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The mediator's role

Power in mediation

Bernadette Rogers

Introduction

As modern mediation has moved from adolescence to maturity, more writers are querying some of the 'fundamentals' of mediation. In this article I explore some of the practical advice given to mediators in current literature on the effect of the parties' power in a mediation, in particular the desirability of the mediator accepting responsibility for balancing power. I then look at the origin of this advice and how the concept of power balancing has developed. I then propose an alternative structure for considering the impact of power in a mediation.

It is acknowledged that any discussion of power will often draw in considerations of gender, culture and discrimination issues. I refrain from discussing of these areas to explore the abstract concept of power in greater depth.

Discussion of 'power'

Most texts in the area of dispute resolution address the issue of power or influence. I will restrict discussion to those that appear to be representative of texts used in teaching mediation or negotiation. These have been chosen to cover the period from the early 1980s to the present time, from the United States, Australia and England. The texts range from a theoretical approach to a practical 'how to' bent. It is hoped this group of texts captures the approach that most practising mediators today will have been exposed to in their training and will reflect the approach practitioners take to power issues.

Moore

The work by Christopher Moore *The Mediation Process*¹ was one of the first 'how to' books written in this area to come out of the United States. It evolved from Moore's work as a trainer and mediator since the 1970s.

When discussing power Moore uses

the definition of Thibaut and Kelly:² '[p]ower or influence is the capability of a person or group to modify the outcome, benefits, or costs of another in the context of a relationship.' He recognises the strategic and ethical problems involved in the mediator choosing between two options when the parties do not appear to have equal bargaining power. The first option, possible empowerment of the weaker party, involves 'activities that shift the mediator's function dangerously close to advocacy'. The second option, to do nothing, based on the principle that 'mediators should not do anything to influence the power relations of disputing parties because it taints the intervenor's impartiality',³ opens the process to abuse.

Moore then moves to identify the forms of mediator influence and how to exercise it when the parties have equal or unequal power.⁴

In the situation of equal power he states, 'perception of power symmetry is usually dependent on the ability to measure or project the potential outcome of a dispute if one or more parties decide to exercise their power'. He then goes on to say, '[w]hen parties have different bases of influence a power assessment problem often develops.' He addresses this by suggesting the 'mediator encourage a party to list his or her own sources of power and then identify the costs or benefits of exercising it. The same procedure should then be followed for assessing the opponent's power.' In other words he suggests the mediator merely assists each party to explore the strengths and weaknesses of the other side. This does not create difficulties for the mediator or the process.

In the more difficult situation of what he refers to as 'asymmetrical power relations' he suggests using the strategy of obscuring the strength of influence, or 'balancing power'.

This is done by

assisting the weaker party in obtaining, organising and analysing data and identifying and mobilising his or her means of influence, assisting and educating the party in planning an effective negotiation strategy, aiding the party to develop financial resources so that the party can continue to participate in negotiations, referring a party to a lawyer or other resource person and encouraging the party to make realistic concessions.⁵

He notes the stronger party often welcomes a mediator's role in power balancing. Notwithstanding the ethical dilemma he acknowledges up-front, Moore advocates an interventionist role for the mediator in this area and implicitly accepts that power balancing can be achieved.

Acland

Andrew Acland was involved in the development of mediation in the United Kingdom during the 1980s and published *A Sudden Outbreak of Common Sense* in 1990.⁶ He adopts the definition of Max Weber (1864-1920): '[p]ower is the possibility of imposing one's will on the behaviour of other persons'. This definition encompasses the concept that power only comes into play when there has been a choice to exercise it, ie power as a 'possibility', but at the same time the definition encompasses more than influencing, it talks about 'imposing'. Acland's view of power balancing is 'trading off one type of power against another to promote a more realistic approach to the situation.'⁷ He is of the view that power balancing does two things — it ensures recognition of different types of power and prevents agreements dictated by power alone. His discussions appear to focus on the parties balancing power themselves rather than this being done for them by a mediator. He also discusses the concept of capability as well as power. This requires looking at the factors that limit or expand the effectiveness of

power, in particular 'legitimacy', that is, what individuals themselves perceive to be fair and reasonable.

