

Collaborative Governance and Lawyers' Duty to Strengthen Democracy

Lisa Blomgren Amsler, J.D., Distinguished Professor
Paul H. O'Neill School of Public & Environmental Affairs
Indiana University Bloomington

Overview

- Carrie Menkel-Meadow and Deliberative Democracy
- ABA Res. 108, Legal Education, and Lawyers
- Collaborative Governance and Public Voice
- Strengthening Democracy in Communities
 - Community Voices for Health (RWJF)
- Lawyers Can Identify and Address Intrastate Preemption of Community Problem-solving

LAWYERS AND DELIBERATIVE DEMOCRACY

Carrie Menkel-Meadow

- “[I]f democratic participation is the means for achieving both public order and social justice, lawyers have a role to play in such processes”
 - The Lawyer's Role(s) in Deliberative Democracy (2004)
- “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....”
 - Deliberative Democracy and Conflict Resolution: Two Theories and Practices of Participation in the Polity (2006)

LAWYERS AND STRENGTHENING DEMOCRACY: DR SECTION AND ABA RESOLUTION 108 (2011)

RESOLVED, That the **American Bar Association** affirms the principle of civility as a foundation for democracy and the rule of law and **urges lawyers to set a high standard for civil discourse** as an example for others in resolving differences constructively and without disparagement of others.

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

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

FURTHER RESOLVED, That the American Bar Association **supports governmental policies, practices, and procedures that promote civility and civil public discourse consistent with federal and state constitutional requirements.**

COLLABORATIVE GOVERNANCE: THE PUBLIC'S VOICE IN GOVERNANCE

- Amsler, Collaborative Governance: Integrating Management, Politics, and Law, 2016
 - A family of governance processes that entail voice and collaboration among government, the private and nonprofit or civic sectors, and/or the public to accomplish the public's work.
- CG encompasses public voice: the public and stakeholders working together across the policy continuum.
 - Upstream legislative branch: Policy-making.
 - Midstream executive branch: Implementation and Management
 - Agency quasi-legislative and quasi-judicial action
 - E.g. negotiated rulemaking, collaborative public management, and environmental or public policy dispute resolution, ADR.
 - Downstream judicial branch: Adjudication and ADR.

COLLABORATIVE GOVERNANCE MAP ACROSS THE U.S. POLICY CONTINUUM (Amsler 2016)

Upstream —————> Midstream —————> Downstream

Legislative
Quasi-legislative
Making policy

Executive
Implementing
Policy

Quasi-judicial
Judicial
Enforcing Policy



Collaborative Public Management &
Networks



Public Engagement
Deliberative Democracy



Dispute Resolution

Institutional Design and Dispute System Design

- Elinor Ostrom, *Understanding Institutional Diversity* (2005):
 - Institutional Analysis & Development
 - Rules - Law: “the rules used by participants to order their relationships”
 - Action Arena: Rules shape what happens inside
- Smith and Martinez, *An Analytic Framework for Dispute System Design* (2009):
 - Goals, processes & structure, stakeholders, resources, and success & accountability
 - Amsler, Martinez, Smith, *Dispute System Design: Preventing, Managing, and Resolving Conflict* (2020)
- Ansell & Gash, “Collaborative Governance” (2008) and Emerson & Nabatchi, *Collaborative Governance Regimes* (2015)

COMMUNITY VOICES FOR HEALTH IN MONROE COUNTY

Core Initiative Components



CVH 2020-21 Timeline



UNDERREPRESENTED VOICES

Engagement Scan

April – Sept 2020



Engagement Stage 1

POLICY & DECISION MAKERS

1st 5 MONTHS: Refine and Launch work; build relationships; network building (SC & Advisory Council); Identify key local policy makers; funders; health program and service decision makers; identification of PE best practices; and policy samples; what PE looks like in MC.

CONNECT INFORM CONSULT COLLABORATE

Dialogue

October 2020 – June 2021

**Engagement Stage 2
Small Group Discussions**

Gathering information
Identifying the issues
Deepening awareness

Dialogue & Deliberation

July – December 2021

**Engagement Stage 3
Deliberation Sessions**
Moving to problem solving,
deepening understanding, making
choices & recommendations, &
shared ownership of problems

15 MONTHS: Engagement Implementation

Identify resources and needs; deliberation around priorities; share knowledge and data; empower and amplify voices; facilitation training; continued network and PE leadership development; PE capacity building with policy & decision makers

SHARED
LEADERSHIP
ACTION

Jan - August
2022

SHARED
LEADERSHIP
ACTION

INTRASTATE PREEMPTION: STATE RULES BAN COMMUNITY DECISIONS

- **Federal Preemption of State Law:**
 - Under U.S. Constitution Supremacy Clause, Federal laws preempt or supersede contrary state laws unless federal statute specifies otherwise (e.g., Federal Fair Labor Standards Act or minimum wage)
- **Municipal Powers to Enact Ordinances (Legislation):**
 - Originally, **Dillon's Rule**: Municipalities are creatures of state law with only those powers that the state delegates to them.
 - Modern **Home Rule**: Municipalities have the same general powers of a legal person to enter into contracts, etc.
- **Intrastate Preemption: State Preemption of Municipal Ordinances:**
 - ***STATE STATUTES SET GENERAL RULE AND PREEMPT OR PROHIBIT ANY CONFLICTING MUNICIPAL ORDINANCE.***

EXAMPLES: SOCIAL DETERMINANTS OF HEALTH, VOICE, AND INDIANA INTRASTATE PREEMPTION

- **Minimum Wage:** Locked into federal and cities or towns may not enact living wage ordinances
- **Landlords:** Cities or towns may not enact ordinances regulating landlords and rental housing
- **Health insurance and benefits:** Cities or towns may not enact ordinances requiring these in employment
- **Open Door Law:** Cities or towns bound by state rules on *virtual* public meetings requiring minimum percentage of elected officials in person

CONCLUSION: WORK IN PROGRESS!

- Lawyers and ADR professionals are essential partners in community problem-solving using dialogue & deliberation
- Using institutional design and DSD, the public, private, and nonprofit sectors and community residents can adopt new infrastructure
- Lawyers can identify and address state laws that disempower community decisions