Bias and Mediators' Ethics

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A recent *Negotiation Journal* article by William Smith (1985) points the way toward a unifying statement of principle which resolves a knotty problem for mediators. Smith (with Saadia Touval and others) has established that, at least in international disputes, biased intervention can be both acceptable to the disputants and successful. This fits in with a trend toward acceptance, or even encouragement, of certain mediator conduct traditionally regarded as biased.

"Traditional" mediators in Smith's use (or "apolitical" in Touval's) have claimed freedom from bias as the cornerstone of their moral authority and even their existence. Perfect neutrality, however, is unobtainable even under the best circumstances. Smith notes the likelihood that a given mediator will acquire a degree of personal bias toward or against one of the parties during the course of a case, even if the mediator began the case personally neutral; and I have identified in another paper (Honeyman, 1985) several structural biases which operate regardless of the mediator's origin or intent.

Such biases as the preference of moderates over radicals, negotiators over principals, and weaker parties over stronger ones are well enough known to experienced parties (albeit perhaps at a "gut level") that such parties have always regarded mediators' protestations of utter neutrality with skepticism. The result is that the traditional theory of mediation is flawed by its failure to account for the inevitability of these biases in real life. It thus creates a false image of even the most neutral mediator obtainable.

At the same time, the current of thought exemplified by Lawrence Susskind (Susskind and Ozawa, 1983) tends to equate certain desirable social goals with responsibilities of the mediator. The perceived duties which result may have many elements, including a duty to inform parties of the "sufficiency" of a settlement, a duty to advance the general "public interest," and a duty to go and find parties of interest not already included in the negotiations. These have already been proposed as ethical requirements for members of the Society of Professionals in Dispute Resolution[1] or elsewhere, and are merely the beginning of what may be a long list.

To "traditional" mediators, these concerns are clear examples of a set of biases which might be called biases of social reform. Recognizing that many of the parties they deal with can be characterized as *opponents* of social reform (at least as to one or another of these issues at a time), these mediators are likely to find such "duties" inconsistent with their perception of neutral status. A schism is thus probable.

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Smith's discussion of the successes and failures of biased intervention in international disputes comes close to identifying the principle which resolves this problem. That principle is that parties be given fair notice of the mediator's biases.

The fact that biased intervention has been successful in international disputes can be explained in terms of such notice. Parties in international disputes, each equipped with a diplomatic service, are uniquely qualified to discern the intent of a mediator even when no explicit statement of the mediator's interests is made. In effect, for this reason and because of the "small size of the international community" cited by Smith, these parties are on permanent "constructive notice" of the biases of the intervenor, even when that "neutral" fails to make a fair disclosure. Consequently, such a biased intervention as Kissinger's Middle East effort was acceptable to the parties (and tolerated by hard-line Arab states) largely because no one involved expected him to do anything else. Smith's discussion of the Falklands crisis also supports this view, by saying that the war was likely the result of failure by Argentina to comprehend the U.S.'s true interests as well as failure by the U.S. to explain those interests: In other words, the system of "constructive notice" failed on this occasion.

Outside the "international" arena, such failure can reasonably be expected to be the norm. Even in complex business disputes, the battalions of outside counsel available to the parties are heavily loaded toward specialists in litigation rather than negotiation; and most other fields of dispute display less sophistication than that. We therefore cannot expect parties to allow for these biases unless we tell them, in one way or another.

The obligation of mediators to disclose their *personal* biases has been generally accepted. There is no persuasive reason to excuse the same obligation where it applies to those biases I describe as situational. (These are biases which stem from the intervenor's obligations to persons or parties other than those immediately involved in the dispute. See Honeyman, 1985.) The parties' right to know the institutional interests of an appointing agency, for example, cannot be denied either on ethical or pragmatic grounds. Smith's Falklands example will serve as well as any to show the practical need for this kind of understanding by both parties: If for any reason a party misunderstands the commitments of the intervenor, it is less likely to engage in "principled negotiations" based on a common set of criteria. Settlement is thus less likely, and the probability of a truly disastrous miscalculation of self-interest by that party is significantly increased. On an ethical plane, failure to identify such biases is equally indefensible. It amounts to a claim that "we know what's good for you" to the parties, and deliberately distorts the parties' perception of what they are getting. Mediators who act in this manner prevent the parties from making an informed choice of the type of intervention they want.

By careful analysis of personal interests and those of his or her appointing agency, an intervenor can identify those interests, be they political, social or other, that impinge on his or her function. In many contexts these interests have long been identified to parties, by statutory requirements, agency regulation, handbook, letter or oral explanation. While these "disclosures" are not often labeled as such, competent parties can read between the lines of, for example, an agency rule restricting the availability of mediators to testify in litigation. Such a rule is commonly established in order to protect the confidentiality of discussions; but its tendency to deprive a party seeking to prove bad faith of highly credible evidence is apparent. Its existence is therefore a reminder to parties that mediation can further bad-faith bargaining. This history is sufficient to show the practicality of a "fair notice" principle: It allows sufficient flexibility that different circumstances can be accommodated while we still get the message across.

Identification of those biases I describe as structural, however, is difficult to make on a case-by-case basis, and poses additional problems for a mediator. (Structural biases are those which are inherent in the mediation process. See Honeyman, 1985.) First, these biases can combine in shifting and unpredictable ways as a case progresses, and their net effect is difficult to calculate. Second, mediators are likely to resist a "fair notiçe" requirement if it is taken so far as to threaten their effectiveness. A literal reading of the obligation to disclose all biases would imply a duty to point out to a radical faction that the mediator is about to undercut its position by structuring a deal designed to appeal to the majority interest on each side. But saying anything of this nature at the moment when it is most relevant is likely to queer the deal entirely. Yet no one who approves of the American Revolution can maintain that the radicals are always wrong, or that a mediator has an affirmative ethical duty to try to undercut them. It may be that no better warning to parties can be given of the "inherent biases" of mediation than by the "inherent disclosure" of academic publication.

In general, fair notice of bias can serve as the unifying principle which will dispose of much of the confusion over a mediator's ethical obligations. To the extent that some of the biases of mediation are not avoidable by any mediator, as previously noted, publication of their nature in some standardized manner to parties not so sophisticated as to fall under the "constructive notice" principle would do much to alleviate those parties' nagging fears. Notice of the biases described previously as personal and situational should be required on a case-by-case basis, where it is not obvious.[2]

No one is obliged to accept mediation (unlike other neutral functions such as arbitration), and a party confronted with a proposed intervenor known to be biased may choose to reject that intervenor. But I do not agree with Smith that this type of disclosure carries a serious risk of rejection of mediation as a process. Instead, it enables a party to make an informed decision. That decision may often be to accept the intervention and bear in mind the altered uses and interpretations to give to the relationship, for the reasons Smith has noted. The success of mediation attempts known to be biased by all parties shows that parties can be capable of recognizing their overall interest even in the heat of the moment. In the long run, the acceptability of mediation is better served by encouraging the sophistication which makes such choices fruitful than by permitting obfuscation.

NOTES

1. See *Draft Rules of Ethics,* Committee on Ethics, Society of Professionals in Dispute Resolution (1985).

2. The "acquired personal bias" noted by Smith seems to me an example of an obvious bias which requires no explanation to the parties. In my experience, parties who so irritate the mediator as to engender such a bias during the course of the dispute are well aware of that fact.

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