Much of Queensland's A. & T.S.I. population resides in isolated communities, formerly missions and government reserves. These are commonly known as Deed of Grant in Trust (D.O.G.I.T.) or Trust communities. Legislation passed by the previous government in 1986 provided for new land arrangements - deed of grants in trust.

The C.J.P. held consultations during the second half of 1992 with several communities with a view to selecting one community to pilot a mediation service.

A number of principles informed the manner in which the task was approached:

a) Commitment to skilling local people to mediate in disputes within their own community.

b) Recognition of the need to commence and develop the program in consultation with a community. Broad community support was required in view of representational dilemmas referred to earlier.

c) Concern to not undermine the authority of elders and traditional dispute processing mechanisms which are in place to varying extents in different communities.

d) Acknowledgement that mediation is only one of a number of community justice mechanisms, and that it would function to best advantage as part of a comprehensive set of interlocking strategies to address disputation and violence.

e) Development of culturally-appropriate mediation models and training material.

The community ultimately selected was Hopevale, a community of approximately 1,000 persons located one hour's drive from Cooktown and 360 kilometres north of Cairns. Hopevale was originally a Lutheran mission which brought together mostly Guugu Yimidhirr-speaking clans from the Cooktown region and further north who had originally been dispossessed by the Palmer River gold rush and the spread of the cattle industry.

Some of the major issues and considerations that faced the C.J.P. in developing and implementing the mediation training package for Hopevale were:

1. ***Selection of Mediators***

This was seen as pivotal to the success of the initiative.

Ideally, those selected needed to be broadly representative of the community (this, in the context of customary law and authority systems and modern adaptations/impositions, is not easy to define), acceptable to the whole community, committed to the concept of mediation, available to undertake the training, and in possession of the interpersonal and analytical skills necessary to engage and manage the disputants and to track the content of the dispute.

Various options were considered for recruiting and selecting mediators including:

- advertising in the community;
- adopting a ready-made list of interested people provided by an elder;
- asking each of the major family groupings to nominate someone; and
- asking the Council to nominate people.

Ultimately, participants self-selected following a number of visits to the community by C.J.P. staff, both to give information about the training project, including demonstration role-plays and to mediate in an earlier dispute. Self-selection may not necessarily be the best basis for choosing mediators in Aboriginal communities because of traditional cultural patterns which favour self-deprecation in communication. Those most vocal and ready to take up such an opportunity offered from the outside may not be the persons with most influence or acceptability within the group. This can lead to the efforts of the trained mediators being undermined or thwarted by the more influential few.

Alternatively, members of marginalised families may feel unable to put themselves forward. As an outsider only visiting the community, it is very difficult for someone to develop a comprehensive and accurate understanding of these matters, and they often only become clear after regular contact and visits.

Sixteen people enrolled in the program. Nine persons actually commenced the training course on 10 May and formed the core of a mediator panel in the community. All are respected and represent a number of families within the community. Two are community police; one a primary school teacher (a local person who went to Adelaide for teacher training and then returned to the community); one is the wife of a regional A.T.S.I.C. Councillor and Chairman of the Cape York Land Council. The age range is from the late thirties onwards. Unfortunately, only one of the participants was a woman.

The training was facilitated by Alex Ackfun, the Aboriginal Mediation Project Officer at that time and Patricia Hovey, a white woman who is the C.J.P.'s full-time Training Officer.

As part of the training, the mediators were assisted in working out how they would manage the delivery of a community-based mediation service, from intake procedures through to the records and monitoring systems design. Since then, the Project Officer has continued to provide support in the form of advice and regular visits to assist the design and implementation of a community-based and managed mediation service.

2. *Content and Structure of the Course*

The C.J.P.'s standard training manual and training scripts for role-plays were not considered culturally appropriate for the Hope Vale course.

A special manual was developed with new role-play scripts. The trainers were determined to be flexible and responsive to input from trainees. This need for flexibility has been borne out.

