

## **Power Imbalances in Mediation**

By: Amrita Narine

### **Introduction**

In recent years, mediation has become increasingly popular and now represents a viable option for parties in a variety of scenarios. Despite its rising popularity, mediation has received mixed responses because of the potential to entrench preexisting power imbalances. This paper will explore the usefulness of mediation when dealing with an imbalanced power dynamic. In part I, this paper will focus on defining power within mediation. Part II will explore the critiques of mediation in situations where there is an imbalanced power dynamic and specifically delve into gendered imbalances and employment imbalances. After exploring the critiques and responses to them, part III will focus on specific techniques that a mediator can use to help balance out the power dynamics at play and offer best practices for dealing with power imbalances.

### **I. Defining Power**

***“Power is a word the meaning of which we do not understand.” – Leo Tolstoy***

Power is a fluid word. Depending on the context, power can have a positive or a negative connotation. While some associate power with “coercion, a noncooperative spirit, and a breakdown in communication,”<sup>1</sup> it can also be associated with empowerment and strength. Within the context of mediation, “power can be defined as the ability of a person in a relationship to influence or modify an outcome.”<sup>2</sup> To fully understand power, it is necessary to go beyond this definition and look at its features. Diane Neumann lists four defining features of

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<sup>1</sup> Bernard Mayer, *The Dynamics of Power in Mediation and Negotiation*, 1987 CONFLICT RESOL. Q. 75, 75 (1987).

<sup>2</sup> Joan B. Kelly, *Power Imbalance in Divorce and Interpersonal Mediation: Assessment and Intervention*, 13 CONFLICT RESOL. Q. 85, 87 (1995).

power, each of which this paper will focus on individually: “(1) power is composed of many factors; (2) it is relative, situational, and shifting; (3) everyone has some degree of power; and (4) power is only effective when it is used.”<sup>3</sup>

Oftentimes, we only focus on one or two different factors of power, when in reality there are a myriad of factors. When discussing power, we often tend to think of economic power and societal power (power based on genders or roles). By only focusing on one or two factors, we take away from the parties in mediation other forms of power that already exist. Neumann lists ten factors that contribute to the individual’s power:

1. Belief system—a belief that one is on the side of right
2. Personality—the image one projects, how powerful one acts
3. Self-esteem—the internalized image of oneself, how powerful one feels
4. Gender—Western society grants men greater power than women
5. Selfishness—consistently putting oneself before others is a form of power
6. Force—willingness to use coercion or threats and the fear engendered in others is a form of power
7. Income/assets—power increases with income and the accumulation of assets
8. Knowledge—possessing information is a form of power
9. Status or age—increased status confers increased power, and power usually increases with age
10. Education—higher levels of education are associated with higher levels of power.<sup>4</sup>

While these are factors for an individual’s power, another consideration includes factors that can create power inequities in mediation. Joan B. Kelly lists eight such factors, which are by no means meant to be an exhaustive list: (1) history and dynamics of disputant relationship; (2) personality and character traits; (3) cognitive style and capabilities; (4) knowledge base; (5) economic self-sufficiency; (6) gender and age differences; (7) cultural and societal stereotypes and training; and (8) institutionalized hierarchies.<sup>5</sup> While some of these overlap with Neumann’s

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<sup>3</sup> Diane Neumann, *How Mediation Can Effectively Address the Male-Female Power Imbalance in Divorce*, 9 CONFLICT RESOL. Q. 227, 229 (1992).

<sup>4</sup> *Id.*

<sup>5</sup> See Kelly, *supra* note 2, at 89.

factors for individual power, it is important to acknowledge the ways that an individual has power *and* the factors that can create power inequities.

The second feature of power is that “it is relative, situational, and shifting.”<sup>6</sup> Power does not reside with the same person all of the time and it is only relative to another person.<sup>7</sup> Even if someone seems all-powerful, that perception will vary from person to person. For example, in a traditional marriage a man might have more economic and gender power, but with regards to children the woman is given more deference. Even though the man might have power for deciding alimony, the woman might have power when deciding visitation rights. Depending on the topic and the situation, power can move from one party to the other and should not be based on surface level observations.

