

POWER IMBALANCES IN MEDIATION

By: James Christopherson

- One definition is the ability to control resources or access to resources that another wants or needs. Power is a relational concept. It does not exist in a vacuum, but it exists and is exercised in relationship to others.
- Many define power as the ability to get what one wants. One well-known mediator has defined power as “control of or access to emotional, economic, and physical resources desired by the other person.”
- Power is comprised of many factors.

2. WHAT IS A POWER IMBALANCE?

- When the dynamics between the parties affect the discussion of solutions to the point that one or both parties are:
 - Unable to speak for themselves
 - Unable to reach a voluntary agreement
- Power is relative, situational, and can shift.
- Even if one person has more power than another, each person has some degree of power.
- Degree of power, awareness of having power, and exercise of that power are three separate things.
- Not every power difference between parties affects settlement or mediation.

3. EXAMPLES OF POWER IMBALANCE:

- Belief system – a belief that one is on the side of right.
- Personality – the image one projects, how powerful one acts.
- Self-esteem – the internalized image of oneself, how powerful one feels.
- Gender/Race – Western society grants women and people of color less power.
- Selfishness – consistently putting oneself before others is a form of power.
- Force – willingness to use coercion or threats and the fear engendered in others is a form of power.
- Income/assets – power increases with income and the accumulation of assets.
- Knowledge – possessing information is a form of power.
- Status or age – increased status confers increased power, and power usually increases with age.
- Education – higher levels of education are associated with higher levels of power.
- Physical / emotional abuse

4. HOW AND WHEN TO RECOGNIZE A POWER IMBALANCE?

- Speaking to parties in advance
- Speaking to counsel in advance

5. IF A POWER IMBALANCE BETWEEN THE PARTIES EXISTS, HOW CAN MEDIATION BE FAIR?

- **Role of the Mediator.** The issue of power does not end with an examination of the party's power. Analysis of the power dynamics within the mediation process must include examination of the mediator's power. Though the mediator is impartial, his or her impartiality should not be construed as a lack of power. The power of the court-appointed mediator is readily apparent: she or he clearly has the authority of the official court behind her or him. The power of the private mediator is not so apparent, but it is very real.
- A mediator's power derives from his or her control of the entire process. This control manifests itself in several ways:
 1. Creating the ground rules.
 2. Choosing the topic.
 3. Deciding who may speak.
 4. Controlling the length of time each person may speak.
 5. Allowing and timing a person's response.
 6. Determining which party may present a proposal to the other.
 7. Presenting an interpretation of what the party said.
 8. Ending the discussion.
 9. Writing down the agreement.
- Note that every element of power listed is controlled by the mediator. The mediator actually has the most power in the room.
- The mediator must recognize the power dynamics between the parties in order to address the power imbalance between the parties.

6. OTHER TECHNIQUES TO "BALANCE" POWER

- Neutral/safe venue for mediation
- Assist each party to obtain all the information needed
- Encourage use of an attorney
- Use of caucus
- Separate sessions
- Closely enforce ground rules
- Use of co-mediator

7. SHARING OF EXPERIENCES FROM MEDIATIONS

- Examples of power imbalances
- What worked and what did not

James A. Christopherson practices in the area of healthcare law, construction and real estate law, litigation and alternative dispute resolution. Mr. Christopherson regularly advises and represents healthcare clients and providers on a wide range of healthcare issues, including compliance, Stark, HIPAA, collections, litigation, medical malpractice, joint ventures, and corporate issues. He received his B.A., *magna cum laude*, from Michigan State University, and his J.D. degree, *cum laude*, from Wayne State University. He is a member of the State Bar of Michigan and is admitted to practice before the United States Supreme Court (where he has personally argued), the United States District Courts for the Eastern and Western Districts of Michigan, and the United States Court of Appeals for the Sixth Circuit. He is the recipient of the American Jurisprudence Award for Taxation. He is a member and former president of the Grand Traverse/Leelanau/Antrim Bar Association. He is a member of the American Health Lawyers Association, and the Health Care Law Sections of the State Bar of Michigan and the American Bar Association. Mr. Christopherson is an arbitrator and mediator for many organizations including many courts, the American Arbitration Association, the National Arbitration Forum, the American Health Lawyers Association and the International Institute for Conflict Prevention & Resolution. He is Member of the Chartered Institute of Arbitrators. Mr. Christopherson can be reached at Christopherson@ddc-law.com or at 231-929-0500.