

Disputing Neutrality: A Case Study of a Bias Complaint During Mediation

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Researchers find that some participants in mediation hearings report that the mediator was unfair or biased, but disputants rarely communicate these perceptions to the mediator, and very rarely do they do so during the mediation hearing itself. During data collection for a study of mediation hearings, a videotape of a small-claims mediation hearing was made in which a disputant did make such an accusation during the hearing. This serendipitous capture of an accusation of bias on videotape enables us to examine how a mediator's actions during the hearing may have contributed to a disputant's perception of unfairness. Narrative analysis is used to show how mediation techniques such as empowerment, representation of disputant positions, story summarizing, and emotion work can cause a perception of bias if they are applied unequally.

Although most disputants report satisfaction with the mediation process (Bahr, 1981; Depner, Cannata, and Simon, 1992; Kelly, 1989; Kelly and Duryee, 1992; Parker, 1980; Pearson and Thoennes, 1985; Waldron and others, 1984; Benjamin and Irving, 1995), some disputants do report perceptions of mediator unfairness or bias (Chandler, 1990; Gaughan, 1982; Gaybrick and Bryner, 1981; Kelly, 1989; Meierding, 1993; Irving and Benjamin, 1992; Saposnek, Hamburg, Delano, and

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Michaelson, 1984; Benjamin, 1995). However, these perceptions are rarely expressed during the hearing itself. Most previous research on mediator bias is based on survey or interview data. Although these methods are useful, they cannot directly examine the process of creating a perception of bias. An interactional analysis of an actual mediation hearing is needed to explore how an impression of bias or nonneutrality can be created.

During data collection for a study of mediation hearings, a videotape of a small-claims mediation hearing was made in which a disputant made an accusation of bias during the hearing. This serendipitous capture of an accusation of bias on videotape enables us to examine what aspects of the hearing may have led to the bias complaint. Our goal in this article is to determine what went wrong in this hearing. What sequence of actions led to the disputant's bias complaint, and what was the role of the mediator in this process? Answering these questions will show some ways in which mediators can avoid creating perceptions of bias.

Data and Methods

The mediation hearing analyzed in this article was one of thirty mediation sessions videotaped for a study of the creation of agreement in mediation hearings. The videotape was transcribed using the techniques of conversation analysis (Atkinson and Heritage, 1984; see transcribing conventions in the exhibit). The mediator in this hearing is an experienced, professional mediator, and, as she stated during the hearing, this was the first time she had been accused of nonneutrality. At the time that these data were collected, she had been working for several years at a city-run mediation center in the Midwest.

First, we describe the hearing and the emergence of the bias complaint. We then describe the potential triggers of the bias complaint, such as how the mediator used empowerment, story solicits, representation of disputants' positions, summaries of disputants' stories, and emotion work. We conclude with a discussion of the implications of our analysis.

Description of the Hearing and the Emergence of the Bias Complaint

The hearing begins with a brief description of the mediation process by the mediator, followed by her request to hear the complaint of the plaintiff (Sheila). Sheila describes the relationship between herself and

the defendant (Doreen) as a casual, work-related one. She claims that she lent a compact disc (CD) player and \$250 to Doreen and that Doreen failed to return these items. She offers as "proof" an audiotape that allegedly captures a telephone conversation she had with Doreen's boyfriend (Andrew), during which the boyfriend states that they still have the CD player. Although Sheila offers to play the tape, the mediator initially says that it is not necessary for her to hear it. As Sheila completes her story, the moderator makes a point of telling her that she will have a chance to respond to anything Doreen might say.

When it is Doreen's turn to respond, she frames her "story" as a denial of Sheila's accusations by asserting that she had not borrowed \$250 from Sheila and that she does not have her CD player. Instead, Doreen insists that Sheila's claims are motivated by a desire to maintain contact with her. She describes their friendship as one she maintained out of "pity" because, she claims, Sheila had no other friends. Furthermore, she cites Sheila's alleged involvement in illegal activities and her history of violent behavior as reasons for her wanting to terminate the relationship with Sheila. Doreen also states that Sheila frequently tapes telephone conversations, thus suggesting that the use of the audiotape would be proof that Sheila's claims are problematic.

After Doreen tells her version of the story, the moderator asks for Sheila's response. Sheila first addresses the "facts" of Doreen's argument, and then she turns her attention to the more "emotional" parts of Doreen's story. The moderator's questions focus primarily on the emotional aspects of the case (how this has affected Sheila, how it has hurt their friendship, and so on), and she reminds Sheila and Doreen that the goal of mediation is to "work something out that satisfies both of you." She tells them that in the courtroom only "the proof" counts, "not your feelings, not your emotions, nothing but the proof."

The mediator then asks Sheila for proof of her claims. Sheila has no documents supporting her claim that the loan was made, but again she offers as evidence the taped telephone conversation between her and Doreen's boyfriend, Andrew. This time, the moderator tells her that she is welcome to play the tape. Doreen again objects to the tape being used as evidence and accuses the moderator of being biased against her. She states that the moderator expressed concern for Sheila's level of stress several times without offering her similar support ("And I hear you say, 'Oh, this must be stressful on you, this must be stressful on you.' Why is it that you feel that it's just oh so stressful for Sheila?"). The mediator disagrees

