FOCUS: DELIBERATIVE DEMOCRACY

5 Can Public Policy Dispute Resolution Meet the Challenges Set by Deliberative Democracy?
By Lawrence Susskind

7 Representation in Democratic Deliberation
Issues and strategies
By David Kahane and Carolyn Lukensmeyer

11 Consulting the Public—Thoughtfully
By James S. Fishkin

15 Managing Political Pressures in Public-policy Mediations
By Susan L. Podziba

18 Deliberative Democracy and Conflict Resolution
Two theories and practices of participation in the polity
By Carrie Menkel-Meadow

23 The Democratic Legitimacy of Government-Related Dispute Resolution
By Richard C. Reuben

27 A Glossary of Deliberative Terms
By Carri Hulet

FEATURES

28 Book Review: Judging the Handbook for Judges
By the Hon. Cecelia J. Morris

30 An Overview of the Revised Model Standards of Conduct for Mediators
By R. Wayne Thorpe and Susan M. Yates

35 The Model Standards of Conduct for Mediators (September 2005)

DEPARTMENTS

3 From the Chair
39 Federal Legislative Update
40 ADR News
41 State and Federal Cases
43 ADR Calendar
44 The Lighter Side

Dispute Resolution Magazine is published quarterly by the American Bar Association Section of Dispute Resolution (ISSN: 1077-3592). © 2006 American Bar Association.

Editorial Policy: Dispute Resolution Magazine welcomes a diversity of viewpoints. Articles, therefore, reflect the views of their authors, and do not necessarily represent the position of the American Bar Association, the ABA Section of Dispute Resolution or the editors of the magazine.

Contacting the Magazine: Article ideas, letters, advertisement requests and other correspondence can be sent to Dispute Resolution Magazine, ABA Section of Dispute Resolution, 740 15th Street N.W., Washington, D.C., 20005. Our phone number is (202) 662-1680 and fax number is (202) 662-1683. E-mail address: drmagazine@abanet.org.

Non-member Subscriptions, Back Issues, Change of Address: Non-members of the Section may subscribe to the magazine for $30 per year. Back issues are available for $8 per copy. Send requests to ABA Service Center, 321 North Clark Street, Chicago, IL 60610. Phone (312) 988-5522. E-mail service@abanet.org. Notify the Service Center for change of address.

Reprint Permission: Send requests via fax to: (312) 988-6030; tel (312) 988-6102; copyright@abanet.org.
The Section of Dispute Resolution is off to a great start this year.

In my last column, I discussed two areas of importance to my chair year: greater focus on ADR from the perspective of the user and skillful communication among youth to aid in conflict resolution. I am delighted to say that the section is making tremendous strides in both arenas.

Sights set on consumers

The newly formed Committee on Advocacy and Corporate ADR co-chaired by John Phillips, John Sherrill and Charles Stauber has within its scope the end user of ADR services—and great work is underway. In addition, this section’s annual conference, to be held in Atlanta this April, is developing a track of programs relevant to the end user in particular, as well as the lawyers and neutrals providing them with services. I consider this to be a “must attend” track.

‘Words Work’ for youth

And thanks to the efforts of Linda Toyo Obayashi, Michael Palmer and Gail Nugent as well as section staff Gina Brown and Ellen Miller, the youth-focused project we currently call “Words Work” is off to a great start. I am both professionally and personally committed to the Words Work project and am excited about where we are today. Each chair of an ABA Section has the privilege to select personal initiatives for the year, to focus on one or two projects that arouse a level of commitment that keeps him or her engaged—sometimes for years following the end of a reign as chair. For me, Words Work is that project.

Words Work is a program created by the Section of Dispute Resolution to teach youth how to use communication skills to avoid and resolve conflict in their daily lives. The program is part of a larger section effort that encourages ABA members to incorporate conflict resolution options in their local communities, particularly in school systems and with school boards. The goal of Words Work is to give youth the tools to be more effective in their communications and prevent, manage and resolve conflicts. These skills will allow our youth to: identify options and forge cooperative solutions for conflicts that impact their lives and their communities, build self-confidence and develop relationship skills that will benefit them in their youth and as adults.

The program will demonstrate how communication skills can help prevent and manage conflict and how skillful communication can turn information into power and conflict into opportunities—opportunities for greater understanding, more meaningful solutions and a stronger sense of community.

The ultimate message is that strong communication skills are essential for people to be successful in all aspects of their lives, that conflict can be handled constructively—and with the proper tools, kids can be part of the solution.

ADR as disaster prevention

I suspect that most of us recognize that dispute resolution is not just about a lawsuit or an ADR process. It is about seeking information, promoting greater understanding and creatively addressing a situation in a constructive way. Strong communication skills are essential life skills that lead us to awareness and self esteem and teach us to be open, not closed. These are the same skills that are used in community development and civic engagement and that aid in a young person’s journey to adulthood.

In the words of James Thurber: “Precision of communication is important, more important than ever, in our era of hair trigger balances, when a false or misunderstood word may create as much disaster as a sudden thoughtless act.”

Farewell—And Thanks

This edition of Dispute Resolution Magazine marks the last edition for our longtime managing editor, H. Kyo Suh, who has joined the ABA Criminal Justice Section as manager of technology and publications.

Kyo worked with the magazine since its inception in 1995, and served as its layout and production editor for several years before becoming its first managing editor. His roles were many, from coordinating article submissions to gently reminding writers of impending deadlines to finalizing details with our printers, and then some. Through it all, Kyo exuded the spirit of quality, professionalism and caring for which the magazine has come to be known.

We thank Kyo for his service, and wish him the very best in his future endeavors.
P
ublic policy dispute resolution (PPDR) practitioners are a special lot.

Unlike alternative dispute resolution specialists who get involved in disputes between private parties, PPDR practitioners work on the most politically charged issues of the day—how to rebuild a flood-ravaged city, where to store nuclear waste, even on subjects like abortion—and they do so in a fishbowl of public and media scrutiny. PPDR practitioners approach their work with a sense of calling and obligation. Scholars who have been studying democracy for the last decade are now helping to explain why this might be justified.

Many political philosophers see democracy primarily as a process of dialogue, deliberation and ultimately decision-making about how best to meet the shared interests of society—the public interest. They advocate something called deliberative democracy that gives new meaning to the work of PPDR practitioners, for it suggests that what they are doing is nothing less than deepening and broadening our commitment to the fundamental tenets of democracy itself.

The implications are profound for public policy dispute resolution, and, for that matter for the whole ADR field.

How does PPDR work?

The logic of representative democracy is clear. We elect officials who appoint agency personnel who manage the machinery of government. Anyone who thinks that government is treating them unfairly can go to court. In theory, we can try to influence our elected representatives by lobbying, writing letters to the editor, demonstrating in the street or even running for office ourselves. When all is said and done, however, our elected officials—who have won an electoral majority—are supposed to make the hard choices in a way that is responsive to our concerns.

Time and again, however, representative democracy falls short. Our elected officials seem more worried about getting re-elected than they do about solving the difficult problems we face. They seem more responsive to those who finance their re-election campaigns than to those with the greatest needs. While representative democracy puts a premium on majority rule, it doesn’t guarantee that the wisest agreement (or any agreement) will emerge. And, it certainly doesn’t guarantee that the interests of the least powerful will be taken into account.

Given the broadening of the rules of standing in our court system over the past four decades, it is easy enough for an unhappy party to throw a spanner into the works. Thus, we often get no decision even when there are important societal needs at stake. There is no constituency for “good science,” so expertise is either ignored or contested. Finally, the “horse trading” that goes on behind the scenes continues to erode the legitimacy of our governmental institutions.

The rise of PPDR has helped. As increasing numbers of stakeholders have demanded a place at the public policy-making table, mediation (or consensus building) has provided a way to harmonize conflicting claims. The availability of nonpartisan professionals—with dispute resolution skills and specialized knowledge about the problems under discussion—has produced positive results at every level. Indeed, PPDR is now often prescribed as an explicit option in federal, state and local legislation.

Even in the face of seemingly intractable value-based disputes, PPDR has produced workable agreements. It has emerged as a more effective way of responding to the most vexing aspects of public policy-making—moving quickly when controversial decisions have to be made, ensuring that scientific and technical considerations are given due, guaranteeing that all groups (not just those with the money to control the airwaves or go to court) are given a fair hearing, and restoring the legitimacy of government in the face of widespread cynicism about government’s capacity to solve problems. Indeed, there is now ample documentation to show that mediated negotiation in the public arena can produce better outcomes than traditional legislative, administrative or judicial processes. In short, we can show that PPDR produces fairer, more efficient, more stable and wiser results—strengthening our evolving commitment to democracy.

Too many people, however, including some PPDR practitioners, have yet to grasp the link between the practice of PPDR and the ideals of deliberative democracy.

Deliberative democracy and public policy dispute resolution have been developing separately for some time. Now it is time for them to begin learning from each other.
Deliberative democracy

Deliberative democracy poses an ideal. It imagines a context in which opinions are shaped through respectful dialogue. It postulates a governmental process that gives as much attention to the concerns of the average citizen as it does to the most aggressive (and well organized) interest groups. And, it seeks to restore face-to-face deliberation—in which the quality of reasoning carries weight—as a public educational strategy. In addition to the academics seeking to spell out a theory of deliberative democracy for our time, there are practitioners helping to enable this kind of dialogue.

In June of 2005, under the auspices of the MIT-Harvard Public Disputes Program at Harvard Law School, some of the leading PPDR practitioners in the United States and some of the best known proponents of deliberative democracy from around the world assembled to share ideas and experiences. The exchange was eye-opening. (A DVD with a summary of the highpoints of the conversation is now available through the Clearinghouse of the Program on Negotiation at Harvard Law School.)

Three important gaps

While the two “communities” had a lot to say to each other, and found a great deal of common ground, there were three points on which they held surprisingly different views. The first concerned the question of representativeness: Who ought to be involved in ad hoc efforts to supplement the formal mechanisms of government? The second dealt with the management of ad hoc problem-solving efforts or deliberations. The third revolved around the very different ways in which the two groups go about benchmarking success.

PPDR professionals have developed conflict assessment and related techniques to identify appropriate stakeholders in each public policy dispute, but these focus on identifying, selecting and equipping the representatives of groups (both organized and diffused) to participate in problem-solving efforts. They do not focus on the problem of finding a voice that speaks for the general public-at-large.

Deliberative democracy demands that more effort go into ensuring that the average citizen’s view is taken into account. Along these lines, they have developed deliberative polling and other techniques to get at “raw opinion” (not yet shaped by the media or managed efforts to spin the news) in ways that PPDR has not yet adopted. Jim Fishkin’s article in this magazine explains how deliberative polling, for example, can be used to document the concerns of the average citizen.

PPDR professionals are very attentive to how multi-stakeholder dialogues ought to be managed. They see government officials (whether elected or appointed) as interested parties, not as credible managers of collaborative efforts. Thus, PPDR is focused on the important role that professional mediators can play in ensuring the right parties are at the table, ground rules for engagement are developed and every effort is made to maximize value (i.e. do what has to be done to ensure that the interests of all parties are met).

Deliberative democrats have not, at least to date, seen a need for mediators or nonpartisan facilitators to manage the dialogues they prescribe. They presume that deliberations will either be self-starting and self-sustaining, or that government officials will coordinate them. An article in this issue by Susan Podziba speaks to this question.

Deliberative democrats measure their success in terms of the quality of the discourse they stimulate. If ideas are well debated, dialogue is open (not unfairly manipulated) and social learning occurs, they are content. PPDR professionals, on the other hand, are much more focused on achieving implementable agreements.

While they applaud the larger goals of deliberative democracy, PPDR professionals are focused on ways of bridging this divide.

Finally, the link between dispute resolution and deliberation is intuitive but sometimes difficult to articulate. This issue offers a pair of articles to address this question. Carrie Menkel-Meadow discusses how dialogic models of dispute resolution foster deliberative democracy, while Richard Reuben offers an approach for assessing the democratic legitimacy of dispute resolution methods—that is, whether a dispute resolution method or system stands to enhance or diminish the larger goals of democratic governance.

Only through further close study of what deliberative democrats have to say will the PPDR community be able to chart its future effectively. The overarching goal of PPDR ought not to be just to resolve public policy disputes as they present themselves, but in addition to push toward the ideals of deliberative democracy.

Endnotes

1 See generally Lawrence Susskind et al., The Consensus Building Handbook (1999).
2 See generally Lawrence Susskind & Jeffrey Cruikshank, Breaking the Impasse (Free Press, 1987).
3 See generally James S. Fishkin & Peter Laslett, Debating Deliberative Democracy (Blackwell, 2003).
Since the founding of the United States, there has been a gap between the aspiration of democracy and its practice. Despite enormous progress over two centuries to close this gap—for example, we achieved universal suffrage and the law recognizes that all men and women are created equal—continuing bias, inequity and injustice based on race, gender and class mean that millions of Americans’ lives are defined by discrimination and marginalization.

At the same time—and perhaps because of this marginalization—distrust between citizens and government is exceptionally high. People feel disenfranchised and displaced by special interests—and policy-makers devalue public input. We have the technological capacity to bring people directly and transparently into government, but television soundbites remain the dominant mediator between citizens and their decision-makers. And yet one can still perceive in this country a palpable desire to reinvigorate democracy. Citizens want to be involved as long as they are confident their efforts will not be wasted and their trust will not be misused.

At such an important juncture in the history of American democracy, it is critical that we look back on our founding philosophy and remind ourselves of our commitment to a government in which “consent of ourselves of our commitment to a government in which “consent of ourselves” is an inviolable tenet.

Through the lens of this early wisdom, we can see that a viable democracy must maintain an authentic, live connection between the collective will of the people and their representatives. Further, we see that representation that is limited to periodic voting and responding to telephone polls is, in truth, not representation at all.

Having a say
Those affected by political decisions should have a real say in making them. Having a say means more than counting interests in some aggregative process such as voting or bargaining; what’s key is the process of coming to collective judgment. Such democratic dialogue can transform participants’ understandings, their sense of their own and others’ interests and the possible grounds for legitimate agreement. Fair institutions are those that bring the perspectives of all affected into an open dialogue, where what counts is not power or numbers but the persuasive effect of things people say and do within the conversation itself.

And so deliberative democrats, like practitioners of dispute resolution, are centrally concerned with issues of representation—questions of who needs to be at the table when particular sorts of issues are discussed, and what forms of discussion are likely to encompass the range of standpoints and perspectives.

Deciding who needs to be at the table is fairly simple in the abstract: strive to include representatives of the range of groups affected by a given issue or decision. But applying this norm requires analyzing the composition of social groups and the workings of social power along a number of dimensions, including each group’s:

- ability to make use of the forum—which brings in issues of geography, as well as access to transportation and childcare, leisure time and information
- engagement with political institutions—that is, sense of entitlement or marginalization and the way they shape whether and how members participate, and
- ability to exercise deliberative influence—issues of education, language and dominant understandings of what reasons and which voices are authoritative.

