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This issue of the Dispute Resolution Magazine continues the theme of civility in public discourse, which is the theme for the Section of Dispute Resolution in this bar year. Who better than the Dispute Resolution Section and the dispute resolvers who are members of the Section to promote this principle?

As Richard Reuben expresses in his piece, promoting public discourse in all walks of life by dispute resolvers is an important area of growth for our Section leading to one of the most important benefits of being a member. Lisa Bingham’s thoughtful article emphasizes the American Bar Association’s “Call to Action” for lawyers to model civility. She maps out upstream and downstream processes that can be adopted providing concrete examples. Sandy Heierbacher introduces well-tested methods but terms new to many in the dispute resolution community such as “Conversation Cafés” and “World Cafés.” She demonstrates how creativity and initiative can transform discussions into collaborative action through technology.

The theme of civility in public discourse will be showcased during the Section’s Annual Spring Conference in April in Washington, D.C. Mark your calendar for April 18 to 21. Visit www.ambar.org/dr2012 and take advantage of our early bird registration rates. The Annual Spring Conference convenes the largest number of dispute resolvers worldwide under one tent. The course offerings span a wide range of topics sure to attract people new to the field as well as those with decades of experience. During the conference, we honor those who have made a difference in dispute resolution. The award honorees are inspirational and serve as models for what can be accomplished by others entering the field.

The Dispute Resolution Section is the 12th largest Section of the ABA. A quarter of our members are newly admitted to the bar. About 34 percent of our members are over 60, and a quarter of our members are solo practitioners. For the last two years, the American Bar Association has promoted a “Member-get-a-member” program. Under the program, the ABA offers a free trial membership to people who are not current members. This is an opportunity to publicize the benefits of being a member of the Dispute Resolution and highlight the opportunity to associate with our many members who are committed to the dispute resolution field.

The opportunity to promote civility in public discourse is only one of the many benefits of being a member of the Section. The major benefit is the ability to make a difference, whether on a local or global basis. Join with me to recruit people to our Section so we can continue to make a difference with through collaboration and service. ✶
Take the Next Step

The Master of Laws (LL.M.) in Dispute Resolution degree program provides students with the resources of a major university to design a program of study according to their particular interests in the dispute resolution field. LL.M. graduates are now working in the United States and abroad in a variety of positions.

The LL.M. program greatly improved my abilities as an advocate for and counselor to my clients. I learned how to ascertain the true interests of my clients and opponents, how to explain complex legal problems, and how to develop real and lasting solutions. The program is not just for those who plan a career as a neutral. Any lawyer who litigates or counsels clients would benefit from the University of Missouri LL.M. program.

Lowell Pearson, LL.M. '06
Partner, Husch Blackwell LLP
Jefferson City, Missouri

Earning my LL.M. from Mizzou opened doors for me, enabling me to move comfortably from a mediator in private practice to one who is responsible for the design and implementation of a complex program. What I value most is coming away with a sophisticated understanding of the theories behind the practical issues that come up every day in my job.

Andrea Braeutigam, LL.M. '05
Executive Director
Oklahoma Agricultural Mediation Program, Inc.

When I enrolled in the LL.M. Program, all I wanted was a jump start on an ADR career. I found a discipline far richer than I thought, a faculty that challenged and sharpened my analytical abilities, and the opportunity to make significant contributions to a burgeoning field. My time at Missouri not only opened a new career path, it led me places I never thought possible.

Art Hinshaw, J.D. '93, LL.M. '00
Clinical Professor of Law
Director, Lodestar Dispute Resolution Program
Sandra Day O'Connor College of Law, Arizona State University

My LL.M. education influenced my current job because I started a practice in mediation and arbitration, and I was able to join the Center of Arbitration and Mediation of the Chamber of Commerce of Quito, the most important center of this kind in Ecuador. I discovered a new world for my professional activities and academic development, which I share with others in my country.

María Elena Jara Vasquez, LL.M. '04
Associate Lawyer, Noboa, Peña, Larrea, Torres & Asociados Cia. Ltda.
Professor, Andean University Simon Bolivar
quito, Ecuador

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Public Civil Discourse: A New Domain for Dispute Resolution

By Richard C. Reuben

Sometimes the past gives us a good sense of the future. And so it is with the coalescing of dispute resolution and civil discourse about contentious public issues.

In the two decades since the ABA conferred Section status upon the Standing Committee on Dispute Resolution, the ADR community has been about resolving disputes, as our christened name proudly proclaims.

That made perfect sense at what was still the onset of the modern era of Alternative Dispute Resolution. We were, after all, still figuring out just what “alternative” meant, and even whether it was, well, the appropriate word. Arbitration we fairly well understood, though perhaps not the breadth of its possible applications. But this thing called “mediation”… Just what is it? How do you do it? What are the shoulds and shouldn’ts?

As many have said, it was the era of experimentation, and within our Section, as throughout the country, a thousand flowers were blooming. Within this broad field, patches of flowers emerged here and there, sometimes bunched together and other times spread fairly far apart. This was a diversity that we respected — indeed, cherished — and was reflected within the Section in the form of committees, subcommittees, task forces, special initiatives, and other such activities.

But as the years have turned, as we have come to better understand dispute resolution processes, how they compare and how they differ, our roles in them as neutrals and advocates, and the ethical, legal and other constraints and supports they need, the kaleidoscopic world of dispute resolution has become somewhat clearer, although sometimes with less obvious relief. Where there were once gaps between gardens of process, new processes morphed to begin filling in the space. If the canvass of dispute resolution were fine art, it would be more Monet than Rembrandt. And more mosaic than oil.

The field is still a work in progress, of course. But the current impetus within the dispute resolution community toward “deliberative democracy,” “civil discourse,” “public dialogue” and other such collaborative processes both highlights these impressionist qualities, and, more concretely, points to an important area of growth for our field and its importance to our society.

On the side of clarity, a crucial but not initially apparent distinction has emerged — one that goes back to the very root of the identity of our field: the distinction between disputes and conflict. Many if not most disputes, we now understand, are simply the immediate manifestations of deeper underlying conflict. That is to say, if conflict is that state of mind that arises when two or more parties perceive their interests or aspirations to be incapable of simultaneous fulfillment, a dispute is how that conflict is being played in a specific situation. For example, the fight over a family’s estate may be simply a fight over assets, but it may also be about unresolved tensions between family members. The two, while intertwined, are not the same.

The dispute resolution field has by and large focused on the resolution of private disputes rather than the resolution of underlying conflict. The lawyer-bound arbitration and mediation of commercial, domestic, and other traditional legal cases, both pre- and post-filing, are classic examples of what we now understand to be private disputes. So are the community mediations of landlord-tenant and other disputes often too small to call for lawyers.

But we have also learned that such private disputes are part of a much bigger picture, one about the conflict inherent in all societies that democracy itself is intended to manage constructively through a rule of law process based on the informed consent of the governed. It is this understanding, often just a felt sense, that beckons many dispute resolution practitioners toward the different but related work of civil discourse. After all, if private dispute resolution is about the task of giving parties the tools to address the tension between their interests and aspirations without the help of the state generally speaking, then civil discourse is about much the same thing at a much broader social level, perhaps with the government taking a more active role.

As such, we in dispute resolution can view civil discourse about public issues — a direct, deliberative way of exercising democracy itself — as a new but related field in which we can apply our skills and services, and this theme edition of Dispute Resolution Magazine is intended to help those of us in dispute resolution cross the isthmus into what for many of us is the new world of civil discourse.

Richard C. Reuben is the James Lewis Parks Professor of Law at the University of Missouri School of Law and founding chair of the ABA Section of Dispute Resolution Committee on Public Policy, Consensus Building and Democracy. He can be reached at reubenr@missouri.edu and by web at law.missouri.edu/reuben.
Articles by Sandy Heierbacher and Lisa Bingham provide an important bird’s eye view of the landscape. Bingham, a lawyer and professor of public policy, provides a broad sense of the terrain as she situates the relationship between discourse and dispute resolution processes. Discourse process, she says, are earlier in the life cycle of conflict, well “upstream” of resolution, and necessarily so. Heierbacher, executive director of the National Coalition for Dialogue and Deliberation, hones us in on the civil discourse side, mapping the various processes associated with civil discourse. Some are familiar, such as town hall meetings, while others are less so, such as study circles and world cafes.

Public policy mediators Susan Podziba and Howard Bellman offer a lateral view of the relationship between private civil dispute resolution, civil mediation, and traditional public policy mediation, emphasizing the similarities and differences between the processes and the range of shared and complementary skills necessary to engage each of them.

As these perspectives make clear, discourse processes have a look and feel that is both similar and different than dispute resolution processes. They are similar in part because they call for the fostering of mutual understanding of different perspectives on difficult issues — hazardous waste siting, neighborhood revitalization, abortion, to name just a few. But they are different in part because the issues are public rather than private, and because sometimes understanding itself is the goal, rather than resolution.

In this way, the movement toward civil discourse pushes dispute resolution practitioners to work with conflict at a much deeper, more immediate and intimate level. Rather than merely resolving a private dispute — no small task — civil discourse challenges us to work with, and even embrace, public conflict, thus raising the stakes and opening for public evaluation and even comment the inherent preference trading that is the grist of the private dispute resolution mill.

These are places that lawyers, even dispute resolution professionals, often have felt uncomfortable. However, Mary Jacksteit, an attorney and veteran practitioner of both dispute and civil discourse processes, clearly describes the many attributes that lawyers are uniquely qualified to bring to these processes. While these skills and capacities are familiar to lawyers and neutrals in private dispute resolution, the public context of civil discourse exhorts us to exercise them in a different way and in a different role — that of leaders in our communities and in our society. Peter Levine, the director of the CIRCLE research center at Tufts University in Boston, gives us a sense of specific current policy issues in which we may get involved to move the ball forward, both in our communities and nationally.

This is an important step for our field and our profession, the necessity of which is becoming increasingly apparent to many across the country. Indeed, led by the Section of Dispute Resolution, the ABA House of Delegates in August 2011 unanimously approved Resolution 108, encouraging lawyers to take “meaningful steps” to foster a more constructive civil discourse in whatever role they perform. Reprinted in this edition, Resolution 108 also explicitly encourages the ABA to participate actively in the development of collaborative governance processes that employ civil discourse and dispute resolution techniques. ABA immediate past President Stephen Zack reminds us in his article, adapted from his speech to the ABA Annual Meeting Opening Assembly, that this is the lawyer’s highest duty, calling, and privilege.

Together, these articles provide an unprecedented understanding of the relationship between private dispute resolution and dialogue over public conflict, and a window into how we as dispute resolution professionals can augment our practices while at the same time elevating our communities and enhancing our larger democracy. It is an opportunity worth seizing in the year ahead.  

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[T]he movement toward civil discourse pushes dispute resolution practitioners to work with conflict at a much deeper, more immediate and intimate level.
The American Bar Association’s resolution urging lawyers to model civility in public democratic and deliberative discourse is a call to action, a call for lawyers to broaden our conception of our work. Over the past several decades, we have expanded the ways we help clients through alternative dispute resolution (ADR). Beyond advice and counsel, we use negotiation both to help them form contracts and to resolve disputes. In addition to litigation, we represent clients in mediation and arbitration. We serve as mediators and arbitrators. Most of us conceive of our practice in relation to the judicial branch of government.

Resolution 108 reaffirms existing obligations of civility for lawyers and extends them by explicitly authorizing ABA involvement in a broad array of new processes beyond traditional law. Those of us who work in government and advise executive branch agencies work in this arena. We advise clients on public participation or public comment in hearings before local, state, or federal agencies. This article will map these processes as lawyers encounter them in the policy process, show how they relate to each other, and identify some emerging legal issues regarding their use.

Mapping Civil Discourse Processes for Lawyers

Upstream in the policy process, there are many new methods for a lawyer’s tool kit. These include all the ways that the public and stakeholders exercise voice in governance and policy: dialogue, public deliberation, deliberative democracy, public consultation, multi-stakeholder collaboration, and collaborative public management.1

The policy process has many discrete steps. One helpful metaphor is the flowing stream. Upstream, it includes identifying and defining a public policy issue, defining the options for a new policy framework, expanding the range of options, identifying approaches for addressing an issue, setting priorities among approaches, and selecting from among the priorities. It also includes enacting law in the state or federal legislative branch or ordinances in local government. Midstream, it includes developing and adopting regulations in the executive branch, implementing solutions, project management, and program evaluation. Downstream, it includes enforcing law and regulations through agency adjudication and through litigation in the judicial branch. All levels of government (federal, state, and local) engage in these activities; lawyers play a fundamental role.
Just as ADR provides for consensus and resolution as an alternative to adversarial adjudication, so too dialogue and deliberation, or deliberative democracy, provide for civil public discourse as an alternative to adversarial debate on public policy. Dialogue and deliberation differ fundamentally from debate. In debate, participants listen in an effort to identify weaknesses and score points in an effective counterargument. In dialogue and deliberation, participants engage in a reasoned exchange of viewpoints in an atmosphere of mutual respect and civility, in a neutral space or forum, with an effort to reach a better mutual understanding and sometimes even consensus. Participants listen in an effort to better understand the other’s viewpoint and identify questions or areas of confusion to probe for a deeper understanding. Deliberation is the thoughtful consideration of information, views, and ideas. In other words, it is a way to conduct civil discourse. Two models for encouraging deliberation and dialogue are Study Circles and Deliberative Polling, which are detailed in Sandy Heierbacher’s article in this issue.

