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Power issues in mediation

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Power in ADR

Power issues in mediation

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The nature of power in dispute resolution

Power is 'the capacity to influence the behaviour of others, their emotions, or the course of events.'[1] Mayer suggests that '[f]or the purpose of understanding the dynamics of conflict, power may be defined as the ability to get one's needs met and to further one's goals.'[2] This type of power can be understood only in context.[3] In mediation, the concern is with the parties' ability to meet their needs and further their interests during the process and in any agreements reached as a result of the mediation.

At the broadest level of analysis, power can be categorised as either structural power or 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.[4]

Within these two broad categories, there are many types of power, and each of these can be used by the parties and the mediator during mediation.[5] The power dynamics in mediation are not confined to the relations between the parties to a dispute. Another critical type of power is the power of the mediator over the process and in relation to the parties. Mediator power can be understood as 'the ability … to affect the perceptions, attitudes and behaviour of others'.[6] There are a range of views on the ability and the extent of the mediator's responsibility to address power imbalances between the parties.[7] It is argued that for mediators to be effective in any case where one party seeks to use power to determine the outcome '…they must know how to manage the means of influence and power that the parties exercise and how to exert pressure themselves'.[8] As Boulle notes,[9] this is a major policy issue, and although there may be good reasons for seeking to redress a power imbalance between the parties,[10] there are also dangers in doing so.[11]

The following propositions about power are drawn from the extensive literature on this subject.

(1) There are many types of power

These include:

- Resources power, which includes financial power, skills, information power, education, position[12] and familiarity with the process
- Strategic power, for example, when the apparently more powerful party has more to lose by not reaching an agreement, or the apparently weaker party has strong public support
- Emotional or psychological power, intelligence, social status, personal power over an individual
- Cultural power, through being of the dominant race or ethnicity, sexual orientation or by being able-bodied
- Physical power, the ability to intimidate the other party and influence their

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decision-making on grounds of fear of violence or due to previous physical or emotional abuse, and

- Gender power,[13] which may involve an aggregation of resources and emotional or psychological power.

(2) Power is not a characteristic of an organisation or person but is an attribute of a relationship

A party's power is directly related to the power of an opponent.[14] Power is, therefore, very contextual and situational. A person may have power in one situation and less in another. Even a person who is very powerful in *some* situations will not be powerful in *all* situations.

(3) There is always some power disparity in the resolution of disputes[15]

Power relations can be symmetrical or assymmetrical. Although symmetrical power relations are optimal for effective bargaining, this symmetry is not the norm between disputing parties.[16]

(4) Power is not capable of measurement[17]

As a result, an imbalance of power is not something that can be 'balanced' by a mediator simply giving more power to one party.

(5) Power is dynamic

During the course of a negotiation the existence of many different types of power will mean that there will be shifts in the balance of power.

(6) Power is not easily located and preconceptions about where it lies need to be avoided[18]

There are dangers in making assumptions and generalising about the location of power. The complex and dynamic nature of power means that assumptions about power based on stereotypes will often be misleading.

(7) A person may have power but choose not to use it[19]

There may be strategic reasons why a person who has power chooses not to exercise it in some situations. For example, a large business with economic power may have the power to put a small supplier out of business simply by litigating a dispute and imposing legal costs which the supplier cannot meet. The large business may decide, for various reasons, not to litigate but to use a less expensive method of dispute resolution.

(8) A person may have power but be unable to use it[20]

There may be reasons why, despite having certain types of power, a person is unable to use it in a particular dispute to negotiate effectively. For example, a person with resources power may be unable to use it because the conflict is affecting them emotionally or because of other events in their life.

