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PATTERNS OF BIAS IN MEDIATION

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I. INTRODUCTION

The last few years' discussion of mediation is imbued with a certain "born again" quality. The enthusiasm is understandable in view of the attractive features of this process; but it has obscured the facts that no process works well for everyone, and that for some people, mediation is worse than useless. In view of the general tide of professional opinion that mediation is a "better" process for resolving disputes, qualifications and reservations are easily enough overlooked, and "better for whom?" is not a particularly popular question.¹

Like all other dispute resolution processes, mediation has inherent tendencies to benefit certain people and to harm others. For want of a less inflammatory word, these tendencies must be called biases. They deserve a close examination, for they explain a number of situations in which failure, from either a neutral or a partisan point of view, can be predicted. There have been scattered comments by many writers on this subject over a period of twenty years or more: this paper will attempt to codify the major biases found in the mediation process, and to examine their implications.

It should be noted that the focus here is on the more assertive forms of mediation, in which the mediator undertakes to try to develop alternative proposals and to persuade a party to accept or abandon specific items. The distinction between a mediator and a conciliator may be artificial in the fluid environment of an actual case, but those situations which fall within the traditional view of conciliation may be able to tolerate a relatively high degree of bias. The role of conciliator, in the sense of buffer, message-carrier and calmer of nerves, can be effectively served by an able negotiator employed by one of the parties, if he or she has a suitable character.

But once a mediator undertakes to interrogate parties as to their reasoning or to develop alternative proposals, it is axiomatic that the mediator has a degree of choice over which possibilities will be emphasized and which downplayed. Mediators' claim that "we don't make decisions" is true only to a degree, because often there is more than one set of terms that will make for an acceptable deal, and the mediator can exercise great influence as to which combination of proposals is adopted. In these situations the sophisticated nego-

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1. *But see* Crohn, *Signs of Cohesion in Dispute Resolution*, 1 NEGOTIATION J. 23, 26 (1985). It would be foolhardy to claim to have found "the" answers to the questions Crohn has posed, but this paper may provide answers to some of them.

tiator demonstrates a practical understanding of how to use knowledge and skill to obtain an advantage over the opponent. Although some will greet this entire subject with dismay, failure to discuss the biases of mediation preserves the disadvantage of disputants who are more naive or less perceptive. In a profession which claims neutrality, there is no justifiable reason for continuing such a tilt in the balance of power.

For convenience and without rigidity, biases can be classified into three groups: personal, situational, and structural. Of these, personal bias is by far the most widely recognized form.

II. PERSONAL BIAS

Most people would describe a palpable preference for the negotiator or principals of one party as a personal bias. Also, in disputes where a serious philosophical gulf exists, a mediator may have a propensity to think along the general lines of one of the parties. In addition, past associations or a partisan employment history of the mediator can give the appearance of bias. Apparent bias, though, does not have the same results as actual bias. An axiom, borrowed from an ancient legal principle, states that it is as bad for a mediator to seem biased as it is for an actual bias to exist. But this is not an accurate statement of the effect. Even though it affects the mediator's actions and proposals, an actual personal bias may remain unknown to all participants. The *appearance* of personal bias, however, may leave the mediator blissfully ignorant of any problem, while causing one party to act based on its perception that the mediator is biased against it. It is not unknown for a party to complain to the appointing agency, independently seek a different mediator, or return quietly to direct negotiations without ever confronting the mediator with its suspicions or giving the mediator an opportunity to allay its fears.

It should be accepted practice² for a mediator to disclose any known personal conflict, including friendships and past associations. While there is disagreement over what may reasonably constitute a potential conflict, the growing acceptance of the principle of disclosure acts as some reassurance that potentially disadvantaged parties will be given an opportunity to object or at least investigate further. It also helps the mediator's perceived objectivity, by showing that he has nothing to hide.

