

# An Analysis of the Complexity of Power in Facilitative Mediation and Practical Strategies for Ensuring a Fair Process

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*Power imbalances are an unavoidable part of life, and hence an unavoidable part of mediation.*<sup>74</sup>

## Abstract

*Can mediators guarantee procedural equality and demand respectful behaviour between participants to overcome imbalances of power between disputing parties? Power and power balancing in facilitative mediation is challenging and can illicit the best and the worst of mediator ethics and practice decision-making. Some practitioners feel challenged by the impact of power dynamics on their capacity to provide a fair and just process, while others are fearful of not being able to facilitate a fair and just outcome when imbalances of power are evident between the parties. This article considers the nature of power and power dynamics in facilitative mediation and explores how power dynamics shift between the parties. The article also discusses how the power inherent in the role of mediators — as facilitators of the process - impacts procedural and substantive justice in mediation; and outlines some practical strategies for achieving a fair process when a power imbalance between the parties exists.*

## Introduction

Each iteration of a mediation process has its own inimitable power issues.<sup>75</sup> In facilitative mediation,<sup>76</sup> the disputants are supported by the mediator to listen to each other in order to understand each other's perspectives, and there is inevitably some level of disparity in the parties' understanding of the content issues and their emotional capacity to engage in negotiations in relation to the dispute between them. Parties

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<sup>74</sup> N Dunlop, 'Mediation Power Imbalances: Weighing the Arguments' (October 2018) <https://www.mediate.com/articles/dunlop-power-imbalance.cfm> at 15 August 2019.

<sup>75</sup> See L Boulle and R Field, *Mediation in Australia* (LexisNexis, 2018) 216-225. See also L Boulle and R Field, *Australian Dispute Resolution Law and Practice* (LexisNexis, 2017).

<sup>76</sup> NMAS Practice Standards (2015) define mediation as: Mediation is a process in which the participants, with the support of the mediator, identify issues, develop options, consider alternatives and make decisions about future actions and outcomes. The mediator acts as a third party to support participants to reach their own decision; <https://msb.org.au/about-mediation> at 28 October 2019, 2.

are rarely completely evenly matched in terms of their ability to engage in constructive communication with a view to negotiating a resolution or outcome based on their relative needs and interests.

Parties usually come into the mediation environment as positional adversaries. The purpose of facilitative mediation,<sup>77</sup> however, is to enable them to reach a self-determined and interests-based outcome through a willingness to collaborate.<sup>78</sup> The history of the parties' relationship — whether personal or commercial or other — and the impact of the dispute, have a large role to play in how parties conduct themselves and interact, and these elements also play a part in determining how the parties choose to use or abuse the process in pursuit of their own perceived rights. The role of the mediator is a complex one, one facet of which is the management of the power disparities between the parties. The mediator's role is itself a powerful one. For these reasons, power must be understood as a multifaceted, multi-layered dynamic in the mediation environment. Binary, simplistic understandings of power in mediation are common but problematic because they inaccurately portray the way in which power manifests itself in mediation. Rather, the management of power imbalances in mediation calls for sophisticated analyses, high levels of expertise and significant practice wisdom.<sup>79</sup>

This article analyses the complex nature of power in facilitative mediation. First, we define facilitative mediation in the context of a range of mediation models that are currently practised in Australia. Second, we explore the notion of power in mediation, exposing its nuanced, fluid and contextual nature. Third, we consider how power dynamics between the parties might impact the potential for the achievement of substantively fair outcomes through the mediation process. Fourth, we discuss the issue of mediator power and how this might impact on issues of procedural fairness in facilitative mediation. Finally, we identify a range of practice strategies mediators can adopt to enable them to use their power in the process fairly in support of just, self-determined outcomes for the parties.

## Facilitative Mediation

There are many different ways that mediators work and a range of processes and approaches to mediation

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<sup>77</sup> Ibid. Mediation processes are primarily facilitative processes. The mediator provides assistance in managing a process which supports the participants to make decisions about future actions and outcomes. Some mediators may also use a 'blended process' that involves mediation and incorporates an advisory component or a process that involves the provision of expert information and advice. These processes are sometimes referred to as 'evaluative mediation' or 'conciliation'. Such processes may involve the provision of expert information and advice, provided it is given in a manner that enhances the principle of self-determination and provided that the participants request that such advice be given.

<sup>78</sup> Boulle and Field, *Mediation in Australia*, n 3, 2–5.

<sup>79</sup> See, for example, J Higgs, 'Realising Practical Wisdom from the Pursuit of Wise Practice' in EA Kinsella and A Pitman (eds), *Phronesis as Professional Knowledge: Practical Wisdom in the Professions* (Sense Publishers, 2012) 73–85; Margo Paterson et al, 'Professional Practice Judgement Artistry' (2008) 3 *Clinical Reasoning in the Health Professions* 181.

methods.<sup>80</sup> Boule has identified four paradigmatic models of mediation labelling them the facilitative, settlement, evaluative and transformative models.<sup>81</sup> ‘Facilitative mediation’ is generally regarded as the foundational model from which other models diverge.<sup>82</sup> It ‘involves mediators providing parties with assistance and support in relation to the organisation, preparation, communication, negotiation and procedural aspects of their dispute, without advising or recommending to them possible or potential outcomes’.<sup>83</sup> Facilitative mediators encourage the parties to get independent legal advice in order to reach informed decisions.