(9) The power relations between the parties may be a cause of concern at different points in time in the process

The first point in time when this may occur is when a dispute is being assessed for suitability for mediation. A significant power difference is often regarded as a contra-indicator to the suitability of a consensus-based process.[21] Secondly, the issue may arise when a mediation takes place and the question becomes one of identifying the proper role of the mediator in relation to the power relations between the parties, and what level of power the mediator should exercise.[22] Thirdly, the exercise of power by one of the parties or by the mediator during the mediation may also be a concern if a mediated agreement is reviewed after the mediation and the reviewing body is required to decide whether any agreement made at the mediation should be set aside on grounds of duress or unfairness.[23]

Mayer states that one of the many misleading notions of power is that power can be balanced. He argues that while it is meaningful to look at differences in power (whether someone has power to make something happen), at sources of power and at vulnerabilities to other people's power, the notion that power can be balanced so as to produce some equality of power fails to take account of the dynamics of power and the interactional context within which it must be understood.[24] It is more useful, argues Mayer, to consider that people need '…an adequate basis of power to

participate effectively in conflict.'[25]

This view of power is significant to an understanding of the role of the mediator. It is also consistent with the notion that mediation must be consensual for it to be legitimate as it ensures that the parties have enough power that others '… must at least consider their concerns and enough power to resist any solution that fundamentally violates their interests'[26].

Power issues in mediation

Power is a concern in mediation and other facilitative forms of dispute resolution because in these processes there is no third party decision-maker. This means that to reach an outcome the parties must negotiate with each other.[27] There is a general view that the fairness of the outcome will be affected by the ability of each of the parties to negotiate effectively on their own behalf.[28] Where there is a significant power difference, the concern is that one party may dominate the process and the resulting outcome to the extent that the agreement reflects largely only that party's needs and interests.[29] In these circumstances:

> The stronger party is likely to be less motivated to compromise and more likely to use tactics of coercion and intransigence. The less powerful party may react with either passive concession making or reactive defiance, neither of which provides a sound basis for arriving at a durable settlement.[30]

On an individual and practical level there is a real danger that in situations of significant power differences the agreements reached will be unfairly advantageous to one party,[31] or that no agreement will be reached.

The issue of how power is used in mediation, however, also has broader repercussions. Ultimately it may affect the legitimacy of the mediation process itself in these types of disputes. For the mediation process to be legitimate, it must be able to deal fairly with disputes involving significant power differences. Where this is not possible, it may be that mediation is inappropriate. This fundamental concern with legitimacy, the integrity of the process itself, and the tension between neutrality or impartiality and empowerment has been recognised for some time. For example in 1987 Mayer wrote:

> The ethical dilemma that faces mediators working in a number of different areas is how to maintain the integrity of the mediation process, which is based on the assumption of mediator neutrality, without letting the process be used to violate important interests of the community or of interested but unrepresented parties. The problem becomes even more complicated when the mediator has a great deal of clout. The maintenance of impartiality under these circumstances is not an academic question, but one that is basic to the credibility of the process.[32]

Astor has, more recently, argued that mediation derives its legitimacy from two core concepts, neutrality and consensuality. Consensuality involves the parties' ability both to choose the mediation process[33] and '… to arrive at an agreement to which both (or all) consent …'.[34] She states:

> Clearly the reality of consensuality is crucially affected by the reality of the consents made by the parties. It is also affected by the ways in which all of the participants in mediation, including the mediator, use power. Consequently the issue of power relations in mediation is of central importance.[35]

Consensuality can only exist if both parties are making real and free choices based on effective participation in mediation.[36] In circumstances involving significant power differences mediators must attempt to ensure that the participation of all parties is both genuine and active, and that any agreement formed is not based on coercion or pressure.

Neutrality, Astor's other key legitimating principle, is also inextricably linked to the issue of power relations. Neutrality is often taken to include fairness and even-handedness by the mediator, although these characteristics are sometimes categorised separately as impartiality, in which case neutrality is '… used more to describe a mediator's sense of disinterest in the outcome of the dispute.'[37] The on-going difficulty, in both the theory and practice of mediation, is that there can be a contradiction between even-handedness and fairness: if the parties are treated in the same way, then power differentials are not addressed, leading to a lack of fairness in process and outcome. Astor suggests that what is needed is a re-definition of neutrality:

