Shortcomings of Neutrality in Mediation: Solutions Based on Rationality

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The authors argue that much of the conventional wisdom about mediation is based on the concept of neutrality — a concept difficult to operationalize. They replace this approach with the goal of providing Symmetric Prescriptive Advice (SPA). SPA is based on Raiffa's decision theoretic approach to negotiation and mediation, coupled with an analysis of common cognitive errors that occur in mediation. SPA requires mediators to: (1) only push for agreements when a positive bargaining zone exists; (2) search for fully efficient agreements; and (3) help the parties think through the issue of fairness.

Experienced mediators regularly help parties reach agreement. However, often these agreements are not the best that could have been obtained, and sometimes these agreements are worse for one or both parties than an impasse. How and why do mediators reach such agreements? Inappropriate agreements are frequently achieved as a result of mediator preoccupation with neutrality. Neutrality is largely based on intuition as opposed to rationality and logic. Though it is an intuitively appealing concept, neutrality is also ambiguous. Neutrality is so central to the mediation literature that mediators are commonly called "neutrals." However, there are practical diffi-

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culties with the concept of neutrality. The goal of neutrality provides the mediator little guidance about whether to intervene in the negotiation, and the nature of any such intervention.

As an alternative, we propose Symmetric Prescriptive Advice (SPA). SPA is offered as a complement to Raiffa's (1982) asymmetric prescriptive/descriptive advice. According to Raiffa's formulation, the best response to another party in a negotiation depends more upon knowing what the individual *will* do and less upon what the individual is *expected* to do based upon principles of normative models. SPA views the mediator as an adviser to both (all)[1] parties in a dispute. Symmetry implies that both parties understand that the mediator will serve both parties' interests as well as the fact that the mediator serves both parties' interests. Prescriptive advice implies that the process of mediation we outline provides optimal advice to both parties in the dispute. A mediator using SPA will necessarily have an activist role in the negotiation, and the opening statement that he or she makes will explicitly tell the parties that he or she is dedicated to helping them reach the best possible agreement. The SPA approach means that the mediator will remain impartial, but may no longer claim to be completely neutral.

After discussing the disadvantages of neutrality, the logic and rationality of SPA is presented. The disparity between mediator intuition and SPA is then noted. It is ironic that well-intentioned goals of settlement, closure, and equality often hinder effective mediation. We suggest ways to avoid the negative effects of these intentions.

Neutrality

Most observers view neutrality as a critical component of mediation. Whereas it might seem that neutrality is best achieved by a nonintervention-ist approach, Deborah Kolb (1983, 1994) found that while mediators routinely espoused neutrality, they also believed in "interventionist" mediation. As Kolb (1983: 24) describes it:

> When mediators are queried about their roles, they tend to respond by making a normative distinction between passive and active mediator roles. The image of the passive mediator is the silent observer, someone who confines his activities to providing coffee and sharpening pencils. The active mediator is one who, through his efforts, makes a major contribution to the achievement of settlement. The forms of this major contribution may vary. Descriptions of them include applying pressure, channelling communications, allowing the parties to save face, persuading and leading the group in its task accomplishment and social relationships.

In the words of one mediator (Kolb 1983: 27):

> There are times when one side needs my help more than another . . .I come on like a gentleman. I use all the logic and argument. Then I convince them by persuasion, and then I take them and bang their heads. Today, if I'm not persuasive enough to get a settlement, there isn't one there.

We argue that these tactics cannot be completely neutral since active behaviors affect the substance as well as the likelihood of agreements. Thus, while neutrality is claimed as a goal of mediation, any interventionist approach in fact threatens neutrality.

Some recent approaches have attempted to resolve the "actively neutral" issue by reframing the question. For example, Christopher Moore (1986) argues that mediators cannot and should not be neutral with regard to the process. The mediator may assist the parties with the process, but the parties "own the substance." Neutrality becomes less of a practical operational procedure than an ideal to which mediators aspire. However, any action on the part of a mediator involves value judgments about what to do to bring about a productive session or acceptable settlement (Forester and Stitzel 1989). Hence a mediator who steers the process cannot literally claim to be entirely neutral with regard to the outcome.