Boulle

An Australian academic, author and mediator, Laurence Boulle wrote his book *Mediation: Principles, Process Practice*⁸ in 1996. Like Moore, his background as a mediator and trainer informed his writing. However Boulle, in light of his belief that mediation is 'practice in search of a theory', attempted to articulate a theoretical framework that will foster the theory of mediation.

He identifies two critical issues of concern arising from power. The first is a threshold question of whether mediation should be used at all in a

parties' ability to perform well and feel good about their performance'.¹⁰ He states, 'mediators can redress imbalances by creating doubts about the powers of the stronger parties, and assisting weaker parties to use power of which they were not aware'.¹¹ He promotes the use of process interventions and, in the last resort, termination of the mediation. He acknowledges that, when exercising an empowering function, the mediation cannot be seen as a value-free, neutral process.

Mayer

A colleague of Moore, Mayer first published *The Dynamics of Conflict Resolution* in 2000.¹² This is not a 'how to' book; rather, it is an attempt to explore what makes a successful

'our power can increase as our adversaries' power also increases'.¹³

Mayer divides power into two general categories: structural and personal power.

Structural power is lodged in the situation, the objective resources people bring to a conflict, the legal and political realities within which the conflict occurs, the formal authority they have and the real choices that exist. Personal power has to do with individual characteristics, such as determination, knowledge, wits, courage and communication skills.¹⁴

He is of the view that mediators are more likely to be successful in their interventions aimed at influencing personal power than they are when attempting to address structural power.

Of the 13 sources of power identified by Mayer, an interesting one is the perception of power. He is of the view the beliefs people have about their power is a power in itself, therefore the ability to change that perception is also a source of power. This concept ties neatly with his view that it is necessary to prepare for war and peace at the same time. The process of preparation will influence

a party's perception of power as it progresses.

Astor and Chinkin

The 2002 edition of *Dispute Resolution in Australia*¹⁵ reflects the change in ADR discussions in Australia since the first edition in 1992. It is not a 'how to' book; rather, it is an attempt to provide a theoretical, critical and evaluative overview of ADR in Australia and is written by two academic authors.

Astor and Chinkin also accept the proposition that power, like neutrality, is contextual and contingent. What may be defensible as a general statement will not necessarily be true in the context of a specific mediation. They are of the view that recognising the complex and contingent nature of power does not relieve the mediator of the responsibility for tracking the changes, but suggests it is more useful

[Mayer] is of the view the beliefs people have about their power is a power in itself, therefore the ability to change that perception is also a source of power.

situation of power imbalance, and the second is mediator strategies. Looking at the first issue, he starts from the premise that mediation has the same equality assumptions as the legal system, but does not have the coercive powers to redress the imbalance. He then asserts that entry into the mediation process is a matter of informed choice and makes the important point that 'power is a phenomenon influenced by many factors and cannot always be translated directly into a satisfactory outcome for the power-wielder'⁹.

He recognises the fluid and dynamic nature of power and the elusive nature of the subtleties and fluctuations that a mediator must interact with to influence the directions and outcome of the mediation.

In the section looking at the function of the mediator, Boulle discusses the empowerment of the parties, where it is the role of the mediator 'to increase the

peacemaker, with an emphasis on values, skills and focus, rather than processes, methodologies or tactics.

He starts with the premise that power (which he defines as the ability to get one's needs met and to further one's goals) can only be understood in context. He looks at the misleading images of power, including the view that power can be balanced, which he rejects because it fails to recognise the dynamics of power and the interactional context in which power must be understood.