In contrast to facilitative mediation, ‘settlement mediation’ involves ‘mediators supervising patterns of incremental bargaining by disputants over quantifiable items, usually money, with each side using a range of tactics to induce more concessions from the other side than they make themselves, both expecting a compromise somewhere around the mid-point between their ambit starting positions’.<sup>84</sup> ‘Evaluative mediation’ then is ‘characterised by mediators providing advice and recommendations on procedural aspects of the system and on the substantive merits of the case at hand, to guide parties through the procedure and in particular to influence them on appropriate options and outcomes’.<sup>85</sup> Mediators engaging in these models must have significant content expertise and often provide legal information to ensure the parties fully understand the risks associated with not settling within the suggested legal framework.<sup>86</sup> Finally, transformative mediation ‘involves mediators focusing parties on their relationship dynamics and underlying factors of emotion, perception and bias, with a view to empowering each side and having them recognise the situation of the other en route to making decisions suited to the circumstances’.<sup>87</sup>

Within the context of facilitative mediation, a range of formats are possible. For example, the process can take place in the form of a face-to-face meeting, a shuttle or telephone encounter, or online. A mediator might mediate alone in a ‘solo mediation’, or with another mediator in a ‘co-mediation’ model.<sup>88</sup> A mediator’s choice of approach is likely to be influenced by their preferred mediation model and its values and goals. It is also based on a mediator’s basic philosophies, attitudes and beliefs about the way in which

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<sup>80</sup> See for example, Boule and Field, *Mediation in Australia*, n 3, 3–4.

<sup>81</sup> *Ibid.*, 271–273.

<sup>82</sup> See *NMAS Practice Standards* (2015) 2, where mediation is defined according to the principles of facilitative mediation as follows: ‘Mediation is a process that promotes the self-determination of participants and in which participants, with the support of a mediator: (a) communicate with each other, exchange information and seek understanding; (b) identify, clarify and explore interests, issues and underlying needs; (c) consider their alternatives; (d) generate and evaluate options; (e) negotiate with each other; and (f) reach and make their own decisions’ <https://msb.org.au/themes/msb/assets/documents/national-mediator-accreditation-system.pdf> at 9 August 2019.

<sup>83</sup> Boule and Field, *Mediation in Australia*, n 3, 3–4.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> See *NMAS*, n 4.

<sup>87</sup> Other terms for these versions, respectively, are problem-solving and interest-based; positional bargaining; advisory and therapeutic mediation.

<sup>88</sup> M Brandon and L Fisher, *Mediating with Families* (Thomson Reuters, 4<sup>th</sup> ed, 2018) 27–43.

people in dispute behave, think and make decisions; and on their understanding of the communication and negotiation theories that underpin and influence mediation.<sup>89</sup> For example, mediators who favour a facilitative approach believe in party empowerment and self-determination.

## Power in Facilitative Mediation

‘Not only can power sometimes not be recognised, but it can be hidden, emerging only during the course of mediation.’<sup>90</sup>

Power dynamics in mediation are complex, nuanced and relational, with many dimensions.<sup>91</sup> Astor has made the point that power is a subtle, situated phenomenon involving many contradictions. It is not simply a commodity that a party has or has not.<sup>92</sup>

Power derives from many sources, and manifests in a variety of ways. The term ‘power’ can be defined as: ‘the ability to do or act or affect something or someone, the possession of control or command over others or exercise authority or influence or dominate’.<sup>93</sup> In reality, all of us routinely experience power differentiation in our daily lives. As Qtaishat acknowledges, ‘in the realm of mediation, power imbalance cannot be ruled out rather it is bound to happen given the informal setting of mediation process.’<sup>94</sup>

Mayer identifies the following 10 sources of mediation power: formal authority, expertise, association, resources, procedure, sanctions, nuisance, habits, morality and personality.<sup>95</sup> Formal authority ‘derives from a formal position within a structure that confers certain decision-making prerogatives’.<sup>96</sup> Parties have expert or information power when they have particular expertise or knowledge about a particular matter, or in a particular field. Associational power (which is sometimes also called referent power) is power that attaches to a person because they are associated with others who have power. Resource power involves ‘control over valued resources (money, materials, labour, or other goods or services)’.<sup>97</sup> This power can also operate in reverse if a person has the power to deprive another of needed resources. Procedural power refers to an ability to control decision-making procedures; whilst sanction power concerns an ability (or

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<sup>89</sup> M Brandon and L Robertson, *Conflict and Dispute Resolution A Guide to Practice* (Oxford University Press, 2007) 146.

<sup>90</sup> Dunlop, n 2.

<sup>91</sup> Boulle and Field, *Mediation in Australia*, 224. See also B Mayer, ‘The Dynamics of Power in Mediation and Negotiation’ (1987) 16 *Mediation Quarterly* 75.

<sup>92</sup> See H Astor, ‘Some Contemporary Theories of Power in Mediation: A Primer for the Puzzled Practitioner’ (2005) 16 *Australasian Dispute Resolution Journal* 30.

<sup>93</sup> *The Concise Macquarie Dictionary* (1982) 983.

<sup>94</sup> AK Qtaishat, ‘Power Imbalances in Mediation’ (2018) 14(2) *Asian Social Science* 75, 77

[https://www.researchgate.net/publication/323340195\\_Power\\_Imbalances\\_in\\_Mediation](https://www.researchgate.net/publication/323340195_Power_Imbalances_in_Mediation) at 16 August 2019.

<sup>95</sup> Mayer, n 19, 78.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

perceived ability) to ‘inflict harm or to interfere with a party's ability to realize his or her interests’.<sup>98</sup> Nuisance power is the ability to cause discomfort to a party; habitual power ‘rests on the premise that it is normally easier to maintain a particular arrangement or course of action than to change it’;<sup>99</sup> and moral power ‘comes from an appeal to widely held values’ and a ‘conviction that one is right’.<sup>100</sup> Finally, personal power is ‘power that derives from a variety of personal attributes that magnify other sources of power, including self-assurance, the ability to articulate one's thoughts and understand one's situation, one's determination and endurance, and so forth’.<sup>101</sup>

These forms of power can be broadly divided into structural power and personal power. Structural power encompasses formal and informal authority, power by association and habitual power; and it is also recognised in law and policy, resources, rewards and sanctions. Personal power can be demonstrated through resources such as knowledge, aptitude or skills, personal characteristics, status, or the withholding of information.<sup>102</sup>

Parties to a mediation may seek to harness a source of power they may have (or that they perceive they have, or that they know the other party perceives they have) for various reasons; for example, ‘reputational concerns, needs for ongoing business relationships, confidentiality requirements, and so on’.<sup>103</sup> It is important to remember that parties may have sources of power unknown to them. Further, as indicated above, ‘parties’ subjective perceptions of their own and the other side’s power can be as important as actual power realities’.<sup>104</sup> Theories of power are thus relational and not possessory in nature, incorporating social networks, group dynamics and interpersonal relations.

