

**STETSON UNIVERSITY COLLEGE OF LAW**  
**30th Annual National Conference on Legal Issues in Higher Education**  
**February 24, 2009**  
**Alternative Dispute Resolution in Higher Education**

**Summary Paper.**

The Session is a combined look at the legal position for Alternative Dispute Resolution (ADR) in the United States (Holiday H McKiernan – Section 1), how policy, law and theory translate into practice (Lucy Croft – Section 2) and a view from England regarding how ADR is developing within the specific context of higher education (Tim Birtwistle – Section 3).

~~~~~

**Section 1**

**Holiday Hart McKiernan**  
**Senior Vice President and General Counsel**  
**Lumina Foundation for Education**  
**P.O. Box 1806**  
**Indianapolis, Indiana 46206**

**I. INTRODUCTION**

For diverse reasons, traditional litigation in the United States may be perceived as an undesirable means of resolving a particular dispute between parties. The alternatives to traditional litigation take many forms in the United States, from court-mandated mediation to informal problem-solving by a neutral third party sought out by two individuals, and are collectively referred to as Alternative Dispute Resolution, or "ADR." The most common forms of ADR in legal disputes are arbitration and mediation, with newer techniques emerging. In the realm of higher education, universities have embraced ADR both to resolve employee grievances and as a means of furthering educational goals in the context of intra-student disputes. Given the unique context and extra-legal precepts of higher education, ADR and its adaptability may have particular value to those in the higher education community.

**II. BACKGROUND<sup>1</sup>**

ADR in the United States can be said to predate the formation of the country itself. "Arbitral tribunals" were panels used to settle disputes in various trades as early as 1768 in New York. With such a far-reaching historical hold on conflict resolution it is no surprise that ADR continues to provide a faster, more flexible way to end disputes in the U.S.

---

<sup>1</sup> General information about ADR throughout this presentation has been drawn from 1 Bette J. Roth, Randall W. Wulff, & Charles A. Cooper, *The Alternative Dispute Resolution Practice Guide* (2008).

today than is available in our court system. In fact, and as testament to ADR's viability, the past twenty years have shown much growth even in officially sanctioned uses of ADR within U.S. federal and state courts.

Though the U.S. Supreme Court upheld an arbitrator's ability to issue a binding judgment as early as 1854,<sup>2</sup> arbitration was not particularly supported or enforced by American courts until the latter half of the twentieth century. Congress passed a Federal Arbitration Act in 1925, and the Uniform Arbitration Act was drafted by the National Conference of Commissioners on Uniform State Laws in the mid-1950s.<sup>3</sup> Since then, almost every state has either adopted the uniform act or its own version of the act.

American courts have also now adopted ADR procedures. The Federal Judicial Center ("FJC") was established by Congress in 1967 as the research and education agency of the federal courts. In the mid-1990s, the FJC undertook a study of the uses of ADR in federal trial courts and found that many federal trial courts had implemented some form of either mandatory or voluntary ADR during litigation, some of it even required or encouraged by Congress.<sup>4</sup> Federal magistrate judges often include talk of settlement or aid in negotiations during the early stages of litigation.

State courts may particularly encourage ADR in family law cases. Many divorces in the U.S. are now resolved through mediation instead of litigation. And some states authorize courts to order families to mediate child custody disputes.<sup>5</sup>

### III. ARBITRATION

Arbitration, like litigation, leads to a decision binding on the participating parties. Parties often, but not always, agree to arbitrate before a dispute occurs; for example, they might sign a contract for services in which both parties agree to arbitration instead of litigation in the event of a disagreement. Parties see arbitration as a faster, less expensive alternative to litigation in part because arbitration does not involve the same burdensome discovery process that a lawsuit in American

---

<sup>2</sup> Burchell v. Marsh, 58 U.S. 344 (1854).

<sup>3</sup> Uniform Law Commission, <http://www.nccusl.org> (follow "Final Acts & Legislation" hyperlink, then choose "Arbitration Act" and "Search").

<sup>4</sup> Elizabeth Plapinger & Donna Stienstra, Fed. Judicial Ctr., ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers (1996), available at [http://www.fjc.gov/public/pdf.nsf/lookup/adrsrbk.pdf/\\$File/adrsrbk.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/adrsrbk.pdf/$File/adrsrbk.pdf).

<sup>5</sup> New contexts for ADR are on the horizon. Recently, the suggestion was raised that both tax-exempt charitable organizations and the Internal Revenue Service might benefit from ADR in tax disputes. Diane Freda, *Alternative Dispute Resolution Urged For Tax-Exempts as IRS Case Load Grows*, Daily Tax Report, Nov. 18, 2008, 222 DTR G-7, available at [http://news.bna.com/dtln/DTLNWB/split\\_display.adp?fedfid=11025759&ynname=dtmnot&fn=11025759&jd=A0B7M2P7C5&split=0](http://news.bna.com/dtln/DTLNWB/split_display.adp?fedfid=11025759&ynname=dtmnot&fn=11025759&jd=A0B7M2P7C5&split=0).

courts often generates. Instead, a third-party arbitrator decides the dispute on its legal merits as would a judge, but outside the formal legal process. Because arbitrations are outside of "open court" or the public domain, confidentiality can be preserved as well.

When parties agree to arbitrate, they have a number of options. An arbitration agreement may decide a number of questions, including where the arbitration will occur, what law will apply, what rules govern, how the arbitrator will be selected, how discovery will be conducted, what the arbitrator may decide, and what remedies the arbitrator might award. Generally, the power of the parties to contract the scope of the arbitration is quite broad.

A typical arbitration would begin with an aggrieved party making a demand for arbitration to the other party. A demand for arbitration is also filed with an arbitration organization. The largest arbitration organization in the United States is the American Arbitration Association. The parties then select an arbitrator or panel from the list of arbitrators affiliated with the arbitration organization. Arbitrator selection happens in accordance with the parties' arbitration agreement. The parties then exchange information, also in accordance with their agreement. The exchange may resemble the discovery process, or it may be much more informal. After the exchange of information, a hearing is held before the arbitrator. At the hearing, witnesses may give testimony, and the parties will present their cases. The arbitrator may ask questions. The parties need not comply with formal rules of evidence, but the hearing may resemble a trial. After the hearing, the arbitrator takes time to deliberate and then issues a decision or award. The arbitrator's decision typically can be enforced by local courts.