with this challenge to her neutrality (“Doreen, I’m really sorry if it seems to you like I am playing favorites, because I’m actually not”). Doreen responds by reformulating and reissuing her complaint about the mediator’s unequal response to their stress levels (“But you did say that to her a few times. Why do [you] feel that she may be under so much stress and I’m not?”). When the mediator denies feeling this way, Doreen asks, “Well, why is it that you brought it out to her and not to me?” Then, the moderator responds argumentatively (“Why did I use every word in the English language that I used with you and I probably did not use every word in the English language that I used with her?”) and reiterates her claim that she is not taking sides (“I’m really sorry that you feel like there needs to be sides here, because there’s not. You know? I’m just doing my job. I’m not on one side or another”). This response apparently does not appease Doreen, because she interrupts the moderator’s final sentence to elaborate her complaint (“But I did hear you state that twice to her . . . and you said you’re not worried about emotions here, but that was asking [about] her emotions. Is that not true?”). Jennifer again defends herself (“I don’t think that I did say I wasn’t worried about emotions. I think emotions are very important. And how you feel is just as important. I believe I gave you ample time to talk. I asked you at least twice if you had anything else you wanted to say”). Doreen uses the claim that she was given sufficient time to talk as a jumping off point for her second main complaint (“But then you went back to Sheila again, which gave her two times to talk”). The exchange continues in an argumentative fashion. The moderator decides to end the hearing because of the accusation of unfairness.

While the mediator’s response to the bias complaint is not the focus of this article (we are concerned with *why* the bias complaint occurred), it is interesting to consider how a different response might have rescued the situation and restored disputant confidence in the mediator and the mediation process. The mediator made several attempts to placate Doreen after she made her accusation of bias, and to tell her that she was mistaken—for example, “I’m really sorry if it seems to you like I am playing favorites, because I’m actually not. I’m really sorry that you feel like there needs to be sides here, because there’s not. You know? I’m just doing my job. I’m not on one side or another.” But the mediator’s attempts to placate Doreen fall flat because she does not provide evidence to support her claim that she is not biased. Perhaps the mediator’s disclaimers would have been more persuasive if she had explained why she did what she did—for example, why she was concerned with Sheila’s stress levels, and why she was asking Sheila

about her feelings. The main problem, however, seems to be that at times the mediator slips into an argumentative mode as she discusses the bias complaint with Doreen. Perhaps she could have announced a “time out” from the mediation to discuss the bias complaint calmly, or she could have called a caucus to talk with Doreen privately about the bias complaint so that she could have explained more openly why she treated Doreen and Sheila the way she did.

It should be emphasized that it is our research question that caused the disputant to feel that the mediator was biased, not whether the mediator was in fact biased or not. What is important for mediation practice is to learn more about how a mediator’s actions affect perceptions of the disputants, so that mediators can act in ways that will present an impression of fairness and impartiality. If a disputant perceives bias, we want to know why, so that we can avoid such situations in the future.

Potential Triggers of the Bias Complaint

In this section we will discuss how the mediator’s actions could have contributed to Doreen’s perception of bias. Are there ways she could have employed mediation techniques differently, in order to avoid the perception of asymmetrical treatment that emerged? There are a few actions that could be identified as possible mediator “mistakes.” For example, the mediator may not have described the mediation process and her role in it thoroughly enough at the beginning of the hearing. When the mediator opens the hearing, she does not tell the disputants that they can have multiple chances to tell their stories. Later in the hearing, Doreen assumes that she has only one chance to tell her story, whereas Sheila has two chances. But most of the problems in the hearing seem to emerge as a result of applying standard mediation techniques (such as empowerment, story solicits, intervention in or responses to disputant’s stories, or emotion work) unequally or without sufficient sensitivity to how each disputant perceives the mediator’s interaction with the other. The interactional problem, from the point of view of the mediator, is how to play to two audiences simultaneously.

Empowerment

Empowerment is one of the ways mediators can ensure that mediation is a fair process when (as is usually the case) the disputants are unequal in power, status, or knowledge (Neumann, 1992). As Barsky (1996) notes, one view of empowerment is as a method of power balancing. The

mediator identifies the weaker party and helps him or her compensate for these inequalities (see also Harrington, 1985; Regehr, 1994; Wall, 1981; Tjosvold and Van de Vliert, 1994).

As others have argued, this empowerment of one party raises practical and ethical issues (Matz, 1994; Regehr, 1994; Rifkin, Millen, and Cobb, 1991; Roehl and Cook, 1989). In particular, "if the mediator acts in a way that redistributes power, then the parties may see this as evidence of mediator bias against the more powerful party" (Barsky, 1996, p. 112). However, "if the mediator does not act to redress power imbalances, then the mediation process may be perceived as unfair" (Barsky, 1996, p. 112; see also Susskind, 1981; Stulberg, 1981). Empowerment is typically something the mediator does without announcing that he or she is doing it. Thus extra help or attention given to the "weaker" party may not be perceived by the "stronger" disputant as a legitimate difference in treatment, thus leading the party receiving less attention to believe that the mediator is biased against him or her. This is what may have happened in the hearing under consideration.

The "undercover" nature of the empowerment technique is also problematic because it does not involve the disputants in decisions about how the process will work. When mediators open hearings, they typically tell the disputants how the hearings will be structured. If they are not informed about the possible use of empowerment techniques, then they have not been adequately informed. This puts power in the hands of the mediator, which probably should be in the hands of the disputants. It is also possible that if the mediator makes independent decisions about who needs what kind of help without informing the disputants, any bias or partiality he or she may feel toward one of the disputants may be reinforced by this implicit alignment with one of them. Because the disputants will not know that empowerment is being used, they will not be able to protest against its use if they disagree with it or correct any errors in understanding that result from it. On the other hand, a mediator might say, "I will try to assist Disputant A because she has a problem communicating that will make it difficult for her to participate in mediation." Disputant B might respond by saying, "That's fine." Or he might say, "But I also have a problem communicating that I need your help with." The mediator might then get information that would enable her or him to understand more clearly the needs of both parties and may therefore be able to more accurately assess who needs what kind of help.

