaching and policing where the practitioners have often used their own personal skill sets to make talk work as informal conflict resolvers.⁴¹ Even though a lot of their work involves conflict invention, they have not been specifically referred to as conflict resolvers.⁴²

Since the 1970s, however, interest in a more deliberate use of dispute resolution as an area of scholarship and practice has grown.⁴³ Frank Sander's 1976 speech at the Pound Conference on "The Causes of Popular Dissatisfaction with the Administration of Justice," where he laid the foundation for alternative ways to handle disputes beyond traditional litigation,⁴⁴ is often referred to as the "big bang moment" of the ADR field.⁴⁵

While it continues to be challenging to find quantifiable data about how many ADR practitioners exist, there is growing evidence that

misunderstandings and help parties to have difficult conversations. Even when conflict resolvers use an evaluative approach like arbitrations, their work relies largely on parties having to express themselves verbally and nonverbally. For sure, similar communication techniques are common to many other professionals, but for the conflict resolvers exploring ways they could share their work with the public, they agreed that the phrase "make talk work" captured the essence of conflict resolvers' work. As a result, the CUNY Dispute Resolution Center started a Make Talk Work initiative, with many projects devoted to increasing public awareness about dispute resolution. Among the best known were those funded by the JAMS Foundation which included a series of 24 bookmarks, each providing a tip on how to make talk, and an international video competition of 60 second videos using the messages on the bookmarks and posted on YouTube. As part of this initiative, the CUNY Dispute Resolution Center trademarked the phrase, "Make Talk Work".

41. See Maria R. Volpe, *Police and Mediation: Natural, Unimaginable or Both*, in MOVING TOWARD A JUST PEACE: THE MEDIATION CONTINUUM, (Jan Fritz ed., 2014) [hereinafter Volpe, *Police and Mediation*].

42. *Id.*

43. See Moffitt & Bordone, *supra* note 8.

44. Frank E. A. Sander, Varieties of Dispute Processing, Addresses Delivered at the Nat'l Conference on the Causes of Popular Dissatisfaction with the Admin. of Justice (April 7-9, 1976), in 70 F.R.D. 79, 111-119 (1979).

45. Michael L. Moffitt, *Before the Big Bang: The Making of an ADR Pioneer*, 22 Neg. J. 437 (2006).

ADR practitioners are playing a role when it comes to resolving conflicts. For instance, Velikonja states that “experienced practitioners estimate that more than 100,000 people have received some sort of mediation training.”⁴⁶ A recent report on community mediation released by the National Association for Community Mediation estimated that there are approximately 20,000 active volunteers who mediate in community dispute resolution programs at the local level in the United States.⁴⁷ Jurisdictions where mediators are certified provide insight about the number of mediators on their rosters. For example, in Florida, where its Supreme Court certifies mediators, there were 6,360 certified mediators as of August 2012.⁴⁸

Dispute resolution related policies, procedures and processes have been increasingly institutionalized in a variety of organizational contexts, like the workplace, schools, government, and business operations.⁴⁹ Such initiatives are often referred to as ombudsmen programs, which use a variety of conflict resolution processes.⁵⁰ Academic programs offer a variety of dispute resolution coursework and training programs at all stages of the educational spectrum.⁵¹

46. Velikonja, *supra* note 12.

47. Justin R. Corbett & Wendy E. H. Corbett, *THE STATE OF COMMUNITY MEDIATION 26* (National Association for Community Mediation, 2012), available at <http://www.nafcm.org/?page=State>.

48. *About ADR & Mediation*, FLA. CT. SYS., <http://www.flcourts.org/resources-and-services/alternative-dispute-resolution/about-adr-mediation.stml>.

49. *See generally* Charles L. Howard, *THE ORGANIZATIONS OMBUDSMAN: ORIGINS, ROLES, AND OPERATIONS – A LEGAL GUIDE* (American Bar Association, 2010); James T. Ziegenfuss, Jr. & Patricia O’Rourke, *THE OMBUDSMAN HANDBOOK: DESIGNING AND MANAGING AN EFFECTIVE PROBLEM SOLVING PROGRAM* (McFarland & Co., Inc. 2d rev. ed. 2010).

50. *Id.*

51. *See* Tricia S. Jones, *Conflict Resolution Education: The Field, the Findings and the Future*, 22 *CONFLICT RESOL.* Q. 233, (2004); *see also* Roy J. Lewicki, *Teaching Negotiation and Dispute Resolution in Colleges of Business: The State of the Practice*, 13 *NEG. J.* 253, (1997); Robert B. Moberly, *Introduction: Dispute Resolution in the Law School Curriculum: Opportunities and Challenges*, 50 *FLA. L. REV.* 583, (1998).

Courts have been referring cases, and in some instances, mandating that the parties try mediation.⁵²

Along with all of these developments, dispute resolvers have searched for new contexts where they could introduce innovative dispute resolution related work. Unlike other post disaster response services that are better understood, readily recognized, and appreciated, dispute resolvers experience a different post disaster scene.⁵³ Not only are dispute resolvers confronted with the unpredictability of the disasters themselves and their own lack of preparation, they often have to explain their work to those who might be in a position to benefit from such services at the very time that a disaster occurs.⁵⁴ Moreover, a major hurdle has been the expectation that they should provide their services pro bono.⁵⁵

With the expanded availability of trained dispute resolvers, there have been significant attempts to apply their knowledge and skills in post disaster responses.⁵⁶ Mazur notes that dispute resolution professionals provide communication and problem solving skills of “deep listening, empathy, validation, and respect for human dignity.”⁵⁷ This growth of dispute resolution practitioners searching for opportunities and the increased occurrence of large-scale disasters has provided a convergence of readily available dispute resolution experts and the potential opportunity to offer their services in a new context.⁵⁸

52. See, e.g., FLA. CT. SYS., *supra* note 48.

53. See, e.g., Chasen, *supra* note 14; Gross, *supra* note 16.

54. See, e.g., Gross, *supra* note 16.

55. See Meyer, *supra* note 13.

56. See Volpe & Strobl, *Dispute Resolvers*, *supra* note 7; Volpe & Strobl, *Responses to 9/11*, *supra* note 7; Volpe & Strobl, *Restorative Justice*, *supra* note 7; Volpe, *Looking Back*, *supra* note 7; Volpe, *Taking Stock*, *supra* note 7.