## Pre-Mediation

Many facilitative mediators conduct a suitability assessment, to establish whether the parties seeking facilitative mediation have the ability to be able to negotiate more or less as equals and to establish the appropriate form for them and that the matter is suitable for mediation. A thorough risk assessment is part of this intake process.<sup>105</sup> Mediators use their knowledge and understanding of power disparities addressed above as a guide together with their responsibilities to make sure that parties are going to be physically and

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<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

<sup>102</sup> Brandon and Robertson, n 17, 9.

<sup>103</sup> Boulle and Field, *Mediation in Australia*, (n 3) 224.

<sup>104</sup> Ibid, 225.

<sup>105</sup> See for example the Family Dispute Resolution (FDR) screening and risk assessment practices discussed in ALRC, *Family Violence – A National Legal Response* (ALRC Report 114, November 2010) <https://www.alrc.gov.au/publication/family-violence-a-national-legal-response-alrc-report-114/21-family-dispute-resolution-3/screening-and-risk-assessment-practices/>.

emotionally safe, and that the process will do no harm. This means that the parties need to fully comprehend that it is their choice to attend, unless the mediation is mandated, and it is their responsibility to make informed and workable decisions.<sup>106</sup> Mediators use their insight, ethical decision making and power in establishing whether a facilitative process is or is not suitable.

## During Mediation

Mediators, too, are powerful in mediation. Whilst facilitative mediators do not have a determinative role, they have significant potential to influence the parties and the outcome they reach, if only through the way that they facilitate the mediation process itself.<sup>107</sup> The way mediators deal with these different manifestations of power depends on how they view their role and their own power as mediators and the depth of their understanding of power and their awareness of their own perceptions of conventional power stereotypes.<sup>108</sup> As John Wade has said, ‘virtually every step taken by a mediator involves the exercise of power’.<sup>109</sup>

Mediators have power deriving from the fact that they are the dispute resolution experts in the mediation room, sometimes also having a positive professional reputation or prestige. This is reinforced by structural arrangements such as mandatory mediation and the capacity of some mediators to evaluate parties’ conduct in the process.<sup>110</sup> Mediators exercise power in a variety of ways depending on context, style and timing. Proficient mediators have skills and techniques (discussed below) for dealing with aspects of the parties’ power differences, both before and during mediation. In doing so, mediators can contribute to the procedural justice of the process and the substantive justice of outcomes.<sup>111</sup> The appropriate exercise

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<sup>106</sup> MA Noonan, L Akin Ojelabi and L Buchanan, *Ethics & Justice in Mediation* (Thomson Reuters, 2018) 18–21.

<sup>107</sup> See for example, A Gerami, ‘Bridging the Theory-and-Practice Gap: Mediator Power in Practice’ (2009) 26(4) *Conflict Resolution Quarterly* 433; R Zamir, ‘The Disempowering Relationship Between Mediator Neutrality and Judicial Impartiality: Toward a New Mediation Ethic’ (2010) 11 *Pepperdine Dispute Resolution Law Journal* 467, and T Bogdanoski, ‘Beyond the Paradox of Neutral Intervention: Towards a Situated Theory of Mediator Neutrality’ (2010) 21 *Australasian Dispute Resolution Journal* 146.

<sup>108</sup> Brandon and Fisher, n 16, 105.

<sup>109</sup> J Wade, ‘Forms of Power in Mediation and Negotiation’ (1994) 6 *Australian Journal of Family Law* 40.

<sup>110</sup> See N Polak, ‘No Longer Neutral: Practitioner Power in Compulsory (Family) Dispute Resolution’ (2009) 20 *Australasian Dispute Resolution Journal* 88.

<sup>111</sup> See C Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (Jossey-Bass, 2014) Chapter 4 and 507–10. See also PT Coleman, ‘Power and Conflict’ in PT Coleman, M Deutsch and EC Marcus (eds) *The Handbook of Conflict Resolution: Theory and Practice* (Jossey-Bass, 2014) Chapter 6; K Lau, ‘Mediation in a Cross-Cultural Setting: What a Mediator Should Know’ (2014) 25 *Australasian Dispute Resolution Journal* 221; S Hardy, O Rundle and DW Riggs, ‘Working with Trans or Gender Diverse, Intersex and/or Non-Heterosexual Clients: Advice for Mediators’ (2017) 28 *Australasian Dispute Resolution Journal* 35.

of mediator power requires, however, a high level of professional artistry,<sup>112</sup> and an understanding of the psychology of mediation practice.<sup>113</sup>

It is illustrative to consider the nature of a mediator's power.<sup>114</sup> For example, mediators can achieve referent power by building connections and rapport with the participants, by using empathy, acknowledgements and their charisma. Mediators have informational power as a result of their expertise in dispute resolution and mediation and sometimes also in the subject matter of the dispute. Positional power can be derived from a mediator's authority through assertiveness, or reputation.

The difficulty created for mediators in terms of seeking to exercise their power to create a fair process that makes just outcomes possible, is that 'if mediators treat unequal parties even-handedly they preside over unequal bargaining, and if they treat them differentially they undermine their impartiality'.<sup>115</sup> There is a great deal of feminist literature, for example, that criticises the capacity of impartial mediators to mitigate structural and gendered imbalances of power in individual relationships where there is a history of domestic or family violence to support negotiations on an equal footing.<sup>116</sup> Other areas in which power imbalances can potentially impede the achievement of procedural and substantive justice in mediation include, for example: environmental disputes where 'power differentials are caused by unequal access to resources, scientific data, legal assistance and expert opinions';<sup>117</sup> discrimination disputes which tend to disproportionately involve 'marginalised groups such as immigrants, foreign-language speakers or

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<sup>112</sup> See K Douglas and D Goodwin, 'Artistry in Mediator Practice: Reflections from Mediators' (2015) 26 *Australasian Dispute Resolution Journal* 137; M Dickenson, 'The Importance of Self-Awareness and Self Development to Mediator Effectiveness' (2010) 21 *Australasian Dispute Resolution Journal* 97. See also, MD Lang and A Taylor, *The Making of a Mediator: Developing Artistry in Practice* (Jossey-Bass, 2000); Higgs, n 7 and Paterson, n 7.