> It must take into account the particular qualities of mediation, and the sources of legitimacy of mediation. It must take into account the fact that mediation takes place in private and does not necessarily apply the law, and must therefore take particular care to protect from exploitation those who are vulnerable …it is necessary to abandon the 'grand theory' of neutrality in which neutrality is conceived of as a great – though essentially undefined – goal. Further, we should move away from a focus on neutrality as an attribute of the mediator… Instead, we should focus on maximising party control as the legitimating principle of mediation.[38]

If neutrality is focused on '… what the mediator is doing to ensure that, to the maximum extent possible, the parties control the content and the outcome of the dispute'[39] then ensuring that both parties can act free from pressure or coercion is imperative. If neutrality is understood in this way, addressing power differences becomes an even higher priority.

Strategies to address power differences in mediation

Numerous commentators have written about ways to address the disparity of power between the parties.[40] It is sometimes stated that power differences can be addressed by the mediation process itself, and by specific mediator strategies and interventions.[41] While efforts to separate these are problematic because the way the mediator applies the process is itself a strategy, it can be helpful to look at it this way.

(1) Features of *the process* that enable power imbalance to be addressed include:
   - An intake or screening process provides the mediator with some information about the parties' relationship and may allow the mediator to anticipate power issues. This also provides an opportunity for the mediator to refuse to mediate
   - In voluntary mediation, the

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parties' agreement to participate in the process
- The process is structured to give each party an opportunity to speak
- By agreeing to 'ground rules', parties give each other an opportunity to speak without interruption and without abuse or criticism from each other[42]
- The presence of a neutral third party, usually on neutral ground, provides support to the parties
- Confidentiality, especially between the mediator and each party, provides an opportunity for parties to 'express emotions and their true interests'[43]
- Creating steps in the process when parties are to exchange documents and other information can assist them to prepare for the mediation
- Parties are encouraged to treat each other as equals, and the mediator can model this in the way that he or she relates to the parties[44]
- Separate sessions provide an opportunity to check how the parties are coping with the process
- Shuttle mediation can be used where the parties are not prepared to be, or are best not put, in a room together
- The number of meetings that are held can be increased and can occur over an extended period of time so that the parties do not feel rushed into making decisions
- Whether a voluntary or mandatory process, the parties cannot have a decision imposed on them by the mediator

(2) There are many strategies and interventions available to mediators, and the list that follows is not intended to be exhaustive[45] They include:
- During the intake session or a preliminary conference, and at any time during the mediation session, explaining the process and indicating what information the parties may need to assist their decision-making
- Ensuring that the physical setting of the mediation is conducive to effective negotiation
- Reflecting on whether the process is 'fair' after using a series of questions to focus attention on the parties' abilities to negotiate[46]
- Enforcing the mediation ground rules to reinforce the role of the mediator as being as objective and neutral as is possible
- Encouraging parties to seek legal advice before and during the mediation
- Improving communication between the parties through use of specific forms of questions and reframing, paraphrasing and summarising what the parties have said
- Using private sessions:
  - to provide opportunity for a party to disclose and discuss information they are not prepared to disclose or discuss in joint session
  - to test out whether the party has sufficient knowledge or information to negotiate effectively
  - to reality check options that have been raised
  - to discuss whether there are cultural issues that are impacting on the negotiation process,[47] and
  - to rehearse techniques that the party can use in joint session
- Using a support person, or friend for the parties
- Using an interpreter where the parties cannot communicate with each other and the mediator in the same language
- Encouraging and advising parties on how to seek assistance to collate information or material needed for the mediation
- Where one party has been violent against the other, amongst other things, at least:
  - requiring strict adherence to the terms of contact agreed to between the parties, and
  - maintaining contact with the parties between meetings
- Calling adjournments
- Encouraging the parties to agree to a cooling off period *before* signing an agreement[48]

- Encouraging parties to include a cooling off clause in their agreement, allowing a party to rescind the agreement during a short period *after* it was made
- Reality checking all the likely consequences of a proposed course of action, including the long term consequences of using their power unfairly during the mediation, creating doubts in the minds of the parties over 'the facts, the law, the evidence and their likelihood of their being successful in litigation'[49]
- Terminating the mediation where the process is operating unfairly against one party or where the agreement reached between the parties is so unfair that it would be a miscarriage of justice[50]
- Threatening to terminate or terminating the mediation.