57. See Mazur, *supra* note 19, at 20.

58. *Id.*

II. POST DISASTER WAKE-UP CALL FOR DISPUTE RESOLVERS

To discuss post disaster responses, I first examine the dispute resolvers' responses to the September 11th attacks on the twin towers of the World Trade Center. In the immediate aftermath of this tragedy, dispute resolvers asked what they could do in response to the overwhelming disaster situation. On September 20, 2001, dispute resolvers came together at John Jay College of Criminal Justice – City University of New York to discuss their perspectives, opinions, and next steps.⁵⁹ It is important to note that everyone in the room had been touched by the tragic events in one way or another.⁶⁰ They either knew someone personally or knew someone who knew someone who had been killed, hurt, or displaced.⁶¹ There were a myriad of ways in which everyone had personally experienced the tragedy locally through disrupted transportation, closed streets, and air quality issues.⁶² They also shared their attempts to provide assistance at churches and a variety of help centers.⁶³

Unlike many other professions, dispute resolvers do not have professional associations and large organizations that can voice concerns and assemble resources on their behalf.⁶⁴ For them, merely communicating with each other was a challenge.⁶⁵ The main purpose of the September 20th gathering was to provide dispute resolvers with an opportunity to find out what dispute resolvers in the area were doing in response to the attacks and brainstorm what else they might

59. *See* NYC-DR ListServ, *supra* note 36.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. After Hurricane Katrina the ABA Dispute Resolution Section established a Post Katrina Working Group to spearhead response efforts. It established a listserv and posted disaster relief dispute and conflict resolution resources on its website to assist those interested in providing assistance to victims of Hurricane Katrina. *See Disaster Relief: Dispute and Conflict Resolution Initiatives*, A.B.A., http://www.abanet.org/dispute/katrina/disaster_relief.doc.

65. *Id.*

want to consider doing.⁶⁶ Their need to be able to communicate with each other was extremely important.⁶⁷ To address this concern, the CUNY Dispute Resolution Center created the NYC-DR listserv, which remains an active means of communication for dispute resolvers in New York City and now much beyond.⁶⁸ The attendees also agreed to continue meeting to discuss how to share the work of dispute resolvers with the larger society and the kind of information and materials that they could share with the public.⁶⁹

Central to the meeting, however, was what was on the participants' minds, namely their role in response to the events of 9/11.⁷⁰ The discussion offered insights about the kinds of concerns dispute resolvers were experiencing and the challenging questions that they faced in response to the disaster that had occurred.⁷¹ Their brainstorming also shed light on the many barriers they foresaw in reaching out and engaging the public as dispute resolvers as well as what they needed in order to be more relevant and better prepared to do work as dispute resolvers among themselves, with those in allied fields, and the public.⁷² The following is a list of concerns that they generated:

- [1] a. How can dispute resolution educators and practitioners in NYC be relevant in response to a crisis such as that at the World Trade Center (WTC)?
 - b. What actions can dispute resolution educators and practitioners take?
 - c. What is the right thing to do?

- [2] a. What do dispute resolvers need to learn in order to

66. *See* NYC ListServ, *supra* note 36.

67. *Id.*

68. *See generally id.*

69. *See id.*

70. *Id.*

71. *Id.*

72. *Id.*

help in response to the WTC tragedy?

b. How do we prepare mediators with anti-bias skills, sensitivity about bias issues facing Arab youth and Muslims, etc.?

c. How do we deal with anger which may emerge during and after facilitated discussions?

[3] How do we identify educators and practitioners in the NYC ADR community to facilitate conversations?

[4] How do we interface with other groups involved in dispute resolution related work in NYC e.g. ACLU, peace education groups, etc.?

[5] How do we keep the current conversations visible, alive, and civil?

[6] a. How relevant is the Western mindset of problem solving for responding to the WTC attack?

b. How important is the understanding of context (historical, political, etc.)?

[7] How do we integrate conflict resolution into other areas?

[8] How do we balance reflections about intervention with the pressures for political and other leaders to take action?

[9] How can stakeholders around the world be engaged?

[10] What are the consequences of disagreement, e.g. the fear of those in the minority to express their views?⁷³

73. *Id.*

The attendees also brainstormed what they thought they could do as dispute resolvers, particularly in making dispute resolution skills and processes available to others. The list included the following:

[1] Organize groups in selected communities, on campuses, etc.

[2] Collect lists of existing dialogue groups.

[3] Prepare tip sheets:

How to facilitate discussions in the classroom (when you are falling apart yourself)

[a] Process questions

[b] Meet students where they are

[c] Bias awareness

[4] Create ways to connect with the NYC dispute resolution community, including

[a] Start a listserv for NYC (CUNY DRC will create one)

[b] Sponsor Muslim and community/public sector dialogue

[c] Convene Roundtables (to prepare deliverables)

[d] Newsletter (contact ACR NYC)

[5] Write open letters featuring a reflective piece on peace

[6] Prepare statement from NYC DR community, for example:

[a] Op-ed article –e.g. for the *New York Times*

[b] Public service ads

[7] Organize teach-in...educational

[8] Contact local TV stations to hold forums focusing on dispute resolution skills – facilitation

[9] Reach out to other communities for our forums

(e.g. intergenerational with youth)

[10] Find ways to learn from other communities to go beyond Western approach⁷⁴

In many ways, this meeting and my subsequent research found that 9/11 and subsequent disasters like Hurricane Katrina and more recently Hurricane Sandy continue to serve as wake-up calls for dispute resolvers.⁷⁵ After each disaster, dispute resolvers continued to express tremendous enthusiasm about playing a role in the response efforts, but the full potential of their involvement has yet to be realized.⁷⁶ Nonetheless, there is evidence that dispute resolution processes have gained traction.⁷⁷

III. ROOTS OF POST-DISASTER ADR INITIATIVES

It is difficult to precisely pinpoint when ADR initiatives were recognized as a component of the post disaster response landscape. The ambiguity is a result of the specifics involving the very nature of disasters themselves as well as the state of the dispute resolution field. As mentioned earlier, what constitutes a disaster can be complicated and unique.⁷⁸ Most notably, knowing what might be needed as a response is not always easy to anticipate.⁷⁹ Equally problematic is the dispute resolution field where it is not only difficult to make a living as a professional,⁸⁰ but one where the

74. *Id.*

75. See Volpe & Strobl, *Dispute Resolvers*, *supra* note 7; Volpe & Strobl, *Responses to 9/11*, *supra* note 7; Volpe & Strobl, *Restorative Justice*, *supra* note 7; Volpe, *Looking Back*, *supra* note 7; Volpe, *Taking Stock*, *supra* note 7.

76. *Id.*

77. *Id.*

78. See FEDERAL EMERGENCY MANAGEMENT AGENCY, *supra* note 1; see also *supra* text accompanying notes 1-4 and 20-22.

79. *Id.*

80. See Velikonja, *supra* note 12, at 263.

processes remain obscure to the public and the various dispute resolution processes themselves are not readily distinguished from each other.⁸¹

Some of the informal initiatives undertaken in the distant past, which were not referred to as dispute resolution, may have been very similar to what we now refer to as dispute resolution related intervention work.⁸² There are many efforts to help people talk, but have not been identified as dispute resolution work. For instance, even the Listening to the City forums in New York City after 9/11 and the congresses in New Orleans were not labeled as dispute resolution related work by the organizers.⁸³ Yet conflict resolvers who helped facilitate the programs, included them in their portfolio.⁸⁴

To complicate matters, the lack of a clear definition for what constitutes a disaster context contributes to the challenges of understanding when the deliberate application of ADR processes begin.⁸⁵ Since activities may be labeled differently over time, it is difficult to establish when the use of ADR in post disaster responses occurs.⁸⁶ In an attempt to identify markers that signaled the use of

81. See Maria Volpe, *Mediation Remains Elusive in Public Discourse Despite Its Ubiquity*, 30 ALT. TO THE HIGH COST OF LITIG. 185, (2010) [hereinafter Volpe, *Mediation Remains Elusive*].