Sara Cobb and Janet Rifkin (1991) suggest that there are actually three different conceptions of neutrality at work in mediation:

> "impartiality" as "that which ensures against bias," where the mediator's role is "to either dismiss their opinions, values, feelings, and agendas or to separate them from the mediation process. . .in order to avoid coercing the parties and thus imposing the mediator's solution or values upon them." (42)
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> "equidistance" which concentrates on keeping the relationship between the parties equal even though at any one moment the mediator may favor one side or the other. (42/46)
>
> and
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> "a practice in *discourse*" where the "mediators participate by shaping problems in ways that provide all speakers not only an opportunity to tell their story but a discursive opportunity to tell a story that does not contribute to their own delegitimization or marginalization." (62)

Cobb and Rifkin believe the rhetoric of neutrality presently used in mediation theory and practice reinforces assumptions that are widely held but not explicit. They contend that mediators speak of neutrality as if it is a "self-explanatory" or "obvious" concept, noting that such language only helps to reinforce the implicit assumptions people have already made. Their claim is strengthened when we consider, for example, the concern of the late James Laue (1987) when he noted that:

> Another important aspect [of the Society of Professionals in Dispute Resolution's newly adopted standards] is the use of the word "neutral." By my count, it appears more than 35 times in the standards without any definition or description. The word "neutral" does not describe for the reader what it is that the third party really does. It is crucial as we talk of refining the code that this issue be dealt with.

Because neutrality is typically used in both the "equidistant" and "impartiality" senses without discrimination, Cobb and Rifkin feel conflicts of interest are inevitable in mediation practice. They believe that mediators will simultaneously try to avoid bias in the sense of an undesirable proximate relationship and at the same time they will try to avoid the negative psychological processes which may tend to favor either side. But, as they note, because some of these processes are unconscious, mediators are in the difficult position of monitoring their own unconscious behavior. They characterize the paradox as one where the mediator is forbidden from coercing or persuading disputants while simultaneously keeping the disputants from coercing or persuading each other.

Cobb and Rifkin thus feel that the first two senses of neutrality that they identify are impractical and hinder positive mediation practice. They note that the findings of Kressel and Pruitt (1983) suggest there is a positive correlation between mediator assertiveness and successful settlement. They propose an alternative model which derives from treating mediation as a story-telling activity, where each participant tells his or her story in such a way that he or she is allowed to cast himself or herself in a positive light which thereby legitimizes his or her behavior. Under this framework, a mediator remains neutral, and yet can actively intervene by fostering an environment conducive to a certain kind of story-telling.

However, while this model has undoubted descriptive merit, it still offers limited prescriptive advice. Although Cobb and Rifkin have recast the concept of neutrality, their work still tells the mediator little about how he or she should act once the disputants' stories have been told. The stress on neutrality in mediation practice — however it is described — is inevitably restrictive. In order to develop a workable prescriptive model of mediation behavior, the goal of neutrality should be less paramount in mediation theory and practice. Instead, mediators should strive to foster "rational" outcomes.

SPA — Symmetric Prescriptive Advice

Three criteria define a "rational" negotiated outcome in the SPA framework.

1. An agreement should occur if — and only if — both parties can better achieve their goals through negotiated agreement rather than coming to impasse.
2. An agreement should be maximally efficient. That is, there should be no acceptable alternative agreement available that is more beneficial to both (all) parties.

3. There should be full consideration of the allocation of the disputed resources by the disputants.

The first two criteria are based on fairly strict economic assumptions that are invariant across situations. The last criterion is more value-laden and there exist many competing (but mutually contradictory) solutions. Raiffa's analytic framework is at the core of the SPA framework. However, asymmetry gives way to symmetry — both parties knowing the mediator is giving the best possible advice to the other party as well. Below we elaborate each of these three criteria.

Should an Agreement Occur?

It is desirable for disputants to reach an agreement only if there is a positive overlap between their reservation points. A negotiator's reservation point is the value that defines his or her break-even point (Raiffa 1982). In other words, the reservation point defines a negotiator's least acceptable terms. To the extent that there is a positive overlap between parties' reservation points, it is in the parties' interests to reach a settlement. For example, if a buyer's reservation point is $290,000 and a seller is willing to part with the house for no less than $280,000, then there is a positive bargaining zone of $10,000. However, if the buyer is only willing to pay $283,000 for the house, and the seller can sell the house elsewhere for $287,000, this will transform the bargaining situation into one characterized by a negative bargaining zone. The key task of a mediator, then, is to assess whether there exists a positive bargaining zone and its relative size. If it becomes clear that no positive bargaining zone exists, a mediator should encourage impasse as efficiently as possible.

The complexity, of course, arises from the fact that mediators typically do not know parties' reservation points. Moreover, the parties themselves may not know or may be unwilling to say what their reservation points are. The mediator should attempt to assess parties' reservation points to determine whether there is overlap in their bargaining zones, since the bargaining zone defines the space and scope of available agreements. The mediator must also consider the costs of time and bargaining delays. To the extent that the zone of agreement is small and settlement requires extra time to reach, delays may prove more costly than failure to reach agreement. That is, a positive bargaining zone may be transformed into a negative bargaining zone due to the transaction costs associated with the mediation process.

