

INTERVIEW

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Perspectives from Practitioners: An Inside Look at Dispute Resolution

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INTRODUCTION

Forty years ago, Dispute Resolution emerged as a conflict management tool and has grown in use and scope to become a widely exercised option for professionals across a multitude of fields. However, it defies simple definition and remains a mystery to many within and without the field. Attorneys, governmental agencies, and the public alternate between viewing it as a saving grace or as a nuisance, but by whatever definition, it is clear that dispute resolution mechanisms are changing the face of legal and governmental practices. The author spoke with four practitioners of dispute resolution to help develop the definition of dispute resolution in practice today and gain insight into this developing field. Included among these practitioners were government employees, a private attorney, and a man often credited with the creation of what we now call environmental conflict resolution. A brief introduction of the

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individual being interviewed will precede the interview questions and subsequent answers.

I INTERVIEWS

A. Interview with Shayla Simmons and Elena Gonzalez

Shayla Simmons and Elena Gonzalez work with the Department of the Interior's Office of Collaborative Action and Dispute Resolution (hereinafter CADR). CADR promotes proactive collaborative action within the agency and seeks to integrate consensus-building processes into all levels and areas of the Department of the Interior (hereinafter DOI). Elena Gonzalez is the Director of CADR, and Shayla Simmons serves as Senior Counsel for CADR.

Question: I find it interesting that most every alternative dispute resolution (ADR) practitioner has a different definition of what ADR actually is. So my first question to you is, what is your definition of ADR?

Elena Gonzalez (hereinafter EG): I rarely use the term alternative dispute resolution. It is defined within a narrow scope for a lot of people and that definition leaves out a lot of the processes we use. I like to use the terms “good public engagement,” “resolving disputes appropriately,” and “collaborative approaches.” Personally, I use the term collaborative approaches the most. I think it includes the non-adversarial approaches without necessarily relying on consensus-building as a goal. It’s people working together to create a process that suits the occasion.

Shayla Simmons (hereinafter SS): I agree with Elena. My job has me in the office as a solicitor, advising attorneys. When the attorneys come to me for advice, they think of ADR as the last resort, and it’s more than that. I love the term collaboration because it describes how the attorneys and the parties should be collaborating at all stages of a dispute. Under the ethics rules, part of the job of an attorney is to consider all avenues. Why do attorneys think that their role is only involved at the end? It should be a broader involvement about everything from start to finish because everything from start to finish involves conflict, and attorneys should be ready for that. The scope of the term should encompass how you collaborate with your clients throughout the process.

How do you decide which complaints or disputes can be resolved through collaborative processes and which disputes have to be handled using a more traditional, adversarial, or adjudicatory process?

EG: Anything that needs a precedent for key parties and stakeholders should go through the adversarial process. Another factor to consider is the availability of resources—can the parties sustain a long action? I would say that setting a precedent is the only actual “bar” to collaborative processes though. We have a very thorough assessment process at the DOI where we spend a lot of time examining options and working with the clients to identify the issues they have and what route may work best. We really allow the clients to design what kind of process would work best for them.

SS: Again, I agree with Elena. If we need to set a precedent, then that will immediately take the conflict out of the realm of collaborative processes. My long-range goal is to improve interaction with the Department of Justice (hereinafter DOJ) at the district court level about when to engage in ADR. Right now, it is typical to wait until there is a court order to engage in ADR and that does not seem effective. We see some of the same parties over and over again, so engaging in ADR may help build a new relational interaction. Justice should have those goals in mind and work towards ADR when appropriate.

What would better interaction between DOI and the district courts look like?

EG: I would like to create a quick and dirty systemic approach to present to DOJ and DOI to show how ADR can be integrated at different “checkpoints” in a conflict. A Fortune 500 group presented a similar system to DOI that would work, but it was too radical a change at the time. There are very set processes in place right now, and a drastic change may be too much to implement. I would like to work on how they could integrate a quick stop during the existing process for reflection on an ADR process—sort of a triage step.

Upon receiving a dispute ripe for ADR, could you guide us through how the ADR process works in your agency?

EG: Generally, we wait for people to come to us. However, if we see a case that is just evident that it needs ADR or would benefit from it, we may reach out to those parties.