Provided that the accepted disclosure rules are applied conscientiously, there is nothing about personal biases which threatens to cause widespread or

2. The principle of disclosure of known conflicts of interest has long been implicit in such statements as "acceptability of the mediator by the parties as a person of integrity, objectivity and fairness is absolutely essential." CODE OF PROFESSIONAL CONDUCT FOR LABOR MEDIATORS FMCS/ALMA 1964. In recent years there has been increasing sensitivity to this principle among mediators, perhaps because of the well-publicized cases involving failure to disclose by the neutral in the related field of labor arbitration.

enduring resistance to the use of mediation as a process. That is not the case, however, with the other, more subtle, types of bias.

III. SITUATIONAL BIAS

Situational bias refers to those biases which result from a mediator's source of appointment and obligations to persons or parties other than those immediately involved in the dispute.

Most lay people, if asked, would probably say that mediators are selected by the parties jointly. In reality, this ideal is rarely achieved, because such a mutual selection process calls for a fair degree of mutual trust and willingness to negotiate initially. In most types of disputes, the intercession of some organizational third party is necessary to enable the parties to accept a given mediator. Depending on the type of dispute, the appointing or recommending agency may be a court (increasingly in certain states in divorces and civil litigation), a state or federal labor mediation agency, an international body such as the United Nations or Red Cross, or another organization. Although each of these bodies has a pluralistic constituency, none is without an organizational interest of its own. This interest can affect both the mediator's actions and the parties' perceptions, because a mediator with enough of a relationship to an appointing agency to be selected may be presumed to have some degree of fealty to that agency.

Because of universal familiarity, the United Nations is a good example. Suppose that the Secretary-General, upon hearing of a border clash between countries *X* and *Y*, fears that a wider war will ensue and wishes to send someone to attempt mediation. Suppose further, in the interest of simplicity, that the major world powers are ignoring the matter, and that both *X* and *Y* indicate that mediation would be acceptable. The Secretary-General appoints Ibsen, a recently hired UN civil servant of Swedish extraction. Ibsen has a good reputation, a neutral background as a newspaper editor, and no prior connection with either disputing country.

Can Ibsen be presumed neutral by both parties? Of course, says the observer from a safe distance. But neither President Smith of *X* nor Prime Minister Jones of *Y* is quite so sure. Ibsen comes from an organization which has little or no independent military power, and *X* has lost control of a border village. Smith feels that when push comes to shove the UN will not send troops, and fears that Ibsen may emphasize settlement terms which involve the de facto cession of that village to *Y*. The capital of *Y*, meanwhile, is awash in correspondents and it occurs to Jones that Ibsen could easily leak information in such a way as to put substantial international pressure on *Y* to return the village, which *Y* has considered properly its territory since 1842.

Even ignoring the many other possible complications and the myriad of rumors which attend any serious clash, both Jones and Smith will probably view any discussion with Ibsen regarding the disposition of the village with some misgivings. Is it surprising that neither is willing to trust Ibsen with his

innermost thoughts as to what might be a minimally acceptable settlement? And yet in conventional terms, Ibsen is as blameless, unbiased and professional a mediator as anyone could want.

Situational bias has an actual rather than perceived effect, for example, when an attorney acting as a mediator realizes that a settlement which is mutually acceptable to the parties is illegal.³ An attorney with ethical standards high enough to make him acceptable as a mediator may find it difficult to give himself whole-heartedly to his role as mediator in this situation, even if the impact of the illegality would be minor compared to the result of unsuccessful mediation.