This information assessment task is even more complex if we consider the possibility that disputants' preferences might change during the course of negotiation and mediation. What may appear to be an unresolvable dispute (based on the lack of overlap between parties' interests) may, in fact, be transformed into a mutually beneficial situation when bargainers learn information that modifies or alters their preferences. Mediators thus should not only extract parties' interests and preferences, but also assess the degree of

change necessary by one or both parties that would allow a mutually beneficial solution.

A mediator should assist negotiators in the task of improving their respective reservation points, defined by their best alternative to a negotiated agreement (Fisher and Ury 1981). This is a counterintuitive notion because improving disputants' reservation points effectively reduces the size of the bargaining zone and may, in fact, lessen the chance of a settlement occurring since one or both sides may find alternatives to settlement and hence have less incentive to come to agreement within the immediate negotiation. In effect, the mediator may help the parties realize that it is in their interest *not* to reach settlement (Raiffa 1982). A mediator should help the parties decide whether it is in their best interest to close the deal or not. Unfortunately, mediators often focus on the attainment of settlement rather than the analysis of bargaining zones.

Is the Agreement Efficient?

According to Lax and Sebenius (1985), negotiation involves two processes: creating value and claiming value. Integrative bargaining is the process of creating value. Negotiation may be conceptualized as a problem-solving situation in which the goal is to create or discover added value while protecting and maximizing one's gains. An agreement is fully integrative or efficient if there exists no other outcome or set of outcomes that at least one party prefers and toward which the other party would at least be indifferent (Pruitt and Rubin 1986). A primary task of a mediator should be to help parties create and discover added value in negotiations.

The creation of integrative agreements has been a central theme of the dispute resolution literature over the last decade and a half (see Bazerman and Neale 1992; Thompson 1995). Like the negotiator, the mediator must be skilled in the methods for reaching integrative agreement.[2]

Is the Agreement Fair?

Regardless of the amount of integrative potential, all negotiation situations involve a distributive component. That is, parties must ultimately allocate resources. Follett (1940) tells the story of two sisters fighting over an orange, when it turns out that one just wants the rind, and the other only wants the juice. In the story, they reach a fully integrative agreement by trading the rind for the juice. Despite the charm of the happy ending, very few real-world stories allow one party to get everything he or she wants without some cost to the other party. No matter how much added value mediators create, the pie of resources must still be divided between the parties.

The distributive aspect of negotiation within a positive bargaining zone is a complex issue for the rational mediator. The distribution of resources raises issues of fairness and justice. It could be argued that a truly "neutral" mediator would not want to influence the distributive aspect of negotiation, preferring to leave the distribution issues up to the parties. Similarly, it could be argued that the neutral mediator would seek to allocate resources equally.

However, there is no absolute method of fair allocation. The distribution of resources is driven by values and motivations that are more complex than simple neutrality. Rawls' (1971) philosophical position may be extrapolated to the mediation context. A Rawlsian analysis would suggest that rational disputants would agree to a fair distribution if they were not certain about the nature of the outcome. While this argument may be conceptually appealing, there is much ambiguity on a practical level. There seldom exists a unitary or single, obvious "fair" or "equal" allocation of resources in a dispute situation (Gibson 1989).

Ambiguities in the situation, often in the form of past histories of the disputants, current circumstances, and other factors, obscure clear definitions of fairness and provide fertile ground for the development of "egocentric" interpretations of fairness (Thompson and Loewenstein 1992). What is considered fair by one party may differ dramatically from what is considered fair by another, with both points of view equally convincing, yet conflicting. Thus, there is no deterministic rule of fair allocation in practice.

Any one or a combination of several different social justice principles may guide the distribution of resources. Social psychologists have identified three important social justice principles in this regard: equality, equity, and need (Deutsch 1975). An equality social justice principle dictates that resources should be distributed equally to parties, without regard to parties' needs or investments. An equity social justice principle dictates that resources should be distributed in proportion to the inputs or investments parties have made. Thus, rewards should be in proportion to inputs. Finally, a need social justice principle prescribes that rewards should be in proportion to the relative needs of disputants. It is easy to see that each social justice rule has merit, but each yields different outcomes to parties.

While no single social justice rule is universally applicable, mediators should be aware of the particular rule that they are applying. Often mediators are not aware of the principles of social justice that can strongly influence their behavior. Indeed, subtle arbitrary aspects of the situation may dramatically affect application of social justice rules (Messick 1993). Mediators may develop a single conception and anchor on this assessment. The dispute resolution process will be more effective and better supported by the parties involved when such principles are identified and shared by all parties involved. Therefore, it may be necessary for the mediator to articulate the various principles and ensure that the parties are operating from a common perspective.