Mayer is of the view that instead of looking at equality of power it is enough that there be an adequate basis of power to participate effectively in a conflict resolution process. He identifies the image of power as a fixed quantity in a relationship as being misleading. He rejects the view that the more power one party has, the less the other has. He states that

if the mediator can analyse the shifts in power and develop strategies in response to those shifts.

The authors are concerned with how attempting to balance power impacts on the neutrality of the mediator. They emphasise the perspective the mediator brings when attempting to balance power; for example, some mediators balance power in pursuit of their own perceptions of social justice, the welfare of children, or to support the status quo.¹⁶ Astor argues that 'mediators should abandon claims to neutrality and instead focus on maximising party control in mediation'.¹⁷

Criticism of present approaches

Notwithstanding the recent change in emphasis evident in the literature, the 'balancing power' terminology is still used in training courses and the literature. It is submitted that the time for this terminology is long past its use by date. In fact, it has had a negative effect on the development of mediation theory. As Mayer, Boule and Astor and Chinkin acknowledge, the concept of balancing power fails to provide sufficient flexibility to deal with the complexity of the way power impacts on a mediation as it unfolds. The dynamic mediation process needs constant adjustments. This does not sit well with the cumbersome concept of 'balancing power'. I will now discuss the major criticisms that can be made of this terminology in the context of conflict.

Transferring military theory to conflict theory

The concept of power balancing originated with military theory and can be traced as far back as 2000BC to the time of Sun Tsu, a mysterious Chinese warrior philosopher.¹⁸

The rules of the military are five: measurement, assessment, calculation, comparison and victory. By the comparison of measurements you know where victory and defeat lie.

The heavy prevail over the light.

A balance of power exists when all nations in a system are deterred for military reasons from attacking all others.¹⁹ When calculating the strength

of a military force, experience allows equating factors to be recognised. So a mounted warrior may equal 10 foot soldiers on flat ground or two foot soldiers in heavily wooded hills. The talent of opposing generals can be judged on what they have done before or on their inexperience. Sun Tsu²⁰ says '[t]herefore a victorious army first wins and then seeks battle; a defeated army first battles and then seeks victory'.

The standards of measurement and level of knowledge of the enemy that are available to the military to calculate power are not available yet in the field of conflict resolution. In large part this is because any assessment of power must consider a party's willingness to use their power, and that can change daily. Any attempts by the mediator to balance power are based on assumptions about where the greater power lies. The mediator does not have the ability to measure or check that assumption or look to whether or not the party will choose to use the power.

Difficulties in measuring a dynamic system

As already discussed, power is dynamic. While the structural components of power can be assessed objectively, the decisive factors are to a large extent subjective or elements of personal power. If a mediator is to measure, calculate or assess power, at what point in time do they do it? It is usual for a mediator to make that assessment prior to the mediation when there is limited material. It will often be based on the mediator's worldview or assumptions about where power normally lies. Thus, if there is an obvious structural differential, such as there is in a conflict between a citizen and a government decision maker, the mediator may assume that power lies with the government decision maker, having greater resources, legislative backing and more experienced legal representation.

There is a risk that a mediator, having formed this view, will not continue to assess the actual dynamics of power throughout the mediation. Assume, for example, a decision has been made by the Department of Veterans Affairs about the entitlement of a veteran to a disability pension. It

could be assumed the greater power lies with the Department. However, the balance may change if, for example, it becomes apparent the veteran was a war hero, has fallen on hard times and may attract the sympathy of an independent decision maker should the matter need to be determined by a tribunal. In such a situation it is unlikely the mediator will use strategies to enhance the power of the government decision maker, or even acknowledge the dynamics have changed, because the mediator's original assessment of the 'weaker party' will not be revisited.