Even a very tame recognition of how social inequality plays out along these different dimensions shows one conventional model of democratic inclusion—that is, opening the doors of a forum to all comers—to fall short of the norm that what touches all should be decided by all. The dynamics of power and group membership incline open-door forums to be dominated by groups with greater material resources, higher levels of education, stronger senses of entitlement and more deliberative credibility.

The promise of inclusion
More promising, from the standpoint of norms of democratic inclusion, are forums that aim to be demographic microcosms of the broader affected community. Achieving this sort of statistical representation in practice is far from easy. And yet practitioners attuned to dynamics of marginalization can draw upon a range of strategies—including deliberate outreach to the marginalized, covering costs of transportation and childcare,

Citizens want to be involved as long as they are confident their efforts will not be wasted and their trust will not be misused.

David Kahane is an associate professor of philosophy at the University of Alberta in Canada. He can be reached at david.kahane@ualberta.ca.

Carolyn J. Lukensmeyer is the founder and president of AmericaSpeaks. She can be reached at CJL@americaspeaks.org.
and focusing deliberation on issues of immediate interest to particular marginalized groups.

This practical work of inclusion involves complex and potentially controversial analyses of the groups that matter, the nature of their disadvantage, the nature of others’ privilege and the relations between these groups. For example, if those designing a democratic forum are seeking a demographic reflection of the larger community and realize that this requires outreach to marginalized communities, which ones matter most? Which members of these groups are representative? Is it acceptable to go for community leaders? Should convenors instead seek to recruit unaffiliated members? Should they attend to conflicts within marginalized communities about membership and representation? Is it enough to reach out to groups that are mobilized, with consolidated representations of collective identities and interests? What about groups whose marginalization is so severe that they are unorganized, lacking not only the ability to assert collective interests, but even a sense of shared identity and interests?

Dynamics of deliberation

Meeting democratic norms of fair representation also requires attention to how social group memberships shape deliberative influence. Dominant conceptions of reasonableness and impartiality, for example, tend to privilege the discursive styles and the interests of powerful groups—as when impassioned speech, rhetorical speech and storytelling are treated as less persuasive than calm, linear argumentation, or when the gender of a speaker predicts his or her influence. Here too, conveners and facilitators can draw on a range of deliberative protocols and mechanisms—from clustering members of marginalized groups within the larger deliberation to using facilitation to counteract exclusionary patterns of conversation and decision-making. In some cases, however, patterns of social marginalization and unequal power aren’t tractable through these sorts of adjustments. So it then becomes important, if one is committed to all groups having a fair say, that certain groups be present in greater numbers than statistical sampling would dictate.

Such decisions require tough judgments. From the point of view of norms of democratic representativeness, though, they’re judgments we can’t avoid, either in theory or in practice. Yet practitioners face constraints in making good on norms of representativeness; other norms may pull in other directions and pragmatic considerations can cut against approximating representative fairness. In particular, practitioners are responsible for keeping their processes legitimate, not only in terms of abstract democratic norms but also the dominant norms of the groups and communities they wish to influence.

And so the judgments get even tougher. Practitioners of democratic deliberation work in the space between the ideal and the real, taking their bearing from norms of fair representation even as they make the pragmatic accommodations necessary to realize these norms in practice.

The AmericaSpeaks model

Fulfilling the promise of true democratic participation requires a balance between securing representative participation and other critical core values such as supporting informed dialogue and building transparent links to decision-making. With this in mind, AmericaSpeaks, a Washington, DC-based nonprofit dedicated to engaging the public in government decision-making, has developed an approach that aims to strikes this balance.

The organization’s 21st Century Town Meeting links technology with small-group, face-to-face dialogue to engage large numbers of people—up to 5,000 at a time, or 10,000 distributed across multiple sites and linked via satellite—in deliberations about complex public policy issues, such as reform of the healthcare system or improving a regional economy. Simultaneous small-scale and large-scale dialogues that use meticulously crafted, nonbiased material and are explicitly linked to relevant decision-makers enable this model to achieve the core values noted above.

In terms of securing representation, the model tends to face challenges at three junctures:

1. at the outset, in identifying which populations are likely to be marginalized

2. in the lead-up, while seeking to motivate marginalized groups to attend in sufficient numbers, and

3. during the deliberation, in ensuring group members feel empowered to publicly speak their truth.

The model has been designed to address these challenges—and has had considerable success in doing so.

Identifying populations likely to be marginalized. While some groups are persistently and recognizably marginalized, the subject of a public policy deliberation will always yield groups that might only be marginalized in that particular context. Outside of the box thinking is critical early in the process.

A couple of AmericaSpeaks case studies help illustrate.

In planning for a 4,500-person deliberation on the redevelopment of the World Trade Center site, it was immediately clear that a simple sampling of the population in the affected area would not have sufficiently captured clusters of citizens that had been most impacted by the tragedy, or those...
likely to be marginalized in the redevelopment efforts. After an analysis, recruitment efforts focused specifically on victims’ families, those who owned homes and businesses whose property was destroyed, emergency responders, low income residents and employees of the area, among others.

And in Ohio, an 18-month citizen engagement initiative involving tens of thousands of people is focusing on improving the region’s economy. As with most economic development work, the needs of the urban core and suburbia capture the most attention because of their size and the media-familiar nature of their concerns, such as poverty, violence and substandard education. Recognizing this dynamic, this initiative is making extra efforts to bring in the once relatively mainstream, but today increasingly marginalized, rural citizens.

Getting people in the room. Marginalized populations demonstrate low levels of civic engagement because their voices have never been adequately heard or been able to make a difference. They are unlikely to believe things will be different if the location, format or content of a deliberative event is not credible to them. To both achieve the desired mix of participants and build credibility, the 21st Century Town Meeting process makes representational goals and their anticipated impact transparent from the outset. For example, during registration for the first 3,000-person Citizen Summit in Washington, DC, there was low turnout among recently-arrived Hispanic immigrants who were not yet fully integrated into the city’s community development and political networks. In response, registration targets for this population were established, the rolls were periodically checked against those targets and outreach efforts were reconfigured.

Several other strategies—beyond the obvious one of ensuring that outreach is led by people who live in target communities—can successfully establish enough credibility for a deliberative event to get marginalized people into the room.

For example, the 21st Century Town Meeting is always developed in partnership with a community advisory group to help with outreach and provide input and feedback on the meeting design and agenda. Pre-emptively putting the concerns of disadvantaged groups on the agenda—not insisting that their voices be powerful enough to do this on their own once the deliberation has begun—builds credibility, good will and an increased desire to participate.

In addition, meeting with community members in advance to explain the process and introduce the technology, address concerns and garner support is a critical strategy for establishing credibility. In preparation for the first Washington, DC Citizen Summit, for example, 57 such meetings were held. As a result, a diverse group of more than 10,000 local residents have participated in the summits.

As another example, in an effort to ensure the World Trade Center deliberation included the voices of illegal immigrants who held low-paying jobs in and around the towers, special arrangements were made to enable them to register for the event without providing full names and addresses. Of the 4,500 participants in “Listening to the City,” 448—or 10 percent—were illegal immigrants.

Finally, for severely marginalized groups, the best hope is the deliberate use of community and earned media to frame the process as being so different from “business as usual” that latent interest can be awakened, followed by face-to-face invitations from people they know in their neighborhood. For example, in Washington, DC, church fliers and neighborhood newspapers explicitly advertised the mayor’s up-front commitment to make budget decisions using the outcomes of the citizen deliberations. Residents recognized the unusual opportunity in such a commitment and decided to come to the event.

Helping people speak their truth. Experience demonstrates that marginalized populations will be able to participate fully and equally in a deliberative event if close attention is paid to a range of factors—including facilitation, table seating and overall participant composition.

To ensure a democratic dialogue and deal with power and cultural differences, personality styles and group dynamics, each small discussion table at a 21st Century Town Meeting has a professionally-trained facilitator who makes sure everyone has full opportu-

Marginalized populations will be able to participate fully and equally in a deliberative event if attention is paid to facilitation, table seating and participant composition.

CONTINUED ON P. 14
Those interested in learning more about the relationship between dispute resolution and deliberative democracy may find the following readings of interest. Many may be found on the Web site page for the June 2005 MIT-Harvard Workshop on Deliberative Democracy and Dispute Resolution at http://stellar.mit.edu/S/project/deliberativedemocracy/materials/html.

**DELIBERATIVE DEMOCRACY**


**DISPUTE RESOLUTION**


**JOIN THE ABA SECTION OF DISPUTE RESOLUTION**

Preparing its members for the profession of the future! Just $35 a year (Section dues, for current ABA members).

You do not have to be a lawyer to join the ABA or Dispute Resolution Section; you can join as an Associate. Law student rate is also available. Call 1-800-285-2221 to join today.
CONSULTING THE PUBLIC — THOUGHTFULLY

BY JAMES S. FISHKIN

In many public policy questions, there is some reason to consult the public for answers. What changes should be considered to the health care system? To the Social Security system? How should electricity be provided in a given territory? To what degree should school choice be provided in education? What should be done about rising crime? In each case, policy-makers might do well to consult the public, since it is the public that must live with the trade-offs. But consulting the public, even informally, is more difficult than might be imagined.

For example, in 1966, the utilities in Texas faced a regulatory requirement to consult the public to conduct integrated resource planning. However, they knew that the public lacked information to respond to conventional polls. If they did focus groups, they could never show that such small groups were representative. And if they held open town meetings, they would attract lobbyists and organized interests, but not the public at large. They settled on using the strategy called Deliberative Polling®, which led, in eight different projects, to significant investments in renewable energy and conservation.

Deliberative Polling defined

Two basic questions can be asked about any effort to consult the public: Who speaks for the people? And what sorts of opinions do they represent? Deliberative Polling is based on a distinctive combination of answers to these two questions. As compared to self-selected forums or samples of convenience, it uses scientific random samples. And as compared to the snapshots of an inattentive public often offered by conventional polls, it assesses informed public opinion produced through deliberation. In this way, the Deliberative Poll attempts to represent everyone in a given population, through a statistical microcosm empowered to think about the issues in question under favorable conditions.

Deliberative Polling is applied to random samples of the mass public. Theoretically, it could also apply to random samples of other populations—for example, to members of associations or political parties. It is not, however, an effort to reach consensus among stakeholders. In that respect, it differs from many practices in dispute resolution. However, many projects make use of a stakeholder consensus process as one of the steps in Deliberative Polling. The two processes, far from being incompatible, are usefully complementary. Basically, the stakeholder consensus process is useful to provide the “good conditions,” such as the materials

James S. Fishkin holds the Janet M. Peck Chair in International Communication at Stanford University, where he is professor of communication and of political science and director of Stanford’s Center for Deliberative Democracy. He can be reached at jfishkin@stanford.edu.
and the agenda of experts, for the public to be able to make an informed judgment. A stakeholder consensus process could also usefully add another layer of response to the results of the process, in addition to the media that usually accompany a televised Deliberative Poll.

**Breaking through rational ignorance**

At its core, a Deliberative Poll is a survey of a random and representative sample of respondents, both before and after they have had a chance to deliberate. An ordinary poll offers a representation of public opinion as it is—even if that representation reflects no more than the public’s impressions of sound bites and headlines on the issue in question. A Deliberative Poll, by contrast, attempts to represent what the public would think about the issue if motivated to become more informed and to consider competing arguments.

But why go to all the trouble to conduct Deliberative Polls when a conventional poll can also solicit opinion from a good statistical microcosm—that is, a scientific random sample? A great deal of research has established that the public is often not well informed about complex policy or political matters. Only small percentages of the population can answer even the most basic questions. And other researchers have shown that policy-specific information can lead to dramatic changes of opinion under experimental conditions.3

The low information levels among the mass public should not be surprising. Political economist Anthony Downs coined the term “rational ignorance” to explain the incentives facing ordinary citizens.4 If I have one vote in millions, why should I spend the time and effort to become well informed on complex issues of politics and policy? My individual vote, or my individual opinion, is unlikely to have any effect. And most of us have other pressing demands on our time, often in arenas in which we can, individually, make more of a difference than we can in politics or policy. From the standpoint of democratic theory, this lack of effective incentives for individual citizens to become well informed is regrettable but also understandable.

**When the phantom doesn’t know**

Another difficulty is that many of the opinions reported in conventional polls may not even exist. They may be what Philip Converse in a classic study termed “non-attitudes” or phantom opinions. Many respondents do not answer “Don’t know,” when they don’t—and are more inclined to pick an alternative almost randomly. And even those opinions that are not quite non-attitudes may be very much “top of the head” in that they reflect little thought or sustained attention.

Among methods of consultation, the Deliberative Poll is the most ambitious in aspiring to get informed opinion from a scientific random sample. Unlike AmericaSpeaks and the Consensus Conference, which typically use self-selected samples, and unlike the “Citizens Jury” which is typically too small for the samples to be evaluated statistically, the Deliberative Poll attempts to use social science to represent what the public would think under good conditions.6

**How the process works**

Like the convening function in public policy dispute resolution, the preparations for the process require a number of elements that are greatly assisted by an advisory committee of relevant stakeholders. In many Deliberative Polls, this advisory committee reaches consensus on the briefing materials, the questionnaire, the agenda for the weekend consultation, the list of competing experts and policy-makers who respond to questions from the sample. For example, in both Australia and Denmark, such advisory groups, which largely overlapped with the official yes and no committees for the referenda on the same topics—in Australia about the “republic” and in Denmark about the Euro—played crucial supervising roles. The advisory committees did not have to agree on which arguments were correct, but only that the materials provided to the public were reasonably balanced and that the facts included in them were correct.

Deliberative Polls have been conducted in the United States, Canada, Britain, Australia, Denmark, Bulgaria, Taiwan, China and Hungary. There is also an online version, using voice rather than text with scientific samples. However, the projects described here are all face-to-face. Many of the projects gather the sample together for an entire weekend, arriving Friday evening and departing Sunday afternoon. Others take place for just one full day.

The funding has come from a variety of sources ranging from foundations, to utility companies, to media organizations. In all cases, we have taken care to be sure that the funders intend to facilitate the public’s deliberations rather than promote predetermined conclusions. Given the public’s lack of engagement and information about most policy issues, the potential range of application is enormous. It is limited primarily by funding constraints—that is, applying to the logistics of gathering a random sample together—and the requirement that funders not have a stake in a predetermined conclusion.

**What happens**

Here are some summary observations about how Deliberative Polling facilitates deliberative democracy on issues of public policy.

First, we have routinely managed to gather highly representative samples of the population to come for an extended face-to-face deliberation. We can judge the representativeness of the sample by comparing the people who come with those who do not. Since we only invite people after they have taken a conventional survey, we can compare the participants’ attitudes and demographics with the nonparticipants. We can also compare the participants demographically to census data.