Use of arbitration has increased in the last few decades. American unions have long used arbitration in dispute resolution, and arbitration is now established as standard in industries such as finance and construction. As states have adopted the Uniform Arbitration Act, arbitration has become a common way for parties to avoid the time and expense of litigation. Nonetheless, arbitration carries risks along with perceived benefits. It is commonly viewed as saving time and money. However, fees paid to the arbitrator and the arbitration association would not be incurred if the dispute were resolved in court. Also, the cost savings of arbitration come at the expense of limited reviewability of an arbitrator's award: American courts enforce arbitration awards as rendered except in limited circumstances, so there is little room for "appeal." Parties can also incur additional costs if the jurisdiction or the decision of an arbitrator is in fact challenged by one of the parties.

#### **IV. MEDIATION**

Mediation is a process whereby a neutral third party assists in and directs negotiations between two parties with an eye toward arriving at a mutually agreeable settlement. Mediation is, in contrast to arbitration,

voluntary and non-binding. The mediator has no authority except for influence, and the parties are free to accept or reject any settlement offer made, even at the very end of a mediation. Mediation may occur before a lawsuit is filed (and ideally in place of one), during the course of a lawsuit, or sometimes even after a judgment is rendered. Mediation tends to allow a cooperative approach to problem solving instead of the adversarial one offered by arbitration or litigation.

Parties may arrive at mediation by a number of avenues. Often, a lawsuit has been filed and participants are seeking a way out of expensive, unpredictable litigation. Though parties often seek out mediation on their own or by the efforts of their attorneys, in some jurisdictions a court may also order litigants into mediation. Additionally, a dispute need not have entered the legal system in order for parties to engage in mediation.

The format of a mediation typically includes two types of meetings. First, the parties and their advocates, if there are advocates, participate in a joint session. The joint session is an opportunity for the mediator to explain the mediation process, set ground rules, and describe what his or her own role will be in the negotiations. A joint session often involves an opening statement from each party to the other party and the mediator. Second, parties to a mediation are typically separated for some part (or perhaps most) of the proceedings. During separate sessions, the mediator engages in "shuttle diplomacy" as he or she engages the parties in dialogue about the dispute and carries settlement or resolution offers back and forth. Discussions between the mediator and the parties during separate sessions are confidential. These separate, confidential sessions offer the mediator an opportunity to engage in frank conversation with the parties about the merits of each side and to discuss openly the benefits or weaknesses of various resolution options.

The role of the neutral mediator is to understand and sharpen the focus of the dispute, guide exchanges between the parties, promote settlement, and follow through on any resolution achieved. Some mediators will offer directive problem-solving suggestions. Often, this will require the mediator to understand what the aggrieved parties really want. Because it is the role of the mediator to discern the wants and needs of the parties and because a mediation settlement, if there is one, is an agreement between the parties, there is some room for solutions that might be more satisfying to the parties but that would not occur if the dispute ended in a jury trial. For example, in a situation where the widow of a man killed in an accident with a semi tractor trailer went into mediation with the company that employed the driver, money was not really the issue. In the end, mediation led the parties to a settlement that included money, but also a commitment from the company to improve safety training.<sup>6</sup>

## **V. OTHER METHODS**

---

<sup>6</sup> John Van Winkle, *Mediation: A Path Back for the Lost Lawyer* 31-33 (2d ed. 2005).

One of the advantages of pursuing an alternative method of dispute resolution is that ADR may provide a more flexible means of solving or ending a conflict than the American court system. Besides arbitration and mediation, other types of alternative dispute resolution have begun to develop to fill identified needs.

For example, in the construction industry, many parties might be involved in one project and even a small dispute can escalate because a large number of parties are affected. When such disputes enter a courtroom, they might be decided by judges or juries who have no knowledge of construction. Since the 1970s, "dispute resolution boards" have become a common choice for construction-related disputes. These boards typically consist of three members, one of whom is a trained chairperson and the other two appointed by the parties. A single board follows one construction project from beginning to end, providing a form of mediation whenever disputes arise. Parties may agree to make a board's decisions binding or non-binding. Use of a board allows for on-the-scene, at-the-moment problem-solving that is needed at a construction site to keep the project on schedule and on budget.

Another type of dispute resolution that emerged in the early 1970s is the "med-arb." When a dispute arises, parties who make a med-arb agreement will first engage in mediation to seek settlement. If mediation fails, the parties proceed to binding arbitration. Parties are free, if they wish, to create variations of this process as needed; for example, some issues may be mediated to settlement, and others must be arbitrated.