In the case being analyzed here, there is some evidence that the mediator may have perceived one disputant to be less competent than the other and therefore will have taken steps to empower her. By "less competent," we are not referring to their competence as persons or members of society; we are referring solely to their ability to participate in the mediation hearing. The mediator may have perceived Sheila to be less competent, involved, and cooperative than Doreen because the behavior of the two disputants differs greatly at the beginning of the hearing. Doreen gives the impression of a polite, attentive, calm, and cooperative interactant. She is seated, gazing at the mediator, and giving nonverbal responses at appropriate points in the mediator's speech. Sheila, however, is fiddling with her clothes and possessions, moving around, and avoiding eye contact. She does not appear to be attending to the mediator's remarks. This type of behavior, particularly at the hearing's onset, could signal to the mediator that Sheila will require extra care and attention to involve her in the mediation process. Thus, a pattern where Sheila gets more mediator attention and displays of concern than Doreen is established.

Second, when Sheila does begin to speak (in response to the mediator's solicitation of her story), her voice is monotonal and she speaks with unusually even rhythms; she sounds mechanical and distant. To the extent that Sheila's voice and speaking style make her sound less than competent, the mediator could be led to give her extra attention and accommodation.

During Sheila's account, the mediator takes several steps that appear to be attempts to empower her. These attempts become problematic later on in the hearing when Doreen shows that she perceived them as giving Sheila unfair advantages. In this particular hearing, the mediator's use of empowerment techniques might have been more successful if she had first checked out her perceptions of Doreen's competence before using empowerment techniques for Sheila (if she had interacted with both disputants a little at the beginning of the hearing, she might have come to a different assessment of the relative competence and needs of the two disputants). Second, the mediator failed to "play to two audiences"; while concentrating on empowering Sheila, she neglected to consider the effect of her actions on Doreen. Third, while perfect symmetry of treatment (as explained in the introduction) is not possible or desirable, there were several instances throughout the hearing where greater symmetry in her treatment of the disputants might have helped. We will now examine in detail the mediator's treatment of the two disputants in the hearing as it relates to the bias complaint.

Solicitation of the Disputants' Stories

The standard way mediation hearings are organized may interface with the empowerment issues previously described to create potential sources of asymmetrical treatment. Cobb and Rifkin's study (1991) of community-based mediation hearings shows that while there is a rhetoric of neutrality among mediation practitioners and advocates, the nature of the mediation process militates against actual neutrality. The first storyteller in the mediation hearing uses that opportunity to set the moral stage for the hearing—characterizing their own position as right and good and that of the opposing disputant as wrong and bad. Mediators unwittingly aid in the process of reaffirming the “primary narrative” by orienting to the issues raised by the first story as they facilitate the hearing. Unless mediators successfully aid the second disputant in promoting an “alternative narrative” that challenges the moral framework established by the primary narrative, they have failed in their goal of constructing the mediation hearing as a “neutral” process (Cobb and Rifkin, 1991).

The way the mediator solicits Sheila's story and Doreen's story supports Cobb and Rifkin's findings. The mediator's initial solicitation of Sheila's story was the question “What's been going on?” When the mediator solicits Doreen's story, her story solicitation is not parallel to the one she gave Sheila. The mediator's solicitation of Doreen's story is, “Why don't we give Doreen a chance to respond to some of the things that you've said? And also tell us what happened as she sees it.” This makes it sound as if Doreen must first defend herself against Sheila's complaints. Compared with how Sheila's story was solicited, the solicitation of Doreen's story conveys skepticism (with the words “as she sees it”). The mediator's attempt to empower Sheila is shown by the care she takes to avoid giving the impression that Doreen's story will be given more credibility than Sheila's. Furthermore, the mediator's use of “we” and “us” in her solicitation of Doreen's story apparently refers to Sheila and the mediator. Because Doreen is mentioned by name and the mediator is looking at Sheila during this statement, the mediator thus aligns with Sheila in a way that excludes Doreen.

In general, the problem Cobb and Rifkin identify would be difficult to avoid without changing the format of mediation. There are two things the mediator could have done that might have helped. First, perhaps she could have begun the body of the hearing by having each disputant make a brief initial statement so that each party would have at least one chance to speak before either tells her “long” story. This structure would allow both disputants to respond to each other in their long stories rather than just the

disputant who goes second. Second, the mediator might have tailored the words and phrases used to avoid privileging the first disputant's story or appearing to align with the first speaker. For example, avoiding "we" and "us" to align a mediator with one client against another, avoiding skepticism markers ("as she sees it"), and, in general, avoiding framing the second disputant's story as a "response" to the first disputant might all have lessened the likelihood of the perception of bias. In the case we're examining, the mediator's solicitation of Doreen's story ("Why don't we give Doreen a chance to respond to some of the things that you've said, and also tell us what happened as she sees it?") could have been replaced with the statement "Thank you for telling me what happened. Now, it is Doreen's turn to tell me what happened. Then you each will have a chance to respond to the other's statement." This version treats the two stories as equivalent in terms of their truth value.