If this example is extreme, consider the impact in a family mediation when the original assessment of where the greater power lies is not consistent with what is happening in the mediation, but no adjustment is made in the mind of the mediator because they are aware of their obligation to 'balance power' in favour of the person they have determined to be the weaker party. The fact that an assessment of power is made prior to the mediation will impact on the mediator's ability to objectively assess the shifts and nuances, because the information the mediator is receiving will be interpreted against their preformed perception.²¹ It is this sort of issue that led Bush and Folger to the rejection of an outcome focussed process and their development of a transformative approach to mediation.²²

Mediator neutrality

A further issue that arises as a result of an attempt to balance power is that this impacts on the mediator's neutrality. This issue is explored in some depth by Astor²³ and Field.²⁴ Field discusses a number of writers who claim both that mediators are neutral and that they can address a power imbalance, without articulating how the latter can be achieved without loss of the former. She does not say it is wrong to attempt to address a power imbalance, but argues that it cannot be done without a loss of neutrality at that time, and therefore mediators should be more honest about their advertised neutrality.

Similarly, Astor advocates rejecting the concept of neutrality and instead



promotes maximising party control in mediation. Her review of the literature leads her to conclude that, since neutrality is assessed on the basis of neutral/ not neutral, the standard of neutrality is one that no mediator can reach. She also comments that insisting on neutrality could be at the cost of requiring the mediator to fail to comply with an ethical requirement, such as the responsibility to prevent the process being used as a weapon.

Marketing response not based in theory

The assertion that mediation is an effective tool for power balancing can be seen as a marketing response to criticisms of mediation in the 1980s. Particularly in the area of family law, it was claimed that mediation was not as good as going to court because it did not have the mechanisms that a court has to redress an imbalance of power. In this context the power of an independent decision maker to impose a decision on the parties by applying the same law to both sides is seen as a protection of the weaker party.

battle to the time of decision-making and they will not settle part way through as a result of lack of resources or sheer disillusionment with the manipulation of the system by those lacking good faith.

Rather than challenging these assumptions, the then fledgling mediation movement responded by asserting that mediation could redress imbalances of power.²⁵ A more judicious response could have been to argue that no system is perfect and mediation is merely a system with limitations, offered as an alternative to other systems with limitations.

I am not arguing that mediation cannot identify the sources of power, and that the process cannot challenge the wisdom of a party relying on some sources of power that are available to them. However, I believe that the assertion that a mediator has an innate ability to deal with a so-called imbalance of power is flawed because it does not have a theoretical basis. I also believe that assertion has had a negative effect on the development of mediation to this time. The claim

Mediation may assist the relationship between the parties to an extent that there will be sufficient goodwill for the parties to keep working together if implementing the agreement becomes difficult. It is equally likely that strengths each party had prior to the mediation will still be there, and the party with easy access to a coercive power will rely on it when difficulties arise.

For an agreement to have any prospect of success it must have been reached via an honest exploration of the sources of power each party can draw on for the purposes of entering the agreement and implementing it. This cannot be achieved if the mediator believes he or she should balance power within the mediation. Such a view would hinder the hard reality testing that needs to be done; for example, it could highlight an inequality of resource power when the mediator is trying to convince a party that further information or knowledge power would in some way equalise their negotiation position with that of the other party. As an example, in a

mediation between a bank and a farmer, if the farmer has defaulted on loans the bank can foreclose. There is no way to ignore that capacity in the bank. There will be situations where, to avoid political pressure, or bad publicity, the bank will attempt to make arrangements that are acceptable to the farmer. However, if the farmer assents to an agreement he or she will not be able to keep, foreclosure is still a possible outcome.

As previously discussed, one of Moore's suggested strategies for balancing power is to assist a party to make realistic concessions. That is not balancing power. It is recognising the reality of the environment in which the parties operate. It is something a mediator can do in attempting to reach an agreement, but it is not balancing power.

If an attempt to balance power within the mediation gives a party a distorted view of what they can achieve when the support of the mediator is

The claim that mediators can balance power has backfired because it has put mediators in the position of promising something they cannot deliver.