Finally, on the forefront of ADR practices, parties are using two innovative ways to end conflict. First, "partnering" attempts to prevent disputes before they happen. In a partnering relationship, parties agree on a set of goals and practices at the outset. For example, two parties about to embark upon a large project together would attend a partnering "retreat" before the project begins. At the retreat, the parties agree on their goals for the project and focus on working as a team. The parties commit to a relationship with open communication and to avoiding litigation from the beginning. Though partnering began in the construction industry, it has also spread to other contexts.

Second, "collaborative law" has emerged from mediation as another option, particularly in family law cases. In collaborative law, each party is represented by an attorney and the parties agree to seek settlement with no threat of litigation. But if negotiations fail, both attorneys must typically withdraw and may not participate in litigation. A collaborative law process means that parties have the benefit of legal advice during mediation, but the process is not adversarial and the advocates know from the beginning that they will not litigate the case. In some cases, collaborative law's cooperative approach leads to faster, less acrimonious settlement.

## **VI. HIGHER EDUCATION**

As federal and state governments, employers, and industries have implemented ADR options at the front lines of their dispute resolution strategies, higher education has followed closely behind. ADR in higher education settings offers not only a way to reduce litigation time and costs, but also a means of preserving values that are at the heart of higher education communities -- values that can be lost or misunderstood when disputes enter the legal system.<sup>7</sup> ADR in higher education is thus present in both faculty and student matters.

### **a. THE TENURE CASE**

Like any other employer, a university will experience employee grievances from time to time. And like any other employer, universities may benefit from the decrease in cost and increase in flexibility provided by ADR options. However, universities have unique needs as academic institutions that are not found in other places. In particular, most employers do not have employees subject to a process at once objective and subjective in the same way that university professors are subject to a tenure review.

A university professor with continuous tenure may not be dismissed without adequate cause, dire financial circumstances, or a fundamental change at the university. Academic freedom is the reason most often cited to those who express wonder at this rare job security.

Peer review provides another unique facet of higher education employment. Before granting tenure to a junior faculty member, the senior faculty of an academic department conducts a peer review to evaluate the junior member's research, teaching, and service to the department and discipline. This "peer review" element of promotion is not found in many other employment settings, but it is central to the academic mission of a university. While universities may post objective tenure standards and strive to obtain them, any peer review process necessarily still contains a strong subjective element. After all, who better than senior scholars in a discipline to evaluate the worthiness of one who is striving to join them?

Academic freedom and peer review are two of the cornerstones of American higher education. However, the peer review that helps protect academic freedom creates difficulties if a tenure dispute arrives in state or federal court. Put simply, judges and jurors are not qualified to assess academic credentials. And it would take a prohibitive amount

---

<sup>7</sup> For a general assessment of ADR in higher education, see 1 William A. Kaplin & Barbara A. Lee, *The Law of Higher Education* 134-40 (4th ed. 2006).

of time and money to give judges and jurors some semblance of the qualifications required to make such assessments.

Because tenure decisions occur in a unique setting and are made by a group of tenure "experts" (the applicant's peers), tenure disputes are well suited to ADR techniques. If a university applies a specially designed arbitration process to challenges of denied tenure, the university has the opportunity to craft its own binding process. A panel of the disputing professor's peers is more qualified to consider a tenure dispute than a randomly selected jury pool.<sup>8</sup> In addition, arbitration awards generally are not subject to review by federal or state courts, so the faculty's role in tenure and promotion is protected from interference. A university also has the option to employ its own administrative appeals process. Finally, both the university and the professor might benefit from the privacy afforded by arbitration as opposed to litigation.

Tenure presents one other possible problem in a university setting that may be addressed most effectively through ADR options. In a community of people with "jobs for life" in specific disciplines, a dispute that gets out of hand may not be easily solved by a job transfer and could literally last for a lifetime. ADR provides an opportunity for intervention in these situations on a practical level. A panel of peers who understand a situation intimately or even a trained mediator may provide assistance in a dispute that threatens a community but either cannot or should not enter the legal system.<sup>9</sup>

Along this vein, a particular resource for faculty may be an ombudsman. An ombudsman is an independent, neutral and impartial, confidential, and informal resource who promotes fairness in his or her community.<sup>10</sup> At Brown University, the Faculty Ombudsperson "endeavors to insure that all faculty members and postdocs are treated fairly and equitably, by facilitating communication, understanding, conflict resolution and change."<sup>11</sup> A faculty ombudsman may provide information and resources, mediate a dispute, or bring a community issue to the attention of university administration. In order to

---

<sup>8</sup> Courts have also shown a reluctance to accept the task of second-guessing academy-related university decisions. See, e.g., *Farrell v. Butler Univ.*, 421 F.3d 609, 616 (7th Cir. 2005) ("[T]his circuit and others have been reluctant to review the merits of tenure decisions and other academic honors in the absence of clear discrimination. We have previously recognized that scholars are in the best position to make the highly subjective judgments related with the review of scholarship and university service.") It is important to acknowledge that this "academic deference" has been criticized as allowing too much room for discriminatory decisionmaking. See Scott A. Moss, *Against Academic Deference: How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine*, 27 Berkeley J. Emp. & Lab. L. 1 (2006).