The role-play scripts required further amendment once the course commenced. The presence of only one woman in the group created difficulties as many of the role plays revolved around family feuding and required female roles. Male participants were very uncomfortable with role-playing women, but persevered for the sake of the training. Role-play content was also amended by participants who wanted them to reflect actual disputes they had experienced at Hopevale. In an attempt not to offend local sensitivities, the trainers had originally written "neutral" situations which could not be construed as reflecting any current disputes on the community.

In order to accommodate the local lifestyle, which would inevitably require participants' absence from the training course on family and other business, the course was extended from the usual 72 hours to 96, conducted between approximately 9.00 a.m. to 3.00 p.m., Monday to Thursday over four weeks, commencing with a two-week block followed by a week's break and then the remaining two weeks.

Attendance varied on a day-to-day basis from a maximum of nine people to a minimum of three as a result of participants' other obligations, and a level of flexibility was provided by the facilitators.

3. ***Post-Training Phase***

Major challenges remain in the post-training period to support trainees and maintain and enhance their skills as they attempt to exercise the role of mediator in an isolated community, and to evaluate the success of the initiative. This will continue to be a major function of the Project Officer, with the emphasis here being on assisting the development at a community level of systems and operating procedures that the community believes will meet its dispute resolution and management needs.

By strengthening local systems for dealing with disputes, it is anticipated there will be less need to call on the C.J.P. for mediation services. The ultimate potential benefit to the community is in the ability to deal with conflicts quickly and independently, thereby reinforcing the principles of self-determination and empowerment.

Progress to date has been very satisfying: there are clear indications the skills gained through training have been applied by the mediators, not only in settling conflicts, but also in other roles where they have been able to generally improve the flow of communication, problem-solving and levels of understanding between the people involved. While there have been no mediations conducted using the C.J.P. model (two mediators and twelve step process), all the mediators have described where they applied the knowledge and skills gained through the training in more informal ways to resolve conflicts and disputes in ways that are more aligned to the community and traditional ways of interacting.

Provision of Visiting Mediation Services

Another strand of the C.J.P.'s work with A. & T.S.I. communities has been the provision of a visiting mediation service, often on a crisis-response basis.

Requests for visiting mediation services have come from several sources: the Aboriginal Coordinating Council, police, the offices of the Minister for Family Services and Aboriginal and Islander Affairs, and the Minister for Tourism, Racing and Sport who is responsible for liquor licensing and communities themselves where they have been familiar with the C.J.P.'s work.

Providing services in this way is clearly a very expensive option for the C.J.P., although in a number of instances Community Councils have shared some of the expense. The C.J.P. is nevertheless committed to fulfilling its role in the Queensland "Whole of Government" approach to service delivery within Aboriginal communities.

Whilst it is very demanding for mediators to enter an unfamiliar community on short notice, communities themselves often the see the outsider role of the mediators as an advantage in terms of neutrality. Even in Hopevale where local residents are trained as mediators, most people insist that for more serious disputes it would be necessary to bring in mediators who do not have ties (particularly family) to parties to the dispute, and that the perception of neutrality is often a greater concern than whether the person is Aboriginal or not.

In addition to dispute-resolution services provided to communities, the C.J.P. has mediated in a number of disputes involving Aboriginal people in country towns and urban centres, and facilitated several consultation processes between government departments and Aboriginal stakeholders.

Issues and Dilemmas

Some of the hallmarks of classic mediation are severely challenged by adaptations to the Aboriginal community context. For this reason, there is no plan at the current time to accredit the mediators trained at Hopevale under the Dispute Resolution Centres Act 1990. It may not be possible nor appropriate for them to operate under the constraints imposed by the Act, nor would it be easy for the C.J.P. Director to meet legal and program accountability requirements for mediators operating under the circumstances envisaged at Hopevale.

Neutrality

The actual and perceived neutrality of the mediator is considered a significant factor in the success of all mediation. This is not lost on Aboriginal and Islander people who, in many of the cases, have welcomed and often asked for outside mediators. Whilst most people insist that mediation be conducted by people who are seen to be neutral and not connected with the issues of people, local people who are respected for their impartiality within the community and are trusted to keep matters confidential, will often be accepted as mediators in most disputes. People with this level of respect are usually well established Elders, although some younger people sometimes qualify.