The Mediator's Interventions in Sheila's Story

The mediator's actions during the disputants' stories are quite different. Her interventions in Sheila's story are supportive and facilitative, whereas her interventions in Doreen's story are generally challenging. As soon as Sheila begins telling her story, the mediator intervenes by asking for relevant details and helping Sheila produce the information she needs to understand what happened.

Excerpt One

SHEILA: I know Doreen because I work with Doreen at Parker's Restaurant.

MODERATOR: OK.

SHEILA: OK, we've been friends for, I guess, two years maybe?

MODERATOR: Were you [good] friends?

SHEILA: Well, I wouldn't say real good friends, you know. We . . .

MODERATOR: Did you see each other outside of work?

SHEILA: Uh, once in a while, . . . yeah, you know?

MODERATOR: OK.

SHEILA: Not a lot.

MODERATOR: OK. What's happened?

SHEILA: Uh, what has happened is, uh . . .

The initial hesitations and uncertainty markers in Sheila's story give the impression that she is having trouble getting her story launched—for example, the pauses and the use of “I guess” and “maybe.” The mediator uses continuers (see Sacks, Schegloff, and Jefferson, 1974) such as “OK” and questions such as “Were you good friends?” “Did you see each other outside of work?” and “What's happened?” to help Sheila get her story off the ground.

The mediator continues to provide supportive responses throughout Sheila's story. At one point, Sheila deviates from the central issues. As Sheila gives unnecessary details, the mediator redirects her to the essential points by asking, “So what happened?” This question gets Sheila back on track. In sum, the mediator's frequent interventions in Sheila's story are supportive and consist mainly of continuers, supportive questions, and redirects intended to focus her story on the essential points. These are typical aspects of mediation work.

The Mediator's Interventions in Doreen's Story

The mediator does not offer Doreen the same type of help in storytelling that she gave Sheila. During most of Doreen's story, the mediator speaks little (perhaps because Doreen's fast, fluid speaking style does not convey a need for assistance). Although the mediator does provide some continuers, most of her interventions in Doreen's story challenge rather than provide support.

The first question the mediator asks Doreen occurs quite late in her story—after Doreen provides several reasons why she had no need to borrow money from Sheila. The mediator summarizes Doreen's denial that there was a loan and draws an upshot from it: “So you're saying there was no two hundred and fifty dollars?” Restating or summarizing is a routine part of mediation work, and it is often quite helpful in showing both disputants the import of a disputant's story, as well as helping the storytelling disputant to focus on the main points (Ury, 1993). However, the mediator's use of a skepticism marker (Whalen and Zimmerman, 1990) in this utterance (“So you're saying . . .”) conveys doubt about Doreen's claims. Mellinger's research (1989) on emergency telephone calls shows that call takers who were skeptical of a call signaled this by writing “caller states” or “caller claims” in their computer report of the incident. The mediator's tone of voice as she produces this utterance sounds skeptical.

In addition, the questions the mediator poses to Doreen do not merely refocus the story, they challenge Doreen's story from the perspective of

Sheila's story (see Cobb and Rifkin, 1991). This type of mediator intervention, "replacing the disputant" (Garcia, 1995), occurs when the mediator actually assumes the role of one disputant to the other. "When 'replacing' the disputant, the mediator does not restrict him or herself to representing the disputant's expressed position[;] he or she goes beyond what the disputant said and argues in place of him or her" (p. 35).

In excerpt two, Doreen argues that the letters Sheila sent her show that Sheila is obsessed with her. The mediator first asks an informational question ("What kind of letters?"), but she uses a skeptical tone of voice. When Doreen's response indicates that she only received one letter rather than several ("The one that she has right here that she says she sent"), the mediator asks her to confirm whether that was the only letter received ("Is that the only letter?"). The mediator's informational questions work to deflate Doreen's initial claim that she had received a number of letters; thus Doreen's attempt to use the letter(s) as evidence supporting her claim of Sheila's obsession falls flat.

The mediator's intervention in this exchange becomes even less supportive of Doreen when she sanctions Doreen for interrupting. Donohue (1989) finds that a struggle for control of the floor can escalate a mediator's emotional involvement in the dispute and can "distance mediators from formulating refined interpretations of disputant communication patterns" (p. 340). When this sanction occurred, Doreen was elaborating a reply to the mediator's prior question, so the mediator was actually interrupting Doreen rather than Doreen interrupting the mediator. However, the mediator says, "Let me finish." Once she has secured control of the floor, the mediator asks, "So you think that she's doing this two hundred and fifty dollar thing and the CD player thing simply to get reinvolved in your life?" Again, this utterance is not simply a summary of Doreen's position; the mediator is conveying skepticism of Doreen's claims by using the phrase "so you think" and the word "simply." When Doreen replies, "Yes, exactly!" the mediator again conveys skepticism by immediately countering with the question "How would that happen?"—in a skeptical tone of voice, thus suggesting that it is unlikely that it would happen.

Excerpt Two

MODERATOR: Tell me why you think Sheila says anything about the two hundred and [fifty dollars or the] CD.

DOREEN: [Because she wants . . .]

MODERATOR: Player?

DOREEN: Because she thinks that this is a way of getting back in[to] my life. She sent me letters . . . I totally ignored [them].

MODERATOR: What kind of letters?

DOREEN: The one that she has right here that she says she [sent].

MODERATOR: [Is] that the only letter?

DOREEN: That's the only letter! [And] I didn't get invo[lved bec]ause I didn't want to [call her].

MODERATOR: [So. Let me] finish. So you think that she's doing this two hundred and fifty dollar thing and the CD player thing simply to get reinvolved in [your life?]