The third feature of power is that each person always has some degree of power. The above situation is a prime example of different degrees of power. Courts are more inclined to give women custody rights over men, which means that a man with children might not attempt to wield his economic power as much as he could. If he did, the woman could respond by attempting to restrict visitation rights knowing that the shadow of the law is on her side.

Finally, the fourth feature of power involves knowing that you have power. If a party does not know that s/he has power, oftentimes s/he is disadvantaged because s/he might not use this power effectively. An example of this would be in a mediation between a mistreated employee and his employer. The employee might not think that he has any power, especially because the employer has the ability to fire him. However, if the company were trying to maintain a good reputation, a lawsuit would not look good. The employee could talk to news outlets or post about the company on social media. If the employee is being treated unfairly,

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<sup>6</sup> *Id.* at 87.

<sup>7</sup> *See* Neumann, *supra* note 3, at 230.

there are a number of ways for him to get his story heard that could also harm the reputation of the company. This means that the employee does not have to agree to whatever the company wants simply because he does not think he can do better. If the employee does not know he has this power, then it is ineffective because the employee is more likely to give into the employer's demands.

## II. Critiques of Mediation in Imbalanced Power Dynamics

### *“The way to have power is to take it.” – Boss Tweed*

Many critics of mediation believe that power imbalances cannot lead to fair and equitable outcomes. They claim “mediation ‘works best when equals are bargaining with one another and proves ‘ineffective in cases of severe power imbalances between the parties.’”<sup>8</sup> This claim is known as the “oppression story.”<sup>9</sup> The “oppression story” is the belief that mediation allows for stronger parties to impose their will on weaker parties because mediation emphasizes the power imbalances and the system does not provide effective checks and balances.<sup>10</sup> These critics focus purely on the stronger party's wealth, resources, and knowledge,<sup>11</sup> but do not give credit to the many benefits built into the mediation system that allow the process to be fair.

### A. Gendered Imbalance

Many women advocates believe that women should not participate in mediation because they are generally considered the “weaker” party.<sup>12</sup> This rationale exists for a variety of reasons, including: (1) historically, “women have had less access to positions of power, and fewer

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<sup>8</sup> Jordi Agustí-Panareda, Power Imbalances in Mediation: *Questioning Some Common Assumptions*, 59 DISP. RESOL. J. 24, 26 (2004).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See Kelly, *supra* note 2, at 85.

external resources, including wealth”;<sup>13</sup> (2) “women have not been socialized to ask for what they need and thus cannot bring an appropriate sense of entitlement to negotiations”;<sup>14</sup> and (3) women are disadvantaged because “they prefer relational harmony to conflict.”<sup>15</sup>

Further disadvantages experienced by women include disparity in economic power, disparity in information, and the credibility gap between men and women.<sup>16</sup> The assumption made with regards to disparity in economic power is that women are likely to have lower incomes than men.<sup>17</sup> The party with more resources, generally the man, can hire a lawyer, afford to wait out an extended delay, and can raise more issues than a party with fewer resources.<sup>18</sup> In addition, if a woman is in a weaker financial situation, she may be forced to accept an early settlement and ultimately settle for less than what she is entitled to by law.<sup>19</sup> The assumption for disparity in information is that in most traditional marital households, the husband will have more information about the family finances.<sup>20</sup> If the wife does not know what information to request or how to interpret the information, the husband is once again at an advantage.<sup>21</sup> Furthermore, the husband might have more access to information about the process as well, because he may be more likely to be able to afford to speak with a lawyer.<sup>22</sup> Finally, men tend to receive more credibility than women do.<sup>23</sup> In society, women are often treated with disbelief and are not taken seriously, oftentimes naturally and unintentionally.<sup>24</sup> Women have more features

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See Kathy Mack, *Alternative Dispute Resolution and Access to Justice for Women*, 17 ADEL. L. REV. 123, 124 (1995).