82. See Barrett, *supra* note 38.

83. See Chasen, *supra* note 14, at 21.

84. *Id.*

85. Since situations may be vaguely referred to as a disaster, such a state of affairs contributes to the confusion of knowing what role, if any, ADR processes may play.

86. For example, in response to hurricane damage, insured parties may initially file claims with their insurance company. If not satisfied, they may threaten to sue, but if a hurricane mediation program is available, they may consider discussing the matter with a mediator. If unsuccessful in reaching an agreement, may continue with litigation. In New Jersey, for example, the NJ Department of Banking and Insurance prepared the following information regarding the Storm Sandy Mediation Program: "Policyholders may elect to participate in an insurance company's internal appeal process, appraisal processes or insurance company mediation program when applicable, as well as the mediation program established by the Department." *Storm Sandy Insurance Mediation Program*, STATE OF N.J.,

ADR processes in response to disasters, two disasters stand out as indicators of when mediation emerged as a recognizable response in the handling of disaster related matters: Agent Orange and Hurricane Andrew.

The first involved the processing of lawsuits resulting from the use of a chemical defoliant known as Agent Orange by the US Army in Southeast Asia during the Vietnam War when toxins were released in the environment.⁸⁷ Litigation by Vietnam veterans, which began in 1979, finally reached Judge Weinstein in 1984, the person who paved the way for the use of a special master to creatively settle the cases.⁸⁸ According to Feinberg, who was appointed as a special master by Judge Weinstein to work on the mass settlement, “The lawsuits constituted the largest mass tort litigation in American history; between two and three million Vietnam veterans and eight million to ten million family members might have been implicated in the litigation.”⁸⁹ Feinberg reflects on his participation in these cases as that of a mediator in his recent book, *WHO GETS WHAT? FAIR COMPENSATION AFTER TRAGEDY AND FINANCIAL UPHEAVAL* as follows:

In March 1984, just six weeks before the massive [Agent Orange] trial was scheduled to begin, I received a call from [Judge] Weinstein, asking me to mediate a comprehensive settlement of the litigation as his court-appointed special master. I explained that I had no background whatsoever in mediation, had never been a mediator, and had never even taken a course in mediation in law school. Weinstein

DEP'T OF BANKING & INS.,
http://www.state.nj.us/dobi/division_consumers/insurance/sandymediation.html#4

87. *See generally* Peter Schuck, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (Belknap Press rev. ed, 1988).

88. Kenneth R. Feinberg, *WHO GETS WHAT? FAIR COMPENSATION AFTER TRAGEDY AND FINANCIAL UPHEAVAL* 23-40 (Public Affairs: Perseus Book Group 2012).

89. *Id.* at 24.

did not waste words: “I need somebody I can trust, somebody with the personality and skill to secure a global settlement of the litigation. Ken, you know how Washington works and have Ted Kennedy’s confidence. The veterans need help and the government, especially the Veterans Administration, should be enlisted to work something out. The trial will not benefit anybody. We need to get the case settled and you are the one to do it.”⁹⁰

The Agent Orange case was one of the first instances when mediation was referred to as a response to mass tort litigation involving a disaster.⁹¹ It gave rise to the notion of mass dispute resolution settlement as a means of relieving pressure from the court to process the large volume of cases resulting from specific actions, including those following disasters.⁹² Since the Agent Orange case, Feinberg has been asked to manage virtually all of the high profile post disaster compensation plans, including the 9/11 fund and the BP oil spill fund, so much so that questions have surfaced as to whether the approach he uses is unique to him.⁹³ In a recent article, Judge Weinstein, who appointed Feinberg to settle the Agent Orange case,

90. *Id.* at 25.

91. *Id.*

92. *Id.*

93. *See* Schuck, *supra* note 87 (stating that, in addition to overseeing payouts for Agent Orange, 9/11, and the BP oil spill in the Gulf of Mexico, Kenneth Feinberg, whose official title was usually special master, but widely referred to as pay czar, has played a role in the compensation plans for the Dalkon Shield birth-control device, Virginia Tech shootings, Penn State sex abuse scandal, Aurora, Colorado movie theater shootings, Boston Marathon bombings, the Newtown-Sandy Hook Community Foundation, and General Motors’ faculty ignition switch car recall, among others. He was also appointed to establish pay plans for top executives receiving financial assistance from TARP, the Troubled Asset Relief Program).

noted, “Everyone is sui generis,...but he’s more sui generis than others.”⁹⁴

The use of mediation is not always evident in all of the aforementioned mass dispute resolution cases, especially since the title given to the intervener is often that of special master.⁹⁵ Nonetheless, mediation has gained visibility, not least of which is the fact that Feinberg was referred to as a mediator in the far-reaching publicity his interventions have attracted over the years.⁹⁶ His profile at mediate.com states that he is “among the best-known figures in the field of conflict resolution.”⁹⁷ He has been widely recognized by conflict resolvers for his mass dispute resolution compensation work, and he has acknowledged that his work has been influenced by mediation.⁹⁸ It is the skills and techniques used by mediators that are invaluable during the mass dispute resolution settlement efforts.⁹⁹ Feinberg has often referred to the need to listen to the parties who present conflicting versions about their situations during the 9/11 Victim Compensation Program sessions and found himself managing family squabbles over who should be compensated.¹⁰⁰

The second significant indication that mediation emerged as a major response to disasters occurred after Hurricane Andrew in 1992 when the Florida Department of Insurance asked the American

94. Terry Carter, *Master of Disasters: Is Ken Feinberg Changing the Course of Mass Tort Resolution?*, A.B.A. J. (Jan. 01, 2011, 11:00 AM), http://www.abajournal.com/magazine/article/master_of_disasters/.

95. Kenneth R. Feinberg, *Resolving Mass Tort Claims: The Perspective of a Special Master*, 53 DISP. RESOL. J. 10, (1998).

96. See generally *Kenneth Feinberg*, MEDIATE.COM, <http://www.mediate.com/people/personprofile.cfm?aid=228> (Kenneth Feinberg’s website).

97. *Id.*

98. *Id.*

99. As Kenneth Feinberg states in his address to the joint conference of the International Academy of Mediators (“IAM”) and the American College of Civil Trial Mediators, see Ken Feinberg, *The 9/11 Victim Compensation Fund and Mediation*, MEDIATE.COM (May, 2004), <http://www.mediate.com//articles/feinberg.cfm>.