DOREEN: [Yes!] Exact[ly!]

MODERATOR: [How?] How would that happen?

DOREEN: It won't! I . . . no matter what! And no matter what, even if I, . . . You know, I said the worse that can happen is that you can believe Sheila, what she says, and her little tape recorder, because she has hundreds of them!

MODERATOR: I've got a very, very] easy job. I don't have to . . .

DOREEN: [But the point is . . .]

MODERATOR: Believe or disbelieve anybody. OK?

The mediator is responding to Doreen's story from the perspective of Sheila's story (Garcia, 1995). The questions the mediator asks Doreen during the opening of her story are directly related to the accusations Sheila has already produced. Doreen could perceive this as an attempt to squelch her position by forcing her to simply respond to Sheila's accusations (Cobb and Rifkin, 1991). However, in contrast to the mediator's questions to Sheila, which we saw as "helping" Sheila explain her story in detail, the questions asked of Doreen appear "accusing" in nature and seem to force Doreen to refocus her story to directly answer Sheila's accusations.

For example, in excerpt three, the mediator asks, "When's the last time she lent the CD player to you?" After Doreen answers this question, the mediator challenges Doreen by reminding her of the evidence that Sheila has brought with her: "Sheila says she has something on a tape!" Doreen responds by vigorously contesting the validity of the tape.

Excerpt Three

MODERATOR: When's the last time she lent the CD player to you?

DOREEN: Oh, it's been months! Well, in August, when we went to Georgia, I took . . . we took my sister's CD player, so it was way before then!

MODERATOR: Sheila says she has something on a tape!

DOREEN: Of Andrew! Well, it doesn't. When was this? If she'd lent me . . . ?

MODERATOR: I don't know.

DOREEN: [I'm.] OK. If she has a tape, how . . . for what day? When is . . . when could this be? If she [had] lent [me] the . . .

MODERATOR: [I don't.]

DOREEN: CD player numerous times . . . That tape could be from any of those times that she . . .

The techniques the mediator used to help Sheila tell her story are absent in her exchange with Doreen. Rather than provide supportive questions aimed at refocusing, she tends to use Sheila's story to challenge Doreen's account. The accusing and/or skeptical nature of her interventions could also have contributed to Doreen's perceptions of bias.

There are several issues that need to be considered here. First, neutrality and fairness in mediation do not necessarily mean treating each disputant exactly the same. The disputants do not present the same content, attitude, or interactional issues to the mediator, so identical, "script-like" responses would be ineffective. For example, as previously mentioned, Sheila's hesitancy in getting the story off the ground may require a different type of response or assistance from the mediator than Doreen's fluency. The trick is to provide what assistance is needed while making it clear that each is being given what is needed and no more. Perhaps the mediator could explicitly share her strategies and the reasons for them with the disputants. For example, she could say, "I will ask questions or otherwise intervene in your stories, as necessary, so that I can understand them, so that we can stay on topic, and so that I can help you get your statement out clearly. I may have to treat you differently at times in order to give each of you the help you need. Please do not be disturbed if I ask you different questions than I asked the other."

Second, mediators should be alert to the risk of being drawn in by the logic of the first story (Cobb and Rifkin, 1991). Mediators might want to

avoid using the first story to critique the second as well as to avoid “representing” the disputant (Garcia, 1995) or using skepticism markers (Mellinger, 1989). Mediators may find it helpful to have a separate question and answer session after each story is told to make such critiques, and, ideally, the disputants will make them, not the mediator.

The Mediator's Response to Each Disputant's Story

The way the mediator summarizes and responds to the disputants' stories could have also contributed to the bias complaint.

The mediator's summaries of the disputant's stories. As each disputant completes her story, the mediator summarizes and restates it. The mediator's summary of Sheila's story (excerpt four) is basically supportive of her claims.

Excerpt Four

MODERATOR: Let me see if I understand what you're telling me so far. You made a loan to her of two hundred and fifty dollars? With the understanding that Andrew would pay you fifty dollars a week?

SHEILA: That's what she was telling [me.]

MODERATOR: OK. That's what she was telling you. Nothing's been paid on that?

SHEILA: That's correct . . .

MODERATOR: And then you allowed her to use your CD player and you haven't seen your CD player since?

SHEILA: No, I haven't!

MODERATOR: OK. So, basically, that's it? You haven't seen the two hundred and fifty dollars? Or your CD player?

SHEILA: That's correct.

MODERATOR: Do you have any receipts for your CD player?

SHEILA: I purchased the CD player down in Atlanta, Georgia, last year.

The mediator's summary of Sheila's story—"You haven't seen the two hundred and fifty dollars or your CD player?"—is followed immediately by the question "Do you have any receipts for your CD player?" By moving

directly from the story summary to requesting a document that could establish the value of the CD player, the mediator may give the impression that she is accepting Sheila's story as true without letting Doreen tell her side. Because Doreen has never denied the existence of the CD player, the mediator's question can be heard as trying to establish its value.

When the mediator sums up Doreen's story (excerpt five), she again says, "So you're saying," which may subtly convey skepticism. The mediator overlaps Doreen's denial with a continuer ("OK"), and then she immediately gives Sheila a chance to respond. Thus the mediator, in her effort to keep the hearing moving and to quickly get back to Sheila, prevents Doreen from producing her denial of the accusation in the "clear." Her lack of response (other than "OK") may make Doreen feel that the mediator is not listening to her.

Excerpt Five

MODERATOR: So you're saying that you're a very honest person [and that] you do not have two hundred and fifty dollars of hers and you do not [have her CD player]. Is that . . . ?