<sup>17</sup> See *id.* at 126.

<sup>18</sup> See *id.*

<sup>19</sup> See *id.*

<sup>20</sup> See *id.* at 127.

<sup>21</sup> See *id.*

<sup>22</sup> See *id.*

<sup>23</sup> See *id.* at 129.

<sup>24</sup> See *id.* at 130.

associated with powerlessness than men do, including the use of language features associated with powerlessness (such as superlatives or fillers), higher pitched voices, and smiling more frequently.<sup>25</sup> Since these factors are associated with powerlessness, women are perceived as having less credibility.<sup>26</sup>

Despite the concerns by advocates for women, “women in custody and divorce mediation have reported that mediation enable[s] them to have a voice and express their views, and they perceived that they had equal influence over the terms of the agreements.”<sup>27</sup> Furthermore, it is the mediator’s responsibility to ensure that the process is fair and equitable for both parties. If the mediator is unable to foster a collaborative environment and strongly believes that one party is being taken advantage of, the mediator can still choose to terminate the mediation.

#### **a. Domestic Abuse**

The use of mediation in domestic abuse cases has generated even more controversy than gender imbalance in general. On one side, “victim advocates assert that mediation is potentially unsafe and inherently unfair,”<sup>28</sup> while on the other side, “[m]ediation proponents counter that mediation can be a more empowering and effective process than such alternatives as lawyer-assisted negotiations, litigation, and adjudication.”<sup>29</sup> One of the primary concerns victim advocates have is safety – mediation generally involves face-to-face communication, which gives the batterer access to the victim and potentially provides information that could jeopardize future safety.<sup>30</sup> Additionally, the mediated agreement could include terms that provide for ongoing communication between the batterer and the victim. Another concern is that while men

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<sup>25</sup> *See id.*

<sup>26</sup> *See id.*

<sup>27</sup> *See Kelly, supra note 2, at 85.*

<sup>28</sup> Peter Salem and Ann L. Milne, *Making Mediation Work in a Domestic Violence Case*, 17 FAM. ADVOC. 34, 34 (1995).

<sup>29</sup> *Id.* at 34-35.

<sup>30</sup> *Id.* at 36.

already have social and economic advantages over women, an abusive relationship is likely to exacerbate this problem, taking away the fairness and voluntariness that are central to mediation.

### **B. Employment Imbalance**

Another imbalanced power dynamic occurs in the employment setting. When there is an employer and an employee, the employer is generally seen as having all of the power. Employers tend to have more wealth, more resources (including access to lawyers), and more experience. There is also a disparity between employers and employees because employers and their lawyers are usually repeat players—they might use the mediation system regularly to resolve employment disputes.<sup>31</sup> Employees, on the other hand, are usually one-shot disputants, meaning they only have one chance to resolve their employment dispute.<sup>32</sup> This problem is further exacerbated if the employee cannot afford legal counsel.<sup>33</sup>

However, the adjudicative system may not necessarily be a better option for employees. The same obstacles still apply in that the employer has more wealth, resources, and experience, and is still a repeat player. In addition, for employment discrimination cases, if the case does go to trial, “[employment discrimination plaintiffs] ‘win less often than other [civil case] plaintiffs’ and they prevail on their claims at ‘only half the rate of other plaintiffs.’”<sup>34</sup> At least when dealing with employment discrimination, advocates have asserted that informal alternatives to the court system provide plaintiffs with a more realistic chance for a fair resolution.<sup>35</sup>

### **C. Mediation Benefits**

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<sup>31</sup> Michael Z. Green, *Tackling Employment Discrimination with ADR: Does Mediation Offer a Shield for the Haves or Real Opportunity for the Have-Nots?*, 26 BERKELEY J. EMP. & LAB. L. 321, 339 (2005).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 328.

<sup>35</sup> *Id.* at 329.

