

2011 AALS WIP Conference – Abstracts

(in the order of presentation)

Jen Reynolds / Multiparty When?

The University of Oregon School of Law (Oregon) and the West Point Negotiation Project (WPNP) have begun working together on a series of projects around teaching multilateral negotiation.

This is not as unlikely a partnership as it might first seem. The WPNP trains military leaders to manage complex conflict situations that often involve working with constituents with vastly different interests, values, priorities, and resources. Oregon teaches public interest and environmental lawyers to engage large-scale public policy and environmental efforts that typically involve numerous stakeholders with widely divergent priorities over long periods of time.

Both programs use similar tools to address similar issues:

- Both programs use the interest-based negotiation framework promulgated by the Program on Negotiation consortium housed at Harvard Law School. This model focuses heavily on bilateral dispute resolution and dealmaking.
- Both programs train people to work in highly complex bargaining situations that involve multiple parties, multiple issues, unpredictable timelines, and unstable political climates.

Although the bilateral interest-based model is helpful in conducting negotiations between more than two people, it does not address directly some of the thornier issues present in multilateral, ongoing, complex negotiation situations.

For example, how do group dynamics and coalitions affect the process/substance of negotiations, and how can these dynamics be managed effectively? What happens when negotiations take on an explicitly public/private character, as when stakeholders within the process threaten or start litigation? Is there such a thing as a stable BATNA (or even a stable set of interests) in multilateral, large-scale settings? How broad or how narrow should negotiations be scoped? What implementation concerns exist in these broader contexts, and how can parties overcome impediments to implementation? What does it mean for a negotiator to become a change agent? What process tools are helpful in ongoing, large-scale bargaining? What are the downsides/risks of alternative processes in multiparty settings? These are just some of the pressing questions that come up when dealing with multilateral negotiations in military, political, and environmental contexts.

Our current project examines the “when” of teaching multiparty. The basic idea is comparing groups who are exposed to multiparty concepts and practices early in their negotiation training with groups for whom multiparty comes at the end of training. Changing the traditional format for negotiation training will likely introduce some costs as to conceptual clarity but may, ultimately, provide a more “realistic” frame for students who will be conducting complex negotiations in the future.

Richard Reuben / Our Dirty Little Secret: The Inconvenient Truth about Legal Negotiation

Negotiation and settlement discussions are a staple of the practice of law. The law encourages these discussions in many ways, including assuring their confidentiality against admissibility in subsequent legal proceedings. Federal Rule 408 sets forth the basic paradigm, and most states have adopted it in some form. This article looks beyond the plain language of the state statutes and court rules, and looks out how state courts have interpreted those rules. In particular, it analyzes and categorizes every state court decision rejecting claims of confidentiality under state settlement discussion rules, and identifies nearly a dozen exceptions and other limitations to the rule of non-admissibility. If fully exploited, these exceptions could seriously compromise the utility of settlement discussion rule. This truth is particularly inconvenient at a time when the legal profession is increasingly moving toward interest-based models of legal negotiations, which relies on the disclosure of sensitive information about interests, preferences, and concerns to achieve integrated outcomes – the very kind of information that could be most damaging if negotiations fail and the case moves to trial. The article discusses the problem, the implications for practicing and teaching legal negotiation, and proposes a pragmatic remedy for reform.

Andrea Schneider / Developing Moral Muscle

The current situation in the practicing bar is a dismal misunderstanding of how rules of disclosure in negotiation and the rules on confidentiality overlap. Both empirical and anecdotal evidence demonstrate that a significant number of lawyers and law students operate under a mistaken belief that they are within the rules while committing fraud. Both ethics classes and negotiation classes need to have a renewed focus on clarifying and encouraging students to “do the right thing.” Some professors worry that “moralizing” or teaching this will impose the professor’s values on the students yet studies show that law students are still in the middle of their own moral development as well as the development of their idea of professionalism. Teaching should be based on a better understanding of the rules and cases but also needs to include more. New evidence demonstrates that teaching empathy can help overcome some of the cognitive psychological traps that causes unethical behavior.