Conclusion

The ability of a mediator to employ these many and varied strategies and interventions will depend on their knowledge, skills and ethics as a practitioner. It will also depend on any parameters placed on the mediator's powers. In private mediation any parameters placed on the mediator's or the parties' power would need to be agreed upon by the parties. In mediation within a statutory context the various interventions may be allowed, required or disallowed by the legislation. While power is a complex dynamic in any mediation and the concept of 'balancing' power is fraught with difficulty, many aspects of process design, and strategies and interventions can be employed effectively by mediators to ensure that parties are able to negotiate effectively in their own interests to reach fair outcomes. ●

Editor's note: This is an adaptation of an article entitled, 'The Nature and Importance of Mechanisms for Addressing Power Issues in Statutory Mediation' by the authors published in (2002) 14 Bond Law Review 285.

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Endnotes

1. *The Concise Oxford Dictionary* 10th ed, 2000.
2. Mayer B *The Dynamics of Conflict Resolution: A Practitioner's Guide* 2000, p 50.
3. Above note 2.
4. Above note 2, p 54.
5. In his earlier and influential work on power, Mayer identified 10 types of power: 'The Dynamics of Power in Mediation and Negotiation' (1987) 6 *Mediation Quarterly* 75, 78. More recently Mayer has extended the list to 13 types of power, see above note 2, pp 55-60.
6. Boulle L, *Mediation: Skills and Techniques* Butterworths Skills Series, 2001 181.
7. For example, Wall argues that a mediator's primary task is to manage the power relationship of disputants and in unequal relationships may attempt to balance power: Wall J 'Mediation: an Analysis Review and Proposed Research' (1981) 25 *Journal of Conflict Resolution*, 157, 164. For discussion see Moore C *The Mediation Process; Practical Strategies for Resolving Conflict* 2nd ed, 1996, pp 333-7. Mayer, on the other hand, argues that that the idea that power can be balanced is misleading: see above note 2, p 51.
8. Moore, above note 7, p 327. For discussion of the sources of power mediators and other intervenors have in disputes, and a framework for understanding the roles that interested and powerful intervenors play in disputes see Watkins M and Winters K 'Intervenors with Interests and Powers' (1997) *Negotiation Journal* 119.
9. Boulle, above note 6, p 225.
10. For example, NADRAC, *Issues of Justice and Fairness in Alternative Dispute Resolution Discussion Paper* (1997) 28-29; Clarke G R and Davies I T 'Mediation – When is it not an Appropriate Dispute Resolution Process?' (1992) *ADRJ* 70, 70-71.
11. Boulle, above note 6, pp 226-7.
12. Tillett G *Resolving Conflict: a Practical Approach*, 2nd ed, 1999.
13. See, for example, Alexander R 'Family Mediation under the Microscope' (1999) *ADRJ* 18 and Mack K 'Alternative Dispute Resolution and Access to Justice for Women' (1995) 17(1) *Adelaide Law Review* 123.
14. Moore, above note 7, p 333.
15. Boulle, above note 6, p 224.
16. Moore, above note 7, p 336-7.
17. NADRAC, above note 10, p 29. See also Mayer, above note 2, p 51.
18. Charlton R and Dewdney M *The Mediator's Handbook* (1995) 239.
19. NADRAC, *Issues of Fairness and Justice in ADR* above note 10, 29.
20. NADRAC above note 10.
21. For example, see Clarke and Davies, above note 10.
22. For a discussion of power issues and how they are dealt with in a conciliation model, see Bryson D '"And the Leopard Shall Lie Down With the Kid": A Conciliation Model for Workplace Disputes' (1997) *ADRJ* 245.
23. The grounds of review and for setting aside a mediation agreement will depend on what legal rules, including statutory provisions, apply to the mediation.
24. Mayer, above note 2, p 51.
25. Mayer, above note 2, p 52.
26. Mayer, above note 2, p 52.
27. NADRAC, above note 10, p 28.
28. See, for example, Maute J 'Mediator Accountability: Responding to the Fairness Concerns' [1990] *Journal of Dispute Resolution* 347.
29. NADRAC, above note 10, p 28. The Discussion Paper refers to the danger that one party will dominate the outcome, rather than the process. In the writers' view, domination of the process is also a concern.
30. Kressel K *The Process of Divorce: How Professionals and Couples Negotiate Settlements* (1985) p 52.
31. See, for example, Access to Justice Advisory Committee *Access to Justice: An Action Plan* (Australia, National Capital Printing, 1994) pp 298-9 where it is recognised that women may obtain unfair results in the family mediation context due to power imbalances.
32. Mayer (1987) above note 5, p 83.
33. Astor does acknowledge circumstances where mediation may be mandated but in that case the process