100. *Id.*

Arbitration Association to establish an insurance mediation program.¹⁰¹ The success of that program in processing property damage cases spawned a whole new area of mass disaster mediation practice for mediators, not only in response to hurricanes but as a response to the 1994 earthquake in Northridge, California.¹⁰²

According to the American Arbitration Association, as a result of Hurricane Andrew, 2,400 claims were mediated with a 92 percent settlement rate.¹⁰³ As a result of this groundbreaking initiative, when Hurricane Katrina and then Hurricane Rita hit the Gulf Coast in 2005, the American Arbitration Association Disaster Recovery Claims Resolution Program was established to provide insurance mediation for claims where disputes existed between homeowners and businesses and their insurance companies.¹⁰⁴ After Hurricanes Katrina and Rita, 15,000 cases were filed in Louisiana with a settlement rate of 74 percent and 5,000 cases were filed in Mississippi with a settlement rate of 82 percent.¹⁰⁵

In the aftermath of Hurricane Sandy in 2012, one of the most common reasons cited for establishing insurance mediation programs was the high settlement rate of disputed property claims that were mediated after Hurricane Andrew in Florida and after Hurricanes Katrina and Rita in the Gulf region.¹⁰⁶ Their success was a recurrent theme for introducing the insurance mediation programs in New York,¹⁰⁷ and New Jersey.¹⁰⁸ For example, New York State Governor

101. William Slate, *ADR and Mass Claims*, 53 DISP. RESOL. J. 11, 11 (1988).

102. *Id.*

103. *Id.*

104. AMERICAN ARBITRATION ASSOCIATION, DISASTER RECOVERY CLAIMS RESOLUTION PROGRAM 3, (2012) *available at* https://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTG_024228&RevisionSelectionMethod=LatestReleased.

105. *Id.*

106. *See infra* notes 108 and 109.

107. Press Release, N.Y. Governor's Press Office, Governor Cuomo Announces DFS Mediation Program for Disputed or Denied Insurance Claims for Storm Sandy Homeowners (Feb. 25, 2013), *available at*

Cuomo cited both the number of claims and high settlement rates in Louisiana and Mississippi in his press release announcing a voluntary mediation program for homeowners who disputed their insurance claims or disagreed with the denials they received.¹⁰⁹

In addition to the establishment of state insurance mediation programs, on February 21, 2014, the U.S. Eastern District Court of New York issued a Case Management Order that included mediation, arbitration and voluntary settlement to facilitate the efficient resolution of the over 800 cases that had been filed in that court.¹¹⁰ On March 12, 2014 Gerald Lepp, ADR Administrator of the Eastern District of New York, sent an email to the NYC-DR listserv seeking interns to assist his ADR Program since, “The Eastern District of New York will refer 900 cases involving Hurricane Sandy to mediation.”¹¹¹ The large number of cases also resulted in a search for mediators.¹¹² According to a press statement, “The Eastern District of New York’s mediation program was one of the first in the country, and maintains a panel of screened, trained, and certified private mediators—but too few to handle the expected influx of cases.”¹¹³ Magistrate Judge Robert Levy reported that in response to an extensive recruitment, the Court ended up with nearly 100

<https://www.governor.ny.gov/press/02252013-%20dfs-mediation-program-for-disputed-or-denied-insurance-claims> [hereinafter NY Gov. Press Release].

108. N.J. Order A13-106 (2013), *available at* http://www.state.nj.us/dobi/orders/a13_106.pdf.

109. N.Y. Gov. Press Release, *supra* note 108.

110. *See* Case Management Order No. 1, In Re Hurricane Sandy Cases, 14 MC 41 (E.D.N.Y. 2014), *available at* https://ecf.nyed.uscourts.gov/dropbox/docs/Sandy_Program_Book_WEB.pdf (page 235).

111. Posting of Gerald P. Lepp, Gerald_P_Lepp@nyed.uscourts.gov, to nyc-dr@listeserver.jjay.cuny.edu (Mar. 12, 2014), <http://listserver.jjay.cuny.edu/archives/nyc-dr.html.1> (last visited Oct. 1, 2014).

112. *See* THE THIRD BRANCH NEWS, *Eastern District of New York Looks to Mediators to Expedite Sandy Cases*, USCOURTS.GOV, (June 26, 2014), <http://news.uscourts.gov/eastern-district-new-york-looks-mediators-expedite-sandy-cases>.

113. *Id.*

mediators for the anticipated Hurricane Sandy cases.¹¹⁴ Most of these cases were flood insurance claims that were covered by the Federal Emergency Management Agency (FEMA) National Flood Insurance Program and could not be mediated in the state programs.¹¹⁵

Starting in January 2013, Liberty Mutual asked Kenneth R. Feinberg of Feinberg Rozen LLP to offer an ADR program to its clients who were disputing their claims in order to better manage cases with their customers.¹¹⁶ Ted Gramer, Liberty Mutual Executive Vice President and Chief Claims Officer for Personal Insurance, stated “resolving claims disputes through proven alternatives to the court system could accelerate an expensive settlement process for customers from possibly years to just a few months.”¹¹⁷ Feinberg, who had served as special master of the 9/11 Fund, had also previously managed Liberty Mutual’s ADR program in response to Hurricane Katrina in 2005.¹¹⁸

By the time Hurricane Sandy occurred, the question was no longer whether insurance mediation programs would be introduced post hurricane disasters, but when. Political, government, and court officials had sufficient data and access to a significant track record to not only establish, but to promote and even mandate insurance mediation programs as part of the disaster response efforts. And mediators who had responded to previous hurricanes in Florida as insurance mediators began sharing their lessons learned.¹¹⁹

114. *Id.*

115. *See* N.J. Order A13-106, *supra* note 108.

116. Press Release, Liberty Mutual Insurance, Liberty Mutual Insurance Companies Offer Alternative Resolution Program For Disputed Sandy Claims (Jan. 4, 2013), *available at* <http://www.prnewswire.com/news-releases/liberty-mutual-insurance-companies-offer-alternative-resolution-program-for-disputed-sandy-claims-185647432.html> [hereinafter Press Release, Liberty Mutual Insurance].

117. *Id.*

118. *Id.*

119. *See, e.g.,* Mel Rubin, *Disaster Mediation, Lessons in Conflict Coordination*, 13 DISP. RESOL. MAG. 17 No. 1, Fall 2016; Mel Rubin, *Disaster Mediation:*

IV. BEYOND THE POST DISASTER MASS DISPUTE RESOLUTION AND
INSURANCE MEDIATION RESPONSES

Dispute resolvers are clearly beginning to emerge as part of the post disaster landscape, most obviously as insurance mediators, in disputed or denied property claims matters. However, the question remains: ‘What else can they do in response to disasters other than mediate hurricane cases?’ This question is particularly important since the field is diverse and a considerable amount of dispute resolution related activity occurs beyond the legal context.¹²⁰ For those who seek to find constructive ways of managing difficult situations, empowering parties, and minimizing adversarial methods for problem solving, the potential for dispute resolvers is vast and untapped.¹²¹ However, identifying what role dispute resolvers can play in broader post-disaster initiatives can be difficult since their efforts are often eclectic, not sufficiently coordinated, and occur behind closed doors with little accountability to others or connection with established agencies which would provide access and transparency.¹²² The post disaster ADR efforts that are identifiable are typically associated with agencies that have sufficient resources to make their work known to the public.¹²³

Lessons in Conflict Coordination and Collaboration
9 CARDOZO J. CONFLICT RESOL. 351 (2008).