Laurie Giles/ Keeping Family Ties Tied

Deciding upon appropriate care and services for an aging or ill loved one is often difficult for many families. Unable to reach agreement, many families resort to litigation to resolve the issues. Consistent with all civil litigation the financial cost can be considerable. Unlike civil litigation, litigation which causes family members to become adversaries, frequently results in irreconcilable emotional and relational consequences.

A cutting edge development in mediation is the utilization of elder mediation. Similar to other forms of family mediation, the goal of elder mediation is to achieve a mutually acceptable resolution. Given the necessitation of parties to maintain a harmonious working relationship, ideally elder mediation will lay the foundation for such a continued workable relationship.

This article, which will be divided into four parts, will examine the use of elder mediation from, legal, practical and ethical perspectives. Part one will explore the evolution of the mediation as a viable alternative to litigation in resolving family. Part two will discuss the growing trend of employing elder mediation to resolve conflict surrounding care of aging loved ones and end of life decisions. Part three will assess the practical and logistical aspects of elder mediation. Finally, the article will examine the ethical issues inherent in family mediation, with emphasis on ethic associated with elder mediation.

Susan Exon / Six Building Blocks of Trust to Enhance Communication for the Virtual Mediator

Trust in the mediator and in the mediation process encourages open, candid dialogue. Trust is particularly challenging for a mediator to engender in an online, nonvisual environment. This article sets forth Six Building Blocks of Trust to help a virtual mediator gain and maintain calculus-based trust and knowledge-based trust:

1. Establish Online Reputation and Credibility
Building Block 1 provides helpful information for mediator marketing purposes in terms of website design and capitalization of online referrals designed to help a mediator be resourceful with a community.
2. Create Social Presence
Building Block 2 is helpful for mediators to recognize the necessity of connecting psychologically to mediation participants and recommends creating a social presence in website design as well as applying social presence norms to online communication.
3. Establish Credibility Through Skillful Written Interaction
The purpose of Building Block 3 is to demonstrate how a virtual mediator can gain and maintain credibility, and therefore trust, by using skillful text and skillfully managing the text of mediation participants.
4. Create Positive Experience and Perceptions
Building Block 4 is a corollary to Building Block 3 because it suggests methods that a virtual mediator can use to send and manage written messages, but adds a level of optimism through the generation of positive messages and perceptions.
5. Sustain Mediator Competence
The purpose of Building Block 5 is to highlight the fact that mediator competence in a face-to-face setting is not necessarily the same thing as an online experience. There are additional considerations that the virtual mediator must consider.

6. Use Technology to Promote a Trustworthy Environment
Building Block 6 is necessary to demonstrate the critical role of technology to engender trust in the virtual mediator and in the online mediation process.

Arthur Pearlstein / Pursuit of Happiness and the Future of ADR

The exploding interest in the study of human happiness, though emerging from the field of psychology, has reached across disciplines and methodologies with an emphasis on scientific and rigorous approaches. I have been taking what I believe is the first comprehensive look at the application of the science and study of happiness to the field of conflict resolution in the law. I conclude that there are major implications for alternative dispute resolution (ADR) in the body of knowledge being accumulated in the study of happiness. There are also striking similarities between many of the concepts developed in the applied study of happiness and the study and practice of conflict resolution and there is arguably a meaningful convergence of these disciplines. Yet, the science of happiness is largely based on empirical research using validated measures and advanced resources, the relative lack of which is detrimental to the reputation and effectiveness of the field of conflict resolution. Systematic application of lessons from happiness research to conflict resolution has major theoretical and practical value and should help drive the agenda for the future of ADR. One major lesson is the importance of social capital and social networking for strategies in pursuing happiness as well as effectively dealing with conflict.

Scott Hughes / Evolution, Emotions, & Expressions: What can the Art of Mediation Learn from Cognitive Psychology and Neuroscience?