SS: The Board of Contract Appeals has a very good system built in. It is very logical and step-by-step, so lawyers love it. The other two boards within DOI¹ have been slow to integrate ADR. Our process is that we have very in-depth conversations with appellants about what they want and where they want to go. We want to involve the Board of Contract Appeals, too, and talk with them about why they got appealed. We then introduce ADR as a course of action.

EG: This process also buys the agency a great deal of goodwill because we look inwards to see what went wrong. Parties feel heard and feel more respected, and it reaps a lot of benefit when the parties understand why the agency acts the way it does and what it cannot do.

SS: Right. There can be defensiveness among field agents when one of their decisions is questioned or appealed, and sometimes it helps to call that decision into question from the Appeals Board. The parties see that we examine the decision and try to recognize when the agency makes an error of judgment. That really helps in a collaborative process.

In your agency, is there a certain form of ADR that is more commonly used than others? If yes, which method and why is that?

SS: We fit the form to the facts. We let the parties decide after we talk about the options and have the parties design the process that will work best for their needs.

EG: If you ask DOI, generally people—especially out West—would say community-based collaborative processes. When these processes work, they work for the long-term.

SS: *[laughs]* This might worry some people because it works so well.

EG: That's why we use it!

We've already identified a lot of positive attributes of ADR processes—like party satisfaction and long-term compliance—but can you elaborate on more of the benefits of using ADR? Also, what do you see as the drawbacks of ADR?

SS: We discussed a lot of the positive attributes before, but I'd say that goodwill and the long-term prospects are the best. In terms of drawbacks, the adage of "faster, cheaper, better" that's often applied

¹ The two other boards within DOI are the Interior Board of Indian Appeals and the Interior Board of Land Appeals.

to ADR processes is not necessarily true. It's not always faster. The multi-year projects may be comparably as long as an adversarial process and take a lot of money. Collaborative projects take a lot of conversations, and a lot of questions, and a lot of hard looks about what ADR can actually help with. It requires a lot of hard work and more coordination than people may think. The processes also require multi-level agency conversations and a lot of internal coordination. The practitioners need to know how to view the system, but it's complicated.

EG: I don't believe in the "lowest common denominator" belief, but I know that it exists. People sometimes believe that ADR processes result in an agreement that is the lowest level acceptable to both parties rather than the best agreement. I don't believe in that. ADR processes can also take a lot of resources, both material and human. People, particularly people who are involved in long-term processes, get worn out because they are also working full-time jobs. There's a definite "wear out" factor among participants. The studies show that people will say, "Yeah, the process worked for me, but I wouldn't recommend it." I believe that is because of the "wear out" factor. It's also difficult trying to find people who know how to run procedures well because it doesn't fit the molds well for rewards. Sometimes things aren't defined well.

SS: We let people know that it's hard and can be a lot of work but that the results may be better. Sometimes, the person who starts the process is not the person who finishes it, and this can cause frustration with the stakeholders when they have to meet new people over and over.

EG: There's also an issue of how you define success in an ADR process because it's not necessarily resolution. It can be agreement on a number of topics but not overall agreement. It can also be an improved relationship or communicative ability between parties. This means that defining resolution is sometimes difficult.

I've heard some about the difficulty of defining success because ADR success looks so different from litigation and other projects. It doesn't necessarily lend itself well to existing performance metrics at agencies and firms because it's hard to show your successes to your boss when the project is a long-term collaborative process with no clear end or resolution.

EG: *[laughs]* Exactly.

Do you think your agency will continue to use ADR processes? If yes, do you think it will grow? If no, why not? Are you optimistic about it?

EG: I'm optimistic, as we all have more experience. It's still a new field—I would say forty years old—and the seminal authors on the subject are still walking around. We're adapting and changing. There's no question that the current institutions are failing. My personal sense is that it won't be these expert, third-party neutrals who continue the practice of ADR. It's going to be everyone. With the political, budgetary, and confidence climate, the traditional structures won't work. ADR will be the answer more and more. There is no one-size-fits-all, and I don't see another option on the horizon.

SS: I'm from Texas and have worked a lot with people who work in extractive resource management. I've been talking with former colleagues and commiserating on the failing morale and feelings of uncertainty about what they can deliver. I have a colleague whose family was in timber and saw a complete restructuring of the industry. This may be a bold statement, but I think we're seeing a restructuring of the government. I've seen it with the car and the oil industries in Texas, too. The people who lead us need to go off and discuss how to change. It's clear that change is coming. We don't know what it looks like, but we have an obligation to have a voice in what it will look like.