120. *See, e.g.,* Volpe & Strobl, *Dispute Resolvers*, *supra* note 7; Meyer, *supra* note 13.

121. Melissa Lombreglia, *The Calm After the Storm: Using Mediation to Resolve Parenting Dispute in the Wake of Natural Disasters*, 46 *Family Court Review* 395 (2008).

122. Although this has been changing, *compare* Howard, *supra* note 49; Ziegenfuss & O’Rourke, *supra* note 49; Jones, *supra* note 51; Lewicki, *supra* note 51; Moberly, *supra* note 51; and A.B.A. *supra* note 64; NYC ListServ, *supra* note 36.

123. *See, e.g.,* FEDERAL EMERGENCY MANAGEMENT AGENCY, *MEDIATION: A BETTER WAY TO WORK THINGS OUT* available at <https://www.fema.gov/pdf/library/brochuremediation.pdf>.

Among the leaders in using dispute resolution professionals in post disaster situations is FEMA.¹²⁴ While FEMA has a long history in providing a variety of ADR services, one of its best-known ADR initiatives was announced after Hurricane Katrina when it created a cadre of mediators to assist in the disaster response known as The Alternative/Appropriate Dispute Reservist Advisors (“ADRAs”).¹²⁵ These ADRAs are deployed to assignments in field offices after a major disaster occurs where they support the FEMA personnel who respond to a disaster.¹²⁶ They are primarily responsible for providing workplace conflict resolution and prevention services in FEMA disaster field offices.¹²⁷ The types of conflict resolution activities they engage in are “communication, group dynamics, role clarity, managing expectations, and in many cases, the challenges of being away from family and missing home.”¹²⁸ Overall, their role is to “build the capacity of Reservists and others in the disaster workforce to manage conflict situations, and assist in the resolution of disputes as they may arise.”¹²⁹

More recently in 2013, FEMA added a Reservist Ombudsman Office within the ADR Division of the Office of Chief Counsel to assist its intermittent, disaster workforce.¹³⁰ This new resource is

124. *Id.*

125. See Linda Baron, *Disaster Basics: The Life Cycle of a Disaster and the Role of Conflict Resolution Professionals*, 9 CARDOZO J. CONFLICT RESOL. 301, 304-06 (2008); Robert W. Schott & Linda Baron, *Embedding Mediators: Benefits and Challenges of the FEMA Workplace Model*, 13 DISP. RESOL. MAG., no. 1, Fall 2006, at 13; Linda Baron, *Disaster Basics: The Life Cycle of a Disaster and the Role of Conflict Resolution Professionals*, 9 CARDOZO J. CONFLICT RESOL. 301, (2008).

126. See Schott, *supra* note 125.

127. *Id.*

128. Natasha Wilkins, *Alternative Dispute Resolution on a Ship*, FEMA.GOV (Jul. 24, 2014, 4:00 PM), <https://www.fema.gov/information-employees/alternative-dispute-resolution-ship>.

129. FEDERAL EMERGENCY MANAGEMENT AGENCY, *Reservist Program Frequently Asked Questions*, FEMA.GOV, (July 25, 2014, 6:38PM), <http://www.fema.gov/reservist-program-frequently-asked-questions#ombudsman>.

130. *Id.*

provided in addition to the ADR Advisors who work directly with the disaster workforce.¹³¹ The ombudsman will “provide a dedicated resource for Reservists to discuss, document, address and elevate systemic issues and concerns with Reservist policy implications.”¹³²

Other high profile ADR related post disaster initiatives after 9/11 and Hurricane Katrina were large-scale facilitations in New York City and New Orleans organized by America Speaks, a now defunct non-profit organization that engaged citizens in public decision-making between 1995 and 2014.¹³³ In New York City, the events known as ‘Listening to the City’ consisted of a series of public meetings and online discussions that provided residents with opportunities to discuss rebuilding plans for the World Trade Center site.¹³⁴ In New Orleans, America Speaks helped develop and facilitate community congresses as part of the efforts to address the Unified New Orleans Plan.¹³⁵ Each of these projects used technology to assist thousands of citizens to share their ideas about rebuilding their communities with policy makers, key decision-makers, and other interested parties.¹³⁶ While these sessions were organized and implemented by those who were not directly connected with the ADR field, many ADR experts were used to help facilitate the many meetings.¹³⁷

131. *Id.*

132. *Id.*

133. America Speaks was established in 1995 and closed its doors in Jan. 2014. Its website which maintained America Speaks’ archives is no longer available. For some information on America Speaks, see *AmericaSpeaks*, WIKIPEDIA, (Feb 23, 2014, 9:54 PM), <http://en.wikipedia.org/wiki/AmericaSpeaks>.

134. CIVIC ALLIANCE TO REBUILD DOWNTOWN NEW YORK, LISTENING TO THE CITY: REPORT OF PROCEEDINGS (2002), available at <http://www.civic-alliance.org/pdf/0920FinalLTCReport.pdf>.

135. Carolyn J. Lukensmeyer, Rebuilding New Orleans, Address at the GISC Conference: The Future of Managing Change (June 19-22, 2008), available at <http://www.oecd.org/gov/public-innovation/41021066.pdf>.

136. See, e.g., *id.*

137. See Volpe and Strobl, *Dispute Resolvers*, *supra* note 7, at 5-6 for research findings post 9/11 conducted by the author; additionally, America Speaks organizers posted calls for facilitators to the NYC-DR listserv after 9/11 (e.g. see

Another federal agency that has contributed conflict resolution responders to disasters is the United States Department of Justice Community Relations Service, a federal agency that uses facilitation, mediation, training and consultation to assist local communities deal with “conflicts and tensions over race, color and national origin.”¹³⁸ CRS also helps “communities develop strategies to prevent and respond to violent hate crimes on the basis of actual or perceived race, color, national origin, gender, gender identity, sexual orientation, religion or disability.”¹³⁹ Their interveners are culturally competent and respond to those post disaster situations that fall within CRS’s mission.¹⁴⁰ For example, the CRS website reports that “during FY 2011, CRS continued to provide technical assistance and training services in the City of New Orleans related to community concerns about perceived biased policing practices, the excessive use of force by police, law enforcement corruption, and ongoing issues related to shooting deaths of citizens by law enforcement during Hurricane Katrina.”¹⁴¹

Less well known are efforts organized at the local level where the infrastructures are more limited, visibility is low, volunteers are relied on, and budgets are small. Many of these initiatives are undertaken by community mediation and dispute resolution programs throughout the United States.¹⁴² For the most part, they offer their conflict resolution services, usually at nominal or no cost, to their

email sent on Jan 10, 2002) and Hurricane Katrina (email sent on Oct 27, 2005). Additionally, a variety of other small group and online forums after 9/11 and Katrina were held, with emails sent to dispute resolvers on the NYC-DR listserv. Emails are archived at listserver.jjay.cuny.edu.

