



ADVOCATING SOLUTIONS

30 YEARS OF

DISPUTE RESOLUTION

AT VERMONT LAW

This story might begin: “Two Vermont Law students battled their way to the top, took on all comers, and won a spot in the American Bar Association’s National Negotiation Competition this past February.” But that’s just one way of seeing things.

At Vermont Law School, Professor Joan Vogel would advise you to forget the military metaphors. And Professor Sean Nolon, director of the school’s Dispute Resolution Program, would compare negotiators more to poker players than gladiators. “The best,” he says, “are assertive without being offensive. They are intellectually nimble, work from a strategy, and remain flexible.”

So the professors would report the story like this: Kayvon Hejazi '12 and Jordan Wimpy '12 reached the ABA's national competition through creative problem solving; thoroughly researching the issues involved, devising a strategy, listening and speaking carefully, understanding all options, working with the other side to reach common ground, and all along protecting their client's authentic interests.

This particular way of seeing things is nothing new to VLS; in fact, it's become an important part of the school's DNA.

DISPUTE RESOLUTION ON THE RISE

Thirty years ago, Professor Jack McCrory helped VLS launch one of the nation's first programs to teach the skills of dispute resolution—negotiation, mediation, and arbitration—that provide highly effective methods of achieving client needs by cooperation outside of the courtroom. Through courses, clinics, student competitions, field work, internships, and educational programs with partner institutions, the VLS Dispute Resolution Program offers instruction to degree and nondegree students from across the globe. At its 30th anniversary, the program distinguishes itself through the success of our alumni who use these skills every day.

"Thirty years ago," says Jack McCrory, "awareness was just beginning to blossom." Professor of law at Pepperdine Univer-



sity since 2001, McCrory introduced dispute resolution to the VLS curriculum. "I was influenced by my practice experience in labor law," he says, "where dispute resolution is routine." In 1981, he focused on three objectives: creating courses, engaging students, and developing a "national presence" for VLS. "Things were new," he says. "VLS was developing its environmental law credentials, and we were given the support to establish ADR components in the curriculum." McCrory and his "exceptional" students even staged three conferences in the first years and created four seminal publications that are still relevant today.

Encouraged by where Vermont Law is now, McCrory recalls "at the beginning it was only the 'ADR Project,' and the 'A' for 'alternative' was controversial. Of course, we now understand that litigation is the real alternative; lawyers do a lot more negotiating, mediating, and arbitrating than litigating."

NEW CERTIFICATE

In January of this year, the school increased its profile by approving a new Certificate in Dispute Resolution Advocacy, available to students in the JD, Master of Environmental Law and Policy (MELP), and LLM degree programs and to nonmatriculated students as well. In its approval of the new certificate, the faculty noted "that Vermont Law School was one of the first domestic law schools to teach dispute resolution." The school expects this program to appeal to prospective students who aspire to be leaders and recognize that difficult problems resist simple solutions.

US VERSUS THE PROBLEM

Sean Nolon begins his class sessions with an unusual exercise. He asks his students to pair up and hold hands. Most hesitate, fearing some "touchy-feely" exercise from the dispute resolution professor. Instead, he explains they are going to arm wrestle to "win as many points as you can." The players win points by touching their opponents' hands to the table. As expected, the students assume this is a win-lose setup where big biceps quickly trump small. There's some struggling between more evenly matched pairs.

But inevitably, says Nolon, there will be one or two pairs of students whose fists move back and forth like the pendulum on a fast clock: one touches the table, then the other, back and forth, each quickly racking up numbers of "winning" hand touches. "Some students see the opportunity right away," says



Nolon. “They listen carefully, understand that the objective is to win as many points as you can, and realize that the game is not about getting more points than the other side. Success comes to those who think creatively and can cooperate.”

Nolon reminds us that the vast number of disputes in society are resolved by individuals in the same way, through creative, consensual negotiation. A relatively tiny percentage of our conflicts are resolved through litigation.