Mediation actually counteracts many of the claims of the “oppression story.” Firstly, many of the assumptions made about power imbalance do not acknowledge that power comes from a number of different sources.<sup>36</sup> Even though wealth and resources are advantageous sources of power, they are not the only types of power. As previously mentioned, other types of power include personality and character traits, cognitive style and capabilities, and education.

Secondly, having equal power is not a necessity for a fair mediation.<sup>37</sup> Having equal power does not necessarily lead to a more effective negotiation because “symmetry in conflict situations tends to produce and reinforce hostility and prolong negotiations.”<sup>38</sup> This suggests that equal power is not a prerequisite for a fair mediation.<sup>39</sup>

Thirdly, even though stronger parties have more power, this does not mean that they will abuse their power. There is an argument that “disproportionately greater power on the part of one party in a negotiation often reduces the likelihood of a favorable outcome for the power party.”<sup>40</sup> Abuse of power could unintentionally cause the “weaker” party to be suspicious of the stronger party and reject the stronger party’s proposals.<sup>41</sup> Since parties attend mediation with the hopes of settling their disputes, the stronger party will have to budge or listen to suggestions from the weaker party for the mediation to continue. Furthermore, even though a party might be perceived as having more power, they may not necessarily use this perception of power in a negative, repressive way.<sup>42</sup> The mediator can help to move the parties from a “power over” stance to a

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<sup>36</sup> See Agustí-Panareda, *supra* note 8, at 27.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 28.

“power with” approach, allowing the power to be “used as a creative force aimed at joint problem solving.”<sup>43</sup>

Fourthly, the “oppression story” views power as a possession—something one party owns.<sup>44</sup> However, as previously mentioned, power is relational and constantly shifting.<sup>45</sup> The mediator can access these other power sources by speaking to the parties and finding out what is important to them. This can help even the playing field because, while wealth might not be the most important factor, it might be the only factor the parties are focusing on. This means the other party is not realizing their power and they are therefore, not able to use it. In litigation, the other party might not be able to determine where their power lies, but with the help of the mediator the interests of both parties can be addressed.

Finally, advocates who believe mediation is not right when there is a power imbalance also believe that the judicial process is the best tool parties have available to handle these types of disputes.<sup>46</sup> However, this is not necessarily true. As previously mentioned, the same issues of wealth, resources, and experience will have an impact in an adjudicative setting. The party that is wealthier will be able to hire a lawyer and can afford to go through the litigation process for a longer period of time. At least with mediation the timeline is often much shorter and the process is considerably less expensive than going through litigation. Additionally, “some critical legal thinkers question the adjudication process because they believe that the legal system is designed to preserve existing power imbalances in society.”<sup>47</sup>

### **III. Mediation Techniques to Balance Power Dynamics**

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> See Kelly, *supra* note 2, at 87.

<sup>46</sup> See Agustí-Panareda, *supra* note 8, at 28.

<sup>47</sup> *Id.*

***“An ounce of mediation is worth a pound of arbitration and a ton of litigation!” — Joseph Grynbaum***

### **A. Gendered Imbalances**

While mediation can be an empowering opportunity for women in cases of divorce, “[e]mpowerment in mediation comes about from interactive participation.”<sup>48</sup> When there is a history of domination and deference (as is the case in many traditional marriages), the mediator should concentrate on bringing the deferent party into the decision making process.<sup>49</sup> One way to do this is to engage the deferent party by actively encouraging evaluation of the ideas and proposals put forth by the more dominant party.<sup>50</sup> The mediator can also turn to the dominant party to explain how the proposal might work for both parties, thus converting the power to allow for mutual problem solving.<sup>51</sup>

Caucusing is also useful for parties that are more submissive. If parties fear conflict, they may not feel comfortable bringing up their feelings in front of a more dominant party. Furthermore, it can offer the mediator a chance to check in with the deferent party and probe for her feelings towards the proposal before bringing it up in the joint session. This offers the party a chance to explore and understand her feelings before bringing them up with the more dominant party. Tied into this idea might be an imbalance between the parties’ ability to communicate. If they are unable to communicate their thoughts in an effective manner, they may be less willing to try. Encouragement from the mediator can help the deferent party get their ideas across without feeling flustered or rushed.<sup>52</sup> If the mediator is encouraging to the deferent party, this

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<sup>48</sup> See Kelly, *supra* note 2, at 87.