138. U.S. DEP’T OF JUSTICE CMTY. RELATIONS SERV., *What We Do*, JUSTICE.GOV, <http://www.justice.gov/crs/what-we-do>.

139. *Id.*

140. *See* CMTY. RELATIONS SERV., *About CRS*, U.S.STATES DEP’T OF JUSTICE, <http://www.justice.gov/crs/about-office>.

141. CMTY. RELATIONS SERV., *Consulting*, U.S. STATES DEP’T OF JUSTICE, <http://www.justice.gov/crs/what-we-do/consulting> (under the “New Orleans, Louisiana” drop-down menu).

142. *See* Corbett, *supra* note 47.

residents.¹⁴³ In addition to property claims handled by the insurance mediation programs, often a wide range of conflict related situations arise that can benefit from facilitation, mediation and even training. The community mediation efforts often go unrecognized unless one hears about them through word of mouth. After Sandy, for example, New York Peace Institute, a community mediation program in New York City set up a special project to solicit Sandy victims to consider mediation with their “landlord, insurance adjuster, family member, or neighbor over Sandy related issues”.¹⁴⁴ Although its publicity resulted in 30-40 contacts, only two cases were eventually mediated via its free mediation services.¹⁴⁵

In short, after each disaster, there may be a need for a variety of dialogue and facilitated discussions. In some instances, people just want to talk. However, after some disasters, there may be specific needs to address particular subject matter and may even require some expertise.

Each disaster has its unique issues. Since a wide range of groups sponsor discussion groups and dialogue forums, and there is no clearinghouse to track them, it is challenging to find out the role of conflict resolvers in either organizing events or as facilitators.¹⁴⁶ For example, in the aftermath of 9/11, there were concerns focusing on Muslim non-Muslim relations, and the interfaith community took the lead on dialogues where religion was a central concern.¹⁴⁷ Likewise,

143. *Id.*

144. See NEW YORK HURRICANE SANDY DISASTER RECOVERY RESOURCES 62 (March 14, 2014), available at http://www.stormrecovery.ny.gov/sites/default/files/uploads/ny_resource_list_v8.1.pdf.

145. Email from Alan E. Gross, to Maria R. Volpe, (Feb.19, 2014, 8:13 AM) (on file with author).

146. See generally PENN CENTER FOR EDUCATIONAL LEADERSHIP, *Penn Project for Civic Engagement: Ready for Next Time? Rethinking the Shore After Sandy*, UPENN.EDU, http://www.gse.upenn.edu/pcel/programs/ppce/ready_for_next_time.

147. See generally INTERFAITH CENTER OF NEW YORK, <http://interfaithcenter.org> (last visited Oct 1, 2014); see also Muhammad Shafiq & Mohammed Abu-Nimer,

after Hurricane Katrina there was much discussion about the need for dialogue on race, class and poverty.¹⁴⁸ However, whether or not a national dialogue on race, class, and poverty occurred after Katrina depended on how dialogue was framed.¹⁴⁹ For example, the media seemed to report that Katrina did not stimulate a dialogue, yet researchers found that Katrina did inspire a national dialogue on race and class.¹⁵⁰

While conflict resolvers have participated in helping to facilitate sessions at forums like ‘Listening to the City’ and the congresses held to address Unified New Orleans Plan, they have not had a high profile role in organizing post disaster dialogues.

V. LESSONS LEARNED AND RELATED CHALLENGES

Over the past two decades, the post disaster ADR context has provided numerous opportunities for lessons learned as well as an improved understanding of challenges that need to be overcome in order to better respond to disasters. Before turning to specific lessons learned, it is important to note that an overarching lesson learned by the ADR field is that after hurricane disasters, there will be property damage resulting in countless insurance claims. To respond, capacity has to be established so that when the need arises, suitable services can be provided in a timely fashion. Since Hurricane Andrew occurred in Florida in 1992, dispute resolvers have developed a track

INTERFAITH DIALOGUE: A GUIDE FOR MUSLIMS (International Institute of Islamic Thought, 2007).

148. See Lela P. Love & Homer C. LaRue, *Classroom Conversations About Race, Poverty and Social Status in the Aftermath of Katrina*, 13 DISP. RESOL. MAG. 22, no. 1, Fall 2006; see also Eric Deggans, *Katrina has failed to kindle dialogue on race and class*, TAMPA BAY TIMES, March 1, 2006, available at http://www.sptimes.com/2006/03/01/Worldandnation/Katrina_has_failed_to.shtml (last visited Oct. 1, 2014); Jason E. Shelton & M. Nicole Coleman, *After the Storm: How Race, Class, and Immigration Concerns Influenced Beliefs About the Katrina Evacuees*, 90 Soc. SCI. Q. 480, (2009).

149. *Id.*

150. *Id.*

record in providing insurance mediation.¹⁵¹ By the time Hurricane Sandy struck the northeastern part of the United States, New York and New Jersey officials had adopted the mediation of post hurricane property claims.¹⁵²

Even though Hurricane Sandy was unprecedented, insurance mediation practices were more than twenty years in the making.¹⁵³ Since that time, the American Arbitration Association had accumulated a successful track record and was ready to launch programs on short notice.¹⁵⁴ In addition to programmatic expertise, there was a large pool of experienced mediators ready, willing and able to participate in New York and New Jersey.¹⁵⁵ In short, the requisite infrastructure for processing disputed and denied insurance claims using mediation was available.

To manage the large number of property claims, government officials in New York and New Jersey used the American Arbitration Association's services and mandated that insurers not only participate in the mediation sessions but that they pay the mediators for their services.¹⁵⁶ Even though many of the mediators who were recruited were independent practitioners,¹⁵⁷ the mediators did not have to

151. Information on the enormity of Hurricane Sandy storm can be found at the Federal Emergency Management Agency's website, *see* FEDERAL EMERGENCY MANAGEMENT AGENCY, www.fema.gov (lasted visited Oct. 24, 2014).

152. *See* N.Y. Gov. Press Release, *supra* note 107; N.J. Order A13-106, *supra* note 108; *see also supra* accompanying text to notes 107-108.

153. *See generally supra* note 119.

154. *See* Slate, *supra* note 101.

155. *See, e.g.,* Velikonja, *supra* note 12.

156. *See* N.Y. Gov. Press Release, *supra* note 107; N.J. Order A13-106, *supra* note 108.

157. For example, in her reflections on Hurricane Sandy mediations, Nancy Kramer noted, "The AAA put out a call for experienced mediators and quickly accepted and trained over 200 of them. Most had no disaster mediation experience and the training included a videotape featuring mediators who had worked in the Katrina and Rita programs." Nancy Kramer, *Storm Sandy Cases—Mediation Like No Other*, [MEDIATE.COM](http://www.mediate.com), December 2013, <http://www.mediate.com/articles/KramerN6.cfm>.

worry about logistics and where to conduct mediations since the American Arbitration Association provided the needed administrative support and arranged for meeting space.¹⁵⁸ Moreover, the mediators did not have to sell their process to the users. For the most part, insurance carriers were already aware of the insurance mediation process from having used it in other contexts.¹⁵⁹

An added benefit of the mandated insurance mediation programs was that mediation was constantly in the news as the media covered the new programs. The regularly scheduled news provided steady information about mediation logistics for thousands of claimants who might have otherwise ended up clogging the courts with their claims.¹⁶⁰ The use of mediation was being promoted, administered, and paid for by policymakers and insurance companies.