<sup>9</sup> For more detailed information on this section, see Lawrence C. DiNardo, John A. Sherrill, & Anna R. Palmer, *Specialized ADR to Settle Faculty Employment Disputes*, 28 J.C. & U.L. 129 (2001).

<sup>10</sup> International Ombudsman Association, <http://www.ombudsassociation.org/ethics/>.

<sup>11</sup> Brown University, Faculty Ombudsperson, <http://brown.edu/Administration/Ombudsperson/index.html>.

safeguard confidentiality and neutrality between all university offices, the ombudsman reports directly to the university president.<sup>12</sup>

## **b. STUDENTS AND OTHER CONFLICTS**

Higher education communities also, of course, have another large population of adults who are not necessarily employees (though they may be) for whom ADR can provide resolutions to legal and other problems: students. The confines of a university provide ample opportunity for various kinds of intra-community conflicts, and academia has its own code of ethics that may not be reflected in state or federal statutes, regulations, or cases. At some universities, the same ADR options are available to both employees and students for disputes amongst themselves or between each other.

Some universities have enacted comprehensive ADR programs to address conflict at all of its stages.<sup>13</sup> Before a dispute even arises, a university ombudsman may be made available to all members of the community, not just faculty, to raise issues of fairness and ethics.<sup>14</sup> The ombudsman could mediate him- or herself, or steer parties toward other ADR resources if that becomes necessary. Mediation, by whatever means, provides one way to head off disputes before they become serious enough to merit arbitration or law enforcement.<sup>15</sup> An arbitration-like setting is more appropriate for addressing violations of university policy, such as an honor code. And university policy must encourage the reporting of criminal violations to law enforcement.<sup>16</sup> As is always the case with ADR, universities have the flexibility to craft an ADR framework that makes sense at each individual institution.

A university may offer both mediation and arbitration. For an arbitration, a panel is more common than an arbitrator. The panel may be made up of students or faculty, or a mix of both. Arbitration or arbitration-like procedures at a university allow the university community to enforce its own standards: for example, a panel comprised of professors and students might hear a violation of an academic honor code, whereas a panel of students only might hear a non-academic violation. Honor codes and the like allow universities to set community standards apart from criminal, common, or statutory law, and then apply those standards in consistent ways. The educational mission of a university means that the university may have

---

<sup>12</sup> Jeffrey C. Sun, *University Officials as Administrators & Mediators: The Dual Role; Conflict & Confidentiality Problems*, 1999 BYU Educ. & L.J. 19, 39-40.

<sup>13</sup> For information about specific universities, see James Scott Fargason, *Alternative Dispute Resolution in Higher Education*, 12 World Arb. & Mediation Rep. 133 (2001).

<sup>14</sup> University Ombudsman Office, Harvard University, <http://www.universityombudsman.harvard.edu/>.

<sup>15</sup> See Sun, *supra* note 12.

<sup>16</sup> This is federal law. *Id.* at 34.



particular standards of conduct or academic expectations based in its history or affiliation that are enforced through a community-based ADR process.<sup>17</sup>

One important consideration in crafting university ADR procedures, however, is the inappropriateness of ADR for resolving certain types of situations. For example, the U.S. Department of Education's Office for Civil Rights advises schools that it is not appropriate to require a student with a sexual harassment complaint to work directly with the alleged harasser; nor is it ever appropriate, even if the parties agree, to mediate an alleged sexual assault.<sup>18</sup> Other allegations of violence can also pose barriers to ADR. At the University of Michigan, a university representative must agree that mediation is appropriate, even if the parties already agree, in any case involving violence.<sup>19</sup> A threat of violence during a mediation to a person who is not a party to that mediation may also give rise to university liability.<sup>20</sup>

## VII. CONCLUSION

ADR presents opportunities to higher education both to reduce the burden of litigation and to perpetuate academic communities' particular sets of values. Universities can consider ADR, particularly the well-established methods of arbitration and mediation, when in the midst of civil disputes, such as routine contract disputes. The higher education community can also draw upon ADR models to implement methods of conflict resolution uniquely suited to problems and situations in higher

---

<sup>17</sup> For example, Bates College in Lewiston, Maine, has the following "consideration" in its Student Handbook:

3. The College's standards of conduct and the procedures for determining responsibility for misconduct reflect its particular mission and history. These standards and procedures do not attempt to duplicate civil and criminal legal processes, nor do they attempt to substitute for them. As an institution structured to accomplish its stated educational mission, the College has an independent interest in upholding standards of academic and social conduct, and these expectations may differ from those found in society at large. The College is committed to fundamental fairness in its student conduct procedures.

Bates Student Handbook for 2008-09 81, *available at* <http://www.bates.edu/Prebuilt/dos/student-handbook/SH0809web.pdf>. The Handbook goes on to describe community standards and ADR procedures, including mediation, that are applied at the college. Similarly, at the University of Hawaii, the ADR Director pointed out that litigation cannot address "entrenched attitudes" that lead to discrimination, and that the university's ADR program looks to address attitudes in a way that will allow people to continue to work together. Brian N. Jarrett, *Resolving Discrimination Disputes in Higher Education: Qualitative Field Research at the University of Hawaii*, 6 App. J. L. 219, 221 (2007).

<sup>18</sup> Office for Civil Rights, U.S. Dept. of Educ., Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties 21 (Jan. 2001).

<sup>19</sup> Fargason, *supra* note 9, at 136.

<sup>20</sup> Sun, *supra* note 12, at 35-36.


education, such as matters of tenure and honor code violations. For that purpose, ADR's greatest strength may be its flexibility, which can outweigh the burden of creating an ADR framework and shouldering responsibility for it.