Lawyers can use dialogue to inform people, consult with them, or help them deliberate on policy decisions. There are many ways for people to have civil discourse and narrow the adversarial policy gap. However, models vary across several dimensions. Professor Archon Fung suggests that dimensions include the nature of the participants, their authority, and their modes of communication. Participants may include the general or diffuse public sphere, open self-selection, open targeted recruiting, random selection, lay stakeholders, professional stakeholders, elected representatives, and expert administrators. Fung describes types of authority as including personal benefits, communicative influence, advice and consulting, co-governance and direct authority. He identifies six modes of communication and decision-processes: participants listen as spectators, express preferences, develop preferences, aggregate and bargain over priorities, deliberate and negotiate, and deploy technique and expertise.

Other commentators have suggested that the quality of dialogue processes depends upon how well they satisfy three criteria: inclusiveness, deliberativeness, and influence. Inclusiveness is getting a broadly representative portion of the relevant community to participate. Deliberativeness is the quality of dialogue, information exchanged, and civility among participants and decision-makers. Influence is the impact of deliberation on policy and decision-making. Other examples include community conversations, consensus conferences, deliberative town meeting forums, choice work dialogues, national issues forums, participatory budgeting, citizen juries, and planning cells.

The easiest way to understand the array of process choices is by mapping them in relation to the functions and role of government.

**Figure 1: The Policy Continuum & Collaborative or New Governance**

Upstream — Legislative Quasi-legislative Making policy
Midstream — Implementing Policy
Downstream — Quasi-judicial Judicial Enforcing policy

Collaborative Public Management

Deliberative Democracy

Dispute Resolution

Figure 1 illustrates where dialogue and deliberation and ADR fit on the continuum through which we make, implement, and enforce public policy in our democracy. Processes vary in the legislative, executive, and judicial branches of government. Upstream generally involves making policy through more legislative or quasi-legislative activity; midstream involves implementing, managing, and evaluating policy; and downstream involves enforcing policy through more quasi-judicial or judicial action. Conflict can and will occur at each of these stages.

Lisa Blomgren Bingham is Keller-Runden Professor of Public Service at the Indiana University School of Public and Environmental Affairs and Visiting Professor of Law at the University of Nevada Las Vegas Boyd School of Law. Her research interests are dispute system design and collaborative governance. She is currently working on a book with Janet K. Martinez and Stephanie Smith entitled Dispute System Design: Preventing, Managing, and Resolving Conflict (Stanford University Press, Forthcoming). She can be reached at lbingham@indiana.edu or www.indiana.edu/~spea/faculty/bingham-lisablomgren.shtml.
What all voice processes in Figure 1 have in common is collaboration. They are all deliberative and/or consensual as distinguished from adversarial or adjudicative. However, they map differently along the policy continuum. Generally, processes upstream involve broader participation among a larger number of people from the public with less control over the ultimate decision or outcome. These processes for voice and collaboration upstream in the policy process often entail dialogue and deliberation. Midstream processes entail both collaborative public management and public policy dispute resolution. Collaborative public management involves networks of government agencies, nonprofits, and private sector organizations collaborating to implement public policy. For example, Lake Tahoe has a collaborative watershed management network that includes multiple state agencies, municipalities, resource users, environmental non-governmental organizations, recreational users, and others. It uses dispute resolution methods in decision-making. These involve targeted stakeholder groups in more focused consultation with somewhat more influence on the outcome.

Downstream generally entails ADR. It involves fewer participants and generally those with a legally cognizable stake in the outcome and shared decision-making authority. For example, Superfund litigation is downstream, while negotiating the terms of a permit for using a resource is midstream. However, there are exceptions at every stage of the policy continuum. Superfund litigation may loop back into a negotiated abatement plan overseen by a collaborative network of stakeholders in the litigation. Moreover, it is important to design a sequence of processes to address policy issue across the continuum.

The Legal Framework for More Civil and Deliberative Discourse Processes

This is a new field of work for lawyers, although many other professionals practice in this field, such as the National Coalition for Dialogue and Deliberation. The legal framework for dialogue and deliberation is not well developed. Early ADR proponents had to lobby for legislation expressly authorizing courts and public agencies to develop ADR programs. So too, we need clearer authority for dialogue and deliberation in the policy process. This new field presents substantial legal issues, largely arising out of the statutory framework for public participation and administrative law.

Administrative law encompasses administrative procedure for rulemaking and adjudication, public meetings and sunshine laws, freedom of information, advisory committee rules, and more recent legislation authorizing negotiated rulemaking and administrative dispute resolution. The phrase “public participation” appears as a requirement in many of these and hundreds of other federal statutes; however, generally, it is not defined. Moreover, the various statutes that comprise administrative law have grown from their own historical context and address different parts of the policy continuum. There is no express authority for public bodies to use dialogue and deliberation processes in the policy process. However, neither do laws prohibit these processes. Much like the legal framework for dispute resolution in the early years of the field, the silence creates ambiguity.

For example, through keypad voting, wireless computer banks, and large projection screens, the AmericaSpeaks 21st Century Town Meeting allows a demographically representative sample of thousands of people to deliberate simultaneously on a policy issue. Decision-makers have used this model to understand the public’s views on issues such as how to redevelop Ground Zero, how to allocate the District of Columbia budget, or how to reform Social Security. However, anecdotal evidence suggests that some federal agencies may be reluctant to use this process for rulemaking, because of perceived difficulty in capturing the simultaneous comments of thousands of people in the rulemaking record under the Administrative Procedure Act. Nevertheless, many public bodies have incorporated these new processes for civil discourse into their decision-making, particularly at the local government level.

Moreover, there are promising recent developments. President Barack Obama, on his first full day in office, committed to create “an unprecedented level of openness in Government” and “a system of transparency, public participation, and collaboration” to strengthen democracy, ensure the public trust, and “promote efficiency and effectiveness in Government.” Under the memorandum, federal agencies adopted plans to engage the public and stakeholders from the public, private, and nonprofit sectors in policy. This initiative recognizes that knowledge is widespread in society and that a strong democracy needs many voices and values. While the open government rhetoric has exceeded the results, it is a change in the way agencies think about the public role in policy.
It has served as a model for the states; California has implemented an open government web site.

Last year, the Uniform Law Commission adopted the Revised Model State Administrative Procedure Act. Section 303 authorizes agencies to gather information and solicit comments from the public after a notice of rulemaking. Section 303 also provides that it “does not prohibit an agency from obtaining information and opinions from members of the public on the subject of a proposed rule by any other method or procedure.” Although the notes to this section refer to informal consultation related to negotiated rulemaking, this language may also open the door to some innovation in the methods or procedures for public participation in rulemaking. Similarly, Section 306 on Public Participation appears to permit innovation in the process for consulting informally with the public; it expressly provides that “nothing in this section prohibits an agency from discussing with any person at any time the subject of a proposed rule.” The revisions were a good start on expanding information-sharing, between agencies and the public, but they fall short of explicitly authorizing collaborative decision-making.

The legal framework for civil public discourse is stronger at the local government level, where municipalities have adopted charter provisions and ordinances to provide for new forms of public engagement, like neighborhood councils in Los Angeles that provide a forum for deliberation among residents and agencies about area service needs and priorities. In many states, local government elections are non-partisan. However, even nonpartisan public bodies need help structuring conversations with citizens about important policy choices. There is a growing body of knowledge and resources on this local use of deliberation.

One way to encourage more civil and deliberative public discourse would be expressly to authorize government bodies to use processes other than the standard three-minutes-at-the-microphone public hearing. One possibility is to pass a collaborative governance act, similar in structure to the federal Administrative Dispute Resolution Act that authorized federal agencies to use negotiation, mediation, and arbitration. Such a statute could authorize agencies to innovate with models for dialogue and deliberation and build internal agency capacity for hosting more civil and deliberative discourse on public policy.

This primer is just a brief introduction to the rich array of processes for addressing conflict over policy through civil and deliberative discussions, to the role of lawyers, and to the legal issues that may arise as lawyers counsel clients about their use. The Section for Dispute Resolution will offer a variety of informative sessions at its annual conference in Washington, D.C., April 18-21, 2012. This is a new arena of practice for dispute resolvers. As lawyers, we can help clients working upstream in public policy to find more collaborative and problem-solving ways to address critical issues. 

Endnotes


2 For a selection of resources recommended by dialogue and deliberation practitioners for the ABA Section of Dispute Resolution’s Mediation Week (October 2011), see www.americanbar.org/dispute.


5 James S. Fishkin, When the People Speak: Deliberative Democracy and Public Consultation (2009); see also Gastil & Levine, supra note 4.


7 See www.ncdd.org.

8 This discussion is adapted from Lisa Blomgren Bingham, The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance, 10 Wis. L. Rev. 297 (2010).


11 Id. at § 306, which provides “(b) An agency may consider any other information it receives concerning a proposed rule during the rulemaking. Any information considered by the agency must be incorporated into the record under Section 302(b)(3). The information need not be submitted in an electronic or written format. Nothing in this section prohibits an agency from discussing with any person at any time the subject of a proposed rule.”

12 For more detail, see the publications of the Institute for Local Government, available at www.cal-ilg.org (last accessed November 6, 2011).
Navigating the Range of Public Engagement Approaches

By Sandy Heierbacher

Dozens of effective public engagement techniques have been developed over the last decade or two that enable citizens to have authentic, civil, productive public discussions across partisan divides—even on highly contentious issues. Techniques include National Issues Forums, study circles, 21st Century Town Meetings, Open Space Technology, Sustained Dialogue, and The World Café, to name just a few.

When done well, these techniques create the space for real dialogue so those who show up can tell their stories and share their perspectives on the topic at hand. This kind of interpersonal dialogue builds trust among those meeting even for the first time and enables people to be open to listening to perspectives very different from their own, which is quite a feat in itself in these highly polarized times.

The process of deliberation is key to public engagement work as well, enabling people to discuss the consequences, costs and trade-offs of various policy options, and work through the emotions and values that are a necessary part of making tough public decisions.

Dialogue is not about winning an argument or coming to agreement, but about increased understanding and learning. Deliberation, on the other hand, emphasizes the importance of examining options and trade-offs so people can make informed public decisions. The trust, mutual understanding and relationships that are built during dialogue often lay the groundwork needed for effective deliberation.

Basic but crucial elements of quality public engagement include small-group discussion, skilled facilitation, and the use of ground rules. Oftentimes, convenors provide participants with balanced background information on the topic at hand, and may even develop a broadly-framed spectrum of possible policy choices for participants to discuss.

These practices are similar to dispute resolution processes like mediation and negotiation, though there are some important distinctions. Dialogue is often open-ended, focused more on increasing understanding and developing relationships than on reaching an agreement. Dialogue and deliberation both often involve

A snapshot from a 21st Century Town Meeting held at the National Conference on Dialogue & Deliberation.
groups whose conflict or challenge is widespread and not specific to those in the room (e.g., poor race relations in a community versus a race-based dispute involving two neighbors). Because of this, public engagement processes often focus on outcomes that foster change outside of the group as much as on the participants themselves.

Dialogue and deliberation can serve many purposes:

- Resolving conflicts and bridging divides
- Shifting the tone of public discourse on a contentious issue from vitriol to civil and solvable
- Building understanding and knowledge about complex issues
- Generating innovative solutions to problems
- Inspiring collective or individual action
- Reaching agreement or recommendations on policy decisions
- Building civic capacity, or the ability for communities to solve their own public problems

Techniques range from intimate, small-group dialogues to large televised forums involving hundreds or even thousands of participants. Evolving communication technologies are sometimes integrated into these programs to overcome barriers of scale, geography and time.

To help people navigate the range of public engagement approaches available to them, the National Coalition for Dialogue & Deliberation (NCDD) identified four main streams of engagement based on the primary purpose community leaders, public officials and others have for using these processes to engage citizens: exploration, conflict transformation, decision making, and collaborative action. These four streams are described below.

**Exploration**

If you are interested in helping people explore an issue or problem or helping them get to know each other better, consider using “exploration” methods like Conversation Café, World Café, Open Space Technology, and Bohmian Dialogue. These methods emphasize open-ended dialogue and work best when a group or community seems stuck or muddled and needs to reflect on their circumstance in depth and gain collective insight. These methods encourage new insights and connections to emerge by creating a space for people to openly share their thoughts, feelings and perspectives.

Open Space and World Café are often used at conferences, where the organizer wants to see attendees talking to each other and exploring issues and questions of common concern and when the goal is not a specific type of outcome, such as a decision or the formation of action committees. New ideas and action groups may emerge, but the whole group is not moved in that direction. Often, “exploration” methods can help determine what type of in-depth engagement is needed to help a group progress further on an issue.

In his role as mayor of Harrisonburg, Va., Kai Degner used Open Space Technology to convene several successful community dialogues. In May 2009, for example, Degner held a successful community-wide Open Space event called the “Mayor’s Sustainability Summit,” involving about 160 people and 120 organizations in an innovative day-long event held in public and commercial spaces throughout downtown Harrisonburg. The cost to the city was a mere $30 for a few supplies; everything else was donated.¹

Methods in this category are also a good choice for community leaders who sense that many residents are shaken up about a recent natural disaster or national crisis. People may be angry about how a crisis was handled, discouraged by media coverage of the crisis, worried about a similar crisis happening closer to home, and unsure how to process all of these emotions and fears. Three of these processes, discussed below, can help them discuss all of these responses civilly and move beyond emotional paralysis to begin thinking about disaster preparedness.