Some observers regard this type of bias with such equanimity that they advocate the *assumption* of a "public interest" role by the mediator.⁴ Lawrence Susskind defends that view in part by noting that Henry Kissinger "[retained] the confidence of all the parties"⁵ in his Middle East intervention even though his role served United States interests. This statement is questionable on logical grounds. If you take a sufficiently expansive view of those with a right to influence the mediated result to include the "mediator" acting in his own or his nation's interest, there is no basis on which to exclude from that right any other power or group which is materially affected by the result. But thus to include in the assessment the more hard-line Arab states, let alone the Soviet Union, would certainly be enough to disprove the notion that Kissinger "retained the confidence" of *all* the parties.⁶

An alternative view is that a third party with a substantial interest in the outcome of a dispute is by definition not able to act as or appoint a mediator. A better term for such a person is the legal term "intervenor." An intervenor is a third party who has interests to protect and of whom the disinterested good faith of a mediator is not expected. Nevertheless, an intervenor may have a material role in resolving the dispute. Perhaps the motivation and conduct of a Kissinger or a Carter would be better evaluated in this sense.

IV. STRUCTURAL BIASES

Structural biases, which stem directly from the nature of mediation, are the most obscure and the least avoidable. There are several of them, so that in

3. See Stevens, *Mediation and the Role of the Neutral*, in *FRONTIERS OF COLLECTIVE BARGAINING* 282 (1967).

4. See L. SUSSKIND & C. OZAWA, *MEDIATED NEGOTIATION IN THE PUBLIC SECTOR*, 1983 S.P.I.D.R. CONFERENCE PROCEEDINGS 32-50.

5. *Id.* at 46.

6. President Carter's Camp David intervention is a better known example of the same problem. By asserting an American role and with American interests in mind, Carter was at least partially successful in mediating a deal between two historic enemies. But while the settlement advanced Egyptian, Israeli, and American interests, it was hardly considered the work of a neutral by those Arab states which faced the resulting loss of their most potent military ally.

given cases they may cancel each other out. The fact that they are rarely conclusive as to the nature of the agreement reached does not mean that they are not real, nor does it mean that a perceptive mediator or negotiator will not notice their subtle effect. Among these biases are tendencies for the process to benefit weaker parties over stronger ones, moderate factions over radical, and negotiators over principals. Another bias, which has no reliable preference for any particular participant, is the tendency for the process to favor a quick or easy way out instead of a real and enduring solution. Finally, the most pernicious problem is that mediation can be an effective tool for a party determined to negotiate in bad faith.

A. *Although Both Parties Can "Win," the Weaker Gains Disproportionately*

In any unequal negotiating relationship, the stronger party is in a better position to act unilaterally, while the weaker party seeks to claim some form of perceived equity. An agreement to mediate, however, exposes both parties to some skeptical examination, no matter how polite or restrained, by the mediator. In addition, the agreement to mediate signals an acceptance of the legitimacy of the opposing party's existence, if not of its position. Because a mediator is endowed with a degree of moral authority, no one wants to defend a negotiating position solely on the basis of power; therefore, some claim to law, moral standing or common sense invariably is made.⁷ In the process of altering positions (which occurs to some degree even in an unsuccessful mediation attempt), the stronger party is thus led toward positions and proposals based on "defensible" criteria. In other words, the stronger party loses ground because he is led to compete more within the weaker party's frame of reference.

Sensitivity to this tendency seems to vary from place to place. In American labor disputes, there is a widespread willingness among stronger parties to join in a request for mediation, on the expectation that the mediator will help knock some sense into the other fellows and make them realize what a poor position they really occupy. However, an official of the British Advisory, Conciliation and Arbitration Service once told me that they found it difficult to get

7. [To] gain the approval of third parties who might have a mediating influence in multilateral negotiation, diplomats will usually see to it that their arguments sound reasonable. They will not commit gross violations of logic, brazenly distort well-known facts, or offend common standards of justice and fairness. Western participants in the Eighteen-Nation Disarmament Conference felt that the presence of neutral nations forced the Communist negotiators to use more reasonable arguments than in earlier conferences without neutral participation.