<sup>113</sup> C Smith, 'Applying Findings from Neuroscience to Inform and Enhance Mediator Skills (2015) 26 *Australasian Dispute Resolution Journal* 249.

<sup>114</sup> See O Shapira, 'Exploring the Concept of Power in Mediation: Mediators' Sources of Power and Influence Tactics' (2009) 24(3) *Ohio State Journal on Dispute Resolution* 535, 542-558. See also Qtaishat, n 22, 75-79.

<sup>115</sup> Boulle and Field, *Mediation in Australia* (n 3) 223. See also, M Sweify, 'Mediator's Proposal and Mediator's Neutrality: Finessing the Tension' (2017) 28 *Australasian Dispute Resolution Journal* 129.

<sup>116</sup> See for example, H Astor, *Guidelines for Use if Mediating in Cases Involving Violence Against Women* (NCVAW, 1992); R Field and A Lynch, 'Hearing Parties' Voices in Coordinated Family Dispute Resolution (CFDR): An Australian Pilot of a Family Mediation Model Designed for Matters Involving a History of Domestic Violence' (2014) 36(4) *The Journal of Social Welfare and Family Law* 392; R Kaspiew, J De Maio, J Deblaquiere and B Horsfall, *Evaluation of a Pilot of Legally Assisted and Supported Family Dispute Resolution in Family Violence Cases: Final Report* (AIFS, 2012) <https://aifs.gov.au/publications/evaluation-pilot-legally-assisted-and-supported-family-dispute-resolution>; RF Kandel, 'Power Plays: A Sociolinguistic Study of Inequality in Child Custody Mediation and a Hearsay Analog Solution' (1994) 36 *Arizona Law Review* 879. See also, N Nelson, A Zarankin and R Ben-Ari, 'Transformative Women, Problem-Solving Men? Not Quite: Gender and Mediators' Perceptions of Mediation' (2010) 26(3) *Negotiation Journal* 287. See also the early influential work of JB Kelly, 'Power Imbalance in Divorce and Interpersonal Mediation: Assessment and Intervention' (1995) 13(2) *Conflict Resolution Quarterly* 85; and D Neumann, 'How Mediation Can Effectively Address the Male-Female Power Imbalance in Divorce' (1992) 9(2) *Conflict Resolution Quarterly* 227.

<sup>117</sup> Boulle and Field, *Mediation in Australia*, n 3, 222; J Crowfoot and JM Wondolleck, *Environmental Disputes: Community Involvement in Conflict Resolution* (Island Press, 2012).

intellectually or physically-impaired persons’;<sup>118</sup> and franchising disputes in which ‘the franchise agreements vest control in franchisors and shift risks to franchisees with limited powers and extensive responsibilities’.<sup>119</sup> In a range of additional diverse dispute contexts there are discrepancies in the power of the parties – for example, native title matters;<sup>120</sup> disputes between plaintiffs and liability insurers in personal injury cases,<sup>121</sup> disputes between purchasers and retailers in consumer disputes and disputes between citizens and governments in administrative disputes.<sup>122</sup>

## Power and Substantive Justice

There are certain contexts in which power imbalances between the parties are considered particularly threatening to the possibility of achieving substantive justice in mediation.<sup>123</sup> For example, gender dynamics in family, anti-discrimination and employment disputes.<sup>124</sup> Alder and Heather suggest that each person’s life-time of personal experience acts as an unconscious filter on everything they see, hear, and feel.<sup>125</sup> It is believed that this forms an increasingly unbridgeable barrier between that person and their interactions with others. This interactive event is sometimes called the ‘territory’. Each person in the interaction forms their own subjective ‘map’ of their own world and the events in their world. This subjective map represents what things mean to each individual and what they believe about what goes on

<sup>118</sup> Boulle and Field, *Mediation in Australia*, n 3, 222. See also M Jenkins, ‘Practice Note: Is Mediation Suitable for Complaints of Workplace Bullying?’ (2011) 29(1) *Conflict Resolution Quarterly* 25. Brandon and Robertson, n 15, 94–100.

<sup>119</sup> Boulle and Field, *Mediation in Australia*, n 3, 222. See also S Weaven, L Frazer and J Giddings, ‘New Perspectives on the Causes of Franchising Conflict in Australia’ (2010) 22(2) *Asia Pacific Journal of Marketing and Logistics* 135 and J Giddings, L Frazer, S Weaven and A Grace, ‘Understanding the Dynamics of Conflict within Business Franchise Systems’ (2009) 20 *Australasian Dispute Resolution Journal* 24.

<sup>120</sup> See L Behrendt and L Kelly, *Resolving Indigenous Disputes — Land Conflict and Beyond* (Federation Press, 2008) 14–56 and N Sharma, ‘Mirror, Mirror on the Wall, is there No R(e)ality In Neutrality After All? Re-thinking ADR Practices for Indigenous Australians’ (2014) 25 *Australasian Dispute Resolution Journal* 231.

<sup>121</sup> See the comments of K Burns, ‘Meddling in the Mediation? Liability Insurers and Mediation’ (1999) 10 *Australasian Dispute Resolution Journal* 216, 219. See also, L Steer, ‘Personal Injury Mediation: Implications for the Application of Formal Mediation Techniques’ (1997) 8 *Australasian Dispute Resolution Journal* 123.

<sup>122</sup> BJ Preston, ‘The Use of Alternative Dispute Resolution in Administrative Disputes’ (2011) 22 *Australasian Dispute Resolution Journal* 144.