It is worth noting that we provide monetary incentives for participation and pay the expenses of travel and hotel if the project requires them.
We do whatever we can to get a representative sample to attend. The incentives have ranged from $300 for a three-day event held nationally in the United States to 50 RMB in China, the equivalent of about six dollars for a one-day event. But the monetary incentive is only a facilitating factor.

Most important, we convince the participants that their voices will matter—whether because public officials will respond, or because the event will be televised. The data comparing participants and nonparticipants shows that there is far more potential for consulting the public at large, provided people think their views will be taken seriously.

Second, in every case, there are significant changes of opinion on politics and policy—often quite large changes. For the most part, the considered judgments revealed by Deliberative Polling differ significantly from the respondents’ initial responses. About two-thirds of the opinion items show statistically significant net changes.

Third, the respondents became much more informed by the end of the process, based on information questions asked before and after.

Fourth, we have found in further analysis that information gain explains a lot of the opinion change. It is primarily those who become more informed on the issues who also change their views about them.

Fifth, change of opinion in the Deliberative Poll does not correlate with any of the standard socio-demographic factors—such as education, income, class and gender. Virtually everyone seems capable of deliberating.

Sixth, where there are ranking questions, a higher percentage of the sample has single peaked preferences after deliberation compared to the views in initial questionnaires. Respondents may not agree on a single answer, but they agree on about what they are agreeing—or disagreeing. Deliberation creates a shared public space for public opinion.

Seventh, we have not found the debilitating patterns of group “polarization” that have recently been alleged by Cass Sunstein and others to be a necessary artifact of the deliberative process. Unlike jury discussions, our deliberative process does not require an agreed verdict—and trained moderators give it elements of balance that seem to inoculate it from reaching conclusions as a predictable artifact of the initial group composition.

Balancing deliberation

A great deal depends on the good conditions that facilitate the sample becoming more informed on the issue in question. Respondents, knowing that they are to participate in a visible—usually televised—event, begin, from the moment they are asked, to discuss the issue with friends and family and to become more attentive consumers of the media. We view this information effect in anticipation of the event as part of the experimental treatment. However, the learning that respondents do in anticipation is likely to be unbalanced. The respondent, when talking to friends and family, is likely to talk with people who have similar opinions and who come from similar social locations.

The diversity that facilitates balanced deliberation can be better furthered in the environment of the Deliberative Poll with balanced briefing documents, balanced panels and random assignment to small groups with trained moderators. For example, in Denmark, in the nationally televised Deliberative Poll before the Euro referendum, we included some questions that specifically identified facts supporting either the “yes” case or the “no” case. In the period leading up to the Deliberative Poll, yes supporting respondents learned the yes facts but not the no facts; no supporting respondents learned the no facts but not the yes facts. However, after the weekend of face-to-face deliberation, the gap closed.

A respondent who agrees to participate in the Deliberative Poll is then sent a carefully balanced briefing document on the issue. The document, which is also made available to the press and observers and which is sometimes posted on the Web to help inform other citizens, is meant to offer a reasonably accessible digest of competing arguments and relevant facts on the issue to be deliberated. It is meant to provide a starting point for the discussions. As noted, it is ideally the product of a stakeholder consensus process.

When the respondents arrive, they are randomly assigned to small groups that meet with trained moderators. The groups discuss the issue, initially on the basis of the briefing document, and clarify key questions that they wish to ask in plenary sessions with panels of competing experts—and, usually later in the weekend, panels of competing politicians or decision-makers. In the larger sessions, the experts and politicians do not give speeches. They only respond to questions from the sample. The weekend gathering alternates the small group and large group sessions until, at the end of the weekend, the respondents take the same questionnaire as the one they answered on first contact.

At the same time, the television partner has either been broadcasting the large group sessions live or has been taping and editing the proceedings, usually including the small group discussions, for later broadcast. The Deliberative Poll has been called “a poll with a human face” because it puts a human face—and a human voice—on the process of informed opinion change. The weekend session combines some of the qualitative characteristics of focus groups or discussion groups with the possibility of studying the opinion changes quantitatively at the individual level.

The basic idea has proven eminently practical. We use social science to gather a representative microcosm and then facilitate its deliberation under favorable conditions. Ideally, all citizens would participate, but under normal conditions, citizens in mass society are not effectively motivated to do so. So the idea is to engage a microcosm, in a good social science experiment,
and then use that to represent what informed public opinion would be like—to fellow citizens, to policy-makers and politicians. The considered judgments of the microcosm offer a basis for an informed and representative public voice.

Endnotes

1 Deliberative Polling is a trademark of James S. Fishkin. Any fees from the trademark are used to support research at the Center for Deliberative Democracy at Stanford University.

2 For more information about these projects and their policy impact, see the Web site for the Center for Deliberative Democracy, http://cdd.stanford.edu.


4 ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (Harper and Row, 1957).

5 Converse’s seminal article was The Nature of Belief Systems in Mass Publics, in IDEOLOGY AND DISCONTENT (David Apter, ed., Free Press, 1964). There is a vast literature since, but it has not changed the relevance of the basic insight.


10 On some occasions, there have also been intermediate waves of the questionnaire, to help determine the effects of different portions of the treatment. In Denmark, questions were posed on arrival as well as at the end of the weekend, to assess the effect of learning before the weekend. In New Haven, there was an intermediate wave after a random half of the sample had discussed one of two issues, but not the other. This permitted us to assess the effects of discussion, by comparing those who had discussed a given issue with those who had not.

For example, sanctioning official caucusing of marginalized groups prior to or during a deliberative event may boost numbers for these groups. However, it also may mean members of the group will advocate for a predetermined outcome. Some would argue that this counters the goals of democratic deliberation by creating special interests as opposed to taking power away from these interests; and that it undermines the authentic, organic process in which recommendations emerge after an informed, facilitated discussion among citizens. These risks need to be weighed against the risk of the perspectives of marginalized groups being sidelined in deliberations, where these perspectives may in any case be at disproportionate risk of being branded special interests.

Some practitioners advocate that paying citizens to take part in forums is vital to ensuring representative participation of marginalized groups and to avoid overrepresentation of people who already have a strong civic impulse. However, the choice to pay participants may create a mixed motivation for attending that has an impact on the commitment to deliberate. So here, too, there are difficult trade-offs to consider.

Practitioners and theorists advocate a range of positions on issues such as these, based on their experiences and their interpretations of available research. This diversity of opinion is a great asset to the deliberative democracy field and, importantly, it sets targets for what we need to better understand.

Moving forward

Fair representation for marginalized groups is foundational to democracy and key to reinvigorating it. But as noted, representativeness by itself will not get us where we need to go. In fact, we cannot strive for perfection in representation if it harms other things we care about in engaging the public, such as the impact of a deliberation on real government decision-making. Fortunately, these two factors often are intertwined on the ground. Without the participation of an inclusive group of citizens, decision-makers may deny a process its influence. And without the participation and overt commitment of decision-makers, citizens may be unwilling to take part. Recognizing and responding to this dynamic is critical as strategies for deliberative democracy move forward.

There is no easy formula for meeting norms of democratic representation in practice, nor for balancing these norms against other considerations crucial to realizing deliberative democracy. The way forward with these questions must itself be democratic, deliberative and inclusive—so that theory-making and process design involve a growing range of voices and a commitment to including all those affected. In the end, a commitment to social justice requires reducing the gap between our aspirations of democracy and our practice of it.

Endnote

1 The AmericaSpeaks 21st Century Town Meeting model is described in full at www.americaspeaks.org.
Managing Political Pressures in Public-policy Mediations  

BY SUSAN L. PODZIBA

Over the past few decades, consensus-building processes such as public policy mediations have become increasingly integrated into traditional government structures. As a result, government and stakeholder representatives have had increasing opportunities to discuss public issues and negotiate the language of a variety of public documents, ranging from city charters to government regulations.

The primary success of improved integration with government—nowadays the processes themselves are often explicitly authorized or endorsed by government legislation, agencies or actors—is the improved actionability of the negotiated agreements. Not surprisingly, this increased integration has brought increased exposure to the political pressures and power dynamics inherent in governing activities.

Political power is not intrinsically good or bad. But because it is a significant factor in public policy mediations, it is important for mediators and participants alike to understand the dynamics of political power and its effect on consensus-building processes.

Of course, most decisions in public policy mediations lack significant political controversy, and are made through deliberative discussions that allow participants to combine the differing perspectives and interests of government and affected groups with the relevant expert information and public concerns. On controversial issues, however, political power and influence may also be asserted to promote or delegitimize a process and to support or oppose specific proposals.

Political power has affected public policy mediation and consensus-building processes in both positive and negative ways. As illustrated in the following case studies, government agencies and participants can become increasingly effective at achieving successful public policy mediations by understanding how to exert and manage political power.

Government champion protects process

The Chelsea Charter Consensus Process illustrates how those who expect to lose power as a result of a consensus agreement may attempt to undermine the process. It also illustrates how strong executive support for the consensus process can counteract such destructive efforts and also encourage successful negotiations.

The City of Chelsea, Mass., was placed in state receivership as a result of corruption and fiscal mismanagement. Under state legislation, the receiver was accountable to the governor but otherwise had absolute authority over all decisions affecting Chelsea. Part of his assignment was to recommend a new form of government to replace Chelsea’s 1903 Charter, which had been amended in the intervening years by more than two thousand special acts.

In order to draft the new charter, the receiver, Lewis “Harry” Spence, initiated a public consensus process. He understood that creating a functional and sustainable democratic government required deep engagement by all residents of Chelsea, not only supporters of the clique that ran City Hall prior to receivership.

Significant public input was obtained by holding a series of community meetings run by local residents, trained by the mediation team to serve as facilitators, in a variety of venues, including local clubs, housing developments for the elderly, schools, ward meetings and call-in cable television shows. That public input enabled the charter preparation team—which was selected through a transparent process that included clearly identifiable, understandable, supportable and public criteria—to incorporate their fellow residents’ preferences as they deliberated over and decided the actual text of the city charter.

Full political support from the government representative who initiated the process (the receiver) had an extremely positive influence on the Chelsea process. First, Spence used his authority to create and protect the team’s deliberative public conversations. Second, his prompt, unequivocal and coordinated responses to political attacks on the process helped enable the team’s success.

At every opportunity and at every public meeting throughout the nine-month process, Spence repeatedly told the people of Chelsea that if they reached consensus on a charter and approved it in a special election, he would propose their consensus draft to the governor. Even when the charter preparation team made decisions with which he disagreed, such as electing school committee members at-large rather than by district, he respected the team’s choice in order to support the community’s need to grapple with difficult issues as it increased its ability to self-govern.

In addition, Spence protected the charter process from political attacks by those who feared their own powers would be curtailed under a new charter developed by an engaged citizenry. For example, one elected alderman announced that he had been at the State House and had seen the new Chelsea Charter already being printed, thus allegedly proving that the entire charter consensus process was a fraud.

Later, another alderman told the Chelsea Record that someone had left a copy of the new charter in her mailbox. The newspaper’s headline the next day read “Charter is a done deal,” even though the charter left...
in the mailbox was an outdated draft that had been rejected by the receiver and the Chelsea Board of Aldermen’s Subcommittee on Governance a year before the consensus-building process had even begun.

In response to these political attacks, the receiver and his staff, the mediation team and the charter preparation team coordinated actions to protect the integrity of the process. The receiver wrote a letter to the charter preparation team stating that he remained committed to the result of their negotiations.

Team members, in turn, wrote letters to the editor of the Chelsea Record debunking the accusations, sought public apologies from the aldermen, and went to televised aldermen’s meetings to update the public on the charter issues that had been resolved and the options under discussion for those that remained outstanding.

The Chelsea process suggests two important lessons concerning political power in public policy mediation processes. First, a powerful champion for the process is a great asset. Second, the process must sustain its integrity, sometimes through forceful responses to political attacks.

A powerful champion who understands the value of the deliberative process can contribute to participants’ sustained commitment by assuring them that the results of their efforts will be implemented and, when necessary, by providing political protection. The receiver valued the Chelsea process because he believed that it would lead to a city charter tailored to Chelsea’s unique character and circumstances, and that engaging Chelsea’s citizens in its creation would teach them norms of self-governance and ultimately protect the city from future corruption and mismanagement.

Nevertheless, if the integrity of the process is compromised, or even suspected of being compromised, the effort will likely fail. In working with groups that contain and seek to integrate a wide range of political perspectives, there is a great deal of opportunity for suspicion and skepticism. Political enemies of the Chelsea charter process sought to exploit this environment to delegitimize the process.

As this case study shows, attacks meant to create doubt regarding the integrity of the process must be met with immediate and carefully planned responses to re-assert comfort and security for participants and the public as well as to deter future attacks. By doing so, the charter preparation team weathered all attempts to undermine its work.

**Seeking politicians’ guidance, approval**

Regulations to implement the 1998 Amendments to the Higher Education Act of 1965 (HEA), were drafted through a process called negotiated rulemaking, commonly called “reg neg.” The student-loan reg neg process illustrates the positive effects of broad-based political support for public policy mediations, along with the benefits of seeking legislators’ opinions and administrators’ approval during deliberations.

Before 1998, the U.S. Department of Education had voluntarily used reg neg to write some of its student-loan-program rules. The process was so successful in producing timely, clear and legitimate rules, that as a result of lobbying by stakeholders, Congress mandated reg neg in later HEA amendments, including those creating the direct-loan program. Fortunately, the Department of Education did not respond antagonistically to the move from voluntary to mandatory negotiated rulemakings.
As in most reg negs, the vast majority of issues were decided under the political radar, with participation from legislative and executive authorities. Student loan programs involve technical and tedious accounting as well as monetary concerns. These issues were negotiated until balance was found among the interests of the industry, student, school, college and university representatives.

Other issues were more politically sensitive. Stakeholders unhappy with the results of their lobbying efforts on substantive issues at the statutory level sometimes sought a second bite at the apple by trying to influence the regulations interpreting that statute.

To ensure that the regulations accurately reflected congressional intent, the negotiation teams consulted regularly with both legislative and executive personnel. Reg neg committees often reviewed congressional conference proceedings and questioned sponsoring legislators’ staff, who regularly attended reg neg meetings. They also consulted the Secretary of Education to determine what packages of options and compromises the secretary would support.

Other political issues could not so easily be integrated into the process. For example, a work group including parents of student victims of violent crime generated passionate discussion, but no agreement. No consensus was reached regarding student-loan forgiveness for students claiming death or disability, either, due to an inspector general report indicating high levels of fraud in disability claims. In the end, the issue seemed to require a stronger response from the Department of Education than was acceptable to some stakeholders.

The student-loan reg neg process provides lessons about the integration of executive and legislative power into public policy mediation processes. Mandatory reg neg processes have the potential for creating antagonism to the process from within administrative agencies, but do not necessarily do so. When leaders of administrative agencies see benefits to the process, they are more likely to embrace it.