F. IKLE, *HOW NATIONS NEGOTIATE* 205 (1964). Since under other circumstances the U.S.S.R. had felt little compunction in taking positions strictly on the basis of power, it follows that the need to seem reasonable restricted its possible *substantive* positions, at least to a degree.

anyone to agree to mediation, since parties felt that to be first to ask for or accede to a mediator's assistance was an admission of weakness.⁸

Some may object that this is contrary to the well-known definition of a mediator as someone who listens to and reasons politely with both parties only until he is sure which is weaker, and then jumps on that one with both feet. There is no contradiction, however, because by the time any mediator becomes that aggressive, the substantive concessions and the procedural or posture improvements obtainable from the stronger party have already been made, or indicated to be acceptable contingent on a comprehensive settlement. Pressing the weaker party at what is aptly called "crunch" time is not evidence of bias, because it is necessary to recognize differences in power. If mediators ignored the "real world" and attempted to base all settlements on reason and brotherly love, stronger parties would obtain little benefit from mediation and would soon avoid it. No mediator can long forget that though both parties may be injured in an open collision, some are in a better position to survive a clash than others.

B. The Diverse Factions Constituting Each Party Are Not All Treated Equally

In most types of disputes, (with the obvious exception of divorces) groups of people are involved on one or both sides. A group may be as small as the tenants of a single building or as large as the nations of the Western Alliance or the Warsaw Pact, but the interests of all the participants on the same side are never identical. Often the rift between nominally allied factions may be as wide as the gap between the opposing "parties." Different proposals and trade-offs may benefit these factions disproportionately.

If a given party contains both moderates and radicals, mediation tends to benefit the moderates at the radicals' expense. This is partly because the process of mediation inherently opposes the radical's prescribed sequence of disruption followed by massive change.⁹ The limited nature of concessions which are obtainable at any bargaining table, along with mediation's secrecy, apparent legitimacy, and acceptability to the public, work to legitimize the gradualism of the moderate. Therefore, even at the start a mediator is by no means everyone's friend, and no matter how well-meaning his efforts cannot expect to be treated as such.

A parallel tendency is for mediation to submerge minority interests in general. The pressure to obtain an agreement which will get a majority vote

8. The same attitude was prevalent in the United States at one time. See E. JACKSON, MEETING OF MINDS 30 (1952) (quoting Theodore Kheel). For a similar observation in the international-dispute field see A. LALL, MODERN INTERNATIONAL NEGOTIATION 90 (1966).

9. "Conciliation always ends in a compromise." See J. COT, INTERNATIONAL CONCILIATION 234 (1972).

within both opposing groups, combined with the customary emphasis on secrecy, can leave a dissident faction boxed in with little ability to keep effective contact with the opposing party or its own constituency. Sometimes such a faction's first opportunity to affect the outcome occurs when ratification by the entire constituency is required. By that time, the dissident faction can become militant after being pressured by the mediator and its own "allies," while the majority of the party has become complacent after having prevailed at the bargaining table. The resulting refusal to ratify an agreement has occurred at every level, from local labor unions to the U.S. Senate and the General Assembly of the United Nations.

C. *In Conflicts of Interest Between a Negotiator and His Principals, Mediation Gives the Negotiator an Advantage*

Be the negotiator ambassador, lawyer, union business agent or king, there is often some level of conflict of interest with those he represents. In mediation an advantage accrues to the negotiator because he may be able to block a mediator from direct access to his principals, or at least limit that access. Furthermore, a negotiator often has broader access to sources of information than his principals and can communicate with a mediator on a one-to-one basis, out of his principals' hearing. A mediator, on the other hand, may have to bear in mind the likelihood of dealings with a particular negotiator on another day, in another context. These factors enable a negotiator to use a mediator to cloak proposals and deals which support the negotiator's interests as opposed to those of the constituents.¹⁰ This is a particular problem when the "mediator" is appointed by, or is an official of, a powerful third party with favors to bestow.