DOREEN: [I do not!] I do [not!]

MODERATOR: [OK.] Let's give Sheila a chance to respond to some of the things that you've said.

The mediator's completeness queries. As each disputant comes to the end of her story, the mediator responds with "completeness queries" (to make sure the disputant is done before moving on). The mediator's completeness queries differ for the two disputants. Sheila is given a wider latitude to add new material to her story than Doreen is (perhaps because the mediator is still striving to empower Sheila, the apparently weaker disputant). This difference between the mediator's response to the two stories may contribute to Doreen's perception of bias.

After Sheila has completed her story, the mediator asks her if she has anything she wants to add: "What I'd like to do now is give Doreen a chance to talk, unless you have something else you want to add." Sheila takes advantage of this invitation to produce a letter supporting one of her claims. The mediator then asks her a second time if she would like to add anything: "OK, anything else?"

When Doreen's story is complete, she receives a different type of invitation to speak from that which Sheila had received. The mediator asks,

"Is there anything new that you want to tell me right now, before we give Sheila a chance to respond?" The mediator's specification of "new" information is likely to be heard by Doreen as a strong limitation, because earlier in the hearing Doreen had been sanctioned for repeating herself.

Later on, the mediator gives Doreen a second chance to add to her story, but again this invitation is limited to showing more evidence. However, the mediator does not ask whether Doreen has anything else she wants to tell her. After Doreen says that she has no more documents to show, Doreen volunteers that she has more to say. She describes what she wants from the mediation. Instead of acknowledging or responding to this request/complaint (as the mediator did with the issues Sheila had brought up at the end of her story), the mediator interrupts Doreen and says, "Well, let's see what we can accomplish here" and then solicits Sheila's response. The mediator does not allow Doreen to elaborate or add to her story.

Excerpt Six

MODERATOR: OK. Is there anything else before we get with Sheila, that you wanted to show me?

DOREEN: No.

MODERATOR: OK.

DOREEN: But I do want to tell you [that] I'm still not angry with Sheila. I just want a separation! I just want my life—away from hers, and . . .

MODERATOR: Well, let's see what we can accomplish here, OK? Sheila, [why don't] you respond to some of the things she[']s said?

SHEILA: OK. First of all, . . .

In sum, the mediator's completeness queries constrain and direct Doreen's account but provide an opportunity for Sheila to elaborate her account.

Emotion Work

It is a common and legitimate mediator move to verbalize a disputant's expressed emotions to get them to acknowledge their feelings—a technique that might enable them to move beyond them (Ury, 1993). By bringing emotions to the fore, the mediator may also be trying to create a bond of sympathy between the disputants (Thoennes and Pearson, 1985) or to get them both to connect with their friendship for each other. However, in this

hearing the mediator's attention to Sheila's emotions contributed to Doreen's perception of mediator bias.

According to Doreen, the mediator's statement to Sheila—"Some of these things must have been difficult for you to hear"—was one of the triggers for her bias accusation. Trying to get the disputants' emotions on the table can often move the hearing forward. If the disputants can express their anger or hurt, they can often focus better on the substantive issues. But in this case, Doreen takes it as a display of bias. Why?

When Sheila ends her story with a complaint about how she was treated by Doreen (excerpt seven), the mediator says, "It must really frustrate you." Because Doreen has not yet had a chance to tell her story, the mediator may have given Doreen the impression that she was accepting what Sheila was saying at face value (see also Rifkin, Millen, and Cobb, 1991). A few lines later, the mediator appears to align with Sheila's presentation of herself as weak and victimized (she had recently broken her leg). This alignment results in an implied criticism of Doreen, because Sheila is accusing Doreen of victimizing her.

Excerpt Seven

SHEILA: Yeah, I mean me and Doreen have been friends, you know, and I just, I just don't understand it, you know? It seems like . . .

MODERATOR: It must really frustrate [you].

SHEILA: [After I, well . . .] It was after I broke my leg, and you know . . . and [I d]on't know what happened! You . . . now we . . .

MODERATOR: So you're dealing with a broken leg [and it] . . .

SHEILA: [I was] dealing with a broken leg and then trying to deal with Doreen, you know? I was getting nowhere. [You] know? And I was just trying to be nice about it! You know?

MODERATOR: Do you miss her friendship?

The mediator again does emotion work with Sheila when she asks, "Do you miss her friendship?" With this utterance, the mediator seems to be trying to bring the emotional issues underlying the dispute to the surface. She may also be trying to get Sheila to say something nice about the other disputant, which can diffuse bad feelings and enable the disputants to move forward.

Excerpt eight shows an instance in Doreen's story in which the mediator missed a potential opportunity to do emotion work. Doreen is explaining

some of the stresses she is under and why she does not want Sheila involved in her life any more. Instead of reflecting her feelings or expressing sympathy with the stresses she is under, the mediator chastises her for repeating herself and asks her to finish her story so that they can get back to Sheila.

Excerpt Eight

DOREEN: I feel like no matter what, out of all the things she's done . . . I can't be involved in that anymore. I have too many problems. I have five kids, I have three grand kids. And she was putting all this stress on me, all these problems. Telling me about her stealing all this money! I'm . . . I'm sorry, but I could not deal with it anymore. I don't want to be a part of it anymore! And when you know? I . . . all the tapes? And everything? I know Sheila tapes everything! That's not nothing new to me. She's done it forever! So, all those conversations, she may have a conversation with Andrew. But she's called my house numerous times. That conversation can be from last year.