<sup>123</sup> See T Grillo, ‘Mediation — Process Dangers for Women’ (1991) 100 *Yale Law Journal* 1545; R Alexander, ‘Family Mediation: Friend or Foe for Women?’ (1997) 8 *Australasian Dispute Resolution Journal* 255. See also R Field, ‘Using the Feminist Critique of Mediation to Explore “The Good, The Bad and The Ugly” Implications for Women of the Introduction of Mandatory Family Dispute Resolution in Australia’ (2006) 20 *Australian Journal of Family Law* 45. See also, however, CB Craver, ‘Do Alternative Dispute Resolution Procedures Disadvantage Women and Minorities’ (2017) 70 *Southern Methodist University Law Review* 891.

<sup>124</sup> J Rifkin, ‘Mediation from a Feminist Perspective: Promise and Problems’ (1984) 2 *Law and Inequity* 21; MR Evans, ‘Women and Mediation: Toward a Formulation of an Interdisciplinary Empirical Model to Determine Equity in Dispute Resolution’ (2001) 17 *Ohio State Journal of Dispute Resolution* 145; R Alexander, ‘Mediation, Violence and the Family’ (1992) 17 *Alternative Law Journal* 271; R Alexander, ‘Family Mediation: Friend or Foe for Women?’ (1997) 8 *Australasian Dispute Resolution Journal* 163; T Gee, ‘Family Mediation: A Matter of Informed Political Choice’ (1998) 9 *Australasian Dispute Resolution Journal* 179; R Dingwall, D Greatbatch and L Ruggerone, ‘Gender and Interaction in Divorce Mediation’ (1998) 15 *Conflict Resolution Quarterly* 277; R Field, ‘A Feminist Model of Mediation that Centralises the Role of Lawyers as Advocates for Participants Who are Victims of Domestic Violence’ (2004) 20 *The Australian Feminist Law Journal* 65; M Shaffer, ‘Divorce Mediation: A Feminist Perspective’ (1988) 46 *University of Toronto Faculty of Law Review* 162; AM Pines, H Gat and Y Tal, ‘Gender Differences in Content and Style of Argument Between Couples During Divorce Mediation’ (2002) 20 *Conflict Resolution Quarterly* 23.

<sup>125</sup> H Alder and B Heather, *NLP in 21 Days* (Piatus Books, 2005) 10–12.



around them. Each person's map differs and as the world is seen through individual filters (these filters may change over time) the current perception of an event may be limited and cannot be considered the territory of reality. Each individual person's reality of what happened in the interaction between them, for example as a result of an event or a dispute will be different. Hence the expression 'the map is not the territory.' People's perception of their reality, like their perception of the truth about the same interaction, will be different. For people to understand each other better they need to develop more awareness, bring their own 'maps' to a more conscious level and exchange information in order to make where they are coming from more transparent. This is important to understand and remember when working with disputants.

When parties come to mediation, mediators observe and listen to the reciprocal interactions making up the dynamics of communication between the parties. For example, interactions in which they are not listening to each other or in a situation in which there is tension, things can become strained or even hostile. Such interactions can become an attack-defence spiral when reciprocal or mutual listening is absent.<sup>126</sup> Mediators must be cognisant of such dynamics occurring, establish if there are elements of power and control, in tone, demeanour and use of language, present between the participants, to be able to make the appropriate intervention to change such behaviour respectfully. A key consideration in conflict situations is not about how much power individual people have, but how they choose to use it.<sup>127</sup> As discussed above, one person's power or perceived power over another can be structural or personal.<sup>128</sup>

How in relationships or families one person controls and dominates another creates a pattern of dominance and submission. While these patterns can change over a lifetime, the ultimate control and dominance in relationships and in families is through family and domestic violence, including child abuse, adolescents abusing their parents or step-parents and abuse of the elderly.<sup>129</sup>

The NMAS Practice Standards seek to balance self-determination with a level of mediator responsibility for substantively just outcomes,<sup>130</sup> but they do not provide clear guidance on how this should be achieved in practice. The management of the power differentials between the parties requires significant skill, proficiency and diligence on the part of mediators if substantively just outcomes are to be possible in mediation.

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<sup>126</sup> R Bolton, *People Skills* (Prentice Hall, 1979) 168.

<sup>127</sup> B Mayer, *The Dynamics of Conflict Resolution: A Practitioners Guide* (Jossey-Bass, San Francisco, 2000) 60.

<sup>128</sup> Mayer, n 19, 53–70.

<sup>129</sup> Brandon and Fisher, n 16, Chapter 10.

<sup>130</sup> *NMAS Practice Standards*, n 4.

## Power and Procedural Justice

In facilitative mediation, the National Mediators Accreditation System (NMAS) requires that mediators ensure procedural fairness through being impartial. Practice Standard 7 provides:<sup>131</sup>

*7 Procedural fairness and impartiality*

*7.1 A mediator must conduct the mediation in a fair, equitable and impartial way, without favouritism or bias in act or omission.*

*7.2 A mediator must identify and disclose any potential grounds of bias or conflict of interest before the mediation, or that emerge at any time during the process.*

*7.3 A mediator must not mediate in cases involving a conflict of interest without the informed consent of the participants, and then only if, in the mediator's view, the conflict would not impair his or her impartial conduct of the process.*

*7.4 A mediator must support participants to reach agreements freely, voluntarily, without undue influence and on the basis of informed consent.*

*7.5 A mediator must provide participants appropriate opportunities to speak and to be heard by one another in the mediation, and to articulate their respective interests, issues and underlying needs.*

*7.6 A mediator must ensure, so far as practicable, that participants have had sufficient time and opportunity to access sources of advice or information necessary for their decision-making.*

*7.7 A mediator must encourage and support negotiations that focus on the participants' respective interests, issues and underlying needs and must encourage participants to assess any proposed agreements accordingly and with reference to their long-term viability.*

It is crucial for the parties' perception of a fair process that mediators attend to these matters; indeed, an absence of procedural justice is a noted failing in any dispute resolution system.<sup>132</sup> The emphasis for achieving procedural justice in facilitative mediation is on fairness through enabling party self-

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<sup>131</sup> NMAS, n 4, 11.

