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MOVING NEGOTIATIONS FROM IDLE TO FORWARD: THE COMMITMENT TO FLEXIBILITY

Peter Contuzzi*

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I. INTRODUCTION

The beginning of any mediation is obviously a good time to clarify procedures and roles. But it also offers the mediator a special opportunity to elicit a commitment from the negotiating parties which can prove quite useful later on: a commitment to flexibility. This article examines some advantages of seeking this commitment from the parties at the outset of negotiations and contrasts the commitment to flexibility with the more traditional one to negotiate in good faith.

II. COMMITMENTS IN GENERAL

Except in situations where the law mandates it, people generally come to mediation because they believe they can benefit from it in some way. Thus, the outset of mediation is a good time to exploit whatever positive forces brought them there. Moreover, it seems a basic tenet of human psychology that matters treated at the beginning of a discussion generally assume greater prominence and are more easily remembered than what comes later. If a mutual commitment is obtained at the outset, the entire negotiation can be anchored in a framework to which all parties have voluntarily agreed. A joint commitment also sets a productive tone for the negotiation and may even generate some forward momentum.

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The term "commitment" is a strong one in our language and should definitely be used to enhance the value of this simple technique—no one wants to be seen as reneging on a commitment freely made.

After reviewing procedures with the parties, the mediator is well positioned to raise the subject of commitments. The traditional commitment to request is that the parties agree to negotiate with each other in good faith. Even where prior negotiations have broken down, a mediator who asks for a fresh start and a commitment to good faith negotiating can usually obtain it. Although relatively easy to obtain, this commitment has at least two serious drawbacks: 1) it can backfire, making problems that develop later on even more difficult to resolve, and 2) it is not amenable to constructive use by the mediator.

When problems develop, the parties will almost always have different views of what is reasonable. If those problems are serious enough, one party may accuse the other of violating its commitment and of negotiating in bad faith. That will most likely elicit the same accusation from the other side. How do you measure bad faith negotiating? It is a difficult charge to concretely support or deny. The negotiation gets side-tracked, with the parties now arguing over bad faith and broken commitments. Result: a difficult situation becomes even worse.

Moreover, it is hard for a mediator to put such a commitment to productive use. A charge of bad faith negotiating, even if only implied by the mediator, is a serious and risky matter. How can s/he effectively call a party to task when the standard is so elusive? Besides, the parties have made the commitment to each other, not to the mediator. If the mediator suggests to Smith (gently and privately) that he may not be negotiating in good faith, Smith can easily say: "Jones is not honoring his good faith commitment to me so why should I honor mine to him." Does the mediator now defend Jones to Smith? In short, the commitment to negotiate in good faith is a hard one to cash in.

III. THE COMMITMENT TO FLEXIBILITY

I've found I can get much more mileage out of a commitment to flexibility from the parties, one which they make not to each other but to me. It's not as easy to obtain. A common objection goes like this: "I don't think I can give you such a commitment—there are certain things about which I feel strongly, things about which I'm just not willing to be flexible." My response is to clarify what I mean by flexibility. I encourage them to be firm regarding major concerns, but flexible regarding positions.

1. I generally do this by announcing that I am committing myself to give the parties my best efforts as a neutral mediator. I then ask for a commitment from them in return, a commitment to flexibility.
This objection, in fact, is a convenient lead-in to a brief discussion which can underscore an important distinction at the outset of the negotiation, the difference between concerns and positions. This discussion prepares the way for the exploration of each side's major concerns which will come later. If the parties begin by clearly recognizing that the concerns of each can probably be satisfied by a variety of positions and then give me a commitment to be flexible regarding their positions, the negotiation is off to a good start. If any party has come to the negotiation without the willingness or authority to move from a previously stated position, the commitment request brings that into the open at the outset. Much wasted time can be avoided by immediately addressing that situation.

Flexibility is what keeps a negotiation moving—rigidity is what can easily bring it to a grinding halt. If the parties remain focused on developing positions which will satisfy their main concerns, the negotiation can better maintain momentum. Some negotiations will never produce an agreement because no overlap is possible between the interests and positions of one party and those of the other. But if such a "zone of possible agreements" exists, a flexibility commitment offers an effective, practical means of moving the parties within that zone. A mediator who asks for more flexibility rather than for more concessions offers the parties a terminology which facilitates movement in a face-saving way.

Flexibility lends itself more readily to measurement than does good faith, making it easier to evaluate if the commitment is being honored. Let's assume that a party has not moved on any aspect of its bargaining position for quite some time. It is a relatively simple matter (especially in a caucus with that party) to recall the commitment without risking the crisis that a suggestion of bad faith bargaining might provoke. The mediator makes direct mention of both the lack of movement and the flexibility commitment which that party gave to him/her.

A denial of inflexibility can be evaluated by factual references to position development during the negotiation. The mediator can encourage the party to generate some new ideas, perhaps with the mediator's assistance, as a sign of flexibility. The message communicated by referring to this commitment is not the vague one to "negotiate in good faith" but rather something more concrete and practical—"We've been stuck in one place too long; let's develop some options."

If both parties are being rigid, the mediator can remind them of their commitment to flexibility in a joint meeting (and perhaps explore possibilities for some joint brainstorming) or work on developing options with each during separate caucuses. The flexibility commitment can best have its desired

stimulus effect if it is employed under appropriate circumstances. Wise mediators will not squander the leverage this gives them but reserve it to break serious stalemates.

IV. CONCLUSION

The effectiveness of this simple technique is due ultimately to our concept of commitment and our desire to be seen as acting in conformity with the commitments we make. A commitment is a serious matter—it can strongly influence human behavior. Flexibility implies movement, and movement is the lifeblood of negotiation. In joining these concepts, the commitment to flexibility offers the mediator a useful lever for re-engaging the forward gears of a stalled negotiation.