MODERATOR: Eh, so [that] we don't get back into repeating ourselves about [the fact that] she tapes everything . . . and, you know, I[ve] heard that several times now . . . Is there anything new that you want to tell me right now? Before we give Sheila a chance] to res[pond?]

In sum, the imbalanced use of emotion work with the disputants may have led Doreen to feel as though the mediator was ignoring her emotions, and, consequently, it may have contributed to her accusation of mediator bias.

Domenici and Littlejohn (2001) remind mediators that it is important to pay attention to emotions: "The emotional part of the conflict often needs an emotion-venting period before the rational, content-related issues can be explored" (p. 118). (See also Mackie, Miles, Marsh, and Allen, 2000.) However, they note that it is important to pay attention to the *intensity* of emotions as well. In this hearing, the mediator may have erred not only by focusing on Sheila's emotions extensively while slighting Doreen's but also by underestimating the intensity of Doreen's emotions. Some disputants do a better job of hiding or containing their emotions than others. But the fact that a person is not expressing emotions does not mean that he or she is not experiencing them. Perhaps mediators should consider explicitly asking disputants about their emotions at the beginning of the hearing, to get an idea of how to handle them during the hearing and to get those emotions on the table.

In sum, our conclusion from the analysis of these data is that the bias complaint emerged primarily because the mediator's attempts to empower an apparently weaker disputant backfired when the other disputant interpreted these actions as bias against her. The mediator used different story solicitations, different questions, and different interventions during the stories, as well as different completion queries and different amounts of emotion work, which led Doreen to feel that the mediator was siding with Sheila and her claims.

Discussion

Mediators must constantly think about how their responses to one disputant will be perceived by the other. The mediator's job is a delicate one and is fraught with difficulties. Some of these difficulties became apparent in the hearing analyzed in this article. In this section, we summarize these findings and we recommend questions for further research. We also make some suggestions for mediators to consider as they use empowerment and other techniques in their practice.

The Appearance of Asymmetry

A key element in this hearing was the use of various mediator techniques to offer support to an apparently weaker disputant in an attempt to empower her. Valid mediator techniques, such as summarizing disputants' stories, representing disputants' positions to one another, and doing emotion work, created a perception of bias in a disputant because they were applied in a way that appeared unequal.

Because mediators do not typically inform disputants that they are using techniques such as empowerment or emotion work, it is especially important that they consider how a disputant might perceive these actions as displaying bias. Disputants are not necessarily aware of the reasons behind many of these techniques, or even that they are being used. In this hearing, we found that the mediator used empowering techniques for Sheila because she assessed her as being the more needy disputant. But because Doreen did not know that that was why the mediator was giving her this help, she interpreted it as bias against her.

Perhaps mediators should first discuss the empowerment technique with the disputants to make sure that they know what is being done so that they will not misinterpret it as bias and so that they can correctly inform the mediator about what needs for assistance each of them has

during the hearing. In the current case, empowerment might have been withheld until after the mediator had a chance to interact (at least briefly) with both disputants and assess the relative strengths and weaknesses of each. This case indicates that providing each disputant with the opportunity to give a brief description of her problem before either begins her “long story” might attenuate bias perceptions. Or mediators could have a brief informal exchange with the disputants before the hearing starts. Another option might be to directly ask each disputant what her or his strengths and weaknesses are and what type of help each would like during the hearing. While including disputants in the decision may be more ethical than using empowerment as an undercover technique, this type of public discussion of a disputant’s weaknesses may not always be feasible or desirable.

If further research finds that asymmetry in treatment related to empowerment techniques is related to perceptions of bias, mediators might want to sensitize themselves as to how story interventions—for example, supportive continuers, informational questions, and topic redirects—can be used, while avoiding creating a perception of bias. As in the case discussed here, not all disputants need the same kind of interventions, so they should not simply be treated in exactly the same way. But care could be taken to avoid differences in substance or in tone—for example, displaying skepticism of one disputant’s claims while treating the other’s as true or neutral. This case suggests that the mediator’s strategy of “replacing the disputant” by challenging one disputant’s story on the other’s behalf (Garcia, 1995) might be questionable. If disputants make their own critiques of each other’s stories, mediators can avoid appearing to take sides. In addition, this case indicates that completion queries should provide the same degree of latitude for each disputant to add to her or his story, repeat points, or add new evidence or new complaints.

The Organization of the Mediation Hearing

Whereas the organization of mediation hearings differs depending on the program, mediator style, and type of mediation, a common mediation structure is one in which disputants tell their initial stories in turn, without fear of being interrupted by the other party (Garcia, 1991; see Greatbatch and Dingwall, 1997, on other ways of organizing mediation). The opposing disputant is thus excluded from the interaction during the story. This organization allows each disputant to tell her or his side of the story without interruption and works to minimize arguments (Garcia, 1991), but it

can also create an awkward environment for the disputant who is not currently speaking. Because opposing disputants' versions of the same story will most likely differ, the mediator must elicit as much information as possible from each in order to fully understand both sides of the dispute. This can leave one person out of the process of interaction for an extended period of time. During this time, this person is typically not allowed to react to what is being discussed by the other disputant and the mediator; nor is he or she allowed to immediately object to or refute any information currently being discussed. This may lead to the appearance that the mediator is aligned with the disputant who is currently telling his or her story. Therefore, mediators need to be alert as to how their actions might be perceived in this context.