<sup>132</sup> See, for example, R Delgado, 'The Unbearable Lightness of Alternative Dispute Resolution: Critical Thoughts on Fairness and Formality' (2017) 70 *Southern Methodist University Law Review* 611; M McCormick, 'Confronting Social Justice as a Mediator' (1997) 14(4) *Mediation Quarterly* 293; JM Hyman and LP Love, 'If Portia Were a Mediator: An Inquiry into Justice in Mediation' (2002) 9 *Clinical Law Review* 157 and J Balstead, 'What Do Litigants Really Want? Comparing and Evaluating Adversarial Negotiation and ADR' (2005) 16 *ADRJ* 244. See also K Douglas and J Hurley, 'The Potential of Procedural Justice in Mediation: A Study into Mediators' Understandings' (2017) 29(1) *Bond Law Review* 5.

determination, which in turn relies upon informed consensual decision-making.<sup>133</sup> However, mediation is a confidential and private negotiation environment, which means the achievement of procedural justice in these terms lacks any formal or real safeguards and is reliant on the appropriate and ethical exercise of a mediator's discretionary powers.<sup>134</sup>

In the theory of facilitative mediation (which is reflected in the NMAS Practice Standards) the requirement of mediator impartiality is seen as one of the aspects of ethical practice that ensures the appropriate use of a mediator's discretionary powers.<sup>135</sup>

It is important to note, that notwithstanding the absence of enforceable protections for procedural justice in mediation, survey studies suggest that parties are generally satisfied by mediation procedures, and this is the case even when they perceive the resultant outcome in the process to be unfair.<sup>136</sup> For example, workplace mediation studies indicate that the probability of outcomes being accepted is improved when the parties' have a strong sense of procedural justice having been achieved in the process, even if there is a perception that the outcome is substantively unfair.<sup>137</sup> It is possible, then, to postulate that mediators are generally successful in managing their power appropriately.

Analysis of the multifaceted power and influence mediators have in mediation, and the development of a sophisticated understanding of the tactics mediators employ, is critical to reflective professional practice.<sup>138</sup> Shapira suggests that awareness of power issues in mediation contributes to: (a) more effective use of power and potential power by mediators; (b) improvement in mediators' training programs; (c) better understanding of the ways in which mediators work; (d) enhanced internal monitoring of mediators' use of power by parties and their lawyers; and (e) mediators' self-monitoring of their use of power.<sup>139</sup> It is also

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<sup>133</sup> See R Field and J Crowe, *Mediation Ethics* (Edward Elgar, 2020).

<sup>134</sup> See R Field and J Crowe, 'Playing the Language Game of Family Mediation: Implications for Mediator Ethics' (2017) 35 *Law in Context* 84; R Field and J Crowe, 'The Construction of Rationality in Australian Family Dispute Resolution: A Feminist Analysis' (2007) 27 *The Australian Feminist Law Journal* 97. See also K Mentzel, 'Judging the Fairness of Mediation: A Critical Framework' (1990) 1 *Mediation Quarterly* 3; R Field, 'Family Law Mediation: Process Imbalances Women Should be Aware of Before They Take Part' (1998) 14 *QUT Law and Justice Journal* 22.

<sup>135</sup> GJ Bachar and DR Hensler, 'Does Alternative Dispute Resolution Facilitate Prejudice and Bias: We Still Don't Know' (2017) 70 *Southern Methodist University Law Review* 817. Recently Crowe and Field brought the fairness of mediator impartiality into question - see J Crowe and R Field, 'The Empty Idea of Mediator Impartiality' (2019) 29(4) *Australian Dispute Resolution Journal* 273. However, it is beyond the scope of this article to explore that avenue of thought here. Rather, our focus is on unpacking how mediators, thinking on their feet in the mediation room, manage the exercise of their power in ways that support procedural fairness.

<sup>136</sup> These studies constitute a significant body of literature on procedural justice. See also, for example, T Sourdin and T Matruglio, *Evaluating Mediation — New South Wales Settlement Scheme 2002* (2004) 239, <http://www.endispute.com.au/wpdl/evaluating%20mediation%20settlement%20scheme%20report.pdf>.

<sup>137</sup> See DM McKenzie, 'The Role of Mediation in Resolving Workplace Relationship Conflict' (2015) 39 *International Journal of Law and Psychiatry* 52; B van Gramberg, 'ADR and Workplace Justice: Just Settlement?' (2003) 14 *Australasian Dispute Resolution Journal* 233, 238.

<sup>138</sup> Shapira, n 42.

<sup>139</sup> *Ibid*, 537.

important to understand the ways in which mediators use and misuse their power in mediation if ethical behaviour is to be monitored and the obligations of the NMAS Practice Standards are to be maintained.<sup>140</sup> This can be done through reflective practice<sup>141</sup> as well as through supervision.<sup>142</sup>

The impartiality requirement of the NMAS Practice Standards generally requires mediators to ‘focus on procedural fairness and not on the substantive outcome’.<sup>143</sup> This means they seek to support the parties in reaching an outcome they ‘can live with’. In practice, however, many mediators do consider whether an outcome is fair and equitable by using the necessary reality testing techniques to make sure all or both participants are satisfied with the outcomes on the substantive, procedural and emotional levels.<sup>144</sup>

Mediators are rightly focused on ensuring the process is fair because they have control over the process, not the parties. For example, when mediation has begun in a joint session, a mediator (not the parties) might decide to move to a shuttle process after private session if this becomes necessary because of power dynamics. The reverse can also happen. That is, a shuttle mediation can change later on into a joint session when the mediator establishes that the power disparity is minimal and the participants would benefit from learning to communicate effectively with each other (for example, when they intend to maintain a future relationship with each other). Power is always context dependent and contingent, and even the most powerful people are powerless under certain conditions.

