

9-11 Hope

Hope. We can't hold it in our hands - yet we can give it to someone else. We can have hope and give it away at the same time. Hope has no colour - yet its absence leave us in drab grayness. Hope weighs nothing - yet it can ground us, anchor us.

Hope can be found where we least expect it. People who seem to have nothing else may be rich in hope. People with all their material needs met may lack that essential hope. Hope is a noun and a verb. Some of us may see hope as a goal, something to which we aspire. And yet without hope, what sense does it make to aspire to anything?

The dictionary says that the archaic meaning of hope is "a feeling of trust". To experience the combination of expectation and desire that is "hope", the element of trust is still an essential component.

September 11 and the subsequent events have been felt world-wide. It seems as if hope is a scarcer commodity, more out-of-reach for us than ever. It is much easier to be overwhelmed with feeling "hopeless" than to find the positive energy to experience the feeling of "hopeful".

As mediators, one thing that we can have and give is - hope. It is not just something we are able to do. It is our responsibility to hope and to give hope.

(Inspired by Dr Larry Fong, October 13, 2001)

The Myth of Mediator Neutrality

You and the person with whom you or your client have a dispute have agreed that mediation is the next step. The search is on for a "neutral" mediator. Meanwhile academics and practitioners in the field of mediation are asking the question: is it *possible* for mediators to be neutral?

As you might have suspected all along: the jolly fat guy who brings presents down your chimney and mediator neutrality - both are myths.

Mediators as brokers

Mediators are brokers rather than pure service professionals according to Toronto researchers Dr Desmond Ellis and Noreen Stuckless. Their definition is that pure service professionals work only in the interests of their clients with no interests of their own. In contrast brokers "are intermediates who work in the interests of their clients but who also have 'a set of interests that intervenes on, or even conflicts with, the goal of pure service.'" According to Ellis and Stuckless mediators are brokers who attempt to use their resources (potential power) in ways that result in the outcomes they prefer.

Potential and actual power

Potential power has two main sources. One is sociological resources, derived from the whole society's commonly held values or from its legal system. The other source of potential power is personal or professional resources. These factors may affect the potential power of each negotiator in the mediation and the mediator as broker. An example of sociological resources occurs in divorce mediation when a woman who has been mainly responsible for caring for the children and placing their needs over her career interests would be able to refer to the fact that her behaviour in this respect conforms with societal values for what is considered a "good mother". This might give her bargaining power in negotiating for sole custody and, because

of her resulting low or no income level, higher child support. Professional or personal power resources for that same woman might be her education as a lawyer or her strong skills in communicating her views.

Potential power is the total of the sources of power with the constraints on the power deducted. For example gender inequality may disadvantage women or men in divorce mediation; racism may disadvantage negotiators depending on the race of the participants.

Converting potential power into actual power is the next step. "Threatening, promising, informing, manipulating, misinforming, compromising, cooperating, exchanging, coercing, revealing where the best interests of the other party or parties truly lie, appealing to higher loyalties (such as the best interest of the children)...are all ways of exercising power" according to Ellis and Stuckless. The negotiators and the mediator may choose to use these and other methods of exercising actual power.

Mediator Power

Controlling the process of communication has been identified by many researchers as one of the most significant factors affecting the exercise of power in mediation. Some researchers have concluded that mediator control over the process of communication is essential to ensuring equal bargaining between the parties. The effective exercise of power is assessed by the degree to which the outcome of the mediation achieves the outcomes valued by each of the negotiators and the mediator. The research on divorce mediation found there were valued outcomes for mediators such as agreements that reflect values important to the mediators (for example equity, shared parenting), high compliance rates, continuity of the mediation service, personal satisfaction, career enhancement and job security.

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Munn-thly Memo

Q. I'm on the board of directors of an (Ontario) condominium. The board is having problems with enforcing the condominium rules and bylaws. Certain owners ignore the rules or have various excuses about why the rules don't apply to them. The situation has been getting worse over the last year. Now we have owners complaining that we are not enforcing the rules fairly. Help!