This criticism is based on a number of assumptions that can be challenged. The first is that everyone can access a court. The second is that all are equal before the court in terms of resources and representation. The third is that a court is sufficiently sophisticated to distinguish between valid fears and what it might call unproved accusations. The fourth is that the mechanisms of the court to order full disclosure are effective. A fifth is that parties have the strength to embark on what can be a protracted and bitter

that mediators can balance power has backfired because it has put mediators in the position of promising something they cannot deliver.

Mediation in the real world

If it is accepted that a valid objective for mediators is to arrive at an outcome, or the settlement of a dispute, then it is important to acknowledge that reaching an agreement is only part of the challenge.

Any agreement reached should be implemented following the mediation.

taken away, that is not doing anyone a favour. It allows a party with access to structural power to participate in the mediation, knowing that if proposals are not satisfactory, they will not agree to anything and will resort to their other options.

My experience suggests this strategy of proposing realistic concessions can also be used against the 'weaker party'. Where a mediator is keen for a particular outcome, because his or her own needs have become part of the agenda, it is often effective to put pressure on the 'weaker party' to concede a point under the guise of a realistic concession, rather than do the hard work involved in exploring other options or recognising that mediation to reach an agreed outcome may not be appropriate. Thus legitimising the strategy of 'balancing power' can have unintended and undesirable consequences.

Mediation based on full disclosure

When asserting that mediation can balance power between the parties, it is common to hear mediators talk about the need for full disclosure. The argument runs along the lines that, while discovery can be ordered by a court but not in a mediation, we can at least expect the parties to come to the mediation table in good faith and make a full and frank disclosure of all the issues in dispute.

In commercial mediations there is an acceptance by the parties that one of the advantages of mediation is that they don't have to make full disclosure and thus commercially sensitive material can be better protected in a mediation than in court proceedings. There are situations where full disclosure is not a necessary part of a mediation process, particularly in a commercial environment. Most family lawyers can relate instances where the parties agree on a property split that would not appear to be consistent with what could be achieved in court, and is contrary to the advice given by their lawyers, but is based on a common

understanding of information not shared with their respective lawyers.

Mediation has been criticised for allowing a party to conduct a fishing expedition when there is no intention to settle. While not a fishing expedition as such, I am aware of situations where a party, feeling empowered by the process, or thinking their personal power will be enough to

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sway the opinion of the other party, divulges information that is not known to the other party. The information could be about future plans which make it clear a protracted court battle would not be possible. In some cases information about a person's state of health, while given with a view to explain why a settlement should be reached, only makes the opposing party feel stronger in their ability to make demands.

In situations where mediators are conscious of their advertised capacity to balance power they will often emphasise the need for full disclosure, possibly because it is thought that is what a court does and it is desirable to get as close as possible to that model. This emphasis on full disclosure in some cases fails to acknowledge that, just as knowledge is a source of power, keeping knowledge hidden can also be a source of power that should not be taken from a person marshalling their power if they do not have much. In this situation even an opening statement avowing mediation based on full and frank disclosure could have the effect of taking power from a party who needs to preserve it. The mediation process will protect the weaker party.

The subjective element of power

Power is the capacity to get things done – to exercise control over people, events, situations and oneself. However all power is based on perceptions. If you think you've got it then you've got it. If you think you don't have it, even if you have it, then you don't.²⁶ Cohen touches on the very element

of power that prevents its measurement and its ability to be balanced. He doesn't just identify it as a source of power, or a contributing factor. He has named the perception of power as the factor that ignites other sources of power. Just as the ignition switch allows a car's engine to be ignited to propel the car forward, it is the perception of power that allows other sources of power to come into play. The definition he uses is framed in terms of outcome, of getting things done. If you think you can do it, you can. Mayer also identifies the perception of power as a source of power.

In mediation literature definitions of power often include influence, and indeed in many texts a search in the index for 'power' will refer the reader to influence. It is suggested the use of the terms 'power' and 'influence' interchangeably in mediation literature has led to confusion of the concepts. Rubin Pruitt and Kim define power as 'the capacity to persuade [the others] to yield.'²⁷ Influence could be used to replace the term 'persuade'. Moore combines the words and defines them thus: '[p]ower or influence is the capability of a person or group to



modify the outcome, benefits, or costs of another in the context of a relationship', whereas Mayer is outcome focussed: '[p]ower is the ability to get one's needs met'.