**Conversation Cafés** are 90-minute hosted dialogues that are usually held in coffee shops, bookstores or other public settings, where anyone is welcome to join. Instructions and ground rules fit on a tiny business card and the simple format helps people feel at ease and gives everyone a chance to speak. Two rounds of turn-based discussion using a “talking object” are followed by “pop-corn-style” discussion and a closing round. Conversation Cafés do not focus on action or a decision. They give people a chance to talk to people they don’t know in their community about an issue of joint interest.

World Cafés enable groups of people to participate together in evolving rounds of dialogue with three or four others while remaining part of a larger, connected conversation. Small, intimate conversations link and build on each other as participants move to new tables every 20 minutes to build on ideas already discussed, and discover new insights into questions or issues that matter

**Techniques range from intimate, small-group dialogues to large televised forums involving hundreds or even thousands of participants**

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¹ Sandy Heierbacher is Director of the National Coalition for Dialogue & Deliberation, a community and coalition of 1,500 organizations and practitioners committed to bringing people together across divides to discuss, decide and act together on today’s toughest issues. NCDD’s website (www.ncdd.org) offers thousands of resources and news posts on dialogue, deliberation, and public engagement. She can be reached at sandy@ncdd.org.
to them in their life, work, or community. A World Café can involve hundreds of people in one room at tables of four. Events range from 90 minutes to three days and are often held at conferences.

Open Space Technology is an innovative approach to convening people that helps to inspire creativity and leadership among participants. Rather than having organizers design an agenda with pre-set topics and workshops, in Open Space a “marketplace of inquiry” is created in which participants propose topics they are passionate about and then lead discussions on those topics with other attendees who share their interest. Open Space can involve up to hundreds of people in one large room, with interest groups forming multiple times throughout each of the three days and dispersing to numerous smaller rooms. The self-organizing process used in Bar Camps and Unconferences is often based largely on Open Space Technology.

Conflict Transformation

Methods such as Sustained Dialogue, Public Conversations Project dialogues, Compassionate Listening, and victim-offender mediation are a good choice when you want to address a specific conflict or improve relations between groups that are at odds with each other. These methods tend to be used when relationships among participants are poor or not yet established. Generally, the issue or conflict at hand can only be resolved when people change their behaviors or attitudes, expand their perspectives on the situation, or take time to reflect on their emotions and how they came to form their opinions about another group.

One well-known conflict transformation effort is the Public Conversations Project’s six-year dialogue involving leaders in the pro-choice and pro-life movements in Boston, who came together in secret after a 1994 shooting at a Planned Parenthood clinic. These dialogues revealed a deep divide reflecting two very different world views. Yet, participants began to understand and respect those “on the other side.” The leaders began to speak differently about each other to the media, toning down their rhetoric and, consequently, reaching new audiences. At one point, pro-life advocates dissuaded a pro-life activist from Virginia from bringing his message down their rhetoric and, consequently, reaching new audiences. At one point, pro-life advocates dissuaded a pro-life activist from Virginia from bringing his message of violence to Massachusetts, making it clear to him that his group’s hateful message was not welcome or needed in their state. The Boston Globe provided the vehicle for the pro-life and pro-choice leaders to go public with their experiences in the dialogue, with a 3,000-word, jointly written newspaper article.2

The following are methods that may aid in transforming conflict between individuals or groups at odds with one another:

Sustained Dialogue is a process for transforming and building the relationships that are essential to democratic political and economic practice. It involves sustained interaction to transform and build relationships among members of deeply conflicted groups, such as Israelis and Palestinians, so that they may effectively deal with practical problems. As a small-group process that develops over time through a sequence of two to three-hour meetings, Sustained Dialogue moves participants through a series of phases including a deliberative “scenario-building” stage and an “acting together” stage.

The Public Conversations Project helps people with fundamental disagreements over divisive issues develop the mutual understanding and trust essential for strong communities and positive action. Their dialogue model is characterized by a careful preparatory phase in which all stakeholders and/or sides are interviewed and prepared for the dialogue process. Small groups of people from various sides of an existing conflict meet multiple times.

Victim-offender mediation, or victim-offender dialogue, is a restorative justice process that allows the victim of a crime and the person who committed that crime to talk to each other about what happened, the effects of the crime on their lives and their feelings about it. They may choose to create a mutually agreeable plan to repair any damages that occurred as a result of the crime. In some practices, the victim and the offender are joined by family and community members or others. The process consists of multiple two to three-hour dialogue sessions.

Decision Making

If public engagement is needed to inform policy decisions and public knowledge on a particular issue, processes that emphasize deliberation are a good option. Methods such as National Issues Forums, Deliberative Polling, 21st Century Town Meetings, Charrettes, and Consensus Conferences are some well-known examples. These methods are recommended when the issue at hand is ultimately going to be decided on by a single entity, such as a government agency or committee, that is genuinely interested in learning about their constituents’ informed opinions and shared values. Key features of decision-making methods include unbiased “naming” of the issue and balanced framing of options; creating space for participants to weigh all options and consider different positions; and identifying the public’s core values around an issue.

One common topic addressed through deliberation more and more for the last few years is cities’ budgets. Public deliberation on budget decisions has even come to have its own name: participatory budgeting. Public officials and councils are faced with unpopular decisions if they want to balance their city’s budget. Public deliberation allows them to gather input and gain buy-in from citizens about efficiency measures, tax or fee increases, and service reductions and expansions. It also serves to inform residents about the complex challenges involved in developing a balanced budget.
Examples of decision-making methods include: 21st Century Town Meetings, pioneered by AmericaSpeaks, enable members of the general public to give those in leadership positions direct, substantive input on key issues. Each meeting engages hundreds or thousands of general interest citizens at a time, utilizing innovative technology including handheld keypads and networked laptop computers to effectively and quickly summarize citizen input. These day-long meetings bring large groups of people together in one room or multiple networked rooms to deliberate at small tables. Participation is generally open to the public, although organizers recruit heavily to ensure a diverse, representative group.

Deliberative Polling, created by Stanford University’s Jim Fishkin, uses scientific random sampling to identify a diverse group of participants to provide high-quality input on public policy and electoral issues. Members of a larger random sample are polled and a smaller sampling of those polled are invited to gather for a meeting over a weekend to discuss the issues after they have examined balanced briefing materials. These participants, which may include several hundred people, engage in dialogue with competing experts and political leaders based on questions they develop in small group discussions with trained moderators. Participants receive a small stipend to encourage attendance regardless of income level.

Using Public Engagement Processes

National Issues Forums give citizens a chance to deliberate about public issues like the national debt and healthcare reform. The forums, which are generally two hours long, utilize trained moderators and balanced issue guides to engage from a dozen to hundreds of people in one room around small tables. National Issues Forums are often held in academic settings, but those open to the public are publicized widely to help ensure a variety of viewpoints are present. The National Issues Forums Institute works with a network of institutes across the country to focus energy on one issue each year and reports on its findings to public officials via an annual event in Washington, D.C.

Collaborative Action

If your goal is to empower participants to identify solutions to complex public problems and take responsibility for implementing those solutions, “collaborative action” methods may be the best fit. Methods such as study circles, Future Search, and Appreciative Inquiry are designed to engage people in dialogue and deliberation in order to generate ideas for community action and then help them develop and implement action plans collaboratively. These methods are appropriate when the issue or dispute requires intervention across numerous public and private entities, and any time community action is important.

The problem of bullying, for example, is one that may best be addressed by a collaborative action method that allows students, parents, teachers and school staff to engage in interpersonal dialogue on the issue, identify through deliberation what some potential solutions could be and what they might involve, organize participants into groups based on which solutions they would like to work on, and support them through the action phase. A school can choose to pass a new policy against bullying, but a collaborative action process will create more cross-cutting solutions and broad-based buy-in from across the school community.

Future Search is an interactive planning process which helps people within a system such as an organization or community to discover a set of shared values or themes (common ground) and agree on a plan of action for implementing them. Because participants from all tiers of the system are included, the process builds strong ownership and a powerful shared experience. Future Search involves up to 80 people in a 16 to 18-hour meeting usually including two overnights.

Study circles, a process pioneered by Everyday Democracy, enable communities to strengthen their own ability to solve problems by bringing large numbers of people together in dialogue across divides of race, income, age, and political viewpoints. Study circles combine dialogue, deliberation, and community organizing techniques, enabling public talk to build understanding, explore a range of solutions, and serve as a catalyst for social, political, and policy change. In “community-wide” study circles, hundreds of people meet in separate small groups for four to six 2-hour sessions. Participation is open to anyone, although organizers recruit heavily to ensure that all stakeholders, including those with decision-making power, are represented.

Getting Started

When deciding what public engagement approach might be best, you’ll need to consider your primary purpose (exploration, conflict transformation, decision making or collaborative action), a timeline for planning, the level of community support, and the financial and human resources available to you. Experiment with a variety of public engagement methods, and try mixing methods to fit your own ability to solve problems by bringing large numbers of people together in dialogue across divides of race, income, age, and political viewpoints. Study circles combine dialogue, deliberation, and community organizing techniques, enabling public talk to build understanding, explore a range of solutions, and serve as a catalyst for social, political, and policy change. In “community-wide” study circles, hundreds of people meet in separate small groups for four to six 2-hour sessions. Participation is open to anyone, although organizers recruit heavily to ensure that all stakeholders, including those with decision-making power, are represented.

For more details on these and other dialogue and deliberation approaches, see NCDD’s Engagement Streams framework at www.ncdd.org/streams.

Endnotes

1 Visit www.HarrisonburgSummits.com to learn more about Degner’s summits or watch a video on the event at www.youtube.com/watch?v=ZlFpfSqldQE.

2 Available online at http://www.publicconversations.org/node/75. The project was also featured on NPR’s All Things Considered in January 2003, which you can listen to at http://www.npr.org/news/specials/roevwade/conversations.html.
Public Policy Mediation

By Howard S. Bellman and Susan L. Podziba

Ironically, there is no consensus on the definition of public policy mediation among those in the field. Nonetheless, it has been successfully applied to a great variety of policy challenges and belongs in the array of processes that promise to enhance public discourse. It is an outcome-oriented method for securing actionable agreements among identified parties, who participate as negotiators, often on behalf of constituencies. As such, it overlaps and complements civil court mediation as well as public engagement processes that promote and support civil discourse. These processes are important in helping us to resolve important public matters, such as Superfund cleanups, planning the 9/11 memorial, and siting waste disposal facilities, in a civil manner.

Public policy mediation creates a forum for deliberative negotiations among government, stakeholders and the public. The parties’ contributions of their technical expertise and the resulting greater knowledge of participants’ preferences, are woven into discussions that increase mutual understanding and lead to otherwise untapped opportunities for consensus agreements. The intended result is an agreement that sets forth the terms of the future relationships and responsibilities among the parties with regard to the issues they discussed.

With tailored applications across the policy spectrum — from agriculture to fishing, environment to nuclear power, education to health, and land use to transportation policy — public policy mediation appears in many forms. Of course, public policy mediators, like mediators in general, must be responsive to the unique characteristics of case situations. Typically, this involves attentiveness to layered complexities. The examples below — negotiated rulemaking; policy, planning, permitting, and development cases; and administrative prosecutions and court litigation — are provided to help illustrate its procedural and substantive scope.

Varieties of Public Policy Mediation

Negotiated rulemaking, which convenes government and stakeholders, has been used to formulate state and federal regulations on a broad range of issues including the protection of captive marine mammals, the administration of student loans, worker safety in the operation of construction cranes, and the licensing of radioactive waste disposal facilities.
In planning, policy, permitting, and community development cases, which require an interface among governmental entities, stakeholders, and citizens, public policy mediation has been used to reach agreements rooted in the diverse interests of the public and relevant parties. Examples include planning for the multiple uses of public forests; the protection of watersheds; the closure of public mental health facilities; and even the development of a city charter required for a municipality to emerge from state receivership authority.

Similarly, public policy mediation has been applied in matters initiated by private sector parties seeking governmental permission or public support for their proposals. Examples include proposed private developments that require approvals by planning and zoning authorities; permitting for waste disposal facilities; and forestry sector efforts to promote carbon emission trading programs.

Negotiated rulemakings and planning, policy, permitting, and community development cases, although usually circumscribed by statutory authorities and sometimes subject to court review, are typically not precipitated by litigation, or conducted “in the shadow of the court.” Rather, they are initiatives of governmental authorities seeking broad participation in public decision-making to achieve fully informed, efficiently implementable outcomes. They are transactions necessary to move forward to a public objective.

On the other hand, administrative prosecutions and court litigation have precipitated public policy mediation in cases, for example, where river restoration terms were negotiable; Indian land claims and treaty rights were in dispute; school district racial integration was required; and for Superfund cleanups. In these matters as well, the settlements specify future relationships and responsibilities.

### Defining Characteristics of Public Policy Mediation

Common factors that characterize public policy mediation include the necessity for governmental action of some kind; the capacity for “intervention” by numerous stakeholders, who are politically as well as legally relevant; and a potential for future “public” impact. It is also characterized by a reluctance of government to effectuate its interests unilaterally, or an expectation that broad participation will increase its ability to efficiently achieve its policy goals. In addition, most of the negotiations, other than those based mainly on litigation or administrative enforcement procedures, are conducted under open meeting laws that allow the general public to attend and provide input throughout the process.