~~~~~

## **Section 2**

**Lucy Croft, Ed.D.  
Assistant Vice President for Student Affairs  
University of North Florida**

Please refer to the slides and to the p.d.f. document, for example:

<p style="text-align: center;"><b>Confidentiality, Records, and "Notice"</b></p> <p>The Student Ombudsman's Office is a confidential one. It keeps no official University records of names or concerns, although it may collect demographic and feedback data for statistical purposes only. The Ombudsman may take brief notes as a memory aid, but these personal notes and any other paperwork or communications are disposed of by shredding at the earliest opportunity. E-mail is by its very nature not a confidential method of communication, but its use can provide clients of the Ombudsman's Office with much quicker and more effective service. Therefore, students who visit this Office should consider whether they are comfortable with the Ombudsman using e-mail when working on their concerns, and if they are not, inform her immediately. Otherwise, permission to conduct business on their behalf via e-mail will be assumed. Speaking to the Ombudsman does not constitute "notice" to the University that a problem exists. To do that, a student would</p>	<p style="text-align: center;">Thomas J. VanSchoor <i>Student Ombudsman</i> Office of Student Affairs University of North Florida 1 UNF Drive Jacksonville, FL 32224</p> <p style="text-align: center;">Building 1, Room 1410 Phone: 904.620.1491 Fax: 904.620.2644 E-mail: tvanscho@unf.edu <i>Member of the International Ombuds Association</i></p>	<p><b>Office of the Student Ombudsman</b></p> 
--	--	--

plus materials available on the day.

~~~~~

## **Section 3:**

**Tim Birtwistle  
Professor of the Law and Policy of Higher Education  
Jean Monnet Chair  
Leeds Law School  
Leeds Metropolitan University  
United Kingdom**

This part of the session (England) refers to the Improving Dispute Resolution Project (see: [www.staffs.ac.uk/idr/](http://www.staffs.ac.uk/idr/)) currently being undertaken by a group of researchers in England funded by the LGM fund of the Higher Education Funding Council for England and the project summary from its "Toolkit" consultation paper is at the end of this short paper.

What are the similarities in legal terms?

The use of arbitration and the binding nature of arbitration backed by a legislative framework and a consensual contractual agreement is virtually identical in England and the U.S. England has a strong international reputation for commercial arbitration within the framework of international commercial organisations. In higher education arbitration is not widely used.

Mediation (and we will come to the problems of definition later) is increasingly being promoted across the spectrum of disputes – family, neighbourhood, employment, commercial etc and higher education is no exception except that it is perhaps late on to the scene and this is a reflection of the late onset of the formalisation of disputes. A move from collegiality to commercialisation and the consequences that seem to flow from that (see the literature on the student as a consumer, for example: Bickle, Birtwistle and Kay 2006).

The use of an “ombuds-function” in higher education is a late arrival on the scene of English higher education. Across Europe the pattern is variable. In Spain there is a legal requirement for every university to have ombudsmen dealing with student and staff disputes and the Spanish higher education ombudsman association is well organised. Austria currently has a central higher education ombudsman. The Netherlands has legislative provision for the ombuds-function and some universities have one for staff and one for students or combined or either or neither. Some universities in France have an ombuds, the same in Germany, Switzerland, and Sweden etc. In England there is the Office of the Independent Adjudicator (a central function for dealing with student disputes that have exhausted the university’s internal processes).

There is no pattern or template in European higher education. The European Network of Ombudsmen in Higher Education has an annual meeting (since 2003) and acts as a loose link for interested parties.

The research project in England has a U.S. partner led by Doug Yarn Director of the Consortium on Negotiation and Conflict Resolution (CNCR), University of Georgia. The Centre has worked extensively both across the U.S. and internationally in the field of ADR and in particular mediation and has published an extensive set of literature on the topic. Although there is a dictionary of terms it does appear to be a fact (certainly in England) that there is no common usage of language in this field of operation apart from that defined by law (for example: arbitration). Words such as “grievance”, “dispute”, “appeal” do tend to be thrown around and are at times used as a “ratcheting-up” mechanism.

There is a tendency in a “win” culture to demand a day in court, or at least 15 minutes of fame. To this end anecdotal evidence suggests (without definitions there can be no data) that there is a sizeable number of vexatious litigants “out there”. Given the destructive nature of disputes this does not help anybody in any way.

ADR and especially mediation does seem to be the future and does seem to be a future that is being encouraged (in England) by the legislators and the courts. To

that end the IDR Project in England and the work of CNCR in the States is essential to ensure that best practice flourishes.