Are there any particular examples that stand out—either as successes or as failures—with ADR in your agency?

SS: How do people define success? DOI may think it was a success, only to hear differently from parties. However, even with failures, there's something to be learned. Failures usually lead to something new.

EG: One of Interior's failures is from the Interior keeping a solid core and presenting the same view to the public. I think it's very important that we examine our own actions within DOI. Another issue is whether the people at the table bring the agreement home to disapproval. Parties must keep people *not* at the table apprised of what's going on throughout the process so they're on the same page. When the processes work, how you do the prep work at every step shows. It takes two times as much work to get to the table. Lastly, if you're not successful in implementing the agreement, then the process is not successful. It is a successful, partial project.

What brought you to ADR?

EG: I wanted to do public interest or public service work, really. I came to the Federal Government first and worked in administrative law courts. I wanted to be a judge, but I realized that the best judge couldn't do better for the parties than the parties could do for themselves. So, I went to trainings and worked towards public education to help parties gain their voice. I worked at the DOI hearings board, originally, and talked my way into public participation and creating new processes. Looking back, it was a logical progression but not something I planned.

SS: When I went to school, there was no ADR in law school. I worked in public and private law firms to begin with. Mainly, I worked insurance law on the private end and was ordered to mediation for those disputes a lot. That kind of mediation tended to be a third-party person who knocked the parties' heads together to get an agreement. I knew this wasn't the way mediation should work, so I searched for a good agency and found the Interior. I have a background in Petroleum Resources Management and was the lone voice about other ways to do things and to consider different views. I sought out DOI and found Elena, who was creating this office. Elena convinced me to join and created a role for me that mirrored policy-making and the law.

What does that role look like?

SS: CADR works hard at making everything available in real-time, like what is good policy and the legal rationale behind that. We also help when the agency has to testify in front of Congress and must develop testimonial. We negotiate when Bureau officials disagree about testimony so that there is one Departmental voice. Internal strife and conflict is the issue in those cases.

EG: CADR never brags because parties have the success. However, the power CADR has is unique in the federal agency. It's a very big deal because it is shifting the way the DOI does things internally.

B. Interview with Professor Lawrence Susskind

Professor Lawrence Susskind teaches in the Department of Urban Studies and Planning at MIT and is the founder of the Consensus Building Institute—a nonprofit focused on providing mediation services for complex natural resource management and sustainability

disputes. He is the Vice Chair of the Program on Negotiation at Harvard and leads the MIT-Harvard Public Negotiations Program.

Question: I've spoken with a few other practitioners, and it seems best to open the interview by asking, how do you define ADR?

Professor Lawrence Susskind (hereinafter LS): I define it as everything you can do to resolve disputes, in addition to litigation. I don't use the term in practice at all because I don't think it makes sense as an alternative.

What term do you use instead of ADR?

LS: Problem-solving. Dispute resolution. I never use ADR because it suggests that litigation is the norm. Dispute resolution isn't an alternative.

How do you decide which complaints or disputes can be resolved through dispute resolution and which disputes have to be handled using a more traditional adversarial or adjudicatory process?

LS: I don't think there is a more traditional litigation approach when it comes to complex public disputes like the ones I work with. No one wants to litigate in those situations.

What do you talk about with your clients when developing a procedure?

LS: What I talk about in my work is how to bring the right parties to the table and how to use the neutral third-party appropriately, whether it's a mediator or a negotiator. Those sorts of things are what I talk about with the people I work with around the world. There isn't an "alternative" in these situations. You can't litigate them; you need to bring the parties together. We talk about how these collaborative processes will be put together. That's what I talk about.

How do you find dispute resolution works in your practice?

LS: It works well because there's not really an alternative. You need a process of choosing ad hoc representatives. If someone's not a part of them, then the parties won't play. You have to work with the parties to figure out who the stakeholders are and who needs to be at the table. Places where you try to short-circuit the process end up stuck. The people who get stuck are the people who don't recognize that everyone needs to be at the table and that there needs to be

processes in place. It's slightly different in different countries and slightly different at different scales. I work at several levels, and it doesn't really matter—if you don't involve the right people, they'll throw a monkey wrench into the process. That's why there's not really an alternative. You have to do things this way.