In managing the power in the mediation process fairly, mediators also need to be aware of potential external influences. Since people in conflict are often part of a family, workplace or community, for example, other people around them (who are absent from the mediation itself but perceive they have a stake in the outcome) could take sides in the dispute, fueling the parties with ‘attitudes’ and ‘wisdom’, and giving them advice about what they should or should not do. External influence can become quite overwhelming and controlling for the individuals in dispute, and this can cause significant impact. This is a difficult dynamic to manage procedurally because the ‘elephant in the room’ is often unknown to the mediator.<sup>145</sup> Mediators may need to address this issue in a private session, as unearthing underlying issues and emotional reactions

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<sup>140</sup> See also, however, the critical commentary in B Wolski, ‘Ethical Duties Owed by Lawyer Mediators: Suggestions for Improving the NMAS Practice Standards’ (2017) 26(3) *Journal of Judicial Administration* 184 and B Wolski, ‘Mediator Standards of Conduct: A Commentary to the Revised National Mediator Accreditation System Practice Standards’ (2016) 5(2) *Journal of Civil Litigation and Practice* 109.

<sup>141</sup> See for example, MD Lang, *The Guide to Reflective Practice in Conflict Resolution* (Rowman & Littlefield, 2019).

<sup>142</sup> See for example, Brandon and Fisher, n 16, Chapter 16.

<sup>143</sup> Noonan, Akin Ojelabi, Buchanan, n 34, 7.

<sup>144</sup> ‘Satisfaction Triangle’ [https://auroraproject.com.au/sites/default/files/15\\_satisfaction\\_triangle.pdf](https://auroraproject.com.au/sites/default/files/15_satisfaction_triangle.pdf): at 8 August 2019. See also MA Noonan and L Akin Ojelabi, ‘Insights from Australian Mediators about Mediation and Access to Justice’ (2014) 25 *Australasian Dispute Resolution Journal* 212.

<sup>145</sup> M Brandon and T Stodulka, ‘Making the Invisible Visible in Family Dispute Resolution: The Elephant in the Room’ (2013) 24(2) *Australasian Dispute Resolution Journal* 121.

that may affect negotiations and decision-making are sometimes more difficult to bring to the surface in a joint session.

## Strategies for Power Balancing in Practice

‘Imbalance in and of itself is not a problem. When an imbalance affects self-determination, something needs to be done.’<sup>146</sup>

Whilst the power dynamic in mediation poses significant challenges for mediators in achieving procedural justice and for the parties in achieving substantive justice, some writers have argued that the mediation process itself makes it a particularly effective approach to dispute resolution in matters where the power dynamic is an issue.<sup>147</sup>

Individual approaches to managing power in mediation are often based on a mediator’s underlying values and their response to the parties, their beliefs and values, and their self-perception, identity and character traits.<sup>148</sup> Parties with low self-esteem, or those whose esteem has been eroded due, for example, to workplace bullying or family violence, may need assistance in finding their voice. Dilemmas can occur in mediation practice about how to manage such issues ethically, leading to the key question: should mediators take steps to redress imbalances by ‘increasing’ the power of weaker parties and ‘diminishing’ that of the stronger?<sup>149</sup>

It is simplistic and inaccurate to assume that a mediation where a power imbalance exists will inevitably result in an unfair outcome.<sup>150</sup> ‘The many and varied types of power inevitably present in each mediation

<sup>146</sup> R Voyles, ‘Managing an Imbalance of Power’ (October 2004) <http://www.mediate.com/articles/voylesR3.cfm> at 15 August 2019.

<sup>147</sup> A Davis and R Salem, ‘Dealing with Power Imbalances in the Mediation of Interpersonal Disputes’ (1984) 6 *Mediation Quarterly* 17.

<sup>148</sup> See, for example, J Friedrich, ‘Philosophical Answers to Ethical Questions: Power Imbalance and the Provision of Advice in Mediation Standards’ (2009) 20 *Australasian Dispute Resolution Journal* 179; S Nauss Exon, ‘How Can a Mediator be Both Impartial and Fair? Why Ethical Standards of Conduct Create Chaos for Mediators’ (2006) *Journal of Dispute Resolution* 387.

<sup>149</sup> Some of the classic works exploring this issue include: T Grillo, ‘Mediation — Process Dangers for Women’ (1991) 100 *Yale Law Journal* 1545; ALM Davis and RA Salem, ‘Dealing with Power Imbalances in the Mediation of Interpersonal Disputes’ (1984) 6 *Mediation Quarterly* 17; B Mayer, ‘The Dynamics of Power in Mediation and Negotiation’ (1987) 16 *Conflict Resolution Quarterly* 75; H Astor, ‘Some Contemporary Theories of Power in Mediation: A Primer for the Puzzled Practitioner’ (2005) 16 *Australasian Dispute Resolution Journal* 30; PE Bryan, ‘Killing Us Softly: Divorce Mediation and the Politics of Power’ (1992) 40 *Buffalo Law Review* 441; S Cobb, ‘Empowerment and Mediation: A Narrative Perspective’ (1993) 9(3) *Negotiation Journal* 245; JB Kelly, ‘A Decade of Divorce Mediation Research’ (1996) 34(3) *Family Court Review* 373; PJ Kuriloff and SS Goldberg, ‘Is a Mediation a Fair Way to Resolve Special Education Disputes First Empirical Findings’ (1997) 2 *Harvard Negotiation Law Review* 35; M Brigg, ‘Mediation, Power and Cultural Difference’ (2003) 20 *Conflict Resolution Quarterly* 287. See also DJ Amy ‘The Politics of Environmental Mediation’ (1983) *Ecology Law Quarterly* 1; IG Gewurz, ‘(Re) Designing Mediation to Address the Nuances of Power Imbalance’ (2001) 19 *Conflict Resolution Quarterly* 135; SN Gary, ‘Mediation and the Elderly: Using Mediation to Resolve Probate Disputes Over Guardianship and Inheritance’ (1997) 32 *Wake Forest Law Review* 397; R Field, ‘Mediation and the Art of Power (Im)Balancing’ (1996) 12 *QUT Law Journal* 264.