<sup>49</sup> See *id.* at 90.

<sup>50</sup> See *id.*

<sup>51</sup> See *id.* at 91.

<sup>52</sup> See *id.* at 92-93.

also takes power away from the dominant party because it expresses the notion that both parties will be heard and both parties are offering valuable communication.<sup>53</sup>

Cognitive style and capabilities, as well as knowledge, can also cause power imbalances. If a party gets confused by concepts in a mediation, for example complex financial issues, “interventions include slowing the pace, using a flipchart to record data, asking clients to take notes, reassuring that no agreement is final until everyone understands, instituting separate sessions, making referrals to outside consultants, and offering considerable help in structure and integrating the data, proposals, and tentative agreements.”<sup>54</sup> Similar interventions can be implemented for a lack of knowledge. Additionally, the mediator can encourage questions and hold check-ins to make sure both parties are still on the same page.

#### **a. Domestic Abuse**

When handling domestic abuse situations, mediation should never be mandatory. However, mediation should still be available for parties that want the option. In Alaska, when victims of abuse were legislatively prohibited from mediating visitation issues, the victims expressed anger at being excluded.<sup>55</sup> When it comes to victims of abuse, they should be granted all the possible options to make them feel most comfortable.

Prior to mediation, screening should be conducted to determine whether the dispute and parties are appropriate for mediation.<sup>56</sup> The best type of screening is face-to-face, in private, and with someone of the same gender.<sup>57</sup> Since face-to-face is not always possible because of resource limitations, telephone sessions or questionnaires are also options.<sup>58</sup> Because victims of abuse are

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<sup>53</sup> *See id.* at 93.

<sup>54</sup> *Id.* at 93.

<sup>55</sup> Salem and Milne, *supra* note 17, at 36.

<sup>56</sup> *See id.* at 37.

<sup>57</sup> *See id.*

<sup>58</sup> *See id.*

not always aware they are being abused and do not always consider themselves victims, the screening should use ask about specific behaviors, such as “pushing, shoving, kicking, slapping, biting, punching, striking with an object, or threats with a weapon.”<sup>59</sup> Along with questions about physical acts, the interviewers should also “ask about verbal abuse, such as intimidation and threats, whether the police have ever come to the home, patterns of decision making about specific topics, such as financial issues, patterns of conflict resolution, and other issues that may reveal an abusive relationship.”<sup>60</sup> Screening does not end after the initial interview and mediators should continue to look for signs of domestic abuse throughout the mediation.<sup>61</sup>

Mediation should only occur with the consent of the parties and the mediators—meaning no mandatory court-ordered mediation. Furthermore, mediation may be inappropriate in the following scenarios: “(1) ongoing abuse; (2) batterer’s use of or threats with a weapon; and (3) the victim’s continuing to put the abuser’s needs ahead of her own.”<sup>62</sup> In these situations, the risk for the victim may be too high and the mediator should not attempt to resolve the dispute.

If mediation does go through with a domestic abuse case, there are a number of tools that mediators should use to ensure the victim’s safety and to make sure the victim is heard. Firstly, private caucuses are a necessity.<sup>63</sup> Holding frequent caucuses are essential to check in with the victim during points of agreement and disagreement to ensure that she is not intimidated or coerced into an agreement.<sup>64</sup> If the victim is incapable or unwilling to be in the same room as the abuser, then shuttle mediation might be more appropriate, where the mediator is moving back and forth between the parties (they may be in separate rooms or have sessions at different

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *See id.*

<sup>62</sup> *Id.*

<sup>63</sup> *See id.* at 38.

