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## Public Civil Discourse: A New Domain for Dispute Resolution

Richard C. Reuben

*University of Missouri School of Law*, [reubenr@missouri.edu](mailto:reubenr@missouri.edu)

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# Public Civil Discourse: A New Domain for Dispute Resolution

By Richard C. Reuben

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

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

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

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

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

The field is still a work in progress, of course. But the current impetus within the dispute resolution community toward “deliberative democracy,” “civil discourse,”

“public dialogue” and other such collaborative processes both highlights these impressionist qualities, and, more concretely, points to an important area of growth for our field and its importance to our society.

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

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

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

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



**Richard C. Reuben** is the James Lewis Parks Professor of Law at the University of Missouri School of Law and founding chair of the ABA Section of Dispute Resolution Committee on Public Policy, Consensus Building and Democracy. He can be reached at [reubenr@missouri.edu](mailto:reubenr@missouri.edu) and by web at [law.missouri.edu/reuben](http://law.missouri.edu/reuben).

Articles by Sandy Heierbacher and Lisa Bingham provide an important bird's eye view of the landscape. Bingham, a lawyer and professor of public policy, provides a broad sense of the terrain as she situates the relationship between discourse and dispute resolution processes. Discourse processes, she says, are earlier in the life cycle of conflict, well "upstream" of resolution, and necessarily so. Heierbacher, executive director of the National Coalition for Dialogue and Deliberation, hones us in on the civil discourse side, mapping the various processes associated with civil discourse. Some are familiar, such as town hall meetings, while others are less so, such as study circles and world cafes.

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

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

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

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

**[T]he movement toward civil discourse pushes dispute resolution practitioners to work with conflict at a much deeper, more immediate and intimate level.**

This is an important step for our field and our profession, the necessity of which is becoming increasingly apparent to many across the country. Indeed, led by the Section of Dispute Resolution, the ABA House of Delegates in August 2011

unanimously approved Resolution 108, encouraging lawyers to take "meaningful steps" to foster a more constructive civil discourse in whatever role they perform. Reprinted in this edition, Resolution 108 also explicitly encourages the ABA to participate actively in the development of collaborative governance processes that employ civil discourse and dispute resolution techniques. ABA immediate past President Stephen Zack reminds us in his article, adapted from his speech to the ABA Annual Meeting Opening Assembly, that this is the lawyer's highest duty, calling, and privilege.

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