What do you see as the biggest benefits or gains from the use of dispute resolution for your work, specifically? Conversely, what are the drawbacks?

LS: Benefits are that, compared to anything else, you have the chance to meet the needs of more people more quickly. You have informed decisions that are fairer and achieved more efficiently. You have wiser agreements that are upheld because people take advantage of the information they learn. It's fairer in the eyes of the parties and produces a result that lives up to their commitments and is therefore wiser.

But you can't do it without professional help. People think, "I can do that," and they don't realize that it's not just a process. It's the training, and people don't recognize that. This issue is not unique to collaborative processes. It's true in so many kinds of situations where decisions need to get made. People think they can do it, but they don't know how and they don't know that they don't know how until something goes wrong.

Where do you see the use of ADR in your agency five, to ten, to twenty years from now?

LS: It depends where you're talking about. I work globally. If you're asking around the world? I think we see the evidence that it's growing globally. Italy, Portugal, and Russia have all passed laws at the national level that require public governance processes.

In the U.S., I'm not so sure that we'll see a lot more because we have such a fractured political environment, and collaborative governance processes require the collaboration of people who are working in good faith and working with people with whom you disagree, face to face. I think we have an environment where people are getting so cynical that they can't work across the table with one another.

So, you're less optimistic about the U.S. using more dispute resolution?

LS: I see a global rush towards it but not in the U.S. At the neighborhood scale, I see it a lot more, but those are localized rather than national. There are also some places where there is too little supply of mediators.

Which nation is leading the way?

LS: The Netherlands has the best structure for pretty much everything. Almost everything is mediated.

Are there any particular examples that stand out—either successes or failures—with dispute resolution in your work?

LS: The Organisation for Economic Co-operation and Development modified its practices to use mediation whenever there's a conflict. It has changed all its guidelines to mandate mediation. There is an accumulation of mediation practices. Instead of having an ombuds that investigates, it is moving towards a mediation model. It's interesting to see the dispute resolution systems that are building capacity to handle disputes at every stage.

What was your path to dispute resolution?

LS: I trained as a city planner, and in the sixties and seventies, planning processes changed from being entirely top-down, expert-driven to where you couldn't make projects happen without community involvement. Planners were mandated to go through the community when they wanted to make things work. You had to have a new method of bringing communities together and producing something that is politically possible. That's what I learned to do as a planner.

It was only when I started to work internationally that I discovered that people defined what I did as mediation. I saw it as planning. This started the program at Harvard that I lead. This led to the development of the program, and I've worked with schools all over the country: business schools and all other sorts of graduate schools. People were asking me to help teach these skills, and so I did. I think it is a field. I think we've built a practice and trained thousands of people worldwide using the books and information from the Harvard Program on Negotiation and helped to spread the viewpoint.

C. Interview with Greg Costello

Greg Costello is the Executive Director of the Wildlands Network, a conservation firm that works to support those who protect the environment with strategic and scientific information. Greg is the former Executive Director of the Western Environmental Law Clinic (hereinafter WELC) and worked as a private attorney for over twenty years.

Question: One of the persistent issues with alternative dispute resolution (ADR) is that it is a new enough field that there is no set definition of what it is. My first question is, how do you define ADR?

Greg Costello (hereinafter GC): Broadly, I use ADR as a catchall phrase for many different ways of trying to resolve a dispute. If these ways have any defining characteristics, I would say that they exist outside of the courtroom and allow the clients to have control, not a third-party. For that reason, I would exclude arbitration, which most people consider an ADR practice. I would say ADR practices are more like court-ordered settlements, mediation-type situations, and negotiations like those that take place around Superfund sites.

How do you decide which complaints or disputes can be resolved through ADR and which disputes have to be handled using a more traditional adversarial or adjudicatory process?

GC: I believe there are two decision points in active litigation when an attorney can evaluate which path to choose. The first is at the front end of the litigation. In the litigation context, it is fairly common for a lawyer to explore ADR at the outset—before the case even commences—and sometimes even if litigation has already commenced. In the Superfund context, if the EPA or the State has started a cost remediation, that often causes a second wave of cases and a second wave of evaluations. Attorneys in that scenario will frequently engage with their clients about working in a different route, trying to figure out what avenue to take and which parties to involve.