Because it is almost impossible for outsiders to determine who is trusted and respected enough to be accepted as a mediator, the decision is best left to the parties involved in the dispute.

The C.J.P., whilst offering a visiting mediation service, is committed to skilling local community people, consistent with a principle of empowerment. The first choice is to assist local management of the dispute by members of the community with Community Justice Program mediation services being available as back-up if and when needed. Where outside mediators are requested, first choice is given to employing Aboriginal mediators with other mediators, when needed, being selected carefully for their proven ability to communicate effectively and interact comfortably with Aboriginal people.

Most Aboriginal people expect that everyone must hold personal views, feelings and attitudes about the issues in dispute and therefore do not accept the notion that anyone can be neutral. However, outsiders are often requested more because they are not related and are therefore expected not to be bound by any reciprocal obligations, and are expected to be more able to be impartial in their dealings with all parties to the dispute. Basically, the overriding concern is that the mediator is not seen to be taking sides, and the skills acquired in mediation training are valuable in maintaining an impartial stance. Trust that an individual will behave in an impartial manner can outweigh any concerns about the issue of neutrality.

Voluntary Attendance

The legislation governing the operation of the C.J.P. ensures the voluntary nature of mediation. The relationship between mediation and various forms of formal or informal authority on communities is yet to be worked out. It has been suggested (Cedric Geia, Personal Communication, Cairns, 1992) that mediation may only be considered acceptable in some communities if a respected other person "orders" mediation for parties as the prescribed method of dispute settlement in particular cases.

The alternative dispute-resolution process is flexible enough to accommodate these variations. Ideally, however, mediations are organised and managed and should be considered by the communities and decided according to local needs.

Confidentiality

In Western culture, the confidentiality of the mediation process is a key element which enhances the attractiveness of the mediation option for parties and contributes to its success through enabling a free and frank discussion without fear of legal consequences.

In Aboriginal society, privatisation of disputes as experienced in mainstream urban culture, is rarely possible and not always desirable to the parties or their community in view of physical living arrangements and kinship obligations.

In many disputes, extended family or even the whole community are usually affected by and well aware of the history and causes of the dispute and will expect and often need to be aware of the outcomes of the mediation. It is important that those who supported the opposing parties in a dispute and have therefore shared the hurt and anger should also share in the celebration of mending and settling process, otherwise they could feel a sense

of being cheated by not being informed of the outcome, and a new conflict develop. A formal and often very public announcement by the parties of their resolution or joint arrangements is often necessary to make their families or other groups aware of the outcome and agreements.

Experience has shown that the issue of what information is made known publicly must always be a decision of the parties, and that mediators should always maintain confidentiality unless specifically asked by the parties to help with some announcement.

While the issue of privacy may be stated as a major concern and is insisted on by all parties when arranging a mediation, it should come as no surprise if the parties choose to inform others of the outcome after the mediation is done. Because of the very structure of communities, their remoteness, small town layout and the traditional and cultural factors that bind people to each other, it is almost impossible for anyone to keep a secret on Aboriginal communities. It is, however, very important that the news of what took place or came out of a mediation must never come from a mediator.

Domestic Violence

The C.J.P. has a policy of not mediating between spouses where domestic violence is a problem. This policy is consistent with that adopted by the National Committee on Violence Against Women (Astor, 1991).

Domestic violence is considered to represent too great an imbalance of power between the parties to enable justice to be done in mediation. Mediation may both expose the victim to physical danger or further harassment and intimidation and prove detrimental to her longer term interests as she attempts to negotiate from a position of weakness.

Aboriginal people commonly identify family fighting and domestic violence as concerns suitable for mediation. This has always represented a policy dilemma for women's advocates who seek to safeguard the interests of abused women, yet accommodate Aboriginal views and aspirations.