In addition, legislative interpretations of congressional intent are welcome to many participants because they see this as a means to protect gains achieved through lobbying efforts at the congressional level.

Backlash against political pressure Two additional public policy mediations illustrate failed efforts by negotiators to direct power from the conventional political sphere into the negotiations. In one case, a negotiator contacted a senator with whom he often worked closely. It is impossible to know what the negotiator actually requested, but the senator’s office called all the other committee members to strongly urge support for a particular proposal. The committee members were outraged by what they perceived as undue political pressure instigated by a team member. Ultimately, this negotiator apologized and the proposal was rejected.

In another case, a political appointee seemed to promise support to some negotiators for particular proposals. Since these stakeholders expected complete satisfaction of their interests on these issues, they were unwilling to engage in negotiations, despite other stakeholders’ dissent on their proposals. As a result, final consensus language was not achieved during this process.

These cases suggest that attempts to directly influence individuals through the perceived use of political pressure may backfire in an open, transparent process of diverse stakeholders. In any event, if unilateral action is possible, it is unlikely that a public policy mediation process will be initiated.

Vulnerability to external events The Driver’s License/Personal Identification Cards (DL/ID) Reg Neg illustrates how political circumstances indirectly occurring outside the negotiations themselves can significantly affect a public policy mediation process. The DL/ID Reg Neg was mandated under the 9/11 Act to develop a proposed rule establishing minimum federal standards for individuals to obtain state-issued driver’s licenses and personal identification cards.

Following the first of five scheduled meetings, the negotiations were suspended because the legislation authorizing the reg neg was repealed. President Bush signed into law the Emergency Supplemental Appropriations, Defense, Global War on Terror, and Tsunami Relief in 2005. Attached to that legislation was the Real ID Act, which the Senate had previously rejected, and which repealed the section of the 9/11 Act that mandated the reg neg.

The discontinued reg neg had been intended to provide a forum for state issuers of driver’s licenses and other relevant stakeholders to raise and respond to concerns about cost, regulatory flexibility, privacy and civil liberties, residency requirements and timing for implementation. The Real ID Act provided particular answers to these questions, thereby denying the deliberative forum for balancing advantages and disadvantages of various options to states and other relevant stakeholders.

Political influence helps, hinders Public policy mediation and consensus-building processes, though still used infrequently, have become integrated with and affected by traditional governance structures. Government officials, stakeholders and the general public have become more sophisticated in their efforts to initiate, mandate and participate in public policy mediation processes based on the usefulness of this tool as a forum for furthering their overall interests.

Political power can be used to both support and undermine these processes. To increase their likelihood of success, process participants and public policy mediators need to discern and manage the political power dynamics inherent in these deliberative processes.

Endnote

1 The HEA Reg Negs were co-facilitated with Howard S. Bellman.
For two or more decades now, two different movements have been working in parallel toward the same goal— theorizing about and attempting to structure processes for increased participation in decision-making by the parties most affected by those decisions. As dialogue between the two fields increases, it is useful to consider what we can learn from each other: our commonalities, our differences, and what questions we might want to explore together.

On one hand, the deliberative-democracy movement has emerged within the political science field, and has considered how to enhance reasoned argument and deliberation among members of the polity, principally in political decision-making. Its practical embodiments include deliberative polling, citizen town meetings, national issues fora, citizen juries and the like. On the other hand, the conflict-resolution movement has developed as an eclectic applied social science of both theory and practice, drawing from planning, law, sociology, psychology, communications and decision sciences to develop models of decision-making, dialogue and dispute settlement. Its process embodiments include the primary ADR processes of negotiation, mediation, arbitration and adjudication, of course, along with all the many hybrid forms we have developed in the last few decades—med-arb summation jury trials, mini-trials, consensus-building fora, facilitated collaborative decision-making, negotiated rule-making, study circles, public conversations and restorative justice, to name just a few of the newer combinations.

Shared ideology

Though developing within different spheres, the two movements actually share similar intellectual roots. In both deliberative democracy and conflict resolution, one can see John Dewey’s brand of American democratic philosophical and political pragmatism. One can also see evidence of the social philosophy that “ideal speech conditions” should enable individuals to participate in and discuss rules and decisions that affect their lives, an idea that comes from Jürgen Habermas. And, most recently, Stuart Hampshire’s social and moral philosophy has taught us that if we cannot always agree on the substantive good, we must agree on how to develop processes for living and working together.

Both deliberative democrats and dispute-resolution professionals also usually assert (we still don’t have ideal empirical verifications of these claims) that participatory processes will produce better outcomes, in the sense that the outcomes are joint, mutual and Pareto-optimal. People in both fields also believe that participatory processes create processes with greater legitimacy and satisfaction.

Indeed, for many in both movements, conflict, also called political “dissensus,” is a good thing. In the words of one of our foremothers, Mary Parker Follett, “we use friction to make things happen constructively.”

Both groups believe that deciding issues on the basis of interests or needs rather than positions, and deciding them through honest and open discussion, argument, bargaining and brainstorming, will produce better and more inclusive outcomes. Thus, we have both spent the last few decades attempting to build and evaluate models, processes and institutions that can best facilitate various formats of increased participation in dialogues, mutual understanding and decision-making.

Global use of new processes

This issue highlights some of these new processes, which have been used to resolve a wide variety of disputes around the world. Here in the United States, processes developed in the deliberative-democracy and conflict-resolution movements have been used in environmental siting, budget allocation, and community and inter-ethnic disputes. They have also been applied in addressing divisive political issues such as affirmative action and abortion, and used in local governmental decision-making about such issues as community policing and education.

Internationally, these processes have been incorporated in post-conflict reconciliation fora such as the Truth and Reconciliation Commissions in South Africa and Guatemala. In Rwanda, indigenous-dispute-resolution processes are even being combined with Truth and Reconciliation concepts and criminal prosecutions to restructure the traditional community and public gacaca process.9

Along the way, people in both fields have considered similar questions: how to engage participants most inclusively, what process rules or procedures should be used to ensure adequacy of participation and mutual hearing, what decision rules should be employed (e.g., majority votes, consensus or near unanimity), and what kinds of representation are appropriate. They have also wondered how fact-finding and information gathering should be conducted, what kinds of
discourse are considered appropriate in such settings (e.g., reasoned argument, bargaining for traded preferences, or appeals to emotional, religious or other values4), whether and how experts (either substantive or process facilitators) should participate and how deliberative events should connect to formal processes, whether legislative, regulatory or judicial.

As we attempt to consider how the two fields can learn from one another, we could construct a simple 2 x 2 table10 of contributions made by theorists and practitioners in both fields (with many individuals belonging in more than one cell):

<table>
<thead>
<tr>
<th>Theory Builders</th>
<th>Deliberative Democracy</th>
<th>Conflict Resolution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gutmann, et al.; Sabel, etc.</td>
<td>Deutsch, Fisher &amp; Ury, Raiffa, Sander, etc.</td>
<td></td>
</tr>
<tr>
<td>Practitioners</td>
<td>Fishkin, AmericaSpeaks, etc.</td>
<td>Susskind, Riskin, Feinberg, Stulberg, etc.</td>
</tr>
</tbody>
</table>

**Similar conclusions**

From the learning we already have on both the theory and practice sides, we can see that these two groups have independently reached a number of similar conclusions:

**Institutional gridlock.** Current democratic institutions in the United States, and perhaps worldwide, are gridlocked, outdated and ineffective for both: (1) the quality of substantive decision-making, and (2) the quality of participation citizens have in the polit. This problem is illustrated by the recent lack of governmental coordination in Hurricane Katrina relief and rescue efforts, for example.

**Full participation.** A shared commitment to the Habermassian foundations of both our fields that “the acted upon should assent to the rules or decisions that are made about them,” preferably after full participation in reasoned deliberation, with the hearing of “others” and fair decision rules. People should assent to decisions or outcomes only when they have been persuaded of the outcome’s validity, even if they disagree with it. Only such decisions or actions of governance will have true legitimacy.

Consider local zoning meetings where the few testify about issues that affect the many, as contrasted to New England style (and sometimes idealized) fully participatory town meetings.

**Noncoercion.** Reasoned deliberation or participation should be authentic. It should not be coerced and, as much as possible, should allow everyone with a stake in or concern about an issue to participate.

**Ad hocracy.** New institutions and forms of deliberation and decision-making are necessary to increase true democratic participation of the polity, especially now with such great demographic and viewpoint diversity within both domestic and international populations. Those institutional forms will likely have to be context-specific, in what some have (nonpejoratively) labeled “ad hocracy.”

Such processes have been used in collaborative land-use decisions (such as Wal-Mart location battles), negotiated rule-making about employee health and safety, drafting of food-and-drug regulations, and guided dialogues about difficult civil crises or strife (such as the AmericaSpeaks

**Do deliberative-democracy and conflict-resolution practitioners work well together only when there is a need for a formal decision, such as a policy choice or vote?**

**Shared visions of future**

Both conflict-resolution and deliberative-democracy theorists and practitioners probably share some visions, or as I prefer to call them, “sensibilities,” about where we would like to see the world go:

**Consent.** A belief in consent and participation of the governed.

**Listening.** A hope that individuals can learn in particular settings, with good information, through joint fact-finding and from truly listening to each other (what Dan Yankelovich calls “social learning”12).

**Interdependency.** A hope that with certain structural formats, aided by process architects, such as deliberative polling, consensus-building fora, mediation and negotiated rule-making, people will learn from each other,
change or alter their views, and make better decisions that take account of both self-interest and the common good. Appeals to acknowledge our interdependency have worked to effectuate local and facilitated participatory decisions in policing, education and health (HIV-AIDS) in many communities.

Fellow-feeling. A belief that group engagement and multiparty citizen participation are more likely to enhance empathy and care for the common good, an attitude sometimes called fellow-feeling, and that this empathy will produce decisions further from the self-interested aggregations or compromises that fail to exploit the best for the most, and instead seek lowest-common-denominator solutions that are acceptable to all, but not preferable.

Contingent decision-making. A suspicion that for full legitimacy and accountability, our work will be recursive, repetitive and contingent, because complex social issues will require revisiting and some open-endedness, even within the need for decisions. Indeed, many of our forms of mediation and negotiation are more appropriate for contingent decisions that may have to be revised when new data appears, such as in disputes over environmental hazards, product safety and medical-device safety.

Third-party neutrals. A belief that we probably need third-party neutrals to facilitate in deliberative or decisional settings and that this might be viewed as counter-democratic.

Selection of representatives. A concern about the adequacy of selection of stakeholders or representatives in such processes (as contrasted to direct participation of all) and a related concern about equality of participation and worries about domination by the advantaged in these, as in all other settings.

Consensus versus democracy. An interest in exploring the consequences of contrasting approaches to outcomes. That is, working toward conflict-resolution-style consensus as contrasted to deliberative-democracy-style majority voting.

Implementability. An interest in the implementability of outcomes.

Different views of work
Although we share many issues and concerns about how to structure ideal processes, there are also some differences in how conflict-resolution professionals and deliberative-democracy advocates see their work:

Timeframe. Are conflict-resolution professionals more concerned with immediate problem-solving and less concerned with macro or ongoing social and political processes?

Decision-oriented processes. Are deliberative democrats more concerned with taking a decision and less interested in dialogues for mutual understanding or empowerment that might not necessarily result in a decision? Consider, for example, the work of the Public Conversations Project in facilitating dialogue about abortion, where no decision is reached but opposing sides try to understand each other better.

Levels of discourse. Do deliberative democrats put a premium on certain kinds of discourse, such as reasoned argument, while conflict-resolution professionals are grappling with how to include explicitly traded preferences in the form of interest-based bargaining, as well as encouraging and facilitating expressions of emotions, along with ethical, moral, religious or other values?

Different problems, different processes. Are different processes needed for different purposes? When making policy judgments, do we use one-on-one mediation or large-scale, formal proceedings? When working with deeply divided groups, do we use representative polling, citizen juries or facilitated conversations? Are there differences of scale and temporality?

Consider the differences between permanent organizations and governmental agencies making long-term policy on one hand, and ad hoc or grassroots groups making temporary instrumental decisions on the other. Or, consider the different needs of individuals embroiled in one-off conflicts versus those embroiled in long-term, deep-seeded conflicts or value differences, such as abortion, gun control, the war in Iraq or affirmative action.

Voting versus mutual understanding. Does democracy ultimately turn on some kind of voting mechanism that can aggregate public preferences, while conflict resolution seeks to achieve joint action, mutual understanding and consensual solutions?

Questions to pursue
If deliberative democracy has given us some theory to think about (e.g., how are decisions best made by the greatest number of affected participants) and conflict resolution has given us some of the tools, procedures and protocols for constructing environments to pursue such participation (e.g., facilitation, mediation, interest-based bargaining), what should we do together to advance the cause of enhancing participation in our polity?

Here are some issues and questions for us to pursue together:

What is “reasoned deliberation”? There are many forms of human discourse—reasoned argument, traded preferences, and emotional, ethical and religious commitments — and all exist within decisional and deliberative settings whenever people come together, whether they are discussing political, social, moral, economic or even personal issues.

How can these very different kinds of discourses meet? Must democratic deliberation always be based on so-called rational deliberation? How do we take account of the nonrational or, as I prefer to say, a-rational feelings or commitments that people have, which we know greatly affect points of view, votes and decision-making? Does making all of this transparent help?

Can we cooperate in nondecisional settings? Aspirations of deliberative democracy, when tied to the tools and techniques of conflict resolution, can be applied in nondecisional settings as well. Nondecisional settings, in fact, may enhance participation and encourage new frameworks for thinking about contested matters (such as the Public Conversation Project’s dia-
logues on abortion and gun control\(^1\), away from the need for decision in a particular matter.

**Who should participate?** Democratic theory has focused on the individualistic but representative method of random selection of individuals for polls, voting and other decisional mechanisms, as opposed to different selection devices such as group representatives, critical-mass theory and stakeholder-selection processes, all of which have their own problems.

Also, there is the Oscar Wilde\(^2\) (or Iris Young\(^3\)) problem. Who has the time and resources (and some would say interest) in full participation in our democracies? Child or elder caregivers and those who work more than one job have less time to participate, biasing many proceedings in favor of those with time and resources to attend and deliberate.

Some want in and can’t afford to play; others could care less as long as things are going reasonably well. When is a democracy truly participatory?

**How do process choices affect outcome and legitimacy?** This differs much in different contexts. Deliberative democracy may look different to an organizing labor union, a faculty, a national political party, the EPA or to a regional planning body. In fact, one advantage of deliberative democracy and conflict resolution working conceptually and practically together, is the practitioners’ enhanced ability to apply different processes and different decision rules in different settings.

**Can we effectively merge theory and practice?** Will there be foundational grand schemes? That’s why the theorists look for first principles in all of this and practitioners feed in ground-up observations and experiences. We need scholars and practitioners to create taxonomies of different process characteristics to help us specify conditions and characteristics of particular process choices in particular contexts.\(^4\) And, we need empirical studies of what works and what doesn’t, under what conditions and in which contexts.