Procedurally, public policy mediation cases typically involve as parties multiple government authorities, advocacy and community nonprofit organizations, and private sector entities. The process provides a forum for such parties, who may represent thousands of constituents, to negotiate a set of complex issues and build an unprecedented consensus agreement that addresses a public issue. For example, among the dozen or more student loan negotiated rulemakings we’ve co-mediated, as many as 20 parties representing state and federal government agencies, all categories of higher education institutions, lenders and loan servicers, and students and borrowers, have developed consensus rules that impact all students who have received federal financial aid, their parents, and the schools they attend.

Public policy mediation includes a host of pre-negotiation activities, the first of which is an assessment. Policy mediators interview relevant parties to determine the agenda of issues, learn the history of past efforts to address the situation, and identify the dynamics likely to affect the negotiations. In addition, sometimes the assessment includes the need to specify or confirm the parties that must be involved to ensure any agreement is actionable, and/or to determine the feasibility of initiating negotiations. These early interviews also provide an opportunity for the mediators to build confidence in the mediation process and initiate relationships with negotiators.

In most cases, an initial negotiating task of developing organizational protocols serves to clarify expectations and to prevent procedural conflicts from arising during the process. These agreed upon terms specify many procedural understandings including the group’s definition of consensus, the roles and responsibilities of the negotiators and mediators, the compliance to which ultimate agreement commits the parties, and the nature of appropriate media contact.
Upon completion of such preliminaries, public policy mediators manage substantive issues to enable parties to explore and deepen their understandings of policy issues of concern. The negotiators generate and refine options until they reach conceptual agreements. Such early agreements are then reflected in written drafts and repeatedly revised until consensus is achieved.

Ultimately, the participants’ enhanced grasp of relevant factors, including the interests of others gained by carefully designed discussions, provides opportunities for agreements not previously perceived through the limited lens of each negotiator. With an acknowledgement of power differentials, resource and political limitations, and motivation to reach closure, mediators assist the parties as they make difficult decisions amid a set of imperfect choices.

**Public Policy Mediation in Comparison to Other Processes**

Public policy mediation is related to and overlaps substantially with civil litigation settlement mediation as well as with various public engagement processes. Among the key similarities and differences between public policy mediation and these other categories of process interventions are the objective of the process, the participating parties, and the process components and dynamics.

**Civil Court Mediation**

**The Objective**: The objective of both public policy mediation and civil court mediation is an actionable agreement. The latter typically results in settlements of disputes that would otherwise be adjudicated by a court, for example, negligence and breach of contract cases. Such settlements represent an application and enforcement of existing laws, and first and foremost, resolve disputes arising from past interactions. It may be said, however, that the evolution of civil court mediation has led to a growing appreciation of its value in “broad” disputes and the problem-solving capacity of transactional negotiations even in cases apparently precipitated by litigation. For example, the mediator who helps litigating parties develop a new business arrangement, in conjunction with settling a lawsuit over a past dispute, has added this relational element to the case evaluation he may have been expected to provide.

Public policy mediation outcomes are referred to as “settlements” for the subset of cases initiated in response to administrative prosecutions and litigation, and “consensus agreements” for those cases that result in sub-statutory regulations, policies, plans, permits, or other forms of public agreements. In most instances, the agreement reached is a consensus recommendation to the government agency with jurisdiction over its implementation.

When the outcome is a consensus recommendation, organizational protocols agreed to prior to substantive negotiations often speak to the government’s commitment to implementation. In some cases, for example, negotiated rulemakings, the consensus agreement is subjected to additional public review.

Most public policy mediation cases focus on building agreements related to future actions and activities. They are initiated because of existing or expected substantive and procedural disputes that may prevent the parties from addressing their shared issues. As a result, such mediated agreements establish the future relationships and responsibilities among the participating government entity and the parties and their constituents with regard to substantive issues. Public policy mediation, in that it creates arrangements to be applied in the future, is similar to mediation in collective bargaining, perhaps, historically the most common application of mediation.

**The Participants**: In civil court matters, the negotiating parties are usually predetermined as plaintiffs and defendants (or as divorcing spouses and their children, or unions and employers, as in family court matters and collective bargaining). In contrast, public policy mediation cases often require intensive pre-negotiation activities to identify representative negotiators, who may number in the dozens. For example, in negotiated rulemakings, an initiating agency may request stakeholder nominations through a formal federal register notice. After considering the nominees, it specifies negotiating committee members in a second notice and asks for public comment to ensure its participants represent a balanced group of interested parties. In other cases, as part of the assessment, the mediator may identify and recommend potential negotiators to represent stakeholders and/or segments of communities. The negotiators are the primary participants, and they must represent the interests of their constituents, and often consider the opinions and preferences of the public at large.

Unlike civil court mediation and the administrative prosecutions and litigation subset of policy cases, most

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*With an acknowledgement of power differentials, resource and political limitations, and motivation to reach closure, mediators assist the parties as they make difficult decisions amid a set of imperfect choices.*
parties in public policy mediation cases are not represented in the negotiations by legal counsel, although some may consult with counsel.

**The Process:** The process components of public policy mediation and civil court mediation have many similarities. Both rely on an assessment of the situation, protocols regarding how the process will proceed, and methods for managing negotiations.

Most mediators conduct some form of assessment prior to or early in the negotiations. In civil court cases, a diagnosis may be completed via a pre-negotiation exchange of documents or during early caucuses, or in complex cases, through pre-negotiation interviews. Before formal negotiating sessions, as indicated earlier, public policy mediators usually conduct intensive interviews with identified negotiators, and sometimes, with potential negotiators as well. Sometimes the findings of the assessment are documented and shared with the parties and the public.

Shared protocols provide process structure and clarify what is expected of the parties and the mediators. In civil court mediations, such protocols may be briefly stated or even implied by custom. Often, attorneys rely on the pre-existing norms of settlement negotiations.

In many public policy mediations, by contrast, the parties must develop organizational protocols to create the norms that will govern their negotiations and to make explicit their future commitments under agreements reached. Mediators assist the parties in formulating an agreed-upon protocol document prior to commencing substantive discussions.

**Managing Negotiations:** In all mediation cases, parties examine interests and develop options. There are caucuses and sidebars. The mediators work to avoid and overcome impasse and depend on the growing trust they develop with negotiators concerning confidence in the process and mediator competence. The role of “agents of reality” is familiar to all mediators.

The scope of issues typical to public policy mediation cases and the amount of time required to attend to them, is similar to the most complex civil court cases. In addition, since public policy cases typically involve comparatively large numbers of parties, negotiations require large group meeting facilitation as well as time and mechanisms for consultations with constituents.

**Public Engagement Processes: Dialogue, Facilitated Meetings and Workshops, Facilitated Advisory Committees**

Public policy mediation is also related to and overlaps with other processes that engage citizens in discussions of public concerns. Dialogues, facilitated meetings and workshops, and facilitated advisory committees are similar to and different from public policy mediation in relation to their intended objectives, the participants, and process components and dynamics.

**Objectives:** Public policy mediation and the above public engagement processes are generally initiated to provide forums for vigorous and open, yet safe, exchanges of ideas, opinions, and perspectives on public issues. The expected outcome of public policy mediation, as has been stated above, is a consensus agreement. Examples include a plan to reduce the incidental take of marine mammals during commercial fishing operations and the resolution of Indian land claims.

Dialogic processes generally focus on discerning similarities and differences, increasing understandings, mutual respect, and breaking down of stereotypes among people with differing worldviews and deeply held values. Examples include dialogues on the issue of abortion and inter-faith dialogues. Sometimes dialogue participants elect to take individual actions in light of their new understandings.

The results of *facilitated meetings and workshops* are usually recommendations rooted in participants’ shared preferences and priorities concerning the issues under discussion. These recommendations, and the public support for them, are meant to inform and influence decision makers. Examples include meetings concerning siting a waste disposal facility, pandemic influenza planning, and the 9/11 redevelopment and memorial.

Facilitated advisory committees are typically convened to provide government officials with advice on a range of related issues and topics. Advice may be offered as consensus recommendations, in minority and majority reports, or as individual opinions. The government agency requesting advice may choose to adopt some or all of the committee’s recommendations. Examples include a governor’s task force on health care policy, federal advisory committee on environmental justice, and a citizen advisory group concerning a Superfund cleanup.

**The Participants:** Dialogues typically involve individuals, who may act in their capacity as citizens or as representative of a group, for example, a religious leader; but they usually do not represent constituents. Individuals may voluntarily self-select for a particular dialogue, or a sponsor may identify and invite participants.

Facilitated meetings and workshops cover the broadest range of possible participants and may include citizens and/or technical experts and/or stakeholders or any combination thereof. As with dialogues, participants sometimes choose to attend or they may be invited to do so.

Citizens who choose to participate usually populate citizen advisory committees, as in a Superfund citizens advisory group. On the other hand, members of government advisory committees, such as those governed under the Federal Advisory Committee Act (FACA), are appointed by the sponsoring government agency to represent particular stakeholder groups or due to their technical expertise. Committees established under FACA must include parties that represent the spectrum of interests and perspectives indicated by the issues under discussion.
In both government advisory committees and public policy mediation processes, the range of relevant interests are represented, and the public may be provided with opportunities to participate. However, in policy mediation the sponsoring government authority participates as an active negotiator, and the public involvement component may be very specifically designed to inform and influence the negotiators, as occurred in a consensus process to develop a city charter to restore local governance.

The Process: The process components of public policy mediation and other public engagement processes are similar in relation to required pre-meeting activities and differ in the structure and dynamics of the meetings. All require assessments to develop a meeting design specific to the substantive focus and goals; and in some cases, to identify or confirm the participants. Additionally, within the context of the processes, participants are furnished with trusted information, and they develop shared norms and expectations regarding how the meeting will proceed, its expected results, and how those results will be used.

All of these processes rely on facilitators to promote civil discourse on public issues, but with varied dynamics. Dialogue facilitators sustain participant focus on substantive issues as well as on how ideas and perspectives are conveyed. They work to surface underlying beliefs and assumptions in an effort to cause shifts in understandings and emphasize human connections despite differences in values and beliefs. Facilitated public meetings and workshops often involve facilitation teams, including a lead facilitator for plenary sessions and small group facilitators. In small groups, participants typically discuss the issues and generate ideas, all of which is reported and compiled. Priority recommendations and preferences of the large group may be identified as those common across multiple small groups or through a voting mechanism.

Advisory committee facilitators promote discussions that enable participants to pursue a great range of ideas and options. In these processes, the goal is to explore the issues and provide feedback and advice to the government. In some cases, it is not necessary to synthesize the feedback among the various participants as government officials attend as observers. In others, facilitators may assist the group in developing consensus or majority/minority recommendations on a topic discussed only at that meeting or on others that straddled multiple meetings. For example, at some meetings, an Iron and Steel Advisory Committee provided consensus recommendations for redeveloping closed industrial facilities and at other meetings, offered regulatory revisions. The initiating agency may accept or reject any recommendations.

In public policy mediation, mediators also facilitate discussions, however, with a narrower focus than other facilitated meetings because of the intent to prepare a written agreement. Analysis of options, for example, may be more limited due to existing laws, power differentials, and/or resource constraints that the agreement must respect. Additionally, after reaching conceptual agreements, participant discussion is focused on revising proposed written text into a consensus agreement. The process typically occurs over a period of months and includes mediator activity between meetings to promote efficiency at the plenary negotiating sessions.

It is important to understand that public policy mediation is not an alternative to any of these other public engagement processes. Indeed, whereas these processes may be designed to inform the public, interest groups, and government so as to mitigate and even avoid conflict in the development of public policy, mediation is often applied only after conflict is well developed. Dispute resolution experts understand that the array of processes constitute a repertoire of “process options” to be applied by an astute practitioner, who understands the capacities and limitations of each option. Moreover, these processes may be implemented in a sequence or in tandem so that, for example, facilitated meetings inform negotiators of public views and advise the public of the progress of negotiations.

The Future of Public Policy Mediation

Given the polarization and unusually contentious state of political behavior and strategies across the nation, we anticipate an increased reliance on public policy mediation in the near future. The general awareness of mediation continues to grow in the public and the media: recently editorials have called for mediation as public issues deadlock, and political leaders have appealed for mediation. It appears that there is an increasing appreciation of the potential value of mediation in the political process.

In well-publicized events in Wisconsin during the summer of 2011, for example, there have been requests for mediation to assist in the resolution of issues arising out of the occupation of the state capitol by protesters; to support negotiations to bring home legislators, who had left the State to frustrate the passage of certain bills; and even to assist in the development of better relations among Supreme Court justices following a shocking allegation of an altercation in the Court’s chambers. Mediation was accepted and successful in one of those cases. It may be that the convergence of the current political climate and confidence in mediation indicate an increasing role for mediation in the public arena.

Whereas the potential for seemingly unproductive episodes and impasses in political decision-making is inherent in representative democracy, it may be that mediation can be useful amid agreement on the need to overcome sustained deadlock for the public good.
This We Can Do

By Mary Jacksteit

The ABA has urged its members “to set a high standard for civil discourse as an example for others,” in a response to the current state of our nation’s public life.¹

Imagine your least favorite television commentator (or uncle) saying, “Really? Lawyers as champions of civil public discourse? Don’t lawyers actually exemplify the problem?”

Notwithstanding such caricatures, there is good reason to have confidence in the legal profession. While the incurably adversarial will always be among us, most lawyers indeed possess the attributes needed to model and promote civil discourse, something a growing number already do. The key to success, I propose, is a focus on purpose.