D. *The First Possible Agreement Is Not Always the Best Possible Agreement*

There is almost always more than one set of terms that can make for a mutually acceptable settlement; "give" on one item may compensate for "take" on an apparently unrelated one. However, mediators are almost always under some degree of time pressure, from the press of other work, the need to show progress to the mediator's appointing agency or peers, and for many other reasons. This pressure encourages a mediator to search for the *first* mutually agreeable settlement package rather than for some conception of the *best* agreement. Often the parties are aware of this. Despite the theoretical

10. Deborah Kolb's analysis of the interplay between the mediator and the professional negotiator is written primarily in terms of a symbiotic relationship serving the overall purposes of settlement in the cases discussed. Her description of the bulding up of the negotiator in front of his committee, however, casts light on how a negotiator is in a position to use that process to serve his own ends. See D. KOLB, *THE MEDIATORS* 128-33, 150-73 (1983).

existence of an agreement, it is not unusual for negotiators to meet afterwards, with or without the mediator, and modify the original set of terms to their mutual benefit.¹¹ It is as if these parties needed the mediator's assistance to get within hailing distance of each other, but once that is accomplished, the parties' superior knowledge of their own needs makes direct negotiation fruitful again. Under the same heading, "Never give a mediator your bottom line" is a wise admonition for those who intend to get a better than bottom-line deal if possible.¹²

E. *Mediation Can Actually Abet Bad-Faith Bargaining*

The problem of bad-faith bargaining or "playing games" is endemic. Here mediation has two, somewhat contradictory, tendencies. On a personal level, a mediator can conscientiously apply pressure against games-playing, and a searching inquiry into a party's justification for its proposals can be quite effective. However, if a games-player has the power to block a settlement, a mediator may find himself forced to defend and cover for that party rather than expose the bad faith to the full wrath of the opposing party or general public and risk that negotiations will break down entirely. A similar effect may obtain without conscious manipulation by the mediator. In his autobiography, Graham Greene¹³ described the U.N. Middle East mediation machinery as the proximate cause of an hour of shellfire he endured while travelling along the Suez Canal. In his view, Egypt was using its ready access to mediation to stage brief incidents of shooting which it could terminate through the U.N. before things got out of hand. Greene's description of the use of the ponderous United Nations chain of communication in the hands of a (then) "bad actor" is convincing.

It is natural for mediators to assume that both parties are acting in good faith, and as already noted, parties usually take care to present some rationale for any position they adopt. Even the most skeptical mediator needs to retain the confidence of both parties, including the games-player, to be effective. In addition, the principle of confidentiality restrains the mediator from attempting to use his influence on public opinion to enforce genuine negotiation. Thus there is a potential bias in favor of a party who is negotiating in bad faith.

V. CONCLUSION

To say that a profession has biases is not to decry its usefulness. Biases are a fact of life, and those described here should be no more alarming than such legal biases as the presumption of innocence or the burden of proof. The

11. *But see* Raiffa, *Post-Settlement Settlements*, 1 NEGOTIATION J. 9 (1985). Raiffa, conversely, argues that in direct negotiations both parties can benefit from a post-settlement attempt (with a neutral's assistance) to improve on the agreement.

12. *See* Stevens, *supra* note 3, at 288.

13. G. GREENE, *WAYS OF ESCAPE* ch. 9 (1980).

widespread use of mediation, along with its frequent success, shows that the effects of bias are limited and that parties can learn to live with them. Through understanding and experience, parties such as American labor and management have been able to reduce some of the biases described here to little more than a *caveat* to be kept in mind when discussing options with a mediator. There is ample evidence that many professionals in other fields are also aware of the need to protect themselves against bias. These biases need not cause parties to fear or avoid mediation if better training and more open discussion result in a general understanding of bias among both mediators and partisans. Where mediation does threaten the interests of a minority or third party, that party has every right to avoid harm through whatever means law and morality allow. But to expect the mediator to decide who needs assistance, and how much, is to place on him a burden impossible to carry and unnatural to his function. It is not disrespectful to point out that a mediator cannot be all things to all people; mediators may not always bring “neutral” results, but they remain useful men and women in a difficult business which at least aspires to neutrality.