A. As of May 5, 2001 virtually all disputes in condominiums must go to mediation before they can go to court. The new Ontario Condominium Act sets out the basic requirements for using mediation.

The Ontario Condominium Act says that the mediation shall be done by a person selected by the parties. Section 132 tells the mediator to "confer with the parties and endeavour to obtain a settlement" with respect to the disagreement submitted to mediation. Payment for the mediator's fees and expenses will be according to the settlement or as specified in the notice by the mediator that the mediation has failed. Disputes of the type you describe between the condominium corporation and owners about the by-laws or rules must go to mediation unless the same people have previously submitted the same matter to mediation.

If a mediator does not obtain a settlement then the

disagreement goes to arbitration. The time period is 60 days after the matter was submitted to mediation if no mediator is selected or 30 days after the mediator provides a notice that the mediation has failed.

According to the Condominium Act both mediation and arbitration must have been tried before the condominium corporation can proceed to apply for a Court order in this situation.

Your condominium can create additional rules for the mediation and arbitration process in a by-law so that it is detailed and specific for your condominium community. You may wish to consult a lawyer experienced in dispute resolution for assistance with drafting a by-law.

More information about mediation in condominiums is available from the Summer 2001 issue of *Common Ground* available at www.munnrcs.com or by calling our office for a copy.

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Impartial exercise of mediator power

Even if based on this analysis the mediator cannot be considered neutral, the mediator can be impartial. The impartial mediator does not favour one party over another and does not conduct the mediation in such a way as to have this effect.

What can the mediator do to exercise their potential power impartially? Mediators can become informed about sources of inequality such as culture, race and gender and be aware of how those issues may be affecting the dispute which is the subject of mediation even if those are not issues which can be solved by these negotiators.

Remember my reference above to the jolly fat guy? That would only be understood by people with a certain cultural background. If I were to say that in a mediation session where every one of the mediation participants does not understand the reference although it might be an aside or an attempt at humour, it may have the effect of serving to underline the cultural divide between the participants. This might be counter-productive to my efforts to help the participants find common ground.

Mediators must be self-critical and constantly evaluate their work. They should not be complicit. For example if they see power imbalances resulting from racism they should act in such a way as to alter this. If their efforts to balance power are not succeeding they should stop the mediation. Mediators should not have rigid ground rules. An example is the ground rule "no shouting" which may have a negative impact on people whose cultural norms encourage the form of expression that might be considered shouting. Loud self expression becomes a problem if the other participants find that practice intimidating and in that case it must be addressed by the mediator.

The myth is exposed: mediators are not neutral. A mediator brokers the outcomes desired by the mediation participants as well as the mediator's valued outcomes such as equity in the agreement, and high compliance rate. Mediators can and should be impartial as between the participants and remain vigilant to ensure that this continues throughout their participation in the mediation.

For more discussion about the power imbalances in mediation I refer readers to *Mediating and Negotiating Marital Conflicts* by Desmond Ellis and Noreen Stuckless, especially Chapter 6.

Mark Your Calendar

Upcoming Training Events
Presented by Kathryn Munn

Mediation Training

Full 40 hour program

Fanshawe College

Part 1 - January 24 & 25, 2002

Part 2 - February 21 & 22, 2002

Part 3 - March 21 & 22, 2002

Call 519-246-1412 for more information and registration.

Dealing with Difficult People

Middlesex Law Association

January 17, 2002

12:30 to 1:30 p.m.

Barristers' Lounge, Courthouse, London

Call 519-679-7046 for more information and registration.

Dealing with Difficult People

IAPA (Industrial Accident Prevention Association)

National Conference

at Metro Convention Centre, Toronto

April 24, 2002

Call 1-800-669-4939 or 416-506-8692 for more information and registration.

I am pleased to fill requests for presentations about mediation and negotiation at meetings of professional and business groups. Call or e-mail to make the arrangements.

Electronic Common Ground

If you prefer to be on our e-mailing list please send us an e-mail.

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