The purpose for which lawyers are being rallied to support and practice civil public discourse is the upholding of democracy.² The vital link between public civility and democracy has been beautifully described by Justice Anthony Kennedy. Civility, he says “has deep roots in the idea of respect for the individual... We are civil to each other because we respect one another’s aspirations and equal standing in a democratic society.”³

This article speaks to the multiple ways in which lawyers engage in public life beyond their professional legal roles. The following are the understandings and abilities all good lawyers develop that I believe serve them in “practicing” civil discourse.

Lawyers Understand That Different Roles Carry Different Responsibilities

Lawyers know that along with certain roles come particular obligations, liabilities and boundaries, so they are careful to clarify, and maintain, the roles they assume in the course of their practice (e.g., agent, counsel, fiduciary).

Using this well-honed sensitivity, lawyers can perceive the distinctions of the role of public citizen. Generally speaking, they are not agents but principals (acting and speaking on their own behalf); not authority figures, but peers. Their voice is simply one of many. In some capacities they even withhold their own views in order to support the self-determination of others.

The ABA Report accompanying Resolution 108 describes civil discourse as “first and foremost a personal obligation” about how to “conduct ourselves day in and day out”; in other words, in the multiple roles of our lives.

Lawyers Observe Standards of Professionalism

The ways in which lawyers exhibit professionalism in the practice of law serve them well in the cause of civil public discourse. Some aspects of professionalism seem particularly valuable.

Preparation

When lawyers prepare, they learn the facts, research the law, understand their client’s goals, and explore other parties’ concerns. They study the process in which they and their client are engaged. They think ahead.

This approach to preparation can bring rigor to how one engages in civil public discourse. Think for a moment about a town hall meeting. Typically, its purpose is for government officials to speak to and hear from many community members. Good preparation for a venue with this purpose could include thinking ahead about how to concisely present your viewpoint; preparing materials to leave with staff; cultivating an interest in, and perhaps knowledge of, what others might say; and anticipating how to constructively manage strong feelings (yours and others) if you think they may get triggered.

Reflective Practice

Because mistakes can potentially incur high costs (harm to our clients), good lawyering requires honest appraisal of our performance. Looking at “gaps” between what was intended and what happened is a good exercise, particularly when it comes to civil discourse.

My colleagues and I at the Public Conversations Project teach an action reflection cycle as a method for examining and learning from the effects of one’s communication. The idea is to assess whether impacts match intention, and if they do not, to consider what one might do differently in the future.

There is a way to make this inquiry in advance. Thinking about participating in public discourse, and wishing to support civility, we can ask ourselves:

What tone and language, and what quality of listening are most likely to let me convey my fervent convictions while also supporting a reasoned and respectful discussion that expands understanding of the issue and invites others’ participation? Conversely, what speech and conduct could work against these outcomes?

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If we are lawyers considering how to make appropriate use of our specific abilities, we can also ask ourselves a more personal question:

**Given my purposes and knowing myself, what do I want to bring forward into this situation and what will I want to hold back?**

Responses might be along the following lines:

**My ability to analyze and reason will be helpful here. But my skill at cross-examining will certainly not be.**

I’m used to speaking on behalf of other people. Here, though, I’m going to need to restrain that role and speak for myself, allowing me to share my own experience.

**I usually work hard to give people confidence that I can solve their problems for them. But that won’t help achieve the goals of this meeting. I need to hold back that urge and instead encourage everyone to contribute to solving this dilemma together.**

As a lawyer I like to hold the floor, so I will need to apply self-discipline in order to monitor how much I talk.  

### Practicality: What Will Work?

People come to lawyers to have important things accomplished, be it a contract or a divorce. They come seeking advice for deciding among possible courses of action. The lawyer’s bottom line always involves considering the likelihood of achieving the client’s goal. What will work?

Law professor Andrea Schneider’s research on negotiation styles indicates that what most lawyers think “works” in negotiating, something lawyers do constantly, are non-adversarial modes of communication and a problem-solving orientation. Specific attributes of lawyers judged as the most effective negotiators include: “personable,” “rational,” “realistic,” “perceptive,” “communicative,” “self-controlled,” “adaptable,” and “did not use derogatory personal references.” What works best for negotiation, works as well for civil discourse.

The lawyer’s “what works” attitude is also useful for civil discourse in another respect. Few public issues are so simple that a single actor, single resource or single strategy can address them. Pragmatism promotes a recognition that many actors will be required in order to adequately address a complex challenge. This makes it practical, necessary really, to regard everyone and everything as potentially part of the solution. That in turn calls for considering the positive capacities of all the people, groups, and institutions whose contribution is needed.

### Constant Learning

Lawyers are continuously learning, not just about the law, but also about the worlds of their clients and the contexts of their problems. Taking on a new case or a new client nearly always initiates a process of exploration and investigation. Lawyers are trained to know what they need to know.

A willingness and ability to learn are strong assets for practicing civil discourse in several respects. One, if there are things to be learned, listening carefully to others is necessary. Listening is essential to civility. Second, recognizing we do not have the full picture, we know the possibility exists that the way it looks now is not how it will look after learning more. Openness to where learning might lead us, is a strong asset for civil discourse. It encourages us to test our assumptions.

A bent for learning may also serve the lawyer in a very different way. Concern about civil public discourse can draw one into a wide range of topics including communication theory, deliberative democracy methods and even brain science. These are intriguing topics to explore.

### Lawyers Have Directly Applicable Skills and Abilities

#### Asking the Right Questions

Attorneys ask questions to elicit facts and opinions, matters they want to know or want a decision-maker to know. Sometimes their questions are designed to draw out weaknesses of opposing parties’ positions. Their questions match their purposes. This means lawyers know how to consider what questions would best serve the purposes of civil discourse.

When what is called for is encouraging participation, supporting reasoned deliberation and expanding understanding, we need our repertoire to include questions that welcome clarification, surface underlying concerns, support reasoned deliberation and expand understanding. Lawyers understand that how decisions are made, the way participation is structured (physically and procedurally), and the manner in which information is shared, matter significantly. A process can open or close access,
equalize or differentiate participation, enhance or retard communication.

This makes sensible the idea that the “process” for civil public discourse also needs to be aligned with its purposes. To use Public Conversations Project terms, the “conversational structure” will ideally be one that invites civil discourse and discourages its opposite.

A simple illustration of the impact of structure is a room’s seating arrangement. Theater-style rows and standing microphones promotes limited interaction with others, a listening-only role for most people and a restricted opportunity for speaking that favors those who can speak before a crowd. It also empowers anyone looking to deliver a diatribe. On the other hand, a set-up with round tables staffed with facilitators promotes small group discussion in which everyone can speak, provides a greater potential for connections among people holding a variety of views, and impedes speeches to the whole room.

Many other process elements effect, in different ways, how people participate. Discussions may have “ground rules” or other guidelines. These may include time limits on speaking and guidance to avoid interruptions and personal attacks. People may be instructed to submit questions in writing. There may be recording of participant input on flipcharts, by transcript or by more sophisticated technology like keypads.

Understanding the important relationship between process and purpose, lawyers will appreciate attention to the “how” of public discourse.

Applying Reason and Analytical Thinking

A lawyer’s stock-in-trade is the ability to organize facts logically, distinguish what is relevant from what is not, analyze opposing considerations, and compose clear, reasoned arguments and presentations. This ability to “connect the dots” is highly valued.

These are all good skills for civil discourse, when adapted to that context. Obviously, public discourse is not constrained by the rules of legal proceedings. It accommodates those who use stories, not logic, to make their points, and those who appeal to “higher” laws or ethics, not laws, to determine right from wrong. Relevance is a much more elastic concept. Airing matters that would not be admitted in many formal legal settings may be vitally important.

Experienced lawyers know very well that disputes often entail much more than legal issues. At play can be history, belief systems, relationships and strong emotional and psychological currents. These may forcefully surface in public discourse. Acknowledgement, empathy and even apology may at times be the most powerfully constructive response. For example, I once assisted a community effort where massive development was poised to explode on a low-income neighborhood that a generation before had been nearly destroyed by “urban renewal.” Memories of that past injustice needed to be expressed and honored in order for people to move to envisioning a future that would not repeat the past.

Yes, This We Can Do – Lawyers Can Be America’s Champions Of Civil Discourse.

On the theme of purpose – our common purpose to uphold democracy — I close with Rodney Smolla, a First Amendment scholar and former law school dean who wrote these words a year ago in the wake of the shooting of Gabrielle Giffords:

Those who participate in the democratic experiment … do have choices. Those of us who genuinely form the democracy, Republican and Democratic and independent, right, left and center, have it in our power to improve the quality of our public discourse. And we should do it, for the good of the country … . We should do it because it will … make the country better, and our democracy stronger.6

Endnotes

1 American Bar Association Resolution 108 to Promote Civil Public Discourse was unanimously adopted in August, 2011. See page 23.

2 The opening line of Resolution 108 “affirms the principle of civility as a foundation for democracy and the rule of law.” (Emphasis added.) The Section of Alternative Dispute Resolution Report accompanying the resolution says more: “[A] true and free democratic society cannot long endure” in the kind of “toxic environment” that we suffer today. (p. 2).  


6 Resolution 108 authorizes the ABA and its member entities to “foster the structural advance of democratic governance by encouraging the growth of collaborative processes that are increasingly being integrated into federal, state and local government policy making.”

7 The Enemy Within: Why We’re Hardwired for Conflict, the Public Conversations Project (January 27, 2011), http://www.publicconversations.org/blog/enemy-within-hardwired-conflict.

8 We Need to Improve Civil Discourse for Our Own Sanity, Birmingham News (January 23, 2011) http://blog.al.com/birmingham-news-commentary/2011/01/viewpoints_we_need_to_improve.html.
Fostering Civility in Public Discourse
Speech Delivered at the Opening Assembly of the Annual Meeting of the American Bar Association, August 6, 2011

By Stephen N. Zack

Before the opening assembly of the ABA’s annual meeting, I announced that the ABA and the Canadian Bar Association had executed a Memorandum of Understanding that memorializes the long and warm relationship between our professions and our countries.

We have always shared the same values and concerns and we look forward to continuing to work together on programs that advance human rights and the rule of law. One important aspect of this is civility.

Civility is more important today than ever before for our profession to show the way to our nation and how we can lead a return to civility.

Our visit to Canada provided an opportunity to learn from our Canadian friends. It’s interesting to note, for instance, that the lawyer’s oath in Ontario includes a word that is sometimes missing in U.S. oaths. That word is civility.

The oath reads, in part: “In all things I shall conduct myself honestly and with integrity and civility.”

It’s an issue that has been discussed for generations, if not centuries. More than 400 years ago, Shakespeare said in “The Taming of the Shrew,” “Do as adversaries do in law — strive mightily, but eat and drink as friends.”

How many of us growing up were taught the statement, “I don’t agree with what you say but I will defend to the death your right to say it.” Today, we hear, “I don’t agree with what you say, you shouldn’t say it and, if you do say it, you are a bad person and I will raise my voice to try to keep you from being heard.” Where did we lose our way?

Efforts to foster civility in public discourse have been in the forefront of American society for as long as many of us can remember. During his inaugural address over 50 years ago, President Kennedy issued a message that resonates today for lawyers and for all men and women who believe in the rule of law, and public life, for that matter. He said, “Civility is not a sign of weakness.”

In 1971, Chief Justice Warren Burger addressed civility within the legal profession during remarks before the American Law Institute. Chief Justice Burger said, “Civility is really the very glue that keeps organized society from flying into pieces” — the pieces we are witnessing today all around us.

Given the state of our national discourse lately, those remarks are more important today than ever. In an age where someone shouts down the President on the floor of Congress, where talking heads scream over each other on what passes for truth on cable TV, where gossip magazines and blogs make up stories out of whole cloth, and where talk radio listeners only want to hear one side of a dispute — their side — we have a serious uphill battle that we must wage.

Why do we, as citizens and lawyers, care about civility? Because we care about truth, learning, real facts, fairness, honest debate that enlightens, adherence to rules, and respect. And incivility degrades all those things.

We understand that the role of the lawyer as advocate is fundamental to our profession. We are trained to be zealous advocates for our clients’ interests. And that is precisely why we must take advantage of the unique opportunity our profession gives us, so that our children will live in a society that honors civility.

Since we do much of our work in public, where civility can be demonstrated, and because we are often in opposition to each other, we can show how one disagrees without being disagreeable.

The great Justice Learned Hand said that in a democracy we must believe in the possibility we may be wrong. Incivility destroys that possibility and the very fabric of our nation.

Good lawyers know that driving home an argument doesn’t require sharp words and nasty accusations. This was clearly proven by the recipients of our ABA Medal in 2011, Ted Olson and David Boies, and how they behaved in the Bush vs. Gore case.

My son and niece are young lawyers, and I would be very proud if my grandchildren followed in this great
profession. But whatever they choose to do, I want them to live and work in a nation that values civility.

This continuing slide into the gutter of incivility degrades us all. It destroys the values of respect and diversity that we all treasure, and that leads us to bad societal decisions, to demeaning arguments, and intolerance and repression — symptoms we see all around us.

This lack of civil discourse must stop here and now. Because of our role and our visibility as lawyers and counselors, we can and must here and now begin to change the tone, volume and honesty of our public discourse.