“Judge-made law establishes norms, and that’s how we teach law, through cases,” he says. “But we want students to appreciate that there is a spectrum of processes available outside the courtroom, each with advantages for clients and attorneys.” Doing this well, according to Nolon, requires a complete understanding of the client’s objectives, and the other party’s objectives, as well as an awareness of process options. “I would like our students to think that being a process advocate is part of being a lawyer.”

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— Sean Nolon, Director, Dispute Resolution Program

The heart of dispute resolution is the conflict itself, and how lawyers approach conflict has implications for the out-

come of their work. “Students need to learn how to engage the conflict, to really feel the conflict,” says Nolon. “This will set their course in resolving it.” VLS students learn that there are two sides to every story, however clichéd that may sound, and that sets them up to handle the challenge in a different way. It can help create a cooperative mindset focused on finding the opportunities between the two sides.

“We have learned from behavioral psychologists that language and attitude matter,” says Nolon. “If a lawyer enters a negotiation or mediation with only a competitive orientation, thinking of the other side as ‘adversary’ or ‘opponent,’ the outcome will probably be less creative and less satisfactory. But if she approaches the interaction more cooperatively, in terms of ‘partnering,’ the results will probably be better. We like to tell students to replace the us-versus-them attitude with an us-versus-the-problem point of view.”

TOO IMPORTANT FOR COURT

Vermont Law School offers several skill-based courses focused on the components of dispute resolution, including interviewing, counseling, negotiation, mediation, arbitration, and international commercial arbitration. But like the majority of U.S. law schools, VLS does not require JD students to take a specific course in the field. Instead, concepts are distributed through the required curriculum, especially in the Civil Procedure course.

For students in the MELP program, however, study of dispute resolution is required, and VLS is the only school to offer a full range of dispute-resolution experiences in environmental issues. Professor Nolon explains that the number of stakeholders, decision makers, and issues in environmental conflicts are too numerous to be handled well in litigation. “Litigation,” he says, “is designed to identify who’s wrong and how much they need to be punished. This bounded effectiveness can assign blame and fault, but can’t solve complicated problems like managing phosphorus loads in a watershed.”

Philip Harter, emeritus professor at the University of Missouri School of Law who taught public policy dispute resolution at VLS for 17 years, agrees. “Environmental issues are often too complex and too important to decide in a courtroom,” he says. Through his early, private-practice work as a mediator of complex, controversial, multiparty public policy issues and as head of several ABA task forces, Harter became a pioneer in both the theory and practice of using consensus in government. Through his scholarly writings, he provided the



A PASSION FOR RESOLUTION

Another pioneer in the field is Jaclyn Brillig '79, who enthusiastically admits that “dispute resolution puts the bounce in my step!” Judge Brillig, as the secretary to the New York State Public Service Commission, developed and continues to shepherd the commission’s Alternate Dispute Resolution (ADR) program, which handles issues among the biggest players—utilities, energy service companies, and large, direct customers. In fact, Brillig is so enthusiastic about dispute resolution that she also volunteers as a community mediator and serves on the board of Mediation Matters, a nonprofit dedicated to the management and resolution of conflict. But her five children, she says, offer more opportunities for arbitration than mediation.

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— Judge Jaclyn Brillig '79, secretary to the
New York State Public Service Commission

theoretical underpinnings for federal negotiated rulemaking and the Administrative Dispute Resolution Act.

He says much of environmental law is “about regulation and policy, and that is best created via negotiation rather than litigation.” So the idea behind negotiated rulemaking is to bring together people with expertise in process—mediation and negotiation—with the affected parties, experts, and agencies.

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Professor Harter, who continues to teach at VLS, cites the small-scale issue of snow-making at Vermont ski slopes and the recent national reformulation of gasoline as typical situations. “All the stakeholders got together and figured these things out. Both cases demonstrate that collaborative decision making is the best—and only—way to deal with really difficult decisions, especially those with political overtones.”

In addition to its most obvious objective—to arrive at satisfactory resolutions to disputes—the commission’s ADR program is intended to arrive at more *creative* solutions and to “preserve and perhaps enhance” relationships among utility constituents. Brillig admits that while the commission seeks ways to streamline its work (“we are effectively sharing work with the regulated parties”) and reduce the costs of adjudication, collaboration is not necessarily less labor intensive. “But through this process,” she says, “disputants feel that they are being treated fairly. We are very focused on building confidence in the process. We want these parties to come to us so that our staff is informed directly of the needs and concerns of those regulated.”