It appears that writers are more likely to claim that the mediator may adopt a power balancing role if they bundle together power and influence and see this combination as something softer than control. Mayer acknowledges the ability of a mediator to influence the use of power, particularly personal power, but not to balance (read: 'control') it.

It is interesting to speculate why some writers need to conflate power and influence. In my view there is much to be achieved by keeping the concepts separate. In common usage the two words have very different meanings. Both have a place in mediation.

As an example, let's look at the meaning of the 'power' as opposed to the 'influence' of the mediator. Power is given by the parties to the mediator by legislation (if mediating under a legislative scheme), by a mediation agreement, or by ethical obligations or a code of conduct under which the mediator operates. Some mediators have a lot of power, some have little. An obvious example is the power to terminate the contract if, in the mediator's view, the process is being abused by the parties. While most mediators do not have the power to impose an outcome, the parties may agree to confer this power on the mediator in defined circumstances by way of a mediation agreement.

By contrast, influencing is what a mediator does. Using process, skills and strategies a mediator will influence the parties depending on the philosophy of the mediator. These skills may be directed towards settlement or towards a better understanding of the conflict, but the mediator will be influencing the parties – that is the role of the mediator. Just because a mediator uses an intervention well and it has a powerful effect does not make it a power. It remains an influencing skill. When reference is made to the 'personal power of the mediator' it would be more accurate to refer to the influence of the mediator.

'Balancing power' suggests the mediator can 'control' rather than 'influence', the parties' access to power sources and their decision whether or not to exercise the power they have. It is misleading to suggest a mediator has the power to do this and it would be unethical for the mediator to try.

A different view

Following the above criticism, I propose an alternative obligation on the mediator in relation to power. A mediator should assist the parties to understand the dynamics of power in a mediation. In much the same way as Astor suggests the mediator's obligation in relation to neutrality should be to maximise the parties' control of the mediation, I suggest the mediator's obligation should be to maximise the parties' understanding of how power affects them and their ability to work within the mediation process.

As previously discussed, the perceived responsibility of a mediator to balance power is not only problematic, it impacts on other aspects of the mediation. If a mediator tries to maximise the parties' understanding of, rather than balance, power, this educates the parties about the use of power. This gives them the opportunity to realistically assess the likelihood of a source of power being used, and also grounds any agreement in the environment in which it will be implemented. Educating the parties about power allows them to assess early in the process how they should participate to properly protect their interests. It is something the mediator can achieve, while leaving the parties to decide how to deal with their awareness of the impact of power on their dispute. It keeps open the possibility a party may decide that some other process would be preferable to resolve their dispute. This responsibility of the mediator to educate the parties about their power would be ongoing. This means the shifts and nuances during the mediation would be explored as needed to identify the ever changing dynamics.

Empowering the parties to recognise their own strengths and weaknesses is likely to do more good and less harm

than attempting to balance the power between two or more parties, especially when the mediator can't accurately assess where the power lies in the first place.

The need to calculate a measurement of power

Imposing on a mediator the responsibility to expose the dynamics of power would require them to identify the sources of power and the possibility of that power being used. For most mediators it is difficult to assist the parties to understand this complex area, especially if the parties are in a heightened emotional state, which is often a factor in conflict.

One way to demonstrate the effects of power is to consider the similarities between force, in the world of physics, and power, in a mediation. The calculation of force is made by applying the formula derived from Newton's second law of physics:²⁸

$$\text{Force} = \text{mass (m)} \times \text{acceleration (a)}$$
$$\text{Or } F=ma$$

Similarly it can be seen

$$\text{Power (P)} = \text{source (s)} \times \text{intensity (i)}$$
$$\text{Or } P=si$$

where source (s) is the basis of the power and intensity (i) is the willingness of a party to use that power. Most textbooks have a list of sources of power. It is suggested a mediator could choose the theory and formulation of power that best suits his or her area of practice and apply that list to each dispute. The sources of power can in many cases be objectively determined.