Efforts to promote civility go back many years — even within the American Bar Association and the Florida Bar. In October of 1989, as President of the Florida Bar, I wrote an article entitled, “On Being an Advocate or a ‘JERC’ (Jurisprudence Exercised Rudely and Callously).” The role of lawyers as an advocate is fundamental to our profession. But a lawyer has no right to use the guise of advocacy to justify being a JERC.

We must not let this public perception of the JERC be the image of a profession whose role models have been Thomas Jefferson and Abraham Lincoln, and today Sandra Day O’Connor and Steve Breyer.

Twenty-five years ago, the ABA Commission on Professionalism issued a blueprint for the rekindling of lawyer professionalism and civility. Among other recommendations, it urged that law schools promote specific tools for “learning and practicing civility with students’ first exposure to the profession” and urged bar associations “to instill civility into new associates.”

A few years later, at a meeting such as this, Justice O’Connor noted that “the justice system cannot function effectively when the professionals charged with administering it cannot even be polite to one another.”

Sixteen years ago, the House of Delegates passed Resolution 113 encouraging civility in recognition that a “lawyer owes the profession adherence to a higher level of conduct than mere observance of the rules of professional conduct.”

We have had our warnings. We must now have our call to action. Report 108 to the ABA House of Delegates reaffirms the principle of civility as a foundation for democracy and the rule of law. It is our responsibility to demonstrate to society, our legislatures, school boards, TV and radio shows, magazines and blogs, that true civility comes from the appreciation of our higher calling and dedication to public service, which must unite as a profession.

Let us rededicate ourselves to the proposition that words matter, how we treat others matters, and how others see us matters — not just for ourselves, but for generations to come. ✦

**ABA HOUSE OF DELEGATES**

**RESOLUTION 108**

Cosponsored by:

ABA Section of Dispute Resolution | ABA Section of Antitrust Laws | ABA Section of Real Property, Trust and Estate Law
ABA Section of State and Local Government Law | ABA General Practice, Solo and Small Firm Division | ABA Section of Legal Education and Admission to the Bar | ABA Section of Science and Technology Law | ABA Section of Intellectual Property Law | ABA Section of Individual Rights and Responsibilities | ABA Section of Administrative Law and Regulatory Practice | ABA Young Lawyers Division
ABA Section of Tort Trial and Insurance Practice | ABA Section of Business Law | San Diego County Bar Association | Indiana State Bar Association | New York State Bar Association | Delaware State Bar Association | American Judicature Society | Judge Advocates Association | National Conference of the Administrative Law Judiciary

RESOLVED, that the American Bar Association reaffirms the principle of civility as a foundation for democracy and the rule of law. When dealing with the public as well as with one another, lawyers should set a high standard for civil discourse as an example for others in resolving differences constructively and without disparagement of others.

FURTHER RESOLVED, that the American Bar Association urges all lawyers, ABA member entities and other bar associations to take meaningful steps to enhance the constructive role of lawyers in promoting a more civil and deliberative public discourse.

FURTHER RESOLVED, that the American Bar Association urges all government officials and employees, political parties, the media, advocacy organizations, and candidates for political office and their supporters, to strive toward a more civil public discourse in the conduct of political activities and in the administration of the affairs of government.

FURTHER RESOLVED, that the American Bar Association supports federal, state, territorial, and local governmental policies, practices, and procedures that promote civility and civil public discourse and that are consistent with the First Amendment, and other federal and state constitutional requirements.
How to Combat Incivility:
A Policy Agenda for Civic Renewal

By Peter Levine

The American Bar Association recently passed Resolution 108 finding that “Contemporary political discourse continues to spiral to unprecedented levels of acrimony and venom, thereby endangering not only the quality of decision making about important public issues, but also the very lives and safety of public servants and citizens.”

The shouting matches that we observe on television are nothing new. In the election of 1800, John Adams’ “men called Vice President Jefferson 'a mean-spirited, low-lived fellow, the son of a half-breed Indian squaw, sired by a Virginia mulatto father.'” The incentives in a competitive political campaign have usually favored nastiness, and competition is healthy.

What has changed is the lack of an everyday alternative. Unions, religious congregations, and neighborhood and membership organizations have all shrunk dramatically since 1970. People are substantially less likely to work on community projects and to attend meetings than they were a generation ago. Newspaper readership has fallen at a similar pace, and no alternative source of reported and edited political news comes close to replacing the traditional daily newspaper.

Other trends run roughly in parallel to these. Jury service plays a shrinking role, as the proportion of criminal cases that go to trial has dropped from one in 12 to one in 40 since the 1970s. In 1940, each school district in the United States served only 1,117 people, and usually the district had an elected board. Today the average school board serves almost 20 times as many people, and often it has an appointed leader. The odds, therefore, that any individual will serve on a jury or a school board have fallen by huge margins.

As a result, Americans cannot react to a nasty fight on the television news by telling themselves: “That is not how we get along in our community.” Increasingly, we are not involved in the business of our own communities. Because we lack experience making decisions about public matters with fellow citizens who are different from ourselves, we are in no position to judge the quality of arguments among leaders or to choose representatives who are good at civil dialogue. We cannot distinguish between rudeness and passion, or between obfuscation and complexity.

Civil society is in grave condition, measured not by the proportion of talk that is “civil,” for which no statistics exist, but by the sheer rate of participation in voluntary organizations that involve talk. We are withdrawing from such conversations with diverse people, by, for example, choosing to live in politically homogeneous
communities’ and leaving multi-purpose, diverse organizations for single-issue lobbies and narrowly-defined professional organizations.8

Some of the symptoms of this withdrawal include alienation from public life, with Congress holding a nine percent approval rate at the time of writing, and pervasively manipulative communications. Our first instinct now is to develop a “message” to persuade masses of other people to our view — rather than initiate a conversation to decide what would be best. In this context, angry and divisive messages often pay off.

ABA Resolution 108 calls for lawyers both as individuals and in groups to take “meaningful steps” to do what they can as lawyers to help promote a more constructive civil discourse. Those who work at the state and local levels have a special opportunity in this regard because of their ability to influence what government might do to improve civil discourse. Meaningful steps in this regard might be to encourage government to:

1. Choose one grave national issue and use federal policy to support participatory, deliberative solutions. The issue could be, for example, the high school dropout rate, constantly rising costs of medical care, the loss of jobs and population in our post-industrial cities, childhood obesity, or the failure of policing and sentencing to deter crime. Regardless of the issue, the response would involve a substantial amount of decentralized decision-making and direct work by empowered local bodies that are supported with funds and education and held accountable for results. Youth would be recruited, trained, and rewarded to play important roles in both the discussions and the work.

To be sure, each social or environmental issue connects to others; people do not live within particular institutions such as high schools or clinics. However, the momentum for civic renewal is too weak to permit the federal government to use civic strategies broadly right away. Too few citizens and leaders are now demanding such strategies, nor are they equipped to help implement them. A deep investment in one issue area would provide a high-profile model. At the same time, it would train and empower hundreds of thousands of active citizens, some of whom would later create or demand civic opportunities in other issue domains.

For example, if the U.S. Department of Education, reversing 20 years of momentum in the opposite direction,9 were to delegate important decisions to empowered bodies of parents, teachers, students, and other residents, some members of those bodies would become active at the local level in related topics, such as crime and obesity. Many historical case studies indicate that the strongest impact of particular projects comes later, when participants start unanticipated initiatives of their own.10

2. Make voluntary national service a means to develop civic capacities. Every participant should have opportunities to discuss and influence the strategies used in his or her service program and should be expected to obtain skills for deliberating, facilitating meetings, recruiting citizens, analyzing issues, and advocating publicly. To achieve that objective would require setting standards for learning across all the federal service programs.

3. Prepare a new generation of active and responsible citizens. People form attitudes and habits related to civil society when they are young and keep them for the rest of their lives. But civic education has been cut in most school systems, and there are too few opportunities for young people to learn through service and extracurricular activities. Congress should revive the small Learn & Serve America program that provides competitive grants for service-learning, eliminated in 2011 after 21 years of work. Congress should also restore funding for civic education in schools, eliminated in 2011, but direct the funds to organizations that test or expand innovative educational methods and rigorously evaluate their impact.

Meanwhile, the Office of Civic Education within the U.S. Department of Education should be elevated from its current low status within the Office of Safe and Drug-Free Schools and given a leadership role in coordinating the civic education functions of all federal agencies, including the National Parks Service, the national endowment for the humanities and the arts, the Defense Department, and Homeland Security.

4. Support charter schools, community development corporations, watershed councils, and federally qualified health centers. These are examples of public institutions that have expanded opportunities for civic engagement. Citizens may found such organizations or help guide them by serving on their boards. Their structures vary in ways that matter for civic renewal. For example, a charter school that has a board composed of parents and community members promotes active citizenship more than a charter school dominated by its charismatic founder. A school that must accept students from a lottery promotes equity better than one that can select its student body. Thus, the government should sustain or expand support for these innovative institutions while also moving them in maximally “civic” directions.

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5. Give the public a voice in policymaking. When members of Congress meet the public in open sessions misleadingly called “town meetings,” they encounter polarized and mobilized members of advocacy groups, acting strategically. But when citizens are convened to discuss complex and divisive issues, majorities usually choose reasonable policies, and almost all the participants report satisfaction with the process. A model is the national deliberation called “AmericaSpeaks: Our Budget, Our Economy,” which convened 3,500 participants to develop budget outlines for the federal government in 2010. Participants, although highly diverse, shifted toward a mixed package of revenue increases and budget cuts. Ninety-seven percent thought that “People at this meeting listened to one another respectfully and courteously,” and 81 percent thought that “Decision makers should incorporate the conclusions of this town meeting into federal budget policy.”

To make such processes common and enhance their influence on policies and on the broader political culture, Congress should take two major steps. One would be to fund a high-profile deliberation on a divisive and important topic. The participants’ favored policy would come back to Congress as a bill requiring an up-or-down vote. The other important step would be to create an infrastructure that is ready to organize this and other public deliberations when needed. The infrastructure would consist of standards for fair and open public deliberations, a federal office that could coordinate many simultaneous forums and collect all their findings, and a list of vetted contractors that would be eligible to convene public deliberations with federal grants.

6. Launch a Civic Communications Corps: The metropolitan daily newspaper and its professional roster of reporters was a pillar of civil society for more than a century, complementing voluntary civic associations. Newspapers and traditional journalism are in dire condition. Without government’s help, citizens are creating diverse and interactive new forms of media—mostly online—to counteract the decline of the commercial news and entertainment businesses. But many Americans cannot participate in or benefit from these new media because they lack equipment and broadband access or the necessary skills to be creative online. Meanwhile, thousands of young adults, including many without college educations, have relevant skills, from highly technical expertise with computers and networks, to human relationships in their communities, to creativity with videos and music.

To take advantage of their potential, the government should launch a small new Civic Communications Corps within AmeriCorps. Full-time volunteers would be placed in community organizations to serve their communications needs and would also meet at the municipal level to work on city or county-wide strategies for enhancing the flow of information and discussion. They would generate software, examples, training videos, and other resources for the rest of the national and community service world to use in serving public communications needs. College and universities would also be encouraged to use these tools to become communications hubs for their neighboring communities.

Endnotes

1 A.B.A. House of Delegates, Res. 108 (passed August 8, 2011).
5 Author’s calculations based on school district statistics from the National Center for Education Statistics and population estimates from the U.S. Census, http://nces.ed.gov/programs/digest/d10/tables/dt10_090.asp.
8 Theda Skocpol, Diminished Democracy: From Membership to Management in American Civic Life (2003).
13 Levine, supra note 3.
Mediator’s Proposals: Let Me Count the Ways

By Margaret Shaw

The use by mediators of what has become known as a “mediator’s proposal” can be controversial. A mediator’s proposal is generally understood to be an “end of the day” effort by a mediator to bring closure in a case by suggesting an outcome to the parties that the mediator thinks will have the best chance of both sides being able to agree to. These are often framed as, “Can you live with it?” Some mediators find this kind of intervention to be extremely effective and use it in many if not most of their cases. Others express concern that if parties expect that mediators will end up at the end of the day suggesting a number to resolve the case, they will rarely confide to the mediator their true settlement range.

In the course of discussing this subject with colleagues, it has been fascinating to discover the myriad ways in which mediators actually “do” mediator’s proposals. This article explores some of these ways.

The “traditional” mediator’s proposal occurs after many hours of mediation when the parties are at apparent impasse. Typically, the mediator will suggest and explain the concept and obtain the parties’ approval before intervening in this manner. An explanation might sound something like the following:

There is one more thing we can try in an effort to help you reach settlement, and that is a mediator’s proposal. What this involves is my trying to come up with a number that has the best chance of both sides saying “yes” to. It is not a number that necessarily reflects my own evaluation of the case, it is rather a number that I think may be one you both could “live with.”

The way the process would work is that I would come up with a number and communicate that same number to each party. You would have some time to think about it, then you would tell me in confidence whether that is a number you could accept as a settlement. The other party will not know your answer unless you both say “yes.” If you accept the mediator’s proposal and the other side rejects it, they will never know that you accepted it. I will simply announce that we do not have a settlement.

If all parties agree to the procedure, some mediators make their proposal right then and there. Others like to ponder the appropriate number overnight and call the parties by telephone the next day. Still others provide their proposal in writing several days after the mediation, accompanied by a detailed rationale.