Both Cognitive Psychology and Neuroscience have contributed greatly to the theory and practice of mediation. Damasio established the role of emotions in decision making, removing the idea of “venting” from the vocabulary of informed mediators. In the meantime Ekman has established the universality of certain primary expressions and the ability of the face to create feelings and well as to express them. Then, nearly two decades ago, Rizzolatti and a team of neurologists in Parma, Italy discovered neurons in macaque monkeys that reflected the actions of others. Called mirror neurons (MN), these neurons have been discovered in the human mind and in areas that correspond to human emotions. The ideas of Ekman’s emotion generation and the working of MN do not mesh exactly. This paper will explore the conflicts between Ekman’s discoveries and MN theories and will raise concerns about the impact these issues might have on mediation training and practice.

Ken Fox / Keeping Conflict in Perspective: An Interdisciplinary and Critical Approach to the Teaching and Study of Conflict Theories

A vast majority of American law schools teach negotiation, mediation, arbitration and other forms of dispute resolution practice [cite]. Similarly, a significant percentage of U. S. business schools teach negotiation and, to a lesser extent, other conflict management courses [cite]. Such courses typically include some treatment of dispute resolution theory for the purpose of providing a grounding to the related conflict response practice. In addition, a small number of law and business schools offer separate courses that focus primarily on conflict analysis, as distinct from conflict response. These courses are typically called “conflict theories,” “theories of dispute resolution,” “introduction to conflict/dispute resolution” and similar names. Whether in the context of practice courses or the study of conflict analysis for its own sake, the question of what constitutes a rigorous and appropriate study of conflict theory in professional education has not yet been fully addressed.

Over the past 14 years, I have addressed this question as part of my own research and teaching. The writing project I am working on examines the question “what constitutes a rigorous and appropriate study of conflict theory in professional education?” It further argues for a particular approach to teaching conflict analysis in law and graduate business programs. The writing project addresses both course content and teaching pedagogy.

Rather than using theory to explain a specific conflict intervention practice (such as “negotiation theory” to make sense of an approach to negotiation practice, “mediation theory” to make sense of particular approaches to mediation practices, and so on), I argue that conflict theories instead should be taught so as to challenge students in a different direction. Specifically, I argue that the study of conflict theory needs to challenge students to engage with the following:

1. To reflect more deeply about their own underlying belief systems, ideology and worldview (which includes “mindfulness,” and critical self-reflection about “culture,” “moral order” and social location/standpoint), as well as their emerging professional identity as lawyers, business leaders or other conflict professionals;
2. To understand the broad range theories available to analyze conflict and to appreciate each on their own terms;
3. To examine how the range of conflict “theories” themselves reflect deeper (and sometimes incommensurate) perspectives and underlying belief systems about the nature of people, interaction, groups and social structures in conflict;
4. To recognize how different approaches to analysis have different consequences as to what is an “appropriate” response to conflict; and
5. To integrate these insights so as to become more intentional users of theory in professional practice.

The course and this writing project draw on scholarship from a wide range of academic disciplines, including communication studies, the natural sciences (such as biology or

physiology), philosophy, political science, psychology, social justice studies, and women's studies, among others. While this range of disciplines is not novel, it suggests a systematic cross-disciplinary framework for approaching conflict analysis. In addition, the way in which the course is designed to be taught provokes critical reflection about each approach in relation to the others and in relation to the students' own lived experience.

The article itself will have two parts: The first part will be an examination of the current conflict literature and survey of how "conflict theory" courses are currently designed. I have already done a fair amount of this work in developing my own course, but need to complete my formal review to assure I have not missed important sources and perspectives. The second part will articulate the framework or set of guiding principles I describe above for the study of conflict theories. Ideally, the work it will provide a much-needed model for both teaching and additional research and scholarship.

I believe this approach to studying conflict theory is somewhat unique in graduate professional schools. I also believe that a comprehensive study of the connection between theory and worldview, as relates to the study of conflict in graduate professional school settings, has not been carefully examined. I realize that I already operate from the framework I have been refining over the past 14 years, and I want to test my own framework against the scholarship and pedagogy of others. The Works in Progress conference is an ideal setting in which to do this.

Bernie Mayer / The Dynamics of Conflict: A Guide to Engagement and Intervention.