SPA argues that the central role of the mediator is to provide symmetric, rational advice to the parties. This advice should help the parties identify whether an agreement should occur and, if so, how to structure a fully efficient agreement. Finally, the mediator should assist with the division of the resources by helping both parties see the alternative justice norms that could guide agreement. Unfortunately, mediator intuition frequently moves in directions that are very different than the recommendations of SPA.

Mediator Biases

Negotiators often fail to reach mutually beneficial and integrative outcomes in negotiation. This highlights the need for third-party intervention but, more importantly, suggests that for mediation to be effective, mediators must understand how and why negotiators fall short in negotiation. Like negotiators, third parties fall prey to biases that affect their ability to make decisions. Decision biases are systematic errors in decision making that occur because of the inappropriate use of heuristics or mental "short cuts" to reduce the cost and complexity of thinking. Most of the time, the short cuts people use produce good decisions; however, they sometimes can lead to inconsistent, suboptimal decisions in important situations. A mediator's supposedly nonpartisan perspective does not shield him or her from being affected by a set of cognitive and motivational biases similar to those that plague negotiators.

Three mediator biases work against the objectives of SPA: the "agreement-is-good" bias, the bias toward closure, and the equality bias. The agreement-is-good bias works against the SPA goal of obtaining an agreement only if a positive bargaining zone exists. The bias toward closure works against the SPA goal of obtaining fully efficient agreements. And, the equality bias works against the SPA goal of fully informing disputants about the multiple social justice norms that are relevant to the dispute.

The Agreement-Is-Good Bias

A pervasive belief is that it is always beneficial for people to reach agreement. Individuals often misperceive that any agreement is better than no agreement. Even when the potential for mutually beneficial agreement is blocked, and it is impossible for negotiators to reach an agreement in which both persons profit, a large majority reach a settlement that is "valueless" to them. Negotiators thus prefer to reach an unprofitable settlement rather than an impasse.

The agreement-is-good bias also affects mediators, who often view themselves as failures if intervention does not lead to settlement. Many mediators describe a failed negotiation as one in which impasse remains after the mediation ceases. A mediators who views an agreement as a success is parallel to a salesperson who views each sale as a success. However, at some price, a sale is worse than no sale. Likewise, reaching an agreement that is inferior to nonagreement should not be viewed as a measure of success by mediators. A failed mediation is one in which parties fail to reach agreement when a positive bargaining zone exists, when they reach an agreement despite the existence of a negative bargaining zone, or when the parties reach an inefficient agreement.

The Bias Toward Closure

In his Nobel Prize-winning work, Herbert Simon (1957) suggested that individual judgment is bounded in its rationality such that people forego the best solution in favor of one that is satisfactory — they *satisfice*. They do not examine all possible alternatives. They simply search until they find a solu-

tion that meets a certain acceptable level of performance. Mediators often use the criteria of finding a settlement that is good enough for both parties to accept as this acceptable level. Once this agreement is found, the bias for closure takes over, and the deal is consummated. Unfortunately, this deal is often inefficient.

The behavior of mediators parallels the behavior of salespeople when exposed to Raiffa's (1984) suggestion that after a mutually acceptable agreement is found, they should continue discussions in search of a better agreement for both parties — a post-settlement settlement. This concept is counter to the intuition that people should never reopen discussion after the buyer signs the contract. Just as the salesperson who does not want to tamper with a "done deal," mediators frequently settle for the first viable, mutually acceptable deal. Just as the salesperson should often look for post-settlement settlements, mediators should often look for an even better agreement, for both parties, after an initial deal is found.

Thus, as the parties reach an agreement, the mediator should assess whether the potential for a better agreement exists for both parties, and whether the improvement in the agreement outweighs the costs of getting there. If yes, the mediator might say:

> Congratulations, you have just reached a settlement that is acceptable to both of you. But, in my experience, when parties have a chance to review their agreements, they can sometimes think of additional things that would make the agreement even better for both parties. Now here is a process that might allow us to find such an agreement. . .

The mediator could next suggest an open discussion, if that appears to be risk-free. Alternatively, the mediator might propose Raiffa's third party post-settlement settlement procedure, if there is concern that open discussion could create interpersonal friction at this stage of the dispute resolution process.