In an informal survey of my colleagues, almost all of them indicated that mediator’s proposals are effective, although sometimes not on the day the proposal is made and sometimes not at the exact number proposed by the mediator. Reports as to the frequency of use of the technique varies among mediators, with one mediator reporting use in 40 to 50 percent of his cases, another in 10 percent or less of his cases, and others somewhere in between.

Variations on the Theme

One of the simplest of the variations of a mediator’s proposal involves the issue of keeping each party’s answer as to whether or not they would accept the proposed number confidential. One experienced mediator I spoke with theorized that if one party has accepted the proposal, it might sway the other party to also say “yes” if they knew that their own “yes” answer would end the case. In fact, this particular mediator has experimented with this form of mediator’s proposal and found that his theory works in practice. He has taken care, of course, to ensure that he has the permission of the party saying “yes” to disclose that fact to the other side. It should also be noted that he does not tell the parties in advance that if he gets one “yes,” he will ask if he can disclose that “yes” to the other party. In this way, he hopes to prevent each party from awaiting the other’s response before it responds.

Another colleague said she sets up the process for a mediator’s proposal by floating not only the concept of a mediator’s proposal but also the range in which that proposal would fall. She will say something like the following, to each side in turn:

I’m thinking about making a proposal in the range of, say, 1.3 to 1.7 million. I don’t want a reaction from you right now, and I am not fishing, but there’s no sense in my making a proposal that will be dead on arrival. Is this at least a range that you could seriously consider?

She reports that once both parties have had the opportunity to think, without pressure, about such a
In theory, if one side accepts the mediator’s proposal and the other side rejects it, the mediation is over and the parties are left to face their alternative, whether litigation or arbitration. If this were not the case, parties would try to game the process, and the finality of the procedure, at heart its basic appeal, would be compromised. However, at least one mediator has approached this kind of situation in a different vein. He has gone to the party who has accepted the proposal and said something like the following:

I know that we agreed upon the ground rules going into this process, including the promise that I would not tell the other side you accepted the proposal unless they, too, agreed to it. But here I think it might make a real difference if they knew you had accepted it and, I will really lean on them. I think it’s highly likely that if they know you accepted they will go back to their decision-makers and get a different answer.

This approach, he reports, generally results in resolution, even though it does not adhere strictly to the traditional “rules of the game.”

Risks and Rewards of a Mediator’s Proposal

There appears to be general agreement among mediators and parties alike that while a number of years back the concept of a mediator’s proposal was not well-known, the more widespread use of this technique has led to its more common usage as a potentially useful settlement technique in appropriate circumstances. At the same time, the more widespread use of this technique has its downsides. If parties expect that the mediator may make such a proposal at some point, they may intentionally mislead the mediator about their true intentions in an attempt to set the range of the ultimate proposal.

So, where does this leave us? To answer simply that this leaves us between a rock and a hard place seems like a dodge. I have always advocated for use of the technique sparingly for the reasons articulated, but the cat is very clearly out of the bag, and there is no going back. Indeed, despite the dreamy ideals of the early mediation adherents, as mediation has become more and more an accepted part of the litigation process, it is not surprising that litigants have come to “game” this part of the technique as well. Mediator’s proposals are very alive and well and an increasingly accepted — and often anticipated — part of the mediation landscape. Perhaps one can do no better than to advocate that mediators be thoughtful about whether, when and how they use this very powerful technique. Such a perspective, I believe, would truly benefit the mediation community as a whole. ✷

Endnotes

1 Stephen A. Hochman, A Mediator’s Proposal— Whether, When and How it Should be Used, in DEFINITIVE CREATIVE IMSAPSE-BREAKING TECHNIQUES IN MEDIATION 223 (Molly Klapper ed., 2010).
What to Do When a Party Refuses to Pay Its Share of Arbitration Costs

By Mitchell L. Marinello and Alison T. Schwartz

Most commercial arbitrations are administered by an arbitral association such as the American Arbitration Association (AAA), JAMS, or the International Institute for Conflict Resolution and Prevention (CPR). These organizations typically require the party commencing the arbitration to pay a filing fee to get the arbitration started. Once the arbitrator has been selected, the arbitrator usually holds a case management conference and issues an order setting a schedule for the arbitration. At that time or shortly afterward, the arbitral association asks the parties to deposit funds to cover the arbitrator’s anticipated fees and expenses. The AAA and JAMS invoice each party for its share of this amount and expect payment within a stated time frame in advance of the hearing. In this regard, Rule 52 of the AAA Commercial Arbitration Rules states:

The AAA may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator’s fee, if any, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case.

Sometimes, one of the parties is unable or unwilling to pay its share of the arbitration fees and expenses. This article explores the options available to an arbitrator in those circumstances.

What Do the Rules Say?

When a party refuses to pay its share of arbitration expenses, the first place to look for guidance is the rules the parties selected to govern the arbitration. These rules are usually identified in the arbitration agreement itself or are provided by the arbitral association that the parties have selected to sponsor or administer their case. For example, Rule 54 of the AAA Rules provides a framework for arbitrators faced with a non-paying party:

If arbitrator compensation or administrative charges have not been paid in full, the AAA may so inform the parties and order that one of them may advance the required payment. If such payments are not made, the arbitrator may order suspension or termination of the proceedings. If no arbitrator has yet been appointed, the AAA may suspend the proceedings.

Thus, Rule 54 allows an arbitrator to order that one party cover the other’s costs. If that party refuses, the arbitrator can suspend the arbitration until payment is made or dismiss it outright. Consistent with AAA Rule 54, two federal appeals courts have held that an arbitrator can dismiss an arbitration proceeding if one party refuses to advance the non-paying party’s fees.1 In both of those cases, the claimants requested the court to undo the arbitrator’s order requiring the claimant to advance all of the arbitration expenses. The courts rejected these requests and refused to interfere with the arbitrator’s authority to decide how the arbitration costs should be allocated.

If one party agrees to cover the non-paying party’s share of the arbitration expenses and the arbitration goes forward, the arbitrator should adjust the final award to reimburse the party that advanced the other side’s share of the expenses. The Ninth Circuit emphasized this and...
noted that the arbitrator’s failure to fairly redistribute costs “could likely be subject to challenge in a suit to enforce, modify or set aside an award.”

Suspended or dismissing the arbitration when one party will not cover the other side’s share of the expenses is not always a satisfactory approach. In a commercial setting, if the claimant does not pay its share of the expenses, then it is eminently fair to suspend the arbitration until the claimant makes such payment, or if payment is not made within a certain time, to dismiss the claimant’s case. A claimant should not be permitted to hold a case open and waste the arbitrator’s and other party’s time if it is not able or willing to pay its share of the cost for the proceeding that it initiated.

If the respondent refuses to pay its share of arbitration expenses, however, suspending or dismissing the arbitration proceeding may be inequitable. Suspension or dismissal usually would punish the claimant, who is seeking relief, for the respondent’s failure to fulfill its obligations, and it rewards the respondent for being uncooperative. This is particularly true if the respondent is deliberately attempting to thwart the claimant’s contractual right to arbitration or if being required to advance all the arbitration expenses creates a financial hardship for the claimant. The Ninth Circuit noted that, although it is within the arbitrator’s discretion, dismissing the arbitration when the claimant refuses to cover the non-paying respondent’s costs “may not be an ideal solution.” Instead, the arbitrator should consider other options, but must be careful not to overstep his or her authority.

**Send the Parties to Court**

One option is for the arbitrator to determine that the respondent waived its right to arbitrate by failing to pay its share of the expenses. Thereafter, the arbitrator should terminate the arbitration and clear the way for the claimant to litigate its case in state or federal court.

This approach is consistent with federal law. Section 3 of the Federal Arbitration Act provides that a court can enter an order compelling parties to arbitrate so long as the party seeking the order “is not in default in proceeding with such arbitration.” In *Juiceme LLC v. Booster Juice LP*, a federal district court held that an arbitrator – not a court – must determine whether a party’s failure to cover arbitration costs constitutes a “default in proceeding with arbitration.” If the arbitrator finds such a default, then the claimant can litigate its case in court.

That is exactly what happened in *Sink v. Aden Enterprises, Inc.*, in which the arbitrator held the non-paying respondent in default and terminated the arbitration. The claimant then pursued his claims in federal court. Later, the respondent came up with the funds to pay its share of the arbitration expenses and asked the court to order the parties back to arbitration. The Ninth Circuit affirmed the trial court’s denial of this request, holding that respondent waived its right to arbitrate by materially breaching its contractual obligation to pay arbitration fees. The court also ruled that respondent’s failure to pay its required arbitration costs was a “default in proceeding with arbitration” under Section 3 of the FAA. The court found that compelling arbitration would “allow a party refusing to cooperate with arbitration to indefinitely postpone litigation.” Accordingly, the claimant was permitted to pursue its claims in a court of law.

Although this approach preserves the claimant’s right to have its case heard without undertaking a disproportionate financial burden, it also is not ideal because it allows the respondent to circumvent the parties’ agreement to arbitrate and denies the claimant the benefits of arbitration.

**Hold a Streamlined Arbitration Hearing**

Another option is for an arbitrator to keep the parties in arbitration and hold a streamlined hearing proportionate to the funds available. An arbitrator must give each party the opportunity to present relevant evidence and witnesses to support its claim or defense. However, the AAA Rules give an arbitrator the discretion to vary this procedure so long as each party is treated equally and is given a fair opportunity to present its case. Rule 30(a) of the AAA Commercial Rules provides:

> The claimant shall present evidence to support its claim. The respondent shall then present evidence to support its defense. Witnesses for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

The JAMS Comprehensive Arbitration Rules and Procedures (the JAMS Rules) grant the arbitrator the same leeway. JAMS Rule 22 allows the arbitrator to vary
the arbitration hearing if it is “reasonable and appropriate to do so,” provided that all parties “are afforded the opportunity to present material and relevant evidence.”

For example, if the estimated fees for a two-day arbitration are $6,000, and the claimant already paid $3,000 but the respondent refuses to pay its remaining half, the arbitrator could hold a one-day hearing costing approximately $3,000. Instead of allowing each party a full day to present its case, the arbitrator can allot each party a half day and limit the number of witnesses each party can present at the hearing. As long as each party is treated fairly and given a reasonable opportunity to present its evidence, the arbitrator can hold a streamlined hearing with whatever funds he or she has to work with.

Holding a streamlined hearing has the obvious advantage of upholding the parties’ agreement to arbitrate. It also avoids rewarding a respondent for refusing to pay its share of the arbitration costs and does not place an undue financial burden on the claimant. Of course, this option is also not ideal. The arbitrator may find it difficult to hear all of the evidence needed for a proper resolution of the case in an abbreviated hearing.

An Arbitrator Has No Authority to Enter Judgment against a Non-Paying Respondent

Importantly, an arbitrator does not have authority to enter judgment against a non-paying respondent without giving it an opportunity to defend itself. The AAA and JAMS Rules require that the respondent be given an opportunity to present evidence in support of its defense. As stated earlier, both sets of rules permit the suspension or dismissal of a claimant’s claims for failure to pay fees. The JAMS Rules state that a non-paying party may be precluded from submitting evidence to support an affirmative claim, but cannot be barred from presenting its defense. In Coty, Inc. v. Anchor Construction, Inc., the Supreme Court of New York held that barring a non-paying respondent from putting on a defense was a due process violation. Thus, unless the parties’ arbitration agreement expressly states that a non-paying party can be precluded from presenting its case, an arbitrator may not invoke this remedy.

Summary of an Arbitrator’s Options

An arbitrator faced with a party who will not pay its share of the arbitration expenses has several options to move the case forward. He or she can: (1) dismiss the proceeding or suspend it until payment is made; (2) order one party to advance the nonpaying party’s share of the arbitration costs and award them back in the final award; (3) hold the non-paying party in default under its arbitration agreement and terminate the arbitration in favor of litigation; or, (4) conduct an abbreviated hearing that is commensurate with the financial resources available. Undoubtedly, the most appropriate option will depend on the facts of each case.

Endnotes

1 See generally Dealer Computer Services, Inc. v. Old Colony Motors, Inc., 588 F.3d 884, 887-88 (5th Cir. 2009); Lifescan, Inc. v. Premier Diabetic Services, Inc., 363 F.3d 1010, 1012-13 (9th Cir. 2004); accord Williams v. Tidby, No. C-02-05687, 2005 WL 645943, at 6-7 (N.D. Cal. Mar. 18, 2005) (applying Lifescan, Inc.).
2 See Dealer Computer Services, Inc., 588 F.3d at 888, n.2.
3 See Lifescan, Inc., 363 F.3d at 1013.
6 Sink v. Aden Enterprises, Inc., 352 F.3d 1197, 1199 (9th Cir. 2003).
7 Id.
8 Id. Federal courts have applied Sink to hold that a party refusing to pay its required arbitration fees waives its right to arbitrate and must proceed in court. See Garcia v. Mason Contract Prods, LLC, No. 08-23103-CIV, 2010 WL 3259922, at 4 (S. D. Fla. 2010) (by refusing to pay its share of costs, respondent “forfeited its right to proceed with arbitration, and is now bound by the normal procedures of federal law.”)
9 See Am. Arb. Ass’n (AAA) Rule 30(a) (2010).
10 JAMS Comprehensive Arb. Rules & Procedures (JAMS) Rule 22(a) and (d) (2010).
11 In the unlikely event that both parties consent, an arbitrator can forgo a hearing and enter an award based on the parties’ written submissions which may include affidavits and supporting documents. See AAA Rules 30(c) and 32(a) (2010); see also JAMS Rule 23 (2010).
12 See AAA Rule 30(a) (2010); see also JAMS Rule 22(d) (2010).
13 See JAMS Rule 31(b) (2010).
The Settlement Discussion Rule and Litigation’s Dirty Little Secret
March 13, 2012
12:00 pm – 1:15 pm ET

"Please Don’t Kill the Umpire"
Arbitration in Baseball Teleconference
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Symposium on ADR in the Courts
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Legal Educators Colloquium
April 21, 2012
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International ADR Workshop
April 21, 2012
Washington, DC

Civil Discourse in Mediation Teleconference
May 8, 2012
12:00 pm – 1:15 pm ET

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Supreme Court Addresses the Credit Repair Organizations Act and Arbitration

In CompuCredit Corp v. Greenwood, No. 10-948 (2012), The U.S. Supreme Court ruled in favor of arbitration in a dispute concerning consumer credit card agreements. The issue was whether disputes concerning the Credit Repair Organizations Act, 15 U. S. C. §1679 et seq., (CROA) could preclude enforcement of an arbitration agreement in a lawsuit concerning violations of that Act. The Respondents, in 2008, filed a class-action complaint against CompuCredit alleging CROA violations, including misleading representation that the card could be used to rebuild poor credit and the opening fees that reduced the credit limit.