**Can we transcend identity politics?** In the United States and now worldwide, can we re-imagine a commitment to more common-good, collective-consciousness or interdependence sensibilities?

**Is real cultural change possible?** How can we get more people to see that integrative, joint-gain, problem-solving approaches to solving problems (even with scarce resources) may be more effective than the conventional modes of competition and majority voting used by existing institutions? Is it possible to achieve mass social learning and to change cultural ideas about process and the possibilities of different outcomes?

**What moves people to participate?** To change their minds? To care about others and the fate of the earth?

**What processes best serve society?** Is “deliberative democracy” just another phrase for “system design” in conflict resolution language? What processes best serve the needs of a society or polity to make good decisions that people participate in and adhere to?

**How do we evaluate success?** How will we know deliberative democracy and good conflict handling when we see it?\(^5\) Here are some possible criteria:

- Inclusion of the fullest possible diversity of viewpoints
- Participation in both process decisions and content of deliberation
- High-quality information and data
- Questioning and critical inquiry
- Mutual listening and understanding
- Fair and consented-to decision rules, whether based in majority, consensus or other criteria
- Transparency, openness and public availability of information
- Accountability
- Amendability
- Assent, consent and acceptability

**Learning from each other**

Since this is a journal for professional dispute resolvers and conflict-resolution professionals, it is important to ask what our role is in trying to promote inclusive participation and substantively good outcomes in our current society. We, as conflict-resolution professionals, may be particularly well suited to help design, facilitate, study, critique and reform the varieties of processes that the fields of conflict resolution and deliberative democracy have given us.

Already, many of our number facilitate public-policy decisions, through collaborative policy initiatives\(^6\) or negotiated rule-making. Others of us mediate large class-action lawsuits or negotiate more conventional disputes between parties (whether private or governmental, such as environmental matters and local governance).

Some of us design dispute systems for the most common locus of modern human activity—the workplace. Others of us are deliberately working on international nongovernmental exercises in peacemaking, multi-national governance, and post-conflict restoration of civil society and human rights.

All of this work requires the skills of conflict resolution, which Stuart Hampshire has labeled “the highest of human skills.”\(^7\) Alexis de Tocqueville thought American lawyers were particularly likely to engage in such activities because “lawyers serve as the arbiters of the citizens”\(^8\) in an environment where almost every social and political issue eventually becomes a legal issue.

Both the lawyers and nonlawyers who are part of our newer profession of conflict resolution know that people make better decisions when they work in settings where there is mutual respect, good listening and empathy,
as well as rational deliberation, interest-based trading and accommodation of mutual needs. Perhaps it is time for conflict-resolution professionals to learn some of the theory and practice of deliberative democracy (including methods of larger group deliberations and social learning), in order to consider ways to “scale up” good problem-solving and dispute settlement for situations outside of problems that have already been concretely defined as “disputes” or “conflicts.”

At the same time, deliberative democracy theorists (who advocate for more sites of human exchange) might learn from those of us who already have some of the tools for facilitating human communication and understanding.

In an increasingly diverse world, with more and more layers of both governmental and private action, our very survival may depend on whether we learn to make good decisions together, across differences, and with conflicting and complex data and contexts. And, with some hope that we can, with a little bit of help, find common ground.

Endnotes


6 Stuart Hampshire, Justice is Conflict (2000).


14 “The trouble with socialism (read democracy) is that it takes too many evenings.” Oscar Wilde, A Life in Quotes 238 (Barry Day, comp. & ed., 2000).

15 Iris Young, Inclusion and Democracy (2000).


18 Susan Carpenter & W.J.D. Kennedy, Managing Public Disputes (2000, 2d. ed.).

19 Supra note 6, at 35.

The Democratic Legitimacy of Government-Related Dispute Resolution

The elective branches get most of the attention when we think about democracy. But it's important to remember that one of the things that a democratic government provides is a number of structures by which disputes may be resolved peacefully.

Indeed, voting itself is one way of resolving conflict at a societal level. In the United States, courts historically have been the starting point for the resolution of individual, and sometimes social, disputes. Courts would seem to exude a great deal of democratic legitimacy, but why, and under what conditions? And what about other methods of dispute resolution: How do they relate to democratic governance, if at all?

In my view, dispute resolution is an important function of democratic governance, and when the government engages in, administers or endorses a dispute resolution method or process, we should expect it to operate in a way that furthers rather than undermines the larger goal of effective democratic governance.

This may seem intuitive, but its implications are profound for dispute system choice, systems design and evaluation. Designing and operating dispute resolution methods and systems to recognize and maximize their inherent democratic potential assures their democratic legitimacy.

The values of democracy

The democratic character of a dispute resolution method or system can be assessed by reference to the fundamental values of democracy.

If those values are promoted by a dispute resolution method or process, it seems reasonable to infer that the method or process may enhance democratic governance, and be seen as more legitimate from a democratic perspective. On the other hand, if those values are thwarted by a dispute resolution process, then it seems fair to infer that it will diminish democratic governance, and be seen as less legitimate from a democratic perspective.

The many traditional democratic values can be divided into three major groups: political values, legal values, and social capital values.

**Political values**: These are the values that are perhaps most familiar when we think of democratic values, and include participation, accountability, transparency and

**Legal values**: The extent to which a dispute resolution process and its participants may be held responsible for the process and outcomes.

**Social capital**: Whether a dispute resolution process contributes to the larger society or system, for example, by fostering trust in an institution, connection among people, a spirit of reciprocity, or a sense of public spirit or civil virtue.

**Personal autonomy**: The ability of individuals to make their own choices when resolving their disputes. This value pervades all of the other values.

**Political participation**: The ability of individuals to take part in the dispute resolution process.

**Transparency**: The extent to which the dispute resolution process operates in public view.

**Accountability**: The degree to which a dispute resolution process and its participants may be held responsible for the process and outcomes.

**Rationality**: The extent to which the outcome of a dispute resolution process is consistent with law, social norms, or public or party expectations.

**Legal equality**: The degree to which a dispute resolution process treats participants the same.

**Due process**: The extent to which a dispute resolution process is procedurally fair.

**Social capital**: Whether a dispute resolution process contributes to the larger society or system, for example, by fostering trust in an institution, connection among people, a spirit of reciprocity, or a sense of public spirit or civil virtue.

Designing and operating dispute resolution methods and systems to maximize their inherent democratic potential assures their democratic legitimacy.
rationality. In the dispute resolution context, participation refers to the degree to which the process provides a party to a dispute the opportunity to actually participate in its resolution. Similarly, accountability refers to the extent to which the process, or the neutral as a proxy for that process, may be held responsible. Transparency refers to the degree to which the decisional process is visible to participants and possibly others. Rationality refers to the extent that the process leads to an outcome that is consistent with law, community norms or some other reasonable measure of the parties’ expectations.

Legal values: These democratic values are particularly germane to dispute resolution processes, and include equality and due process. Equality generally refers to the equal treatment of parties within the dispute resolution process in terms of the application of relevant laws, norms or other standards. Due process refers to the procedural fairness of the process. Impartiality is a related value and derives from equality and due process.

Social capital values: Social capital values may be less familiar to some, but political scientists have found that they are just as important to the exercise of effective democracy as electoral politics. These can be thought of as cultural values, in particular the degree to which citizens in a democracy have trust in their public institutions, enjoy social connections with others, share a spirit of *esprit de corps* and engage in reciprocal beneficial behavior. In the dispute resolution context, the question would be whether a dispute resolution method or system fosters or frustrates these values.

The baseline: public adjudication

Under these measures, it is not surprising to find that public adjudication exhibits a strong inherent democratic character. Courts promote public participation in the development and administration of the rule of law by allowing parties to bring actions to enforce legal rights, through jury service in the government judicial adjudicatory processes, as well as through the articulation and maintenance of societal expectations with respect to the legal consequences of conduct that can guide private ordering.

Similarly, courts promote equality, due process and rationality by operating in accordance with specific rules of procedure, evidence, and substantive law that have been enacted pursuant to statutory or administrative prescription, or that have evolved over time at common law. There is also significant accountability and transparency in trial court decision-making through the availability of judicial review of trial-level decisions, as well as the public nature of trials and appellate argument. Finally, as instruments of the rule of law, courts help generate a rich reserve of social capital that further reinforces compliance with the rule of law.

Particular courts and court systems are likely to vary in terms of how well they satisfy each of these factors, and for these courts, the factors point to areas where improvement are appropriate if the courts are to achieve their maximum potential to enhance democratic governance.

Arbitration under the FAA

If public adjudication in the United States provides a baseline against which the democratic character of other dispute resolution processes may be measured, arbitration under the Federal Arbitration Act tends to fall short of the mark in many important respects. To be sure, arbitration permits party participation, arguably at a higher level than adjudication, considering that the informality of the arbitration process can overcome formal barriers to party participation, such as the prohibitions against hearsay evidence.

However, arbitration provides little in terms of accountability. Arbitration awards are generally not subject to the kind of substantive review that is available for decisions in public adjudication. Arguments for accountability through the marketplace are undermined by the fact that many arbitrations conducted under the FAA are mandatory—that is, one of the parties is compelled into arbitration because of an arbitration requirement that the other party unilaterally imposed in the contract at issue.

Similarly, transparency and rationality are not essential values of arbitration. Arbitrators are not required to articulate reasons for their decisions in the form of written opinions, thus precluding substantive judicial review and diminishing the capacity of a written opinion to enhance the legitimacy of the arbitral decision by virtue of the transparency of the decision-maker’s reasoning. Moreover, arbitrators are not required to make their decisions according to rules of law, which, while wholly appropriate in my view, can make their awards appear arbitrary or capricious to those unfamiliar with the process.

Because of the enormous decisional discretion vested in arbitrators, arbitration does not, and arguably should not, provide any assurance of equal treatment of the parties, at least in the sense of the application of substantive rules. To the contrary, arbitration provides a highly individualized form of justice that is narrowly tailored to the specific circumstances presented to the arbitrator, who makes a decision according to whatever substantive standard he or she determines is appropriate under the circumstances, unless the submission to arbitration specifies otherwise. On the other hand, arbitration does provide for equal treatment in the sense of procedural due process, generally assuring that both parties within the arbitration will be treated equally with respect to the presentation of evidence to the arbitrator. While the practices of individual arbitrators in this regard may vary considerably, the market for arbitration cases and other reputational concerns tend to constrain abuse of discretion by arbitrators.

Arbitration is thus a process that does not have a high inherent democratic character. However, this
is where personal autonomy can have a trumping effect, legitimizing an inherently less democratic process. Parties may, and in some circumstances should, choose to waive the democratic failings of arbitration in favor of the other virtues the process offers. To be effective, the choice of arbitration must be real, not implied or imputed from consent to the larger contract.

**Mediation**

As a dispute resolution process that requires the consent of the parties before a dispute can be resolved, mediation may generally be seen as an inherently more democratic process than an adjudicatory process like arbitration. However, the enormous variety of styles, practices and applications of mediation raise uncertainty on several democratic elements—a dynamic that gives rise to some of the most significant, contentious and largely unresolved policy issues in the field.

In my view, democratic theory would suggest the answers to these fundamental dilemmas again may be ascertained by reference to the autonomy value—that is, the capacity for mediation to foster true and meaningful autonomy for the parties in the resolution of their disputes.

The political democratic factors present a particularly mixed bag, in part because of the adaptability of mediation to unique circumstances that makes the process valuable in the first place. While the mediation process allows for a high degree of participation by disputants, the transparency of the process greatly depends upon the particular mediation format that is used.

For example, many believe confidentiality to be a crucial value for mediation. Yet it comes at the cost of process transparency. As the Uniform Mediation Act and other state laws suggest, this is a trade-off most states are willing to make, at least to some extent.

But consider, too, questions over the appropriateness of caucus in mediation. From a democratic theory perspective, noncaucus models are plainly more transparent than the arguably more common models in which private caucuses are used, and through which information crucial to settlement is deliberately shielded from one of the parties by the mediator and the other party, absent party consent to disclosure. Indeed, maintaining the appearance of neutrality while working effectively with private caucus information is a central challenge for practicing mediators who work with the caucus format. Surely this shield of the caucus works both ways, in that mediators will typically caucus with both parties. However, one should not confuse even-handedness with transparency. Caucuses shield information, and that is the antithesis of transparency.

Similarly, mediation is not a particularly rational process—certainly as compared with our baseline of public adjudication—because one account coercive pressures that the mediator can bring to bear on parties in mediation, particularly mediators who use a more directive or cajoling style, as well as other settlement pressures, such as time, resources and the need for a party to move on.

Moreover, this view focuses on particular disputes, and a look at the system as a whole underscores the lack of accountability in mediation. Mediators are not licensed or certified in most states, and so are not accountable to public oversight other than through private actions for malpractice or ethical lapses and through the reputational market for mediator services. Moreover, unlike most contracts, the results of mediated settlement agreements are generally not reviewable for substantive fairness, or even unconscionability. While in most cases there is no need for such review, democracy’s concern would

**Mediation has a stronger inherent democratic character than arbitration. But how that character plays out in particular cases will depend upon how it is implemented.**

of the strengths of the process is the ability of the parties to make decisions about the outcomes of their disputes according to values and standards that are uniquely important to them rather than according to predetermined legal, workplace or other standards. As a result, decision-making in mediation can be more of an idiosyncratic process, rather than one necessarily guided by more objective rationality. While this is entirely appropriate, it can raise an enormous practical challenge in assessing the substantive fairness of a mediated settlement agreement, particularly one that falls well short of what the law may provide but which may satisfy other interests of the parties, including just getting the dispute over with.

The mediation process is similarly ambiguous on the final political value, accountability. On the one hand, because mediation parties are not required to settle, they arguably have all the accountability they need. However, this view does not take into
power to enhance party autonomy in the resolution of a dispute, assuming the mediator is skillful in managing power disparities between the parties. If the mediator is not capable of managing a power imbalance effectively, however, the result can be the suppression of the meaningful autonomy of the low-power party, or, worse yet, the direct or indirect coercion of that party’s choices.

Similarly, in the best of worlds, evaluative mediation can foster meaningful party autonomy by providing a hard-headed third-party assessment of a party’s claims. In the worst, it can be just another tool of suppression and coercion, the antithesis of party empowerment. Particularly in more extreme situations, such a dynamic could raise significant issues regarding the substantive fairness of the mediated settlement agreements, as well as the equality of treatment of the low-power party.

In sum, mediation has a stronger inherent democratic character than arbitration. But as with arbitration, how that democratic character plays out in particular cases will depend upon how it is implemented.

Social capital values

We have not yet considered the social capital values for either arbitration or mediation. Assuming the choices made along the other dimensions have been more democratic, then it is fair to infer that the dispute resolution process itself may help to contribute to democratic social capital by fostering greater public trust in dispute resolution decisions, encouraging constructive social connections with others, fostering a spirit of esprit de corps and community engagement and by rewarding reciprocal beneficial behavior.