The bias for closure can be seen in the linguistics of the dispute resolution field. One of the most commonly-used terms when parties reach a mutually acceptable agreement is "win-win." However, the term frequently describes inefficient agreements. Practitioners often describe a "win-win" agreement as one in which both parties are happy with the deal; however, the simple fact of agreement does not mean that the parties have reached the optimal deal. "Win-win" is also frequently used to describe a satisficing agreement. The mediator's goal should be to obtain a fully efficient agreement, not just any agreement that meets the needs of both parties.

The Equality Bias

In many contexts, a simple 50-50 split is expected by individuals, even when a rational analysis of the problem would not support such a split (Messick 1993). The ease with which individuals accept equal allocations probably accounts, in large measure, for the common use of the compromise solution

in negotiation. However, in many contexts, dividing the resources evenly is not necessarily fair. Proposing a fair-sounding, 50-50 settlement imposes social expectations on the disputants to accept the mediator's proposal: "The two of you are only $4,000 away from agreement, and court costs would be greater than that — how about splitting the difference down the middle?" This argument has great appeal, and it is easy to see how the equality bias of the parties can be used by the mediator to help get an agreement. However, getting an agreement is not the mediator's job. To the extent that the mediator knows that this proposal is against one of the party's best interests, a 50-50 split is an inappropriate proposal for the mediator to make.

Rather than being affected by the equality bias or using the equality bias against the disputants to achieve an agreement, the mediator should better inform the parties of the multiple social justice perspectives that might be relevant in the dispute. The mediator should help the parties realize that 50-50 splits tend to be quite arbitrary. Messick argues that people often accept 50-50 splits because of the discomfort of rejecting something that sounds fair. Rather than using this to extract agreement from disputants, the mediator should use this knowledge to give better advice to both parties.

The three biases reviewed here affect the ability of mediators to make accurate judgments and develop effective interventions in disputes. However, their pervasive nature does not make them immune from analysis and correction. The mediator may take several steps to make more accurate judgments and more effective dispute resolution. Mediators should be trained in *active awareness*. Active awareness involves the mediator taking steps to check his or her judgment process during the course of mediation. Secondly, experience may improve the accuracy of mediators' judgments. Probably the most important mechanism that the mediator can employ to improve his or her judgment skills is to diagnose the outcomes of his or her interventions. This involves seeking feedback about the effectiveness of the dispute resolution procedure in a timely fashion and doing follow-up analyses.

Conclusion

We have outlined a method for mediators to think more rationally and avoid costly biases, and to use this knowledge to help negotiators act in their own best interests. SPA is a prescriptive framework based on empirical evidence about why optimal agreements are often not achieved, with the goal of helping negotiators to the greatest extent possible. This kind of behavior is often not employed by mediators because it seems to violate traditional notions of mediator neutrality. SPA explicitly involves mediators actively taking part in the negotiation to facilitate an optimal agreement among the parties. The approach is designed to help mediators think rationally and eliminate biases that threaten effective mediation. Mediators who think more rationally will obtain better outcomes for their clients and for the more global community.

One question arising from this approach concerns its generalizability and applicability to other situations, including "messy" cases like child cus-

tody or environmental disputes. In such cases — which often involve many complicated issues and often many different parties — few neat or clear solutions are readily apparent. Our approach will not transform difficult cases into easy ones. The procedures we have described, however, are applicable to a wide variety of mediation situations, including those involving highly emotional issues and several parties.

In *all* cases, the mediator can work through an analysis of the bargaining zone, reservation points, post-settlement settlement, and a balanced consideration of social justice issues. Further, the rational approach — in contrast to practices which rely on the mediator's intuition — at least provides practical guidelines to help the mediator determine whether or not he or she is effective.

Our approach develops insights offered by Robert Mnookin (1993). Mnookin lists a series of disputes that reached suboptimal agreements and examines reasons for their failure, including cognitive barriers. The line of reasoning that uses cognitive tools to reach settlement applies equally well to improving the settlements that are reached. Given that society sees dispute resolution as good, if there are preferable settlements available to the parties in a dispute, it is appropriate for a mediator to steer them to the best potential solution.

We do not claim that the rational approach will always bring about the best settlement possible. However, we believe that it is appropriate for a mediator to intervene in order to facilitate a potentially better solution than the one the parties have tabled. The parties are always free to reject any suggestion since mediation is a voluntary process. It would be remiss of the mediator to allow a less than optimal agreement to come about just for the sake of remaining "neutral."

NOTES

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1. We will assume two disputants for the rest of the paper. However, we believe that the ideas presented in the paper generalize to multi-party disputes.
2. Given the extensive coverage of this topic in the literature, we will not provide a detailed discussion here.
3. This idea was suggested by our anonymous reviewer.

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