The Court found that Congress would have been more explicit in limiting arbitration under the provisions of the CROA if that was Congress’ intent, as in other contexts where arbitration was restricted with a clarity that far exceeds the claimed indications in the CROA. Because the CROA is silent on whether claims can proceed in an arbitrable forum, the FAA requires that the agreement be enforced according to its terms. To read more go to: http://www.supremecourt.gov/opinions/11pdf/10-948.pdf

Nursing Home Neglect and the Arbitration Clause

In two recent cases, the Florida Supreme Court struck down portions of nursing home arbitration clauses that capped damages lower than those allowable in state courts and provisions that disallowed punitive damages. In Gessa vs. Manor Care of Florida Inc., the plaintiff sued for negligence, violation of her rights as a resident, and breach of fiduciary duties. In Shotts vs. OP Winter Haven Inc., the plaintiff sued OP Winter Haven, for negligence and breach of duty that led to her uncle’s death.

Arbitration agreements are standard in most Florida nursing home contracts. The agreements at issue in these cases agreements capped non-economic damages at $250,000. In Shotts, the issue was whether the arbitration clause was valid because it disallowed an award of punitive damages. In Gessa, the arbitration agreement capped the non-economic damages at $250,000 in addition to prohibiting punitive damages. The court held both clauses invalid, stating, “any arbitration agreement that substantially diminishes or circumvents these remedies stands in violation of the public policy of the State of Florida and is unenforceable.”


Yaz Bellwether delayed for Mediation

Kerry Sims v. Bayer Corp., et al., No. 3:09-cv-10012 DRH-PMF, in which plaintiffs are claiming Bayer contraceptives Yaz and Yasmin caused dangerous blood clots, and that Bayer did not sufficiently warn patients of the risks, was scheduled to go to trial Jan. 9. Instead, the U.S. District Court for the Southern District of Illinois appointed George Washington law professor Stephen Saltzburg special master to mediate. The Judge’s order stated: “Professor Saltzburg shall consider and utilize every reasonable mediation option available to effectuate settlements in this litigation. Each party is ordered to negotiate in good faith.”

Vacatur Denied for $54.1 Million FINRA Award

The U.S. District Court for the District of Colorado denied a request by Citigroup Global Markets, Inc. (CGMI) for vacatur of a $54.1 million Financial Industry Regulatory Authority arbitration panel ruling in favor of a group of investors. The investors had claimed breach of fiduciary duty, breach of written contract, constructive fraud, violation of FINRA rules, unsuitability, failure to supervise, and respondent superior.

CGMI sold to a group of investors a number of investments that proved to be flawed, with losses of up to 80 percent. The investors claimed that CGMI materially misrepresented the risks involved when they were convinced to invest in these types of products “in lieu of making or continuing direct investments in highly rated and insured municipal bonds or like securities.”

CGMI argued that the FINRA panel disregarded the law in its award claiming the investors could not have relied on contrary oral representations that the firm made in connection with their purchases because the investors had signed subscription agreements which disclosed that they could lose all of their money. Additionally, CGMI argued that the panel exceeded its authority by awarding punitive damages and by awarding attorney’s fees.

The court was not persuaded by the argument of CGMI, stating, “[t]he fact that the Panel disagreed with CGMI’s legal position is not evidence that the Panel ignored controlling law” and that CGMI did not show “willful inattentiveness” to controlling law. The court found the panel did not exceed its powers in either case, denied the motion to vacate, and granted the investors’ petition to confirm the arbitration award.

To read more go to: http://www.leagle.com/xml Result.aspx?xmldoc=In%20FDCO%2020111221H63. xml&docbase=CSLWAR3-2007-CURR

Matthew Conger is a staff attorney with the ABA Section of Dispute Resolution. Duane Rohrbacher is a law student and Ph.D. candidate at Pennsylvania State University.
2012 Award Recipients Announced

Linda Singer and Michael Lewis to Receive D’Alemberte-Raven Award

The D’Alemberte-Raven Award recognizes leaders in the dispute resolution community who have contributed significantly to the field by developing new or innovative programs, improvements in service and efficiency, research and writings in the area of dispute resolution or continuing education programs. The award is named for Robert D. Raven of San Francisco and Talbot D’Alemberte of Tallahassee, former ABA presidents and pioneers within the ABA in the area of dispute resolution.

Linda Singer and Michael Lewis are pioneers of the dispute resolution profession who have trained thousands of professionals, students, and volunteers worldwide. They co-taught the Mediation Workshop at Harvard Law School’s Program on Negotiation for Lawyers for 25 years, and also taught at the CPR Institute for Dispute Resolution. Singer and Lewis were instrumental in forming the Center for Dispute Settlement in 1971 in Washington, D.C., which has experimented with, developed, operated and evaluated various ways of settling disputes, primarily through mediation, in neighborhood justice centers, courts, and organizations such as schools, prisons and hospitals. They currently are both JAMS panelists in Washington, D.C., and are highly regarded and nationally known neutrals who have resolved many high-profile disputes.

Professor Frank E.A. Sander to Receive Award for Outstanding Scholarly Work

This award honors individuals whose scholarship has significantly contributed to the dispute resolution field. Professor Frank E.A. Sander, the Bussey Professor Emeritus of Harvard Law School, began his scholarship in dispute resolution with an essay for the 1976 Pound Conference that suggested a broader role for courts in helping people resolve disputes. It was an idea later dubbed the “multi-door courthouse.” That insight not only stimulated implementation of Professor Sander’s idea but also attracted other scholars to join in building a new scholarly field of dispute resolution. Professor Sander and co-authors followed a few years later with the first major law school dispute resolution textbook, outlining what might be the issues addressed in this new field.

Intent on encouraging broader and more creative use of mediation and related processes, Professor Sander has contributed frequently over the past 30 years to the scholarship of “change.” In fact, scholars watch for his next thoughtful musings about the “tailwinds” and “headwinds” in terms of achieving more constructive use of dispute resolution and his more recent “mediation receptivity index.” A dedicated mentor, Professor Sander encouraged and guided many of the field’s most outstanding scholars. He continues contributing in his “retirement” as co-author of a new law school textbook on dispute system design and a new — sixth — edition of his pioneering textbook.

Kenneth R. Feinberg and Harry Tindall to Receive Lawyer as Problem Solver Award

The ABA Section of Dispute Resolution established the Lawyer as Problem Solver Awards 10 years ago to recognize individuals and organizations that use their legal skills in creative, innovative and often non-traditional ways to solve problems for their clients and within their communities.

Kenneth R. Feinberg exemplifies the mission of the Lawyer as Problem Solver Award by continually demonstrating the way that lawyers can use creativity and systems design in handling society’s major problems. In the past decade, Feinberg has been at the forefront of three efforts to fairly and efficiently administer claims arising from national disasters caused by a terrorist attack, a major financial collapse, and an environmental catastrophe. As the special master of the federal September 11th Victim Compensation Fund of 2001, Feinberg contacted those qualified to file a claim, evaluated applications, determined appropriate compensation, and distributed the awards. His 2005 book, “What Is Life Worth: The Unprecedented Effort to Compensate the Victims of 9/11,” chronicled this experience. He served as the Special Master for TARP Executive Compensation, and he currently serves as the government-appointed administrator of the BP Deepwater Horizon Disaster Victim Compensation Fund. Feinberg has also been involved in the design of dispute resolution systems involving highly complex product liability claims, such as the Dalkon Shield IUD and Agent Orange. In these roles as well as many others, Feinberg has modeled for lawyers important problem-solving strategies and skills that will shape the dispute resolution field for decades to come.
Harry Tindall has been a role model for lawyers who wish to transition from litigators to peacemakers. An attorney practicing family law in Texas for more than 45 years, even before the addition of court-mandated ADR to family law matters, Tindall has focused much of his practice on negotiation and dispute resolution. He led the movement to enact the first Collaborative Law statute in the United States, which was passed by the Texas Legislature. He went on to lead the effort for approval of the Uniform Collaborative Law Act in his capacity as a commissioner on the Uniform Law Commission. He brings a wealth of lawyering experience to his efforts to solve problems endemic to family law by pressing for legislation that promote the use of mediation and arbitration in family cases, testifying in Congress for reform of child support laws, and assisting in drafting uniform laws on interstate child custody issues. He has served as Chair of the Family Law Section of the State Bar of Texas, President of the Texas Academy of Family Law Specialists and Vice-Chair of the U.S. Commission on Interstate Child Support. He is the author of the leading treatise on Family Law in Texas (now in its 21st annual edition) and serves on the Board of the International Academy of Collaborative Professionals.

New Member Resources

Dispute Resolution Magazine is now on the Web

All of the Dispute Resolution Magazine issues and great articles, dating back to the first issue in 1994, are now available on the Section of Dispute Resolution web site. The enhanced magazine archive is a member benefit, so you will need to use your ABA member log in and password to access the Magazine web site. Please go to http://www.americanbar.org/publications/dispute_resolution_magazine/2011.html to visit our new web site.

Mediation Video Center — A New Video Resource

Through a joint project of the Section’s Mediation Committee and the Suffolk Law Center for Representation in Dispute Resolution, we proudly bring you the exciting Mediation Video Center, a video resource for mediation and negotiation. Use these video clips to educate your clients, as an instruction tool in the classroom, or to hone your skills. They are available at www.ambar.org/disputeresources.

Annotated Code of Ethics for Arbitrators in Commercial Disputes Now Available

The Section’s Arbitration Committee and the Ethics Committee of the College of Commercial Arbitrators have annotated the Code of Ethics for Arbitrators in Commercial Disputes. Have a question on whether to disclose an interest or relationship that is likely to affect impartiality or which might create an appearance of partiality? Are you an arbitrator that has been appointed by one party and want to know your duty to determine and disclose their status? Go to www.ambar.org/disputeresources to find answers and to see how courts have interpreted the Code of Ethics for Arbitrators in Commercial Disputes.

National Clearinghouse for Mediator Ethics Opinions Updated

The searchable database provides comprehensive coverage of over 300 mediator ethics opinions from 43 states. The database contains a short summary of each opinion with a hyperlink to the original opinion or document issued by the state or national body. Visit http://www.americanbar.org/directories/mediator_ethics_opinion.html.

Section to Recognize Members for Their Pro Bono Work

The Pro Bono committee has embarked on a program to recognize the good works and pro bono efforts that Section members have undertaken. Please go to https://abanet.qualtrics.com/SE/?SID=SV_1Um2EyfI4zlCrMo and fill out the brief form and tell us about your pro bono work or a particular project that you or a colleague have undertaken. We recognize that many of you serve pro bono for court programs. We want to collect information on other types of pro bono projects that you have undertaken outside the court programs. The purpose is to compile all the activities so we may recognize the good work of our members as well as provide a forum for our members to share their pro bono experiences.

Each month, we will highlight in the e-Newsletter and on the Section homepage, Section members who have made outstanding or unique contributions to their community without expectation of compensation. We look forward to recognizing the outstanding service and contributions of our members.
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Winter 2012 Captioning Contest

By John Barkai

Because many agree that creativity and humor are effective in resolving disputes, we test our readers’ mettle with an occasional cartoon caption contest.

Submit as many captions for the above illustration as you wish. Please submit captions promptly to meet our strict publication deadlines. All entries are judged by Professor John Barkai at the University of Hawaii School of Law, and the winners will be published in a subsequent issue of Dispute Resolution Magazine.

Mail, fax, or email your entries to:
Professor John Barkai
University of Hawaii School of Law
2515 Dole Street
Honolulu, HI 96822
Fax: 808-956-5569
Email: Barkai@hawaii.edu

Summer 2011 Winners

“Always one to value others’ interests, Sue only used the best lemons in her lemonade — and the best catnip.”
— Alaya De Leon

“Whether in meditation or in running a lemonade stand, you got to show’em the glass is ‘half-full’, not ‘half-empty’”.
— Danny Lunsford

“We appreciate your concession on the lemonade, but our interests are really measured in mice.”
— Daniel Newby

“I know we went out looking for a milk stand, but let’s start the compromising process by settling for lemonade.”
— A. Alan Cade

“In every mediation, when a party gives me lemons, it is my job to make lemonade!”
— Jim Stewart