~~~~~

#### References:

Bickle, Birtwistle, Kay (2006) "Criticizing the Image of the student as a Consumer: Examining Legal Trends and Administrative Responses in the US and UK" Education and the Law Vol 18 p85 2006

CNCR – see <http://law.gsu.edu/cncr> and for example the page on (reproduced with the permission of Professor Doug Yarn CNCR):

### **Resolving Campus Conflict**

While significant advances to institute informal means of resolving disputes have been made in the business sector and the legal community, the implementation of alternative dispute resolution methods in resolving campus disputes had been slow and, in some institutions, nonexistent. There are a variety of dispute resolution mechanisms that can be utilized on campus for the myriad of disputes found there.

#### **Ombuds**

The concept of an ombudsman originated in Sweden (the word means "representative of the people" in Swedish) in the 18th century. It has evolved into many different meanings in different parts of the world and different sectors of life, including government, business, and schools. There are at least 100 colleges and universities in the United States with ombuds programs (Stieber, "Resolving Campus Disputes: Notes of a University Ombudsman," The Arbitration Journal, vol. 37, no. 2, June 1982).

Generally, an ombuds on a university or college campus handles complaints and grievances of faculty, staff, and/or students. The ombuds is not necessarily a neutral in a dispute since the role of the ombuds sometimes means championing the cause of one side in a disagreement. The ombuds can also choose among available remedies, sometimes creating new solutions that are workable to both parties. Or the ombuds may decide to mediate the case or refer it to mediation on campus. In some instances, the ombuds may turn the dispute over to another entity on or off campus.

#### **Mediation**

Mediation is a process in which a neutral facilitates settlement discussions between parties. The neutral has no authority to make a decision or impose a settlement upon the parties. The neutral attempts to focus the attention of the parties upon their needs and interests rather than upon rights and positions. The process is voluntary and confidential. There are a number of different ways that mediation has been used on campus, but the two approaches which have gained relatively wide acceptance are peer mediation programs and campus mediation centers, which may or may not use peer mediators.

Peer mediation is a process where professionally trained student mediators help other students work through conflict. Peer mediation programs may be totally student operated, or they may receive some assistance from university administration. Usually a staff or faculty advisor with

some experience in mediation oversees the development of the program and gathers a group of students to be trained who will constitute the core of volunteers to support the program. Peer mediation programs provide a wonderful training ground for students, enhance their conflict resolution skills and teach them a new process. Such programs can also provide a vehicle for campus education and outreach, where peer mediators speak to campus organizations about the benefits of the program and about conflict resolution.

Another approach to using mediation on campus is to create a separate office or center offering mediation services for students. Usually a campus mediation center is staffed by one or more conflict management professionals who coordinate the office, conduct intake sessions and mediate the disputes that they deem appropriate. Often, these programs are established as a joint effort between two administrative sectors or an academic department and student affairs.

Questions of credibility that may arise with a peer mediation program seem to be less frequent with a campus mediation center. Also, the staff of a campus mediation center may be better equipped to provide training and education around campus, eventually leading to the involvement of faculty, staff and students as mediators.

### **Formal Grievance Procedures**

Historically, institutions of higher education have relied exclusively on formal mechanisms of dispute resolution. These formal procedures have included hearing panels, judicial boards and student conduct committees. Although there are certainly situations where these formal procedures are needed, formal processes usually do not allow for resolution of the underlying dispute which may have caused the behavior that led to the grievance. Usually, the student judicial process is adversarial, with emphasis on due process and student rights. Often, it results in a feeling of alienation among the participants.

Some grievance procedures are used in conjunction with a code of student conduct whereby anyone on campus can file a complaint against a student who has breached some provision of the code. The student will then usually have to respond to the charges before a panel that may be composed of faculty members, administrators and/or student representatives. In some instances, the panel or board renders a final decision. In others, the panel or board acts in an advisory capacity, making a recommendation to a dean, vice president or president, who makes a final decision based on the panel's advice.