The problem with bias uncovered in this article suggests that some disputants may feel biased against when a mediator takes a long time to interact with the opposing disputant, before they have had a chance to tell any of their story. The mediator can minimize this risk by how he or she talks to the other disputant—for example, taking a provisional stance toward her or his utterance, or occasionally reminding both disputants that each will get a chance to tell her or his version of events. The mediator can remind the disputants that each disputant's story is not taken as fact by the mediator; it is just that disputant's version. Some mediators ask the "listening" disputant to make a written note of any issues in the other disputant's story that he or she may wish to respond to. This allows the listening disputant some assurance of getting an opportunity to convey her or his disagreements. And by the act of writing at specific points in the storyteller's story, the listening disputant is able to show *what* he or she disagrees with. This enables the listening disputant to communicate a disagreement without speaking or interrupting the storytelling disputant. Another approach—perhaps a little more intrusive of the story—would be to allow the opposing disputant to speak to register a disagreement. That disagreement would be noted, and the opposing disputant would address it later. But the fact that a disagreement had been clearly registered might affect both the storyteller's telling of her or his story and the listening disputant's feeling of involvement with the process.

Mediators might also consider using a collaborative storytelling process. The mediator could focus on the chronology of events and ask each disputant to tell what he or she did at each step in the process. For example, Disputant A might say, "I brought my car to Bob's repair shop to have the engine fixed." And then Disputant B responds, "We had our technician

work on it, but the job turned out to be more complicated than we had thought." In short, both participants would be involved in constructing the narrative, and the mediator would facilitate and perhaps draw a timeline of events on the board, using symbols for diverging perspectives.

Mediators could also allow either disputant to call a time-out at any point in the mediation to discuss the process of the interaction if they are uncomfortable with the way things are being handled or confused about what should happen next. They could also allow disputants to call caucuses, as well as mediators. Disputants might then be able to raise with the mediator, in private, any questions of potential bias.

The "Dominance" of the First Story

This case indicates that asymmetry in story solicits may be problematic—especially asymmetry that appears to critique the second story using the logic and/or facts from the first story. For example, at the beginning of the hearing, the mediator could say, "Each of you will explain what happened from your point of view. Disputant A, we agreed that you would go first." And when Disputant A's story is over, the mediator could say, "Thank you for explaining what happened from your point of view. Now it is Disputant B's turn to explain what happened from his or her point of view."

Getting both disputants involved in the decision of who will present his or her case first might preempt any feelings of unfairness if the first story ends up seeming too long. In some mediation programs, there is a policy that the person who brought the complaint to mediation is the first one to "tell their story." If this is the case, the disputants should be informed that this is why one party is asked to go first. If there is no convention regarding who will go first, an arbitrary method such as a coin toss could be used to determine who starts.

Emotion Work

As shown in the preceding analysis, there was unequal treatment of the two disputants with regard to how their expressions of feeling were treated. The mediator picked up on Sheila's expressions of emotion and responded to them, whereas, for the most part, she ignored Doreen's expressions of emotions. This difference in treatment may have contributed to Doreen's bias complaint. It also seems that the mediator may have erred in her assessment of the needs of the two participants; she may have underestimated the intensity of Doreen's emotions, perhaps because of her apparent plan to

empower Sheila. We have discussed the empowerment technique elsewhere, so we will not revisit it here, but we will briefly consider a couple of possible alternatives the mediator could have used in this hearing. If disputants do not make their emotional states clear at the beginning of the hearing, perhaps the mediator could ask them to rate their intensity of emotion on a scale of one to ten, as a way of getting a rough estimate of how volatile the situation is. Or the mediator could ask them how comfortable they are communicating with each other, as a way of gauging potential problems requiring emotion work.

Implications for Research and Practice

By examining an actual bias complaint as it unfolds, we can learn things about how an accusation of nonneutrality can arise that cannot be learned by other types of research, such as surveys or questionnaires. The examination of the actual interaction as it occurs during the mediation hearing can offer a richer view into the ways in which perceptions of nonneutrality can arise.

Further research should be done to determine whether the findings of this analysis apply more generally. A collection of tapes of mediation hearings could be obtained, with the participants being given a survey following the hearing that will gauge their perceptions about the fairness of the process and the potential for mediator bias. Then, a conversation analytic study of the tapes could be done to see if asymmetry of treatment is related to perceptions of bias. The ideal way of conducting this research would be to use the "impact" method (Frankel and Beckman, 1982), whereby participants are shown a videotape of the hearing they have just participated in and are asked to stop the tape where they see problems happening and then record their comments on the interaction. This would enable us to map each disputant's perceptions of unfairness or bias with specific mediator actions and other events in the hearings. Disputant responses to different mediation techniques could be compared.

This case raises several central questions for the practice of mediation. First, how does asymmetry in story solicitations, story interventions, and other techniques shape perceptions of disputants? The evidence presented here suggests that asymmetry that appears to critique the second story using the logic or facts from the first story should be avoided. Second, how might involving disputants in the decision to use empowerment techniques affect perceptions of unequal treatment? Third, how does the organization

of the hearing relate to perceptions of bias? Might disputants experience more equality of treatment if they are allowed some type of intervention in the opposing disputant's story—for example, permission to register a complaint or call a caucus? Fourth, would reorganizing the mediation process minimize the dominance of the first disputant's story? This case suggests that getting both disputants involved in the decision of who will present her or his case first might have facilitated a successful mediation. Fifth, could giving greater attention to each disputant's emotions reduce perceptions of bias? The answers to these questions should help mediators maintain a perception of equality of treatment in the minds of the disputants.

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