Columns

Confessions of a Public Dispute Mediator

Lawrence E. Susskind

Self-reflection in a purposeful way is a characteristic of people who work in the dispute resolution field. Influenced in large measure by the exceptional work of my late colleague and friend, Donald Schön (1983), we look back on our experiences in an effort to learn. Doing so both improves our practice as dispute resolvers as well as contributes to the growing body of theoretical knowledge about our developing field. As a scholar-practitioner, I constantly travel back-and-forth between two worlds; in fact, these "worlds" are hardly separate at all, but function rather in a highly symbiotic way — with practice informing and helping to build theory, and theory informing and guiding practice.

Recently, on the occasion of concluding 11 years as publisher of CONSENSUS, a quarterly newsletter aimed at increasing the use of mediation and other forms of assisted dispute resolution in public disputes,[1] I had the opportunity to reflect in a public way on some of the things I have thought or done as a public dispute mediator that violate the conventional wisdom about a mediator's obligations. My CONSENSUS "confessions" were also the subject of a recent talk before members of the Dispute Resolution Forum of the Program on Negotiation at Harvard Law School, and the comments and suggestions of that group have helped me to reflect on the disjunctures between our espoused theory and our theories-in-use. I look forward to hearing the opinions of *Negotiation Journal* readers, who also may want to join the discussion

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(and possibly suggest what my "penance" should be).

Before enumerating my sins, however, I do want to emphasize that these were committed solely as a mediator of *public disputes*, which I define broadly as conflicts involving governmental entities and other parties (individual citizens, business firms, environmental organizations, etc.) over policy priorities, standards, or resources they hope to share. Though questions about process design, power, and neutrality also figure in many other dispute resolution arenas (e.g., family and divorce mediation), I would not presume to suggest my reflections have a direct bearing on anything other than public disputes. With those caveats in mind, following is a list of seven "confessions":

1. *Hoping that my process skills would get me by, I have taken on assignments when I knew absolutely nothing at all about the substantive issues facing the parties.*

This turned out to be a mistake. It is important to know something about the problems and institutional constraints facing the disputants. Now, whenever I find myself entering a relatively unfamiliar setting, I try to work with one or more parties whose experience and knowledge complement my own. It is often best if mediators work in teams, combining process skills, substantive knowledge, and institutional familiarity. Process skills alone will not suffice.

2. *I have — in my heart of hearts — assumed that mediation would help those in a multi-party dispute who might otherwise have been unable to help themselves.*

This has turned out to be true. Mediators often argue that because we don't take sides, we are neutral. The mere fact, though, that mediation ensures that all voices will be heard guarantees greater fairness than would otherwise be the case. In many instances, I have offered to provide training in negotiation or to bring together expert panels in advance of a mediation effort. Since all parties were invited to attend, the offer represented no bias in favor of one side or another. However, the fact is that those least prepared and least skilled benefitted disproportionately from the offer.

3. *Likewise, I have intervened in ways that made it hard for those in power to ignore the legitimate concerns of less powerful stakeholders.*

When corporate and governmental interests agree to mediate (and to work toward consensus), they give up the power to act unilaterally. The commitment to work together precludes such action.

As a result, less powerful stakeholders typically end up with outcomes that are better than they might otherwise have achieved. Regardless of the agreements that emerge, the legitimacy of mediated outcomes makes it easier for those in power to move forward, although they have to do so in a more constrained fashion. All told, the result is that those in power have a way to move forward while those out of power get a better result.

4. *Even without sufficient quantitative evidence to prove the truth of*

my claims, I have argued that mediation will produce fairer, more efficient, more stable, and wiser outcomes.

I have argued this basic position on blind faith for more than a decade because my own experience has convinced me it is true. Now, hard evidence is beginning to trickle in that backs up my assumption.[2]

Still, I'm not optimistic that we will ever have conclusive and nondebatable proof of the benefits of mediation. In large part, that's because most of the people doing the measuring quantify the benefits associated with mediation in different ways. For example, relationships can be enhanced by mediation, making it easier for the parties to deal with disagreements in the future. Higher levels of trust can also be achieved which ease implementation of agreements. Even partial agreements narrow the scope of the issues that remain. All these and other benefits must be included in any comprehensive assessment of the benefits and costs of public dispute resolution. They rarely are, though, because there is no agreement on how they should be quantified.

5. *The more public officials see tangible benefits of consensus building, the more they will want to use these techniques.*

I have long argued that mediation should be a supplement to — not a replacement for — traditional means of resolving disputes.[3] But deep in my heart, I know that whenever mediation is used, key stakeholders like the outcome and fight to replace traditional modes of dispute resolution with consensus-building techniques.

While, in theory, mediation doesn't set a precedent, guarantee resolution, or "level the playing field," it does reduce transaction costs, improve relationships, and generate more satisfactory solutions to problems.

6. *Yes, I have told some lawyers that they might well be able to function as mediators and broaden their practice.*

I've said that, but I know full well that most lawyers have a huge mountain to climb to overcome the "trained incapacity" that is an occupational hazard of legal education. To be perfectly blunt, I really don't think that lawyers can maintain practices as both an advocate and a neutral.

My colleague, Frank Sander, points out that there are many experienced lawyers who now function as mediators. I agree. However, I'd rather see lawyer-mediators give up their practice as advocates entirely. It's confusing to the public. Mediators should, in my view, live their professional lives in ways that keep them out of partisan roles.

7. *I admit it: I have tried to nudge participants in mediation towards agreement.*

I know we are supposed to be indifferent to whether or not agreement is reached. And in certain cases, no agreement might well be the best outcome. However, I think the parties in most complex disputes need to be pushed to create as much value as they can. They also need to search for settlements that exceed

their next best option. I certainly haven't ever consciously taken sides, but I've always tried to be optimistic about the prospect of creating joint gains.

I'd be surprised if most mediators didn't feel disappointed if they failed to help the parties in a dispute reach a resolution.

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Well, there you have it. I've learned a lot working with the hundreds of public dispute mediators with whom I have come in contact through CONSENSUS. And, I hope we have helped to broaden and deepen the market for public dispute mediation. We hope that another organization will step forward to assume responsibility for the publication of CONSENSUS. In some respects, the field is just coming into its own. It needs the voice and outlet this publication has tried to be.

NOTES

1. CONSENSUS was published for 11 years by the MIT-Harvard Public Disputes Program. A quarterly, tabloid-sized newsletter, CONSENSUS was a general-audience publication which described public dispute resolution efforts and developments in the United States and Canada, serving as a resource for public dispute resolution professionals as well as the consumers of the services they provide. Several groups have expressed interest in continuing the publication, but it is not clear at this writing if it will be continued.

2. For example, see Susskind and van der Wansam (1999).

3. For example, see Susskind and Cruikshank (1987).

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