<sup>64</sup> *See id.*

times).<sup>65</sup> Being in different rooms will not only make the victim more comfortable, but there is also less of a chance for intimidation to occur. If it is unsafe for the victim to travel or for her abuser to know where she is, telephone mediation is another option and can be conducted either through a conference call or in a shuttle manner.<sup>66</sup> Providing the victim with “community resources and support services, such as a victim advocate, attorney, or counselor, may be effective in helping a client objectively assess options during a mediation session.”<sup>67</sup>

Furthermore, if a victim advocate can be present during the mediation, s/he can serve as another check on the power of the abuser and help to make sure the victim is not giving into proposals out of fear.<sup>68</sup> The mediator should also establish ground rules to restrict the agenda to specific issues.<sup>69</sup> For example, the victim might not be comfortable discussing reconciliation, dropping abuse charges, or modification of restraining orders, and ground rules can keep these topics off limits.<sup>70</sup> Finally, an attorney should be required to review the mediated agreement to assure informed decision-making.<sup>71</sup>

## **B. Employment Imbalances**

When dealing with employers and employees, it is important to try to mitigate the advantages that the employers have as repeat players. The main advantage to being a repeat player is “the ability ‘to choose and manipulate what process will be used to enforce substantive rights’ because ‘advantages . . . will flow to the repeat player who controls virtually all aspects of the disputing process.’”<sup>72</sup> One solution is to ensure that the employee also has legal counsel, who

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<sup>65</sup> *See id.*

<sup>66</sup> *See id.*

<sup>67</sup> *Id.*

<sup>68</sup> *See id.*

<sup>69</sup> *See id.*

<sup>70</sup> *See id.*

<sup>71</sup> *See id.*

<sup>72</sup> Green, *supra* note 20, at 340.

are generally also repeat players in mediation.<sup>73</sup> However, this is not always possible because affordable legal counsel might not be available to the party. One suggested solution is to ask the counsel for the employer to explain the law to the employee.<sup>74</sup> While the counsel might be unwilling to do this, it could also present a show of good faith on the part of the employer. Mediation is about coming up with suitable solutions for both parties and sharing information to get there. If the employer is serious about reaching a solution, then this could be a viable option.

Another option to make sure the employee understands the law is “to get the parties to agree that legal norms may play a role in reaching informed consent and to seek permission from the parties allowing the mediator to discuss those legal norms with either party, as requested.”<sup>75</sup> The same logic applies here. If the employer is actually looking to putting forth a good faith effort, then having the employee be informed about the law will help the process. It is also helpful to inform both parties that there could be trouble with the mediated agreement later on if either party did not fully understand the terms when it was signed. Furthermore, if the mediator feels as though the employee really does not understand what is going on, then it is the mediator’s duty to end the mediation because the process is no longer fair. Since the employer likely wants to come to an agreement in mediation, agreeing to at least one of these terms would be in the employer’s best interest.

The employee should also be involved in the mediation process before it even begins. This suggestion needs to be implemented into the actual mediation system because the mediator cannot help with this. The employee should be ensured “fair and balanced selection processes for the mediators”<sup>76</sup> and provided “the opportunity to select diverse mediators who do not represent

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<sup>73</sup> *See id.* at 340-41.

<sup>74</sup> *See id.* at 350.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 341.

repeat player advantages for the employer.”<sup>77</sup> This suggestion is hard to implement because as one-shot disputants, the employees might not know the procedures for setting up a mediation. This means that the process of selecting a mediator would need to have some extra regulations to protect the parties.

### **C. Comparison of Gender and Employment Imbalances**

Techniques for correcting power imbalances for gender and employment mediations overlap in many places. For example, even though the following techniques are listed under correcting gender imbalance, they can still help with employment mediations: actively engaging the deferent party, caucusing, encouraging the deferent party, and slowing down and checking in to ensure that all parties are on the same page. Utilizing these techniques in employment mediation can also serve to level the playing field for employees who feel like they cannot share their ideas or for those who do not know how to share their thoughts. However, the techniques for balancing power in domestic abuse mediation do not translate as well because most of them are meant to keep the victim safe. While caucusing and checking in is important, solely conducting shuttle mediation in an employment scenario will hinder the collaborative atmosphere mediation strives to bring about.