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itself should proceed consensually: Astor H 'Rethinking Neutrality: A Theory to Inform Practice- Part I' (2000) *ADRJ* 73, 81.

34. Above note 32, p 73.

35. Above note 32, pp 73-74.

36. Similarly, Galligan argues that the guiding principle in making informal agreements in administrative contexts (that is, using negotiation and mediation) is that the agreement be real and that it be voluntarily entered into. The factors he identifies as contributing to a real and voluntary agreement are knowledge of the options, open willingness to enter negotiations and a genuine decision to accept a compromise: Galligan D J *Due Process and Fair Procedures: A Study of Administrative Procedures* (1996) p 383.

37. Field R 'Neutrality and Power: Myths and Reality' (2000) 3(1) *ADR Bulletin* 16, 16. NADRAC also accepts this distinction but includes impartiality as part of the responsibility of the mediator in remaining neutral. See NADRAC *A Framework for ADR Standards*, April 2001, 114 fn1.

38. Astor, above note 32, p 81.

39. Astor, above note 32, p 73.

40. A Davis and R Salem, 'Dealing with Power Imbalance in the Mediation of Interpersonal Disputes', [1984] 6 *Mediation Quarterly* 17; Mayer (1987) above note 5; Neumann D 'How Mediation Can Effectively Address the Male-Female Power Imbalance in Divorce' [1992] 9 *Mediation Quarterly;* Wolski B 'Mediator Settlement Strategies: Winning Friends and Influencing People'(2001) 12 *Australian Dispute Resolution Journal* 248.

41. For example, Neumann, above note 39; Clarke and Davis, above note 10, 73 refer to 'safeguards and techniques', 'some of which are inherent in the mediation process itself and others which can be specifically employed by a skilled mediator, to address the issue of power imbalance between disputants in the mediation process.'

42. Clarke and Davis, above note 10, p 74.

43. Clarke and Davis, above note 10, p 74.

44. Clarke and Davis, above note 10, p 74.

45. Moore identifies 12 forms of influence to 'incline the parties towards agreement' that can be used when the parties have unequal power: above note 7, p 327. See also Eliades D 'Power in Mediation – Some Reflections' (1999) 2 *ADR Bulletin* 4.

46. Severens K *Mediation Manual* (IINCM, 1998) (adapted by) Sourdin T in 'Conciliation Processes' *LEADR – The Third Millennium Conference - 28 July 2000*, 7.

47. Eliades, above note 44.

48. Cooling-off periods *during* mediations are sometimes used by third parties in situations where there are '…highly emotional confrontations in which one or more of the parties has become intensely angry…': Conflict Resolution Consortium, University of Colorado, 'Cooling-Off Periods' *International Online Program on Intractable Conflict*, <www.colorado.edu /conflict/peace/treatment/cooloff.htm>.

49. Boulle, above note 6, p 227.

50. Maute, above note 27, p 348.

contributions

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