Formal grievance procedures also differ from institution to institution in the extent to which they follow quasi-judicial procedures and practices. Some boards or panels may allow attorneys to be present at the hearing, while others do not. Some follow, although quite loosely, rules of evidence, others do not. Most schools have separate grievance procedures for faculty, staff and students.

### **Arbitration**

Arbitration involves an independent third party to resolve a dispute. The third party hears both sides of the problem, then decides what the solution ought to be. The process is called binding arbitration if the third party can apply sanctions for failure to accept or abide by the decision. It is called nonbinding or advisory when the arbitrator does not have any special enforcement powers. Most often, formal grievance procedures use a process that resembles arbitration without calling it by name. It is less formal than litigation, but often resembles it in many other ways.

ENOHE – see [www.english.uva.nl/enohe/enohe\\_network.cfm](http://www.english.uva.nl/enohe/enohe_network.cfm)

# Summary

---

## Snapshots: Viewing 'disputes' as a risk factor for the whole institution

### *Stating the Problem*

1. No HEI welcomes disputes. For the individuals involved they can be destructive of careers and prospects and health and family life. They can be warning signs that all is not well in the HEI's conduct of its affairs. They are expensive and time-consuming for the institution.
2. It is difficult - but important - to put a positive construction on them. HEIs are increasingly aware of the need to improve their dispute resolution. In our informal 'audit' by 'Strand A' questionnaire, and in conversation and correspondence with those working in HEIs, we have noted many examples of good practice and we expect to encounter more as the 'audit' proceeds. This interim report with its Toolkit makes positive proposals to help HEIs review their institutional protocols and practice across the board.
3. The title 'Improving Dispute Resolution' was chosen for the project because the term 'dispute' is capable of embracing a wide range of types of controversy. Of the available terms, it best reflects the complexity of the real problems encountered in and by HEIs when students or staff or any of an increasingly a wide range of academic, public and commercial 'partners' become involved in disagreements with an institution.
4. In meeting the increasingly complex administrative needs of HEIs, there is a widespread tendency to fragment administrative arrangements. This can make it difficult to keep track of institution-wide patterns in the handling of disputes and improve practice. Seeing a 'dispute' in the round within a full system of dispute-resolution makes it easier to foresee and prevent complications, and to avoid making procedural mistakes which then themselves become the subject of dispute.
5. The first section of the report provides a preliminary orientation to this approach. It asks 'what it is like' for those in institutions seeking to make a complaint and those who handle them on behalf of the institution.

## Pathways: Routes to system-wide identification of potential disputes

### *From the bottom-up*

6. It has been apparent since the publication of the Second Report of the Committee on Standards in Public Life (the 'Nolan Report', Cm 3270, 1996) that better mechanisms were needed to enable concerns to be raised and addressed effectively in higher education, where they related to systemic problems in an institution rather than solely to individuals with complaints or grievances. This issue has become highly topical with the hearing of the IUSS Select Committee on 17 July 2008, the publication of the Quality Assurance Agency's revised and extended 'causes for concern guidance' on 1 August 2008 and the consultation published in July by Research Councils UK, on a Code of Conduct and Policy for Governance of Good Research Conduct.

### *From the top down*

7. The ultimate authority in a university lies with its governing body. Recent trends in the work of the Committee of University Chairmen encourage concentration on top-level strategic planning and the delegation of monitoring of operational matters. The 'key performance indicators' listed include only incidental passing reference to potential disputes. There is no attempt to see disputes as a 'whole-institution' risk factor in a way which will help to ensure that 'systemic' failings are regularly picked up and addressed.
8. New Clerks and Secretaries to governing bodies of HEIs who are also Registrars will wish to be careful to avoid conflict of interest between their roles in the handling of disputes involving public interest disclosure or the raising of causes for concern.
9. Fragmentation of the administrative arrangements of HEIs and the appointment of specialist professional administrators may make 'whole-institution' dispute-resolution policies more difficult to implement with respect to the identification of systemic problems.

---

10. The task of overseeing or monitoring disputes which have or may have an 'academic' dimension is structurally and administratively formidable because of the complexity of the question whether 'academic judgement' is being challenged.

## Taking an overview: Designing a 'whole institution' system

### *Saving costs in a unified system*

11. There appears to be considerable variation in the arrangements made by HEIs for monitoring expenditure on legal fees and administrative costs in dealing with disputes. 'Whole-institution' dispute resolution provides an opportunity to review these arrangements against a revised institutional policy.

### *Designing a system for the prevention as well as the resolution of disputes*

12. Some HEIs appear to find 'fire-fighting' of their relatively few complex and expensive disputes preferable to designing a system which will help to prevent them, including in-house provision for alternative dispute resolution options. This approach may benefit from rethinking.

### *Designing procedures: meeting a practical need in a principled way*

13. It is sometimes complained that the requirement to follow procedures impedes speedy dispute resolution. Procedures are depicted as bureaucratic, burdensome, time-consuming, a positive roadblock on the way to the desired destination of a final outcome. For those who need either to access or to implement dispute-resolution procedures the level of detail they tend to contain is a practical problem.