<sup>150</sup> Dunlop, n 2.

do not lend themselves to ready measurement, nor are they capable of meaningful comparison'.<sup>151</sup> The initial suitability assessment of the appropriateness of mediation needs to focus on the capacity of parties to negotiate, rather than on who might hold the balance of power, as it rare for one person to have all the power. Monitoring the impact one party has on the other or others use of power is always part of the mediator's role. It is fundamental to a procedurally just process that one party does not dominate the proceedings.<sup>152</sup>

Parties' capacity to participate effectively in the mediation process to achieve substantively just outcomes depends on their relative ability to understand and respond to the dispute, the mediator and to each other. Their participation can be impacted by cultural, language or communication issues. Some parties may be affected by their experience of anxiety, current abuse, intimidation, harassment or stalking, loss and grief. Some may be living with other mental health issues and/or physical ailments or illnesses. Even with an advocate, support person or translator present certain parties may not be able to fully participate and make fully informed decisions.

Mediators have a significant number of procedural tactics to manage the power dynamic between the parties in a way that can still be perceived as impartial. For example, the words that mediators use in their opening statements can 'prime' participants to act in various ways. Words that include: 'the agreements that you reach', 'informal', and 'confidential' recognise the participants' autonomy in decision making, establish an atmosphere of cooperation, and provide for open dialogue. None of these attributes relates to adversarial processes, and the opening statement can be used to prime the parties' brains to respond differently to a conflict situation and can help to neutralise any previous negative priming.<sup>153</sup> Mediators also use their opening statement to provide clear guidelines or ground rules: try not to interrupt each other, make a note and bring it up later and agree to be guided by the mediator.<sup>154</sup>

Mediators also have the power to change the process from joint to private sessions and back to joint (as noted above); they can mediate with representing lawyers in the room<sup>155</sup> or support people present;<sup>156</sup> they can create a third party voice in the discussions; work on one party in a separate meeting to encourage them to be more flexible; invite the party with the best proposal to open after private session; or move through the agenda so that less contentious issues are dealt with first - quickly and successfully with minimal use

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<sup>151</sup> Ibid.

<sup>152</sup> Brandon and Fisher, n 16, 105.

<sup>153</sup> D Weitz, 'The Brains Behind Mediation: Reflections on Neuroscience, Conflict Resolution and Decision making' (2012) 2(2) *Cardozo Journal of Conflict Resolution* 471.

<sup>154</sup> Brandon and Fisher, n 16, Figure 3.1

<sup>155</sup> See D Cooper and M Brandon, 'Lawyer Role Options in Family Dispute Resolution' (2011) 22(3) *Australasian Dispute Resolution Journal* 198. The power of having lawyers in the room is a separate subject and not further developed in this article.

<sup>156</sup> The use of support people is referred to in Brandon and Fisher, n 16, [11.30], [12.340].

of exploration. Further, mediators can block any use of abusive language by a party, enforce the procedural guidelines, round up summarising before moving onto another item on the agenda, park issues or ignore certain discussion points, and mediators have the ultimate procedural power of deciding to terminate a mediation.<sup>157</sup> Further, mediators can manipulate the mediation environment; for example, having control of where the mediation is going to be held, getting participants to change seats after a break or private session and strategically using time pressure.

Another approach to addressing power differentials between the parties is the way in which mediators encourage and manage the communication flow through the different stages of the process. In the beginning stages of facilitative mediation, the parties speak to the mediator and not to each other until an agenda is established. The exploration, option generation and negotiation stages of facilitative mediation involve the mediator encouraging and facilitating the direction of the communication between the parties themselves.<sup>158</sup> To be able to intervene in destructive exchanges mediators use a range of skills and techniques to foster more effective dialogues.<sup>159</sup> Mediators approach these interventions knowing that they can become role models for constructive communication.<sup>160</sup>

Mediators also have a range of powerful communication tools which can be used strategically. For example, open ended questions, reality testing, the use of non-activity, silence or playing the confused mediator, and highlighting or ignoring underlying emotions. Mediators can influence and motivate the parties through reframing to focus on interests; and by rewarding suggestions and proposals which create progress either verbally or non-verbally.

Mediators must be aware of a lack of good faith by any participant which can also be seen as a power imbalance. This can constitute a reason to terminate the mediation. Name calling during the mediation and/or in private session needs careful intervention to make sure the receiver of such language or putdown is not unnecessarily impacted by such behaviour and use of language. The impact of language on each party in the communication exchange needs to be something that is constantly monitored and assessed by the mediator.

A final particularly effective strategy for managing diverse power dynamics in mediation is the co-mediation model. Co-mediation involves multiple mediators, usually two or more, depending on the number of disputants, who in some way complement each other by gender, personality, culture, professional

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<sup>157</sup> See Noonan, Akin Ojelabi, Buchanan, n 15, 70–74.

<sup>158</sup> M Brandon and T Stodulka, 'The Exploration Phase in Facilitative Mediation: From Dispute to Mutuality' (2015) 34(1) *The Arbitrator & Mediator* 63.

<sup>159</sup> Brandon and Fisher, n 16, Chapters 11, 12, and 14. See also Brandon and Robertson, n 17, Chapters 6, 7, 8 and 9.

<sup>160</sup> Brandon and Robertson, n 17, 147.

background or other ways in a manner that can improve the quality of both the mediation process and its outcome.<sup>161</sup>

## Conclusion

The power dynamic in mediation is nuanced and contextual and the interplay of power between the mediator and the parties and between the parties themselves is always complex. Power should not be seen in a universally negative or destructive sense. Mediators using a facilitative process are guided by process guidelines, and standards, together with codes of ethical practice. They use techniques and interventions based on professional and personal ethical norms and values. These are often similar to how parties use their power, as well as their 'identity' impacted by their dispute with others. Ideally, ethical choices, made by mediators, need to be evaluated through reflective practice in and on action in the best interest of their clients. This is a lifelong learning process. As advances are made over time in terms of the knowledge and skills that inform mediation practice, it is likely that deeper ethical understandings will inform the management of power in the facilitative mediation process.

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<sup>161</sup> J Rendon, 'Interdisciplinary Co-Mediations: The Good, the Bad and the Imago' (July 2008) <https://www.mediate.com/articles/rendon5.cfm?nl=167> at 5 August 2019.