In this new, and significantly revised edition of *The Dynamics of Conflict Resolution*, due to be published in March 2012, I have incorporated themes from *Beyond Neutrality* and *Staying With Conflict* and I have proposed a more relational approach to how we understand and intervene in conflict. I suggest that how people approach conflict, communication, negotiation, and power is fundamentally a systems and interactional process that requires that we move beyond an analysis of individual approaches, motivations and styles—or at least that we understand these in a relational and systemic context. I have maintained a practice oriented approach to the discussion of conflict theory and conceptual frameworks, and I have also tried to maintain an accessible writing style, but I have brought in a series of new concepts and examples that reflect changes in our field and in my own thinking over the past ten years.

Mark Weidemaier / Foreign Sovereign Immunity Law as A Signaling Device... or, How Lenders Learned to Stop Worrying and Love Dispute Resolution

This project uses a unique dataset to examine how sovereign bond contracts responded to the evolution in U.S. law regarding foreign sovereign immunity that began in the 1950s. For much of the 20th Century, contracts between private lenders and state borrowers did not address the subject of dispute resolution at all. When contracts did adopt explicit dispute resolution terms,

these terms often had nothing to do with facilitating an arbitration or litigation with the state borrower; they were instead thinly-disguised efforts to entice influential creditor countries to intervene on the lender's behalf. This general disinterest in dispute resolution persisted throughout much of the 20th Century notwithstanding efforts by the U.S. and other countries to encourage the use of formal dispute resolution terms, especially arbitration clauses, in contracts with sovereign states. It also persisted despite a number of changes to sovereign immunity doctrine that arguably facilitated lawsuits against foreign states. In the late 1970s, however, contracting practices changed almost overnight after the enactment of the Foreign Sovereign Immunities Act in the United States and the State Immunities Act in the United Kingdom. After the passage of these two statutes, sovereign bonds almost uniformly adopted explicit dispute resolution provisions designed to let private lenders sue foreign sovereigns in the lender's home courts.

The project explores why early efforts to encourage dispute resolution failed to prompt changes to established contracting practices – and the related question why the FSIA and SIA were so effective at producing change. I suggest that the answer has little to do with the formal legal effect of these statutes, which did little to change the essential futility of suing a sovereign after a bond default. Instead, I demonstrate that the U.S. and other capital-exporting states had long sent mixed signals to private lenders about the value of formal dispute resolution and about their own willingness to intervene on behalf of their citizens in the event of a default by the sovereign borrower. I show how this history influenced sovereign bond contracts throughout the 20th Century and suggest that the FSIA and SIA were effective primarily because they increased the salience of formal dispute resolution and stimulated investor demand for dispute resolution terms. I also suggest that these statutes effectively signaled something that had been true in fact for decades: that lenders could no longer rely on their home states to intervene on their behalf after a foreign sovereign's default.

Palma Joy Strand / Inequality versus Civity: The Lingering Poison of Rodriguez and Milliken

“Civity” denotes the qualitative character of a social system that is civic in nature. Specifically, civity emphasizes bridging relationships of respect and small-world social networks with weak horizontal ties between bonded social groups. This linked cultural diversity leads to civity characterizing adaptive, resilient, “healthy” complex social systems—including systems such as metropolitan regions, which are increasingly recognized as organic wholes or “citistates.”

Inequality, currently high both nationally and regionally, interferes with civity. Conversely, a lack of civity facilitates inequality. A vicious cycle results. Through this lens, the Rodriguez (San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973)) and Milliken (Milliken v. Bradley, 418 U.S. 717 (1974)) decisions from the 1970's can be seen as profoundly anti-civic through their endorsement of inequality in the essential area of K-12 education. The continuing potency of the Rodriguez/Milliken “story” is deeply harmful to citistate well-being.

Kristen Blankley / Taming the Wild West of Arbitration Ethics

Although much has been written about arbitrator ethics, surprisingly little has been written on attorney ethics in the arbitral forum. This paper looks at the disconnect between traditional litigation ethics rules and statutes and their application to the arbitral forum. Specifically, the paper examines into statutes and ethics rules dealing with perjury and document tampering/destruction and whether this law applies to the arbitral forum at all. This paper also looks at the standard of review available when the moving party complains of ethical violations and the inexplicable reason why the standard of review is higher for review of ethical violations is higher than any other type of review available under the Federal Arbitration Act and state counterparts.