14. The QAA provides a model which brings together the advantages of simplicity with the need for detailed working out of procedural requirements. This involves distinguishing 'precepts' or principles and a commentary, guidance or explanation on their detailed application:

### *The 'Campus Ombudsman' option*

15. Introducing 'campus ombudsmen' as a regular thing in HEIs in the UK seems likely to be a long-term objective, and it may not be right for all institutions. There are also potential problems in making such an ombudsman useful in connection with collaborative arrangements. Nevertheless, a campus ombudsman could perform a range of useful functions, advising, informing, providing a reality check for potential complainants and also for the institution's managers, in the hope of ending disputes at the outset.

## Introducing alternative dispute resolution in your HEI

16. We are working with HEIs which are seeking guidance on the best way to organize in-house training for mediators. Commercial mediation training remains unregulated and is still not quality-assured. It remains a matter of concern that HEIs wishing to arrange training for in-house mediators or to approach experienced mediators to help in the resolution of disputes are having to make choices without a reliable point of reference about professional standards.

17. Commercial mediation training typically provides a short courses of a few days, Providers cannot offer a 'qualification', merely inclusion of approved candidates on their own list. These courses can, however, offer a good practical start to training, and there is comment to that effect on our website under Strand C. Some providers are willing to organise in-house courses for HEIs, which is likely to be less expensive than paying for the training of individuals at several thousand pounds each.

18. Some HEIs are informally 'sharing' their in-house teams. There are clear advantages to doing so, in terms of the costs savings of being able to pool specialist expertise and the better opportunities to learn from experience by sharing lessons learnt.

## Looking to the future: New aspects, new areas

### ***New aspects of disputes involving students: Student complaints and causes for concern***

19. The relationship between student complaints and causes for concern needs to be rethought in the context of in a 'whole institution' approach to dispute resolution. Some HEIs already make provision in their student complaints procedures for a student to make a complaint in a form which would fit the QAA's definition of a 'cause for concern'.

### ***New aspects of disputes involving students: Staff-student disputes***

20. HEIs report an increase in disputes which involve both staff and students. This presents particular problems in finding a means of resolving such disputes under a procedure which can deal with both those on employment contracts and those who have 'student contracts' with the institution.

### ***New aspects of disputes involving students: Collaborative provision and student disputes***

21. There are now extensive 'higher education in further education' collaborative arrangements, under which students may take courses in further education colleges leading to degrees awarded by higher education institutions. The potential for systemic problems to arise here is manifestly greater because more than one institution is involved.

22. An analogous potential problem area in collaborative arrangements involving overseas "providers" was touched on in the IUSS Select Committee hearing of 17 July.

### ***New aspects of disputes involving students: New dimensions to challenging academic judgements***

23. Further elements in the 'academic judgement' equation have come into view as a result of work conducted in the context of the Bologna Process 'Diploma Supplement', by the Burgess Group<sup>4</sup> and on behalf of the Quality Assurance Agency, with the objective of providing students with an 'academic transcript'.

### ***New approaches to employment disputes***

24. For employees of HEIs recent legislative change has reduced rather than enlarged the avenues of recourse. The 2004 Act does not provide for staff any counterpart of the OIA for students, which might be able to consider general causes for concern emerging from individual grievances when they relate, for example, to the way in which an HEI has followed its procedures.

### ***Disputes involving commercial partners, intellectual property rights and research ethics***

25. A number of concerns were identified by a group commissioned in January 2007 by the Director General of Research Councils, which produced a report *Streamlining University / Business Collaborative Research Negotiations: An Independent Report to the "Fundors' Forum"* of the Department for Innovation Universities and Skills<sup>5</sup> later in 2007, with an introduction by Keith O'Nions, Chair of the Research Base Fundors Forum. These concerns have a bearing on the considerations to be weighed in designing a 'whole-institution' dispute resolution system.

26. Many HEIs have codes under which concerns may be raised about misconduct in research. Research Councils UK, 'the strategic partnership of the UK's seven Research Councils' has recently published *Governance of Good research Conduct: Consultation on a Code of Conduct and Policy*.<sup>6</sup> In addition to the code of conduct in preparation through this consultation, is a practical guidance document being designed by the UK Panel for Research Integrity in Health and Biomedical Sciences, which is supported by the UK Research Integrity Office (UKRIO).<sup>7</sup>

4 Beyond the Honours Degree Classification: Burgess Group Final Report, UUK, October 2007, [http://bookshop.universitiesuk.ac.uk/downloads/Burgess\\_final.pdf](http://bookshop.universitiesuk.ac.uk/downloads/Burgess_final.pdf).

5 [www.dius.gov.uk/publications/streamlining-august07.pdf](http://www.dius.gov.uk/publications/streamlining-august07.pdf)

6 [www.rcuk.ac.uk/review/grc/default.htm](http://www.rcuk.ac.uk/review/grc/default.htm)

7 [www.ukrio.org.uk/home/](http://www.ukrio.org.uk/home/).

---