And the information flow isn’t just one-way. “Written documents don’t always work,” she says, “and ADR offers a far more direct channel to knowledge for everyone. We make the process much more accessible and immediate to disputants and their experts.”

One of the most intriguing results of the program is at the back end: stakeholders are more likely to comply with commission orders when they have contributed to the process, discovered solutions that provide mutual gain, and shared responsibility for regulations. “This sort of outcome gives real meaning to our search for ‘creative’ solutions,” says Brillig.

LEARN BY DOING

“You can’t be held in contempt of moot court!” Professor Vogel succinctly describes the advantages of the VLS system of teaching dispute resolution, which includes classroom work richly supplemented by simulations, role playing, moot court, clinics, internships, and the always-popular student competitions.

Professor Vogel knows that negotiation and other tools of dispute resolution simply don’t make sense when all you do is talk about them. “You certainly won’t learn how to negotiate unless you do it,” she says. “Students need to take in the challenge, choose the words, and work out the strategy in real time.”

So her classes offer problems that students, working in

And the winner is...

Law student competitions at VLS

In February, Kayvon Hejazi ’12 and Jordan Wimpy ’12 escaped single-digit temperatures of Vermont and headed to the national ABA Negotiation Competitions in Atlanta with their coaches, professors Laurie Beyravanand and Hillary Hoffmann. They were seeking to regain the national title that VLS won in 2004. Although the VLS team didn’t finish first, the competition electrified the school. It was an honor for all.

Atlanta was the culmination of a season of success for VLS, with another ABA regional victory as well as a negotiation-round victory in the Securities Dispute Resolution Triathlon held at St. John’s University School of Law.

Student negotiations competitions at VLS are organized by the school’s Dispute Resolution Society. Ask Christine Breen ’12, the society’s cochair, why she competes, and she’s likely to say it’s a learning experience. But in a less-guarded moment, she’ll admit that she and her teammate Brandon Wrazen ’12 “had a blast!”

For a student perspective on competitions, check out the frank and charming blog by Ruth White ’12, one of the competitors in the Securities Triathlon. In her narrative she gives good advice for any lawyer: “Speaking clearly, loudly, and directionally toward the judges became a huge competitive advantage....” <http://vlsjd.wordpress.com/author/ruthhw/>

teams, handle quickly. Rather than acting in front of their classmates, the simulated negotiations are taped and viewed in the classroom. Students also keep journals to help them critique their own work. “This gives them the chance to learn from their mistakes.” And, as might be expected of law students, Professor Vogel has found that they love taking on different roles in simulations. But she has also discovered an unexpected bonus: “some students discover that, despite their own expectations, they do these things and do them well.”

The next level beyond simulations are dispute resolution clinics, which offer opportunities for students to practice nonlitigation dispute resolution skills and strategies in the real-world settings of New Hampshire and Vermont courts. Students observe and contribute to court-based mediation sessions and bring their experiences back to the classroom, where they review and analyze their cases in clinic-style rounds. They have the opportunity to participate in supreme court, superior court, family court, civil court, and small-claims mediations.

AGENTS OF SOCIAL CHANGE

A benefit of dispute resolution that may be less obvious to the public is the potential for social change. “Conflict isn’t necessarily a negative thing,” says Professor Vogel. “Disputants may expose situations that need to be addressed, institutional problems that have been overlooked.”

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Drawing on her experience in employment law—she has served as chair of the ABA labor and employment law sections and was a consultant for the drafting of Vermont’s employment law bill in 1997—she recalls a negotiated settlement for a female employee claiming Title VII gender discrimination. The settlement included an agreement that the employer would establish a clinic for battered women. “No court would have given her a domestic violence clinic as a remedy for gender discrimination,” says Vogel. “This settlement is a good example of the kind of creativity that is possible in the negotiations process. It’s for cases like this that my colleagues and I are eager to include it in our curriculum.”