If, however, the choices made along the other dimensions have been less democratic, then it is fair to infer that the dispute resolution process itself may undermine the effectiveness of democracy. The picture is not pretty.

Emerging theory regarding trust in public institutions suggests that less democratic dispute resolution processes may carry significant systemic costs by eroding public trust in the rule of law as an institution. As the Rodney King riots suggested a decade ago, loss of public trust in the rule of law is not a trifling matter.

There are also important implications for the willingness of citizens to comply with the law voluntarily. As an empirical matter, the relationship between trust and rule-compliance has been studied extensively in the context of citizen compliance with legal rules. A leading researcher, New York University social psychologist Tom R. Tyler, has consistently found across studies that trust in legal institutions far exceeds other factors—including agreement in the substantive correctness of the law—as the primary determinant of the willingness to comply with legal rules.4

More specifically, Tyler’s research suggests people are most willing to comply with the law when it is perceived to be legitimate in the sense that it is entitled to or deserving of compliance. Tyler has further found that the primary determinants of this sense of legitimacy or entitlement are the procedural fairness of the decision-making process and an underlying trust in the motives of legal authorities.3

Here the research is striking, showing that it is the integrity of the process by which the rule is developed and applied—the processes and behaviors of legal authorities—that determines whether these initially trusting expectations are met or defeated, not substantive agreement with the rule. What is equally striking is that the referent points that are most salient in making the determination of procedural integrity are generally consistent with the very factors identified above as being central to democratic legitimacy: whether the authorities allow people to influence the outcome (participation), allow people to speak and present evidence (participation), behave neutrally (due process), treat people with dignity and respect (due process), explain judgments (rationality) and provide desired outcomes (rationality).

While striking, the consistency of these values as a baseline for assessment across contexts is not surprising. Rather, it bears testament to how deeply these fundamental democratic values are entrenched, and to how little difference context makes to our need for their fulfillment.

In sum, dispute resolution is a fundamental component of democratic governance, and it is important for the dispute resolution method or process to be designed or operated in a way that is consistent with traditional democratic values. Doing so will inure to the benefit of the dispute resolution process, and for the larger system of dispute resolution that serves and supports our democracy.

Endnotes


4. The most significant of this research focused on citizen contact with police and courts as a proxy for what I describe here as the rule of law. See Tom R. Tyler, Public Mistrust of the Law: A Political Perspective, U.Cin.L.Rev. 847, 856-858 (1998).

5. Id. at 866. Interestingly, Tyler’s research suggests that people tend to begin with a benevolent outlook about the noble motives of government officials with respect to law-making and application, which he calls an “illusion of benevolence” that is subsequently tested by actual contacts with government authorities. Id. at 868-869.
A Glossary of Deliberative Democracy Terms

BY CARRI HULET

This glossary defines some of the fundamental concepts that underpin deliberative democracy and public dispute resolution.

**Common interest**, also called public will or public interest, refers to the collective desires, needs or values that citizens share in a community or society. Common interest is not just the sum of individual concerns; rather, it is the answer to the question, “What is good for everyone?” Many deliberative democracy proponents claim that public deliberation has the potential to reveal the common interest.

**Consensus building** is a process of seeking unanimity through carefully managed dialogue between relevant stakeholders. Consensus is reached when everyone agrees they can live with whatever is proposed after every effort has been made to meet all interests.

**Deliberative democracy** is a contemporary theory of civic engagement placing public deliberation at the heart of democratic governance. In contrast to traditional political theories that emphasize voting for elected representatives, deliberative democrats claim that, to produce democratic outcomes, citizens should be involved directly in formulating public policy and even in lawmaking. As a political theory, deliberative democracy is still developing and there are sharp divisions among those who subscribe to it. Scholars are working on theory-building, while practitioners are creating and implementing innovative opportunities for increased political activity.

**Deliberative Polling** is a tool designed by James Fishkin that attempts to measure what public opinion might be if citizens had the time and resources to better understand an issue. Deliberative polls survey randomly selected, representative samples of citizens before and after they have read about and discussed the issue with experts, leaders and others. (See Fishkin, “Consulting the Public—Thoughtfully,” p. 12 in this issue.)

**Dialogue, deliberation and debate** are different forms of communication that affect policy-making. Dialogue is the respectful sharing of perspectives and is useful in preparing people for deliberation, which is dialogue for the purpose of decision-making. A debate results when the parties advocate for one choice over another with the intent to persuade.

**Enlightened self-interest** is a statement of each citizen’s interests, often arrived at through deliberation. In consensus-building, mediators attempt to help stakeholders move away from short-term assumptions about their interests to a more reflective sense of how meeting others’ interests can satisfy their own interests most effectively.

**Informed opinion** is a term used by Daniel Yankelovich, who claims that people enter a deliberation with raw opinions, but that through the dialogue, can experience a shift of opinion. He calls this transformed point of view an informed opinion.

**Pluralism** describes both the structure of democratic government and the diversity of the values and beliefs of the individuals in a society. The pluralistic nature of modern democracies allows nonelected groups such as deliberative assemblies to have a direct impact on policy-making. At the same time, the pluralism of values and beliefs that motivate one person to want one thing and another to want something else poses the most difficult challenge to collective decision-making.

**Public dispute resolution**, as it relates to policy-making, refers to mediated discussions among stakeholder representatives with a mandate to generate an informed agreement that the public will accept as legitimate and elected and appointed officials will agree to implement. Mediating public disputes is facilitated by nonpartisan professionals trained in group problem-solving.

**Representativeness** is one aspect of legitimacy in deliberations. Deliberative democracy theory is split on the issue of who has the right to speak for whom. The ideal suggests that everyone should be included, calling into question the possibility of general representation. In the field of dispute resolution, there are a variety of expectations about fairness, expertise and efficiency that guide selecting stakeholder representatives. Although dispute resolution professionals are committed to ensuring representation for all relevant stakeholder groups—even those such as future generations that are difficult to represent—questions of legitimacy and justice invariably surround efforts to ensure representativeness in democratic discourse.

**Safe democratic space** is a phrase used by Carolyn Lukensmeyer to describe hoped for, but still nonexistent forums in which elected officials and the public can feel safe deliberating together. She argues for institutional change that makes deliberation an essential and expected part of policy-making. (See Kahane & Lukensmeyer, “Representation in Democratic Deliberation,” p. 7 in this issue.)

**White space** is a term used by Nancy Roberts to describe geographic areas or political situations in which a gap in the assignment of authority provides opportunities for nonofficial bodies to make decisions.

Carri Hulet is a mediator in the public arena who is currently applying to graduate programs in political science. She can be reached at carrihulet@hotmail.com.
Judging the Handbook for Judges

BY THE HON. CECELIA G. MORRIS


This handbook, a collection of papers providing a comprehensive overview of ADR in various court settings, is an excellent reference for court personnel seeking information on implementing an ADR program. In 1993, when the Southern District of New York Bankruptcy Court conceived its mediation program, no such book existed. As clerk of one of the busiest commercial courts in the nation during that critical period, I know only too well the difficulty of initiating a program without the benefit of others’ experiences.

The handbook assembles the collective wisdom gathered by courts and administrators during the years since ADR was a novel idea that a few wished to include as an alternative to the only other option available in most cases—a strictly judge-determined trial.

As the editors point out, each section of the book deals with a particular court, and each chapter acts as a stand-alone resource for a specific practice area. Chapters follow a uniform format, addressing questions regarding the purpose of court-annexed ADR programs, the selection of cases appropriate for referral, the process and procedure for cases that are referred to ADR and the desired qualifications of ADR professionals, as well as issues concerning court supervision of programs and the administration of ADR services.

In addition to providing resources for judges who handle bankruptcy cases (an area of the law in which ADR is well developed), the editors include chapters on almost every area of litigation, as well as an excellent comprehensive Table of Appendices consisting of forms, checklists and model rules.

Thoughtful and well-researched opening and closing chapters augment the more utilitarian, practice-specific chapters that comprise the majority of the handbook. The handbook begins with an overview of ADR in the civil context and concludes with a discussion of the potential future of ADR. These two bookend chapters provide a useful theoretical framework for the practical advice contained in the various chapters, reminding the reader to ensure that the purpose and policy of the program continue to drive the ADR practice.

The handbook assembles the collective wisdom gathered since ADR was a novel idea. Each section deals with a particular court — and each chapter is a stand-alone resource for a specific practice area.

The Hon. Cecelia G. Morris is a United States Bankruptcy Judge for the Southern District of New York, and she chairs the Rules Subcommittee of the Business Bankruptcy Committee of the ABA Business Law Section.

(Photo by Mark Umstat.)
summary jury trial and early neutral evaluation. Instead, these chapters address only the implementation of a viable mediation program.

The handbook does not shy away from controversy, recognizing that as mediation gains popularity as the preferred alternative to adversarial litigation, detractors are increasingly dissatisfied with mediators who use aggressive evaluation techniques to “encourage” settlement. In my experience, many court-annexed mediation programs do not fit within the “self-determination ideal of mediation,” which McAdoo and Welsh describe as a “facilitated negotiation process” designed to foster the parties’ autonomy.

Such an ideal may not be realistic in light of many courts’ need to use mediation as a tool for alleviating docket congestion. Mediation, as an alternative to adversarial litigation, was intended to emphasize participant empowerment. Nevertheless, as Judge Barry Russell recognizes in “Mediation in Bankruptcy Courts,” the first goal of ADR in bankruptcy mediation is “to save time and money,” with party satisfaction included only as a secondary objective. This split in philosophies exemplifies the broader tension between commercial mediation (where sophisticated parties seek an acceptable, one-time solution) and mediation of cases in which emotions are the driving force and parties wish to preserve relationships, such as in the domestic relations arena.

One possible solution to the disagreement between the various constituencies seeking to implement mediation in different spheres of the law is suggested in “ADR in the Courts: Progress, Problems and Possibilities,” by Louise Phipps Senft and Cynthia A. Savage. These authors suggest that an important step in the implementation process is early identification of the core goal of the mediation program. Among possible desired goals are agreement or settlement; individual growth for the participants (as in the case of the victim confronting the offender); or the continuation or repair of a relationship among the parties.

If there is a criticism to be leveled at the book, it is that the authors of stand-alone chapters, after determining that mediation is the preferred form of ADR for a variety of situations, do not explicitly discuss which model of mediation might be most appropriate for each individual court’s framework.

Nevertheless, the handbook correctly states that once the core goal of the court-annexed ADR program is defined by the court for its particular legal context, several alternative models should be considered, and the most appropriate one chosen. As a frequent mediator, I find it interesting that the authors are almost unanimous in choosing mediation as the most adaptable form of ADR for the civil context. In using this book to implement particular programs, I encourage court personnel and judges to carefully read the theoretical chapters to ensure that ADR practice fosters the ultimate goals of the program.
The 2005 revised Model Standards of Conduct for Mediators were adopted by the ABA House of Delegates on August 9, 2005, and soon afterward by the American Arbitration Association (AAA) and the American Bar Association Section of Dispute Resolution. They are in a foundational set of ethical guidelines of the Standards: The Standards form a three-year revision effort by the same three entities that conceived the original standards in 1994: the ABA Dispute Resolution Section, AAA, and ACR’s predecessor, the Society for Professionals in Dispute Resolution.

This article will describe the history and other background of the Standards, the redrafting effort, some of the changes to the Standards, and certain aspects of the Standards as revised. First, a word about the purpose of the Standards: The Standards form a foundational set of ethical guidelines for mediator practice. They are intended to guide individual mediators in their practice; to provide a model for entities, such as courts, professional organizations, and providers of mediation services that establish standards of conduct for mediators; and to inform potential and actual participants in mediation about what they should expect in mediation.

The standards are intended to assist individual mediators, participants in mediation and entities such as courts, professional organizations and providers of mediation services.

Development of the Model Standards of Conduct for Mediators

The original Model Standards of Conduct for Mediators (available at www.abanet.org/dispute/modelstandardsofconduct.doc) were developed between 1992 and 1994. They have been adopted by a variety of state mediation programs, and multiple educational texts, including law school casebooks, reference the original Standards in their discussion of ethical norms for mediators. The original Standards were approved by the Dispute Resolution and Litigation Sections of the ABA, but they were not submitted for ABA House of Delegates approval.

By 2002 the original drafting organizations believed it important to update the original Standards in a way that addressed the changing state of mediation practice and mediators. They convened a Joint Committee of two representatives from each organization to initiate this review. The Joint Committee members included Eric P. Tuchmann and John H. Wilkinson from the American Arbitration Association, Sharon B. Press and Terrence T. Wheeler from the Association for Conflict Resolution, and R. Wayne Thorpe and Susan M. Yates from the American Bar Association Section of Dispute Resolution; the last two members are co-authors of this article. The Committee invited Dr. Joseph B. Stulberg of Ohio State University Moritz College of Law to act as reporter.

The Joint Committee found much to respect and retain in the original Standards, including the basic architecture of the nine standards. One of the most important features of the new Standards is the restatement of the same core concepts of mediator ethics that appeared in the 1994 Standards, which we believe reflects a continued recognition of these concepts as commonly accepted building blocks of mediation ethics. These concepts include self-determination, impartiality, conflicts of interest, confidentiality, competence and quality of process.

When we are asked about the “most controversial” change or simply the “biggest” change, there is no simple answer. The 2005 Standards accomplish the following types of changes:

- updating the Standards to reflect the current state of mediation practice;
- distinguishing the level of guidance provided to the mediator by the targeted use of the newly defined terms “shall” and “should;”
- refining the Standards so they guide only the mediator’s conduct rather than the conduct of any other mediation participants or outside entities such as courts; and
- providing guidance for mediator conduct in situations when the operation of two or more Standards might conflict with one another.

The drafting process

The Joint Committee met for the first time in September 2002. For the next three years the Joint Committee worked in a variety of ways:
six in-person multi-day drafting meetings, numerous telephonic committee meetings, and countless email communications;

• extensive input from dozens of individuals outside the Joint Committee;

• public sessions at four national conferences in Florida, Texas, California and New York and at other local and regional conferences and meetings;

• publication of drafts and elicitation of comments through an interactive web site created specially for feedback on the drafts of the revised Standards;

• updates in publications of the ABA Section on Dispute Resolution;

• correspondence with dozens of constituency organizations to solicit input; and

• issuance of four drafts to the public.

Within the ABA, the Section of Litigation jointly sponsored the 2005 Model Standards with the Section of Dispute Resolution before the House of Delegates, and members of the Section of Litigation provided valuable feedback and commentary to the Joint Committee’s drafts. Much of this feedback was provided through the Section’s Task Force on Ethical Conduct for Mediators, appointed by Section Past Chair Dennis Drasco, and chaired by Charna Sherman and Larry Watson.