More good news came on June 21, 2013 when Connecticut Governor Daniel Malloy signed into law Public Act No. 13-148: An Act Establishing a Mediation Program, whereby as of October 1, 2013 the Commissioner of Insurance was authorized to set up a mediation program for insurance claims resulting from a catastrophic

On its information sheet regarding the Hurricane Sandy Mediation Program, The N.J. Department of Banking and Insurance stated that, “The Department requires that the Administrator use only mediators on the roster of persons qualified to mediate in civil actions for the New Jersey courts. The mediator is an independent neutral party with no ties to the insurance company.” *Storm Sandy Insurance Mediation Program*, STATE OF N.J., DEP’T OF BANKING & INS., http://www.state.nj.us/dobi/division_consumers/insurance/sandymediation.html#5.

158. Nancy Kramer noted, “Ten New York City locations in 10 counties were established—in empty courthouse space, borrowed law offices, AAA headquarters, et al. Procedures and forms were developed and revised. Outreach to potential claimants was begun and the program kicked.” *See Kramer, supra* note 157.

159. *See, e.g.*, Press Release, Liberty Mutual Insurance, *supra* note 116.

160. *See, e.g.*, Ed Beeson, *Slack Demand, But Big Promise Still Seen for Hurricane Sandy Insurance Mediation*, THE STAR-LEDGER, available at http://www.nj.com/business/index.ssf/2013/08/hurricane_sandy_mediation_demand.html

event in the future.¹⁶¹ Like the hurricane mediation programs, insurers will have to fund the program.¹⁶² The past successes of other post disaster insurance programs had not gone unnoticed. When the Connecticut legislation was still pending, George Bradner, Property/Casualty Director of Connecticut's Insurance Department, acknowledged New York and New Jersey's insurance mediation programs and continued by noting that, "Rhode Island, Florida, Louisiana, Mississippi and North Carolina have all created a mediation process to help consumers resolve claim issues that surfaced after major catastrophes in their states."¹⁶³

Regarding the lessons learned, perhaps one of the most significant lessons for ADR professionals is the need to be prepared in order to respond with celerity and credibility. In the aftermath of disasters, decision makers call upon those who they can rely on to deliver selected services.¹⁶⁴ Responders must be ready to serve when needed.

A second lesson learned is that ADR professionals have to wait for conflict situations to ripen. While there is much to celebrate in the launching of the response programs in New York and New Jersey, the reality remains that post disaster work for conflict resolvers may not be as immediate as it is for many other responders. In the case of Hurricane Sandy, the disaster occurred around October 28-29, 2012, yet the New York and New Jersey hurricane mediation programs were not implemented until four and five months, respectively, after

161. SEIGER GFELLER LAURIE LLP, *Connecticut Establishes Insurance Mediation Program In Wake of Super Storm Sandy*, INSURANCEDEVELOPMENTS.COM (Nov. 1, 2013), <http://www.insurancedevelopments.com/2013/11/connecticut-establishes-insurance-mediation-program-in-wake-of-super-storm-sandy.html>.

162. *Id.*

163. *Connecticut Proposes Mediation Program for Homeowners Claims Disputes*, INS. J., (Mar. 8, 2013), <http://www.insurancejournal.com/news/east/2013/03/08/284113.htm>.

164. *See, e.g.*, NY Gov. Press Release, *supra* note 108; N.J. Order A13-106, *supra* note 109.

the disaster occurred.¹⁶⁵ The American Arbitration Association was selected on February 25, 2013 by the New York State Department of Financial Services¹⁶⁶ and on March 28, 2013 by the New Jersey Department of Banking and Insurance.¹⁶⁷ The insurance mediation program at the U.S. Eastern District did not hold its training for mediators until May 22, 2013.¹⁶⁸

A third lesson learned is that subject matter expertise may be essential. In the case of insurance mediation, those who had done insurance mediation prior to disasters had an advantage since their learning curve was not as steep.¹⁶⁹ As Nancy Kramer has written, while she was an experienced mediator, doing insurance mediation was like no other mediation she had done before.¹⁷⁰ It is important for ADR professionals to maintain an inventory of the contexts where they are interested in intervening and find out what proficiency is required. The key is not to wait until the disaster to try to gain expertise. The down-side with preparation in a highly specialized area is that one might invest time and resources in gaining expertise, but given the unpredictability of disasters, never have an opportunity to use one's new knowledge.

A fourth lesson learned is that a myriad of interpersonal, group, and organizational conflicts emerge after disasters.¹⁷¹ To be ready to intervene after a disaster, it is important to work on relationships and to build a large network on a daily basis. Since familiarity breeds trust, if ADR professionals are not familiar with particular cultural, racial, religious or ethnic groups and do not have a relationship with members of specific organizations, it may be daunting to reach out

165. *See id.*

166. *Id.*

167. *Id.*

168. *See* Case Management Order No. 1, *supra* note 111.

169. *See* Press Release, Liberty Mutual Insurance, *supra* note 116; *see also supra* accompanying text to notes 117-119.

170. *See* Kramer, *supra* note 157.

171. *See* Mazur, *supra* note 19.

and engage them post disaster.¹⁷² To gain entrée, creative ways may have to be sought to build relationships, including partnerships with representatives of faith based groups, ethnic associations, fraternal groups, local schools, community or professional organizations among others. To try to build trust with others post disaster will be a challenge especially in those instances where trust is already low among individuals experiencing conflicts.¹⁷³

A fifth lesson learned is that the conflict resolution field needs key spokespersons for the field. Ken Feinberg certainly has name recognition and become a “go to” person for mass dispute resolution compensation cases.¹⁷⁴ As noted earlier, for hurricane mediation matters, insurance department officials, the American Arbitration Association and insurance carrier administrators have taken on some of the public relations role in helping the public to understand how mediation works.¹⁷⁵ Who else could be cultivated as influential spokespersons in helping to establish external relevance for the conflict resolution field? In other words, who could write an op-ed article to explain the conflict resolution process or speak to the media? Since there continues to be a dearth of conflict resolution spokespersons to promote non-disaster dispute resolution matters, the challenge is magnified¹⁷⁶ when it comes to disaster situations. It is important to identify and groom spokespersons before there is a crisis. One way to build this capacity could be the creation of credible speakers’ bureaus for individuals to gain widespread exposure.

A sixth lesson centers on the need for competent mediators and ways to ensure quality.¹⁷⁷ Users of a variety of professional services

172. Maria R. Volpe et al., *Barriers to Participation: Challenges Faced by Members of Underrepresented Racial and Ethnic Groups In Entering, Remaining, and Advancing in the ADR Field*, 35 *FORDHAM URB. L. J.* 119, (2008).