When seen in this way it becomes obvious that this formula would need to be individually applied to each source of power. If a measure could be attached this would probably remain constant. However the intensity or willingness of a party to use each source of power would change at different stages throughout the mediation depending on a party's energy level, sense of trust in the process, awareness of options and many other constantly changing factors.

It is this aspect of the formula that would create awareness in each

party that their power will vary depending on their understanding of options and the progress of the mediation. In other words, the calculation is only valid at one particular point in time. Depending on the dynamics, it may be necessary to make the calculation every few minutes or every few hours. At each point, a different score would result.

It also becomes obvious that the calculation of a party's power requires the identification of each of the sources of power available to them, the calculation of the weight of that power and their willingness to use it. Then each of these calculations needs to be aggregated to arrive at a total score.

Therefore for an individual party at Time A:

Total Power = The sum of {si(1) plus si(2) plus si(3) plus.....}

And the result would be different at time B.

It is not suggested that, at this point in our understanding, actual values could be allocated to this formula. However consideration in this way may assist the mediator to focus on the evidence needed to assess a party's power, rather than to rely on perceptions of where the power lies. It could also be used to assist the parties to assess their own power and their perception of the other party's power.

Mediator's neutrality

Shifting the emphasis to understanding the dynamics of power could avoid the mediator not being able to maintain neutrality or being seen by the parties to have lost neutrality. It is not the mediator who is responsible for balancing power. It is the role of the mediator to assist the parties to identify where the power is and how likely it is that the power will be used. Once a party is aware they have sufficient power to be at the negotiating table they will be able to develop the best strategies for a positive outcome. If there is a perception that the mediator

has lost neutrality, both parties may become angry at the mediator's behaviour and lose trust in the process. When this happens it can be very difficult to salvage the situation.

If the mediator uses influencing skills to educate the parties, but the parties

between the parties to the mediation would not address wider issues in the workplace, it may be preferable to abandon the process and either seek the assistance of a union, or workplace representative, or reconstitute the mediation with the other affected

Parties not used to exercising power will often have an expectation that someone else will fight their battles for them. If a mediator tries to balance power, it tends to appear that is exactly what they are doing.

remain responsible for their conduct, it is more difficult to create an excuse for the failure of the mediation to reach an appropriate outcome by blaming the mediator.

Many parties find it very difficult to be realistic about the power they hold. Some will overestimate their power and deny the power of the other party, or the opposite, while others will not be aware that they have any power at all. Parties not used to exercising power will often have an expectation that someone else will fight their battles for them. If a mediator tries to balance power, it tends to appear that is exactly what they are doing. This limits the parties' opportunity to make their own decisions and frustrates the potential of the process.

A marketing response

How, then, can we address the criticism of the mediation process that it is not able to redress unequal bargaining power? An educative approach can achieve this by ensuring the parties have a realistic understanding of their actual power and the opportunity to assess whether they should be part of the process at all. Where physical safety is in issue, the parties may decide that a negotiated outcome could not be enforced, so it would be undesirable to enter one. In a workplace situation, if an agreement

parties present. If the parties choose to remain at the table it will be with a greater understanding of what will limit their options in the dispute and the limiting factors for the other side.

Mediation in the real world

A better understanding of the potential of power in a dispute would allow a much more realistic outcome to be reached. Because the total environment needs to be considered, together with any changes that may come about as further evidence arises, the parties would be more aware of what is possible after the mediation. It is common for reality testing to occur after the parties have become wedded to a proposal, or a level of fatigue has entered the dynamics. In these cases there are times when the reality testing may not be as thorough as is necessary.