The Standards were then co-sponsored in the House of Delegates by the Administrative Law and Regulatory Practice Section; Criminal Justice Section; Family Law Section; Section of Public Utility, Communications and Transportation; Section of State and Local Government Law; Tort Trial and Insurance Practice Section; and Young Lawyers Division. In addition, the Sections of Labor and Employment and Business Law endorsed the Standards. The House of Delegates adopted the Standards unanimously.

Summary of the Model Standards of Conduct for Mediators

The 2005 Model Standards of Conduct for Mediators are comprised of nine standards, preceded by a Preamble and a Note on Construction. The Reporter’s Notes explain in detail much of the Joint Committee’s analysis in preparing the Standards. The Reporter’s Notes can be found at http://moritzlaw.osu.edu/dr/msoc/index.html.

The following is an effort briefly to summarize the Standards and to indicate some of the significant changes from the original Standards. The effort to summarize in a small amount of space and relatively fewer words than used in the Standards necessarily cannot be totally faithful to both the letter and the spirit of the Standards. Accordingly, readers are urged to consult the Standards in their entirety.

Preamble

The Preamble puts the standards in context, talks about why they were written, and defines mediation and its possible purposes. One could argue that the definition of mediation is broadened somewhat in that it shifts the focus away from reaching agreement to decision-making, adds mutually satisfactory agreements “when desired,” and also adds the concept of “assessing possible solutions.” Readers who look for validation of any particular mediation style in the Standards are likely to be disappointed. According to the Reporter’s Notes (at p. 7): “The revised definition of mediation is not designed to exclude any mediation style or approach consistent with Standard 1’s commitment to support and respect the parties’ decision-making roles in the process.”

Note on construction

The Note on Construction is a new addition in the 2005 Standards. It advises the reader to use the Standards in their entirety and not to attach significance to their order. It goes on to define “shall” and “should” as used in the Standards, and “mediator” to include co-mediation models. It notes that the beginning and ending of mediation are not defined.

The newly clarified definitions of “shall” and “should” are among the more significant aspects of the new Standards.

The newly clarified definitions of ‘shall’ and ‘should’ are among the more significant aspects of the new Standards.
these Standards do or should provide the operative rule of law in any case, but rather our intent is to be certain that mediators and the public recognize that such might be the case.

Standard I: Self-Determination

The first standard retains self-determination as the core principle of mediation. In a substantial change from the original Standards, however, the 2005 Standards make clear that this principle applies not just when determining outcomes, but at any stage of mediation, including mediator selection, process design, and participation in or withdrawal from the process.

An example of the possible conflict foreseen in the penultimate paragraph of the Note on Construction (regarding conflict between the Standards and other authorities) could occur when a mediator in a court program is assigned to parties. Those parties may not always have self-determination in selecting their mediator, but the mediator is still expected to adhere to self-determination in all other aspects of the mediation.

The first standard provides a reminder to mediators that they may need to balance party self-determination with other standards, such as the duty to conduct a quality process. This concept of balancing the standards is new in the 2005 Standards.

This standard also speaks to a mediator’s responsibility to inform or remind parties of the option of consulting other professionals to assist them in making informed choices. This standard closes with a reminder to mediators that they shall not undermine party self-determination due to various inappropriate influences, “such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.”

Standard II: Impartiality

The second standard addresses mediator impartiality. It states that mediators must refuse to mediate if they cannot be impartial, and they must conduct mediations impartially. The standard goes on to say that mediators not only must act impartially, they must look impartial and avoid gifts that raise questions about impartiality. Some latitude is provided for small items or services that would facilitate the mediation or respect cultural expectations, so long as impartiality is not affected. The standard ends by saying that mediators must withdraw if they cannot remain impartial.

Standard III: Conflicts of Interest

The third standard addresses conflicts of interest. In short, Standard III provides that a mediator shall avoid a conflict of interest or appearance of a conflict during and after a mediation; make reasonable inquiry to determine actual and potential conflicts; and disclose actual and potential conflicts reasonably known to the mediator, even if they are raised after accepting the mediation. After disclosure, and with agreement of the parties, a mediator may proceed unless to do so would undermine the integrity of the process. Finally, Standard III prohibits post-mediation relationships that “would raise questions about the integrity of the mediation.”

The requirement to make a “reasonable inquiry” is somewhat more explicit in the revision than in the original, but the revision does acknowledge in Standard III (B) that a “reasonable inquiry . . . may vary based on the practice context.”

The first standard provides a reminder to mediators that they may need to balance party self-determination with other standards, such as the duty to conduct a quality process.

Standard IV: Competence

The fourth standard discusses mediator competence in terms of party expectations and party choice: a mediator shall mediate only when able to do so consistent with reasonable expectations of parties, and parties may select any person as a mediator provided the parties are satisfied with the mediator’s competence and qualifications.

There is a new requirement that a mediator who determines that he or she is not able to mediate competently must advise the parties and address the situation, including possibly withdrawing from the mediation. A mediator who is unable to mediate due to drugs, alcohol, medication or other cause also must step aside.

Standard V: Confidentiality

As the Reporter’s Notes indicate, “One of the most significant developments surrounding the practice of mediation that has occurred since the adoption of the 1994 Version has been the development of the Uniform Mediation Act (2003). . . . While this Standard is consistent with the confidentiality policy goals of the Uniform Mediation Act, it is not designed to match its substantive provisions and nuances in every dimension.”

In doing so, the fifth standard addresses at least three key aspects of confidentiality. First, with narrowly defined exceptions, a mediator must maintain confidentiality of all information obtained by the mediator in a mediation. Second, a mediator must keep confidential any information obtained in a private caucus, unless the party revealing the information consents to disclosure. This is arguably a heightened level of guidance as compared to the original Standards. The Reporter’s Notes recognize that the requirement to obtain this consent may be fulfilled by a variety of different practices (page 16). Third, because of the too common occurrence of confusion about what governs confidentiality in a given mediation, the mediator is directed to promote understanding among the participants of how confidentiality applies in each case.
Standard VI: Quality of the Process

Much of the sixth standard is new. It requires a mediator to conduct a mediation “in a manner that promotes diligence, party participation, procedural fairness, party competency and mutual respect….”. Standard VI (A) contains ten paragraphs governing mediator conduct with respect to various components of a “quality process.” In summary fashion those paragraphs provide as follows:

1. The mediator should be able to devote adequate attention to the matter.
2. The mediator should satisfy party expectations concerning timing.
3. The parties and mediator should agree upon who attends a mediation.
4. The mediator should promote honesty and candor and shall not knowingly misrepresent any material fact or circumstance (see further discussion below).
5. The mediator may provide to parties information the mediator is qualified to provide.
6. The mediator is prohibited from mislabeling a process as mediation to obtain protections of mediation.
7. The mediator is permitted to recommend another dispute resolution process when appropriate.
8. The mediator shall not undertake a different dispute resolution role, such as arbitration, without consent of the parties and a clear explanation to the parties of the possible consequences.
9. The mediator should take appropriate steps if the mediation is being used to further criminal conduct.
10. The mediator should take certain steps to address the circumstance of a party having difficulty comprehending or participating in a mediation (see further discussion below).

Two of these paragraphs—4 and 10—are discussed below. Standard VI (A) (4) regarding honesty and misstatements in mediations is new, and it is also somewhat controversial. The Reporter's Notes summarize it as follows:

Standard VI (A) (4) reflects the nuanced environment in which mediation occurs. The language of Standard VI (A) (4) prohibits a mediator from knowingly misrepresenting a material fact or circumstance to a mediation participant while it acknowledges that resolving matters in mediation is not always predicated on there having been complete honesty and candor among those present. To state the matter differently, while mediation participants might engage in negotiating tactics such as bluffing or exaggerating that are designed to deceive other parties as to their acceptable positions, a mediator must not knowingly misrepresent a material fact or circumstance in order to advance settlement discussions.

There are those who would hold mediators to a higher standard of candor, prohibiting statements in the nature of “bluffing,” designed to deceive as to a party’s acceptable position. The approach to misrepresentation in negotiation taken in the revised Standards has long been accepted by lawyer rules of ethics. (ABA Model Rules of Professional Responsibility 4.1, Comment 2.) Many mediators may choose not to make any such misstatements as a matter of personal style or ethics, but many others find it appropriate to do so, especially when negotiating with lawyers and parties who adhere to such a paradigm of negotiation. Some mediators, for example, find that representing settlement suggestions as their own ideas avoids the reactive devaluation that may arise if the party hearing the proposal knows that the suggestions came from the opposing party. Other mediators would find this inappropriate.

Standard VI (A) (10) is a good example of the value of input from the mediation community during the drafting process, in this case mediators who work with people with disabilities. While this standard would cover participants who are protected by the Americans with Disabilities Act, it is also much broader and would apply to individuals who temporarily are experiencing a difficulty participating in the mediation for a variety of reasons.

Additionally, Standard VI (B), which is new to the Standards, calls upon a mediator to take appropriate steps, including postponement, withdrawal or termination, if the mediator learns of domestic abuse or violence among parties. This type of response is common in mediation practice, but is not without some controversy. Some worry that too many strictures on mediating when there is a background of abuse might lead to the elimination of the mediation option for parties who already have many of their options abridged because of the abuse they have experienced. On the other hand, it is critical that mediation not become the vehicle for further manipulation, or far worse, in an abusive relationship.

Standard VII: Advertising and Solicitation

The seventh standard deals with advertising and solicitation. It requires a mediator to be truthful and
not misleading in advertising and soliciting, to avoid soliciting in a manner that gives an appearance of partiality or undermines the integrity of the process, and to avoid revealing names of participants without their consent.

Standard VII (A) (2) prohibits mediators from claiming to be qualified by an entity unless that entity has a qualification process and the mediator has received the qualification status. It is an example of the 2005 Standards responding to a concern in the field that mediators are claiming credentials that are not actually being issued by courts and other organizations.

**Standard VIII: Fees and Other Charges**

The eighth standard relates to fees and other charges. As in the original Standards, a mediator must provide true and complete information about fees and expenses. A mediator should develop fees in view of certain listed factors and should set forth the fee arrangement in writing unless the parties request otherwise. Section VIII (B) (2), which is new, is an example of a clause intended to address a development in mediation practice, namely the practice of the defendant—often in employment mediations—offering to pay all of the mediator’s fees. While permitting a mediator to charge unequal fees, it is clear that such an arrangement should not be permitted to adversely affect the mediator’s impartiality.

The standard relating to so-called contingency and success fees may be somewhat controversial, although the language of the 2005 Standards VII (B) (1) is identical to that of the 1994 version:

**VII (B) A mediator shall not charge fees in a manner that impairs a mediator’s impartiality.**

1. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.

First, as to the easy part, we are not aware of mediators charging a fee that is based upon the amount of a settlement; we have heard no one defend such a practice. We believe that there is a universal recognition that such a practice would severely impair the mediator’s impartiality, making the mediator a partisan of the side receiving payment.

Second, however, there is substantial disagreement about whether it is appropriate for a mediator to receive a fee where the amount is based upon whether a case settles—“the result of the mediation.” Those who oppose the practice say that it tilts the playing field toward settlement, by giving the mediator an interest in achieving a settlement, thereby arguably impairing party self-determination not to settle. The advocates of this practice believe equally strongly, however, that it is the ultimate vindication of self-determination to provide a financial incentive to the mediator to help parties get their case settled, especially in the context of so-called sophisticated users of mediation.

**Standard IX: Advancement of Mediation Practice**

The ninth standard addresses the mediator’s responsibility to the field of mediation. It presents an expectation that a mediator should advance the practice of mediation and provides five examples of ways in which a mediator might do so (e.g., pro bono mediations, public education and mentoring.) It also states that mediators should be respectful of differing views in the mediation field.

**Focus on ethics**

The original version of the Model Standards of Conduct for Mediators was foundational for mediator standards that followed it. We hope that these newly revised and updated Standards will assist in the ongoing development and provision of the ethical practice of mediation and will encourage courts and other entities to adopt these Model Standards of Conduct for Mediators as their own. Additionally, we hope that the act of promulgating these Standards has created an opportunity for everyone in the mediation field—neutrals and advocates—to turn their attention to ethics. These Standards, after all, are not something to contemplate once every ten years, and return to the shelf, but a living document that should provide guidance on a daily basis and provoke discussion within the field.

---

**The ABA Section of Dispute Resolution Web site**

Visit the Dispute Resolution Section Web site at [http://www.abanet.org/dispute](http://www.abanet.org/dispute)

It contains Section and committee activity updates, ADR policy issues, upcoming events in dispute resolution, Section publications and resources, and more.

You can join the Section directly from the website, subscribe to the Section-sponsored discussion groups, or obtain articles and resources.
The Model Standards of Conduct for Mediators  
September 2005

The Model Standards of Conduct for Mediators was prepared in 1994 by the American Arbitration Association, the American Bar Association’s Section of Dispute Resolution, and the Association for Conflict Resolution.¹ A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005.² Both the original 1994 version and the 2005 revision have been approved by each participating organization.³

PREAMBLE

Mediation is used to resolve a broad range of conflicts within a variety of settings. These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes. Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute. Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.

NOTE ON CONSTRUCTION

These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear. The use of the term “shall” in a Standard indicates that the mediator must follow the practice described. The use of the term “should” indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion. The use of the term “mediator” is understood to be inclusive so that it applies to co-mediator models. These Standards do not include specific temporal parameters when referencing a mediation, and therefore, do not define the exact beginning or ending of a mediation. Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources.

These Standards, unless and until adopted by a court or other regulatory authority do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities, should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.

STANDARD I. SELF-DETERMINATION

A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator’s duty to conduct a quality process in accordance with these Standards.

2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

STANDARD II. IMPARTIALITY

A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.

B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.
1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.

2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.

3. A mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.

C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

STANDARD III.
CONFLICTS OF INTEREST

A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.

B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.

C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.

D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.

E. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.

F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

STANDARD IV. COMPETENCE

A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.

1. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.

2. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.

3. A mediator should have available for the parties' information relevant to the mediator's training, education, experience and approach to conducting a mediation.

B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.

C. If a mediator's ability to conduct a mediation is impaired by drugs, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

STANDARD V. CONFIDENTIALITY

A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.
1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.

2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.

3. If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.

B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.

C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.

D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

STANDARD VI.
QUALITY OF THE PROCESS

A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.

1. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.

2. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.

3. The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.

4. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.

5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

6. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.

7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.

8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.

9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

10. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party’s capacity to comprehend, participate and exercise self-determination.

B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.
C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

**STANDARD VII. ADVERTISING AND SOLICITATION**

A. A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator’s qualifications, experience, services and fees.

1. A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications.

2. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.

B. A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.

C. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.

**STANDARD VIII. FEES AND OTHER CHARGES**

A. A mediator shall provide each party or each party’s representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.

1. If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services.

2. A mediator’s fee arrangement should be in writing unless the parties request otherwise.

B. A mediator shall not charge fees in a manner that impairs a mediator’s impartiality.

1. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.