There's always a point in active litigation when there is an opportunity to move on to a different track. This point varies and depends on the skill of the lawyers and the relationships with the clients and between the parties. Almost always there's an opportunity to engage because most sophisticated attorneys and most

sophisticated clients know that once you step into the courtroom, you lose control of the outcome, and that's a very scary prospect.

What do the sophisticated clients and attorneys do to set themselves apart?

GC: Follow up on the attorney's side is a big part of that because the track you choose depends on knowing your client and knowing the issues. It's easy to compromise on money but not on values. A sophisticated attorney will work with the client to identify the important values and issues, and that helps determine the track. There are so many ways that you can add value in a dispute, but when it's a matter of principle, there's a right answer and a wrong answer for the client. It's a tough one to negotiate out. For example, when a case is really personal—like three business partners or family members, anything where there's a long history involved—it would be very difficult to negotiate to a peaceful resolution.

In the Forest Service, on the other hand, they've gotten funding to work with collaborative processes to make decisions and attempt to get everyone around the table to reach a negotiated solution. It's been somewhat effective, with some hiccups. It's been effective enough that they've started to move beyond forestry and into grazing. There's a few traditional ranchers that are pursuing negotiated outcomes, and these ranchers helped the Forest Service realize what a big issue grazing was when that wasn't necessarily on the table at the outset.

Upon receiving a dispute ripe for ADR, could you step us through how the ADR process functions in your work?

GC: It begins with the initial meeting with the client and the discussion regarding what's at stake and what's the issue. You find the facts and the issues. You talk with your client about the pros and cons of each route. You advise them because presumably they are coming to you because the conflict has moved beyond the stage where they can resolve it themselves. Sometimes, it works well because the client doesn't want to go to court. It's also good to explain to the client that everything will not be under his or her control.

There's also the adversary and the adversary's attorney. For instance, there was an interesting situation with an elderly couple where the wife was sick of taking care of the husband. All the family members involved thought it was something that they could work out. One spouse was set on litigation and hired a very aggressive attorney.

There wasn't a lot the other party could do because that spouse made a decision to hire a very litigation-focused type of attorney, and he drove the conflict towards litigation. With situations like that, you sometimes cannot consider ADR practices until a court orders you to—it doesn't happen otherwise.

Sometimes, you'll come across judges that are knowledgeable and will ask the correct questions to get you into an ADR practice. I think a good lawyer understands that litigation is just one arrow in the quiver, and part of being a good lawyer is knowing which one to use.

In your work, is there a certain form of ADR that is more commonly used than others? If yes, which method and why is that?

GC: Two are more frequently used in civil litigation. In the Superfund issues, there are the negotiated, collaborative processes. It can get just as complicated as litigation. Also in use are the third-party mediators, who are often retired attorneys or judges—someone who brings clout to the table and explains the merits of each case to the parties, realistically.

Typically, the parties end up at someone's office and are kept in separate conference rooms. The judge works through shuttle diplomacy and works as the devil's advocate to drive each party towards a resolution. I worked in the federal court of Colorado for a judge, and he would work both sides very hard. For him, there were very few boundaries for what he would pull out to help parties reach a resolution.

How do the attorneys fit into this scenario?

GC: A good lawyer in mediation is like a good lawyer in court. You have to be who you are, but there is a range, and you have to be able to channel the different versions of yourself that you're capable of being. With some clients, you have to be at your most aggressive, and at some points, you need to be at your most passive.

To be a good litigator, you have to understand what will work in that particular situation. An extremely aggressive lawyer may only respond in kind. One great example is when an attorney went up against a very loud, boisterous attorney, and she would always respond to his yelling by politely asking him to stop yelling at her. He would respond by getting louder, until he realized the impression he was leaving on the court. Here was this big, loud man yelling over

and over at a small, quiet woman. He looked like a complete jerk to the jury. It's best to learn how to be adaptive.

We discussed how ADR practices allow attorneys to be more reactive to their clients' needs, and what else do you see as the biggest benefits or gains from the use of ADR? Conversely, what are the drawbacks?