If the parties are aware of what can work, as a result of their understanding of the impact of power in their relationship, it is less likely that unworkable agreements will be made. The mediation can then take place on the basis of existing power, rather than in an environment where an attempt has been made to change the balance of power to allow the parties to negotiate as equals. An ongoing assessment of how power is affecting the process should prevent a mediator's preconceived idea of where the balance

does lie from impacting on mediator behaviour throughout the mediation.

The need for disclosure

It could be argued that since an assessment of power cannot be made without access to information, the need for full disclosure becomes more relevant. This is not necessarily the case. An assessment can be made of what information is missing, the cost of obtaining it (especially if one party is prepared to resist disclosure), the impact the missing information is likely to have, whether it is one or both parties that are resisting disclosure, and whether there is another process that could be agreed to that obviates the need for full disclosure but allows the parties to take the risks associated with non-disclosure. If disclosure is critical, and can't be assured, that may be a reason for the parties choosing another process.

Conclusion

The assertion that a mediator can balance power should be abandoned. In its place mediators should accept responsibility for addressing the impact of power by helping the parties to understand the dynamics of power. To do this, mediators would need to discuss with each side the sources of power available to them and the other side, and the factors that would affect their willingness to use that power at the start of and throughout the mediation. The mediator would need to assist the parties to consider whether mediation is the best process for them to be involved in and what steps they would need to take to protect their own

position. Mediators would also need to be able to assist the parties to rely on the power that is available to them in the negotiation.

It is probable that this is what good mediators already do. If that is so, then adopting the proposed construct would have the advantage of moving the reality closer to the rhetoric.

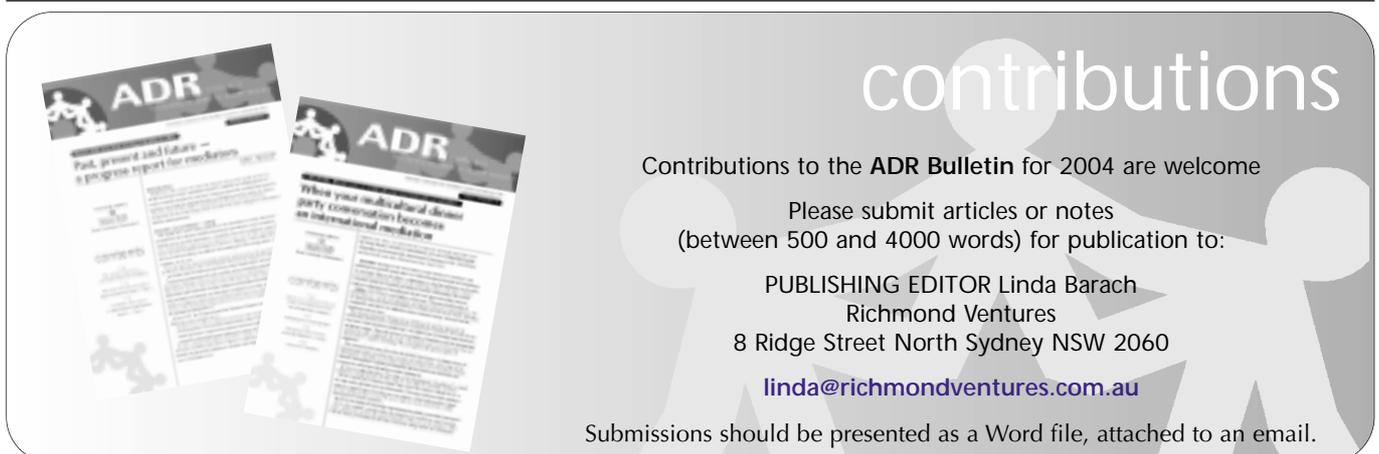
For those mediators who do not operate in this way, this may be an achievable model to adopt, using specific responsibilities that will allow them to advertise and deliver their services in a consistent manner. ●

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Endnotes

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