Hiro Aragaki / Status and Contract in Federal Arbitration Act Preemption

According to the vast majority of courts and commentators, the Federal Arbitration Act's (FAA) purpose is twofold: To (a) honor the parties' choices regarding whether and how to arbitrate (freedom of contract) and (b) to promote arbitration (the national policy "favoring" arbitration). In this Article, I re-evaluate these seemingly settled claims. Although favoritism and contract are certainly important policies that the Court's FAA jurisprudence seeks to advance, I argue that the broader purpose behind that jurisprudence is to modernize the law of arbitration.

In a very different context, Henry Sumner Maine once famously described the law's tendency toward modernization as a progression from "status to contract." In Maine's view, primitive societies regulated persons based on traditional notions about their nature or role in society—that is, about their status. Modern societies, by contrast, reflect a recognition of the right of individuals to regulate themselves through relationships based on contract.

In this article, I argue that the modernizing trajectory of federal arbitration law should similarly be viewed as representing a movement from the pre-FAA legal regime that regulated arbitration based on its status—that is, based on false conceptions about arbitration's essential limitations as a dispute resolution process—to one based on contract. This Sumner-esque interpretation is consistent with the Court's continued emphasis on the twin policies of freedom of contract and arbitration favoritism (the latter of which is typically justified by rejecting status based generalizations about arbitration's inferiority to litigation). But it also suggests that the ultimate goal of federal arbitration law is not so much to vindicate these policies in themselves as it is to further arbitration's legitimate coming of age in conditions of modernity.

The U.S. Supreme Court's controversial decision in *AT&T Mobility LLC v. Concepcion* presents a current, high-profile vehicle for approaching some of these issues. In *Concepcion*, the Court departed from received understandings of the scope of FAA preemption by holding that federal law displaced a state court precedent declaring that a consumer's waiver of the right to a class remedy is unconscionable. The decision been praised by the right for furthering freedom of contract and favoritism in matters of arbitration. At the same time, because it effectively sounds

the death knell for consumer class actions, the decision has been criticized by the left for taking those policies too far. I argue that both sides of the political spectrum overlook how *Concepcion* actually *undermines* these policies. I explain this oversight in terms of a general tendency to focus on freedom of contract and arbitration favoritism in the abstract without understanding how they form part of a larger federal agenda, one that I contend is best understood by reference to Maine's formula: the progression from status to contract.

Ben Davis / Power and Values in Supreme Court Judicial Review of Arbitration

All combinations of Supreme Court majorities in arbitration cases have been activists in their decisions on arbitration clauses and arbitral awards. How they have chosen to wield that power and the values that they have espoused shape the environment for arbitration in America. This paper reimagines the court's jurisprudence through the twin lenses of limitation of liability and neutral dispute resolution to suggest where the Court fails America and where a better path forward might be suggested.

Chris Drahozal / Contract and Choice (co-authored with Peter B. Rutledge, University of Georgia School of Law)

This paper undertakes a comprehensive examination of the use of arbitration clauses in credit card agreements, relying on a largely untapped dataset of credit card agreements from the Federal Reserve Board. It first examines trends in the use of arbitration clauses: to what extent do issuers provide for arbitration of disputes and to what extent can cardholders opt out of the obligation to arbitrate? It then takes a detailed look at the provisions included in arbitration clauses in credit card agreements. Finally, it compares the use of arbitration clauses in business credit card and deposit account agreements to the use of arbitration clauses in consumer credit card and deposit account agreements.

Bernie Mayer / an open conversation on crafting a book

Writing a book for professional audiences is a different process than writing an article for an academic journal. Arriving at a clear concept, developing a proposal, finding an appropriate publisher, developing an effective voice, and planning a process for writing and editing pose specific challenges to a prospective author of a book. In this guided discussion, experienced and prospective authors of book length publications will be encouraged to share their experiences and struggles. In addition, I will discuss how I have approached the book writing process, and specifically what has worked and what not worked for me in these endeavors.