Likewise, techniques for balancing employment power dynamics can also be applied to mediations with gender imbalances. Mediations with gender imbalances (specifically for divorce mediations) do not usually have the additional hurdle of repeat players versus one-shot disputants. However, these mediations do often have the economic disparity that gives an advantage to the employer. If this is the case and one side has a lawyer, while the other does not, it could be helpful to either have the lawyer explain the law or obtain permission for the mediator to be able to explain the law. Even though this might be less appealing to the advantaged side, it

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<sup>77</sup> *Id.*

will help to create a collaborative environment. It will also help in the long run if both parties are fully aware of what they are getting into because this will leave both parties feeling satisfied and there is less of a chance of one party challenging the mediated agreement.

A final similarity revolves around the mediator's power. A mediator controls the mediation and can foster a collaborative environment instead of the typical adversarial atmosphere. Mediators should constantly remind the parties that mediation is a voluntary process and that the parties are in control of the mediation.<sup>78</sup> They have the opportunity to have input on the process, make their own proposals, and veto proposals. Mediators can also model the behavior they want the parties to exhibit (listening, being respectful, not interrupting) and monitor the parties to make sure they are adhering to the respectful communication model that was likely established at the beginning of the mediation.<sup>79</sup> Mediators can also make sure that all relevant documents and information have been produced and make sure there is understanding among the parties either by providing education themselves or referring parties to other sources.<sup>80</sup> They can also ensure the parties are not rushed into making any decisions and check in to make sure parties are comfortable with the mediation process.<sup>81</sup> Finally, mediators have the ultimate power to terminate the mediation if they do not believe the process is fair to both parties or they no longer feel comfortable with the situation.

#### **IV. Conclusion**

There are many ways to interpret power in mediation. Oftentimes when we think of power in mediation we think of economic power or societal power. However, power is multifaceted—it cannot be limited to just the obvious factors. Power has a number of different

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<sup>78</sup> See Kelly, *supra* note 2, at 96.

<sup>79</sup> See *id.*

<sup>80</sup> See *id.*

<sup>81</sup> See *id.*

factors that are often ignored. Mediation can offer the chance to empower both parties and help them use this power to create a collaborative atmosphere. Empowerment comes from interactive participation, so it is up to the mediator to involve both parties in the mediation.

Power imbalances occur when one party has more wealth, resources, and experience. The assumption is that stronger parties will exert their wills onto the weaker parties, thus forcing the weaker parties to agree to less favorable terms. However, this ignores the basic understanding of mediation, which is that mediation is a voluntary process, both parties presumably want to reach an agreement and avoid the costs of litigation (both time and money), and an agreement cannot occur until both parties give their consent.

In cases of gender and employment imbalance, women and employees are often viewed as the weaker party. They do not have the same resources as men/employers and, because of the way they are viewed by society, they might be perceived as or even feel subservient to their respective counterparts. However, this does not mean that mediation is inappropriate for these parties. In order to achieve fairness, the mediator should actively engage these parties by using methods such as asking for their input, referring them to appropriate resources, and by caucusing to check-in and make sure they understand and are comfortable with the process. Power is not static and by engaging the perceived weaker parties, the mediator can empower them and help them find their voices.

Mediation is a powerful tool that should remain an option for all parties. Despite critiques of the system, mediation is ultimately a voluntary, confidential process. Even if the power dynamics seem imbalanced, either the parties or the mediator can always terminate mediation. It is only one option that is available to parties to help them achieve a fair and equitable outcome.

Mediation, if used effectively, can tackle these perceived power imbalances and offer parties a faster, more efficient way to resolve their disputes.