2. While a mediator may accept unequal fee payments from the parties, a mediator should not use fee arrangements that adversely impact the mediator’s ability to conduct a mediation in an impartial manner.

**STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE**

A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:

1. Fostering diversity within the field of mediation.

2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.

3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.

4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.

5. Assisting newer mediators through training, mentoring and networking.

B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.

Endnotes

1. The Association for Conflict Resolution is a merged organization of the Academy of Family Mediators, the Conflict Resolution Education Network and the Society of Professionals in Dispute Resolution (SPIDR). SPIDR was the third participating organization in the development of the 1994 Standards.

2. Reporter’s Notes, which are not part of these Standards and therefore have not been specifically approved by any of the organizations, provide commentary regarding these revisions.

3. The 2005 revisions to the Model Standards were approved by the American Bar Association’s House of Delegates on August 9, 2005, the Board of the Association for Conflict Resolution on August 22, 2005 and the Executive Committee of the American Arbitration Association on September 8, 2005.
House approves postal ADR bill

On July 26, the House passed broad postal reform legislation, H.R. 22, which would expand the use of mediation to resolve labor disputes within the United States Postal Service while limiting the type of mediators eligible to conduct the proceedings.

Under current law, when a labor dispute arises between the Postal Service and its workers, and the parties fail to adopt a procedure providing for a binding resolution of the dispute, the Federal Mediation and Conciliation Service (FMCS) is required to appoint a “factfinding panel.” That panel then investigates the dispute and issues a report—with or without recommendations—to the parties to help facilitate an agreement. If no agreement is reached within a certain time, the dispute is resolved by an arbitration panel under the terms specified in the statute.

H.R. 22, sponsored by Rep. John McHugh, R-N.Y., contains language that would modify this system by requiring the FMCS to appoint a mediator instead of a “factfinding panel” as the first step in seeking a resolution of labor disputes. The bill would also require the parties to mediate the dispute and negotiate in good faith in an effort to resolve the dispute, and it specifies that the mediator must be “of nationwide reputation and professional stature” and a member of the National Academy of Arbitrators. In the event that mediation does not resolve the dispute, the bill would still require the use of arbitration boards to reach a binding resolution, but the bill would make several changes to the manner in which the members of the arbitration board are selected.

S. 662, a companion measure introduced by Sen. Susan Collins, R-Maine, was approved by the Senate Homeland Security and Governmental Affairs Committee on June 22 and placed on the Senate Legislative Calendar. Although both bills enjoy strong bipartisan support, the prospects for final passage remain unclear due to President Bush’s strong opposition to several non-ADR provisions in the legislation.

Reauthorization of state mediation programs

President Bush signed a measure into law on June 29 designed to encourage mediation of agricultural disputes throughout the country. P.L. 109-17 (formerly, S. 643), sponsored by Sen. Pat Roberts, R-Kan., reauthorizes the Certified State Mediation Program through 2010. The program, carried out by the U.S. Department of Agriculture’s Farm Service Agency, provides federal matching grants to state mediation programs around the country. Currently, more than 30 states are certiﬁed to receive matching funds under the program and several additional states are seeking certiﬁcation. To receive federal funding, a state program must meet certain criteria and must provide at least 30 percent of the program’s operating costs.

The program was created in 1987 as a means of resolving credit and loan disputes between USDA and producers, but since that time, Congress has expanded its scope to include many other types of disputes as well, including wetlands remediation, conservation compliance, grazing, pesticides, and other issues deemed appropriate by the Secretary of Agriculture.

Mandatory arbitration of mortgage disputes

Congress is considering several different bills designed to limit the use of mandatory arbitration to resolve certain types of mortgage disputes.

H.R. 1182, introduced by Rep. Brad Miller, D-N.C., would amend the federal Truth in Lending Act, 15 U.S.C. 1639, to prohibit the use of mandatory arbitration or any other nonjudicial procedure to resolve high-cost mortgage disputes unless the parties agree to such procedures after the dispute arises. Miller introduced similar legislation, H.R. 3974, last year, but that measure died at the end of the 108th Congress. H.R. 1182 was referred to the House Financial Services Committee, although no hearings have been scheduled.

A competing bipartisan measure, H.R. 1295, was introduced by Rep. Bob Ney, R-Ohio, who chairs the House Financial Services Subcommittee on Housing and Community Opportunity. Like Miller’s bill, H.R. 1295 would prohibit the use of mandatory arbitration or other nonjudicial procedures to resolve high-cost mortgage disputes unless the parties agree otherwise after the dispute arises. Unlike the Democratic-sponsored bill, however, H.R. 1295 also would require all such post-controversy agreements to comply with the standards set forth by certain nationally recognized arbitration organizations. The measure also would require the creditor to pay the reasonable costs of all parties to the arbitration for at least the first two days of the proceeding. In early December, H.R. 1295 was pending in the House Financial Services Committee.

R. Larson Frisby is a lobbyist working in the ABA Governmental Affairs Office. Copies of the legislation described above, or any other federal legislation involving ADR issues, can be obtained directly from the U.S. Congress’ website at http://thomas.loc.gov, or by contacting the ABA’s Governmental Affairs Office at (202) 662-1098.
The American Bar Association Section of Dispute Resolution is one of many organizations pushing for the defeat of the proposed Federal Consent Decree Fairness Act currently being considered by Congress.

John Bickerman, chair-elect of the ABA Section of Dispute Resolution, fears that the legislation would eliminate incentives for parties to enter into consent decrees, resulting in increased and unnecessary litigation.

“The concern the ADR community has is that this will eviscerate the use of consent decrees in cases involving the United States government,” Bickerman said. “It would be a sea change in the way cases are litigated.”

The bills, S. 489 and H.R. 1229, would authorize state and local governments to file motions to modify or vacate a consent decree four years after it was originally entered, or once the highest elected state or local government official authorizing the decree leaves office, whichever occurs first. Once a motion is filed, the party that originally sought the decree would have the burden of proof to show that enforcement is necessary to uphold a federal right.

Sen. Lamar Alexander, R-Tenn., and House Majority Whip Roy Blunt, R-Mo., introduced the bills in the spring. In proposing the legislation, Alexander said consent decrees can be effective when narrowly drawn, but he wants to make it easier for state and local governments to amend consent decrees made by previous administrations.

“In too many cases, consent decrees have instead sometimes become a means to ‘lock in’ policies for decades after the state or local official that agreed to the decree has left,” Alexander said. “Instead of being free to make the policy choices they were elected to make, newly elected officials often find themselves restricted by the motions of plaintiffs attorneys and policy choices of a federal court.”

Groups such as the American Association of Retired Persons, the Children’s Defense Fund, Human Rights Watch and the Southern Poverty Law Center have also voiced opposition to passage of the legislation. Bickerman said the Section of Dispute Resolution plans to present its resolution opposing the bills to the ABA House of Delegates at the midyear meeting in February.

Florida raises bar on retired judges who mediate

Senior judges in Florida who serve as mediators will be subject to enhanced requirements under recent changes to Florida’s rules of procedure and Code of Judicial Conduct.

Concerned about the possibility of ethical conflicts that senior judges serving as mediators may face, the Florida Supreme Court in November adopted the amendments. The changes include:

- Requiring senior judges to be certified as a mediator under state rules;
- Disclosure by senior judges who have presided over cases involving any party, attorney or law firm involved in the mediation;
- Requiring attendance at a judicial education course focusing on possible conflicts presented by the Code of Judicial Conduct and state mediation rules; and
- Limits on senior judges promoting themselves as mediators by advertising, soliciting business or associating with law firms.

Justice Harry Lee Anstead, writing for a unanimous supreme court, said the purpose of the rule changes was to ensure that senior judges’ impartiality is never in question.

California courts adopt new mediation rules

The Judicial Council of California adopted new rules in November intended to protect the confidentiality of mediation communications that could be disclosed when a court looks into a complaint about a mediator.

Rule 1622.2 of the California Rules of Conduct includes language requiring that all procedures for “receiving, investigating and resolving inquiries or complaints about the conduct of mediators” be designed to preserve mediation confidentiality. The rule also strictly limits disclosure of information regarding the complaint procedures.

The new rules were developed in response to court ADR program administrators’ requests for guidance in making local procedures to handle complaints about mediators who may have violated rules of conduct adopted by the Judicial Council in 2003. Alan Wiener, a staff attorney for the council, said the rule change is intended to help ensure that procedures for resolving complaints about court-program mediators are consistent with California’s mediation confidentiality statutes.

“The percentage of mediations that result in a complaint about a mediator is very low,” Wiener said. “But when a court assists parties in selecting a mediator, it’s important that the court be able to address any complaints or about the mediator’s conduct.”

The rule change will go into effect on Jan. 1.

By Chip Stewart

Chip Stewart, an associate editor with Dispute Resolution Magazine, is an LLM student in dispute resolution at the University of Missouri-Columbia School of Law, and an adjunct member of the faculty of the Missouri School of Journalism. He can be reached at Cstewart72@aol.com. ABA lobbyist R. Larson Frishy contributed to the story on the Federal Consent Decree Fairness Act.
NY court says arbitration damages award is unconstitutional

A New York state appeals court overturned an arbitration panel’s award of $25 million in punitive damages for a second time in September, again finding that the panel’s award was excessive by being “grossly disproportionate to any actual harm sustained.”

The National Association of Securities Dealers arbitration panel in 2002 awarded securities broker Stephen Sawtelle $1.1 million in actual damages along with $25 million in punitive damages against his former employer, Waddell & Reed. The firm was found to have intentionally tried to sabotage Sawtelle’s professional reputation. But the punitive award was overturned by the Supreme Court of New York Appellate Division, First Department, and remanded to the panel a year later on grounds that it was “in manifest disregard of the law” and outside the limits on the relationship between actual and punitive damages outlined by the U.S. Supreme Court in BMW of North America v. Gore, 517 U.S. 559 (1996).

In 2003, after a one-day hearing, the arbitration panel again handed down a $25 million punishment against the brokerage firm. On appeal again, the judges didn’t find the panel’s reconsideration convincing.

“Where an award has been vacated on the ground that it is in manifest disregard of the law … arbitral prerogative does not permit a panel to ignore the ruling and obdurately issue an identical determination,” the judges wrote. “An award of punitive damages that is some 23 times actual damages is irreconcilable with prevailing authority and can only be construed as arbitrary.”

The appeals court also affirmed a lower court order that the punitive damages be reconsidered by a new arbitration panel.

Sawtelle’s attorney, Jeffrey Liddle, has argued that the Gore decision concerns due process, which shouldn’t apply to the arbitration clause because there was no state action in the arbitration. The appeals court did not address this issue in its September ruling, Sawtelle v. Waddell & Reed, 801 N.W.2d 286 (2005). However, in its previous ruling in the case, the court said state action was “besides the point” because the punitive damage award could be challenged on grounds of its “excessiveness.”

Indiana court upholds dismissal of court-ordered mediation case

An Indiana appeals court in August upheld the dismissal of a case with prejudice after a party failed to comply with the trial court’s order to mediate.

The case, Office Environments, Inc. v. Lake States Insurance Co., 833 N.E.2d 489, arose out of a contract dispute between the parties. The trial court ordered the case to mediation at least 60 days prior to the original trial date, scheduled to begin in August 2001. More than two and a half years later, after numerous reschedulings and continuances, Office Environments refused to pay a $600 retainer to the mediator, leading to the dismissal of the case upon Lake States’ motion.

The Court of Appeals of Indiana, Second District, found that the trial court had not abused its discretion in dismissing the case. Judge Nancy Vaidik wrote that the court would have preferred to have seen the case decided on its merits, but that Office Environments’ refusal to “avail itself of the proper channels” in objecting to the order to mediate or to the mediator’s demand for a retainer left the case squarely within the trial court’s discretion to dismiss.

“(N)ot every case is appropriate for mediation,” Vaidik wrote. “And in fact, our ADR rules contemplate such situations and provide a mechanism for parties to follow in order to be excused from a trial court’s order to mediate.”

II1th Circuit says arbitration waiver need not be ‘knowing and voluntary’

Waivers of a right to trial in corporate dispute resolution policies are not subject to a heightened requirement that the waivers be “knowing and voluntary,” according to a ruling by the 11th U.S. Circuit Court of Appeals in October.

Gulfstream Aerospace Corp. faced lawsuits from its employees under various federal laws, including the Age Discrimination in Employment Act and the Fair Labor Standards Act. However, the 11th Circuit panel found that the arbitration agreement in the employment contract modified in 2002 by Gulfstream was enforceable under the Federal Arbitration Act, meaning arbitration of the disputes could be compelled by the company.

The current and former employees suing Gulfstream argued that the waiver was in violation of their right to trial under the Seventh Amendment. But Circuit Judge Frank M. Hull wrote that the dispute resolution policy was a matter of contract law and should not be governed by heightened standards under the Constitution.

“(A)rbitration agreements under the FAA are enforceable absent fraud, duress, or some other misconduct or wrongful act recognized by the law of contracts,” Hull wrote in the decision, Caley v. Gulfstream Aerospace Corp., 2005 WL 2840372 (11th Cir. (Ga.)).

Chip Stewart, an associate editor with Dispute Resolution Magazine, is an LL.M student in dispute resolution at the University of Missouri-Columbia School of Law, and an adjunct member of the faculty of the Missouri School of Journalism. He can be reached at Cstewart72@aol.com.
Compiled by Chip Stewart. Forward information about your organization’s regional, national or international conferences to cswet72@aol.com for publication in a future issue.
Winter 2006 Captioning Contest
by John Barkai

Because most agree that creativity and humor are effective in resolving disputes, we test our readers’ mettle with an occasional cartoon captioning contest.
Submit as many captions for the above illustration as you wish. All entries are judged by Professor John Barkai of the University of Hawai'i School of Law, and the winners will be published in the next edition of Dispute Resolution Magazine.
Mail, fax or e-mail your entries to:
Professor John Barkai
University of Hawai'i Law School
2515 Dole Street
Honolulu, HI 96822
Fax: 808-956-5569
E-mail: barkai@hawaii.edu

Fall 2005 Winners

“Counsel, before I come out, the first item of business is to agree on ground rules.”
—Richard Barron

“Yes, I do use a collaborative approach to mediation. Do you think that would help?”
—Mary Kate Coleman

“Who moved my cheese?”
—Yugo Nakai

“Wait! Let’s talk first. Have you considered mediation? There must be a win/win solution to this.”
—C. Stuart Mauney

“You two must be here to mediate the Katz divorce.”
—Richard Barron

“My lawyer is a real pit bull.”
—Charles Craver

“Once again, Mediator Mouse solves another dispute between fat cats.”
—Russell B. Pate

Chortles Welcome Here
Have a funny ADR anecdote? The Lighter Side welcomes submissions. Send them to dispute@abanet.org.