GC: Control. Absolutely control. The parties are able to control the outcome of their dispute and discuss their options. Litigation puts people in winner-loser situations and cements hard feelings to the point where the relationship is almost inevitably over after the process. ADR, on the other hand, allows parties to save face and continue a relationship, which is tremendously important and valuable to family and business relationships.

The biggest downside is that it is not appropriate for every situation and can increase the transactional costs of a dispute. You can see this affects the parties, especially if there are parties with disparate resources and money. The big parties in a Superfund, for example, can look at the financial situation of a litigation or an ADR process. If the investment fund is more expensive than the ADR process, they can draw out the ADR process for as long as they want. For smaller parties, this may mean that they pay more in transaction processes than they ever would in court. In that context—with a lot at stake, with a lot of parties with disparate responsibility—ADR can be kind of a nightmare. There are some processes that EPA and other agencies have developed that will help the little parties, but it's a tough place for those parties to be.

Where do you see the use of ADR in your agency five, to ten, to twenty years from now? Will it continue to increase? Dramatically? Modestly?

GC: Well, I would start by dividing the conservation community into two buckets: the climate and energy bucket and the wild- and public-lands bucket.

In the climate and energy bucket, I think there will be very little use for ADR practices. There is too much at stake and it mostly revolves around money. There are conservation-group plaintiffs who see no reason to compromise because there's not a lot of upside for them in any compromise resolution. On the industry side, they're in the situation of staying open or closing down, and they'll fight to stay open. These discussions are being driven by economics, not courts.

In the public-lands bucket, I think we'll see much more ADR in the form of very large-scale collaborative processes and probably a continued listing of litigation over timber sales. I think this will hold true even under a Republican government—unless there is a huge overhaul of the environmental statutes that eliminates the citizen-suit provisions.

Most of the parties involved with public lands understand that you cannot litigate yourself into effective land management because you need the public acceptance and goodwill in order to implement the plans. Litigation allows public strife to continue, and so litigation creates considerable backlash within those communities.

In your experience, are there any particular examples that stand out—either as successes or failures—with ADR?

GC: This is difficult because there's not always the opportunity to go back to the parties and discuss how they feel about the process. You don't get that feedback too often. After most processes, the party walks away thinking, "Maybe that wasn't the best result, but it was an acceptable result."

Why do you think parties participate then?

GC: Love them or hate them, the agencies don't get things done quickly. Most conservation groups can't afford to hire a skilled third-party to help go along with the process. It's a very typical process not to participate, but that's to your peril because you will be left behind and the other stakeholders will reach a resolution without you. You then only have the option to litigate, and then you have the public perception to work against. This is because you are perceived as stepping in after five years of hard negotiation to ruin the agreement. The conservation groups often come out on the losing end in that scenario.

About you—how did you get into the practice of ADR?

GC: [*Laughs*] Kicking and screaming. When I started practicing law, I was a litigator and doing trial work. It was probably in the 1990s when ADR became all the rage, and there was a huge push in the legal community for people to let go of litigation and adopt ADR instead. I got jaded by watching some of the Superfund processes and seeing some of the poorer aspects of the law. It seemed like an opportunity for some lawyers to get two bites at the apple.

You need both the carrot and the stick, though—ADR and litigation go hand-in-hand. It's not the latest and greatest thing. It's not going to replace litigation. It's one of the aspects that you can use. If there's not a credible threat of litigation to impact the parties' best alternative to a negotiated agreement, it's very hard to get parties to commit to an ADR process. At WELC, we've had some very successful gains that you could not have gotten from litigation.

It's also difficult because much of ADR work is woefully underfunded by the philanthropic community, which makes it very hard for conservation groups to work with ADR. When donors give, they often give money for very specific causes or cases like wildlife litigation or water restoration. That money is earmarked and can't be used for other purposes. We had one attorney who worked for six years to get funding for ADR and eventually got a \$12 million appropriation for forest restoration. That was a great outcome, but it was a six-year slog on the conservation group's dime. It's a huge gamble for any of the parties involved.

Is there anything that you would like to add that you feel is important?

GC: It's a great thing that universities, like the University of Oregon, are teaching ADR in law schools now because most lawyers of my generation did not receive training. As a practitioner, it's really hard to get yourself up to speed on that. I know there's a lot of competing demand on law students, but I think this is an important area that students should be exposed to, and I'm glad to see that happening.