173. *Id.*

174. *See supra* note 88.

175. *See* AMERICAN ARBITRATION ASSOCIATION, *supra* note 104.

176. *See* Mazur, *supra* note 19.

177. Much has been written about the need to ensure quality of mediation services. Since the field remains unregulated, most anyone can claim to be a

often rely on others to identify providers. Without widespread certification or licensing and without widely accepted standards of practice, processes like mediation are at a disadvantage vis-à-vis other credentialed professionals who respond to disasters. After 9/11, for instance, mediators without other professional credentials were not permitted to offer services at centers that were working with grieving clients.¹⁷⁸ A professional field needs to be disaster ready. Not having criteria in place to establish competency puts its professionals at a disadvantage.

A seventh lesson points to the importance of developing evidence based practices. Showing what works, what does not, and what can be improved based on data is increasingly necessary. For the dispute resolution field, having research and reliable and accessible databases are crucial since a considerable amount of its work goes on behind closed doors. While the availability of reliable data is always useful on an ongoing basis, being able to access data quickly is particularly essential in the aftermath of disasters.¹⁷⁹

An eighth lesson learned involves making the public aware about the various conflict resolution processes. In the aftermath of disasters when parties, particularly decision makers, have to choose what to do, starting from ground zero is disconcerting. The time for public relations and information sharing is not when the disaster occurs, and, for this reason, efforts should be made to educate the public and the media about ADR work on an ongoing basis. After decades of growth, 'mediation' and 'meditation' are still confused and 'mediation' and 'arbitration' are still used interchangeably.¹⁸⁰

mediator. See James R. Coben et al., *MEDIATION: LAW, POLICY & PRACTICE* (Thompson Reuters, 3d ed. 2011-2012).

178. See Gross, *supra* note 16; see also Volpe & Strobl, *Dispute Resolvers*, *supra* note 7; Volpe & Strobl, *Responses to 9/11*, *supra* note 7; Volpe & Strobl, *Restorative Justice*, *supra* note 7; Volpe, *Looking Back*, *supra* note 7; Volpe, *Taking Stock*, *supra* note 7.

179. See *id.*

180. See Volpe, *Mediation Remains Elusive*, *supra* note 81.

The onus is on those in the field to provide ongoing messages with correct information.

All of the aforementioned lessons clearly present challenges to the utilization of ADR after disasters. In order for each lesson to be realized, considerable obstacles need to be overcome. Without a solid infrastructure to provide leadership or support for all those who express enthusiasm, interest, willingness and ability to respond to disasters, it will not be easy to organize and to undertake dispute resolution related work in the post disaster context.

Many of those involved in dispute resolution work are volunteers, in low paying jobs, or in struggling practices.¹⁸¹ Programs are often local and low budget,¹⁸² which may limit more far-reaching efforts. Mediation, by far the best known of the dispute resolution processes, is vulnerable since there are no universally accepted definitions, no widely accepted quality standards,¹⁸³ and few disciplinary processes to oversee compliance with existing professional codes of conduct.¹⁸⁴

If dispute resolution related work can be challenging under optimal conditions, disasters by their very nature create an even more daunting context, one that does not make it easy for dispute resolvers to specialize in or to be able to readily engage in when the disasters occur.¹⁸⁵ As a result, with the exception of insurance mediation initiatives, the disaster related response efforts that are undertaken are often small scale, low budget, not well known to others, and hard to monitor.

Perhaps the greatest challenge of all is the very nature of processes like mediation that rely on the parties to be ready, willing and able to participate voluntarily for them to work.¹⁸⁶ In a culture where adversarial interactions and relationships are the norm, gaining the attention and trust of parties for non-adversarial processes can be

181. *See Velikonja, supra* note 12.

182. *See, e.g., Corbett, supra* note 47.

183. *See Coben, supra* note 177.

184. *Id.*

185. *See Kramer, supra* note 157.

186. *Moore, supra* note 39.

difficult. There is no magical formula or easy solution to do so. It requires helping the parties to become familiar with both ADR professionals and processes. By doing so, barriers to using the processes are lessened.

VI. CONCLUSION

Since 9/11, the role and relevance of dispute resolvers in the aftermath of disasters has been the subject of considerable attention among dispute resolvers themselves, particularly in the New York City area.¹⁸⁷ Hurricane Sandy, the most recent of local disasters, is another example of a disaster that provides an opportunity to take a closer look at the larger post-disaster ADR landscape. This article examined the kinds of post-disaster ADR responses that have been undertaken, and the lessons learned and challenges experienced by dispute resolvers in the post-disaster context.

One of the key questions asked after a disaster has focused on what dispute resolvers can do as dispute resolvers. Although it is not easy to assess the role that dispute resolvers have played in response to disasters historically, since 9/11 there is evidence that post-disaster ADR responses have become palpable. Given the increasing popularity, visibility and even traction of ADR processes since the 1970s, particularly mediation, it should not be surprising that dispute resolvers have been searching for opportunities to use their knowledge, skills and expertise in ways that would be clearly recognizable as those belonging to the dispute resolution field. In fact, the strides made by dispute resolvers in post-disaster work are increasingly noticeable in the media and in online searches for terms such as disaster mediation and disaster ADR.¹⁸⁸

187. See Volpe & Strobl, *Dispute Resolvers*, *supra* note 7; Volpe & Strobl, *Responses to 9/11*, *supra* note 7; Volpe & Strobl, *Restorative Justice*, *supra* note 7; Volpe, *Looking Back*, *supra* note 7; Volpe, *Taking Stock*, *supra* note 7.

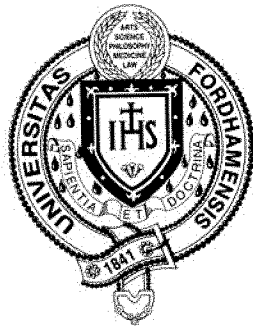
188. A quick online search of terms such as disaster mediation, disaster ADR, and hurricane mediation returns countless entries.

Despite the growing number of dispute resolvers practicing in a wide range of contexts, they continue to struggle to find ways to provide dispute resolution services when disasters occur. While many professions have readily identified roles in post disaster situations, particularly those which provide emergency or essential recovery, rescue, evacuation, repair, rebuilding and related services, dispute resolvers continue to experience difficulty in their efforts to carve out ways to play a significant and more high profile role.¹⁸⁹

In sum, the post disaster context is complicated for dispute resolvers. Some of the challenges are due to the unpredictable and very diverse nature of disasters, but some of the other challenges are due to the very nature of dispute resolution work and the state of affairs of a field that struggles for recognition even in non-disaster contexts.

189. *See* Chasen, *supra* note 14.

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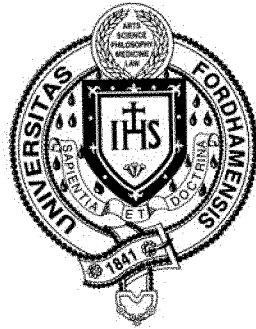
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