There is also a view that Aboriginal people have a higher acceptance or tolerance of violence within their families and communities, and some people ascribe to the notion that violence is culturally more frequent and accepted. While the facts indicate higher levels of violence in most Aboriginal communities than in the general community, this does not necessarily mean that it is somehow a result of being Aboriginal. I think we need to be wary of any suggestion or doctrine that it is in the blood or the genes or the nature of Aboriginal people to be more or less violent than any other human. Aboriginal views and attitudes towards violence can best be understood by analysing the long history of violence inflicted systematically against Aboriginal people by non-Aboriginal institutions.

There have been very few mediations between Aboriginal and/or Islander spouses to date, but there has been an ongoing interest expressed in using mediation where there has been domestic violence. The claim is often that while the violence itself is not acceptable, cannot be negotiated and needs to be addressed through some other process (counselling programs etc), there are other important understandings about values and feelings as well as living arrangements that could be worked out through mediation that could improve the relationship.

Astor (1991:19) says:

> "Alternative methods of resolving disputes, such as mediation, may be useful or appropriate for Aboriginal women, but it should be for Aboriginal women to decide if this is so, to decide what types of A.D.R. are appropriate and whether alternative methods provide sufficient protection for victims of violence."

Even the issue of power imbalance is not so clear when dealing with Aboriginal communities, and can only be considered on a case-by-case basis. It would be fair to say there is general acknowledgement that further policy development informed by experience is required in relation to this sensitive issue.

Reluctance

While there has always been a high level of interest and support from the Aboriginal and Islander communities for the concept of mediation, there are also a number of factors that cause some reluctance amongst Aboriginal people to attending mediation. The issue of trust is particularly important in light of the inordinate levels of intrusion and control exerted over Aboriginal people by the agents of government and other institutions in the past.

Aboriginal people are still recovering from the policies of protection, assimilation and integration that saw families torn from their land and individuals torn from their people and families and scattered across the nation. The results have been: (i) a lack of confidence and trust in any agency or service by government; and (ii) a strengthened desire to take charge of our own lives and future. The reluctance is being steadily overcome by the strategies adopted by the Community Justice Program to empower and build confidence and trust. The Aboriginal Project Officer is employed to personalise advice, and Aboriginal mediators are employed across the state, but the best results are often gained through word of mouth where parties to a successful mediation spread the word through the "murri grapevine".

The promotional activities are raising awareness and interest, but it is common for Aboriginal people to seek very thorough explanations before committing to the process. While the trust is being steadily built and improved, and the percentage of Aboriginal and Torres Strait Islander people utilising the service is comparable with the representation in the State, there is still an almost total reluctance to have family conflicts brought to mediation.

Research and Reports

Much writing about resolving disputes amongst Aboriginal people has been as a result of research projects and studies, often conducted in remote Aboriginal communities of the type initially established as mission reserves in the mid-1800s to early 1900s. These studies have focussed primarily on identifying what, if any, traditional means and mechanisms exist and are utilised to deal with disputes in communities, and how social, cultural and historical factors have impacted. The emphasis has been on studying communities who are thought to be "more traditional", which has led to a vacuum when

it comes to understanding the needs of the larger population of Aboriginal people who are residents of urban centres.

Although most Aboriginal people are basically fed up with being studied and analysed to the nth degree, have little faith in the interpretations made, and don't expect to see real benefits in our lifetimes, we do tend to be a tolerant and forgiving bunch: we continually allow and sometimes even assist generation after generation of scholars and anthropologists to drift in and out of our communities and lives time and time again, asking the same questions and being told the same answers. This does not deny that some of these people are very dedicated to improving the situation of Aboriginal people, but it does leave some doubt about the real purpose and value of the many studies done.

Some of the excellent work by such people as Nancy Williams (Northern Territory research) and Kayleen Hazelhurst (Queensland) have not only analysed how conflicts are handled at a community level, what is effective and where the gaps are, but have also gone on to provide some thought on how traditional and contemporary procedures and mechanisms could complement each other and be improved. These writers have shown the impact that generations of control and domination by outside agents (governments, church and schools, etc.) have had on various aspects of Aboriginal community life generally, and how traditional mechanisms and procedures for maintaining social control and dealing with conflict have been affected.

Ultimately, both writers have promoted the need for the empowerment and resourcing of people to enable them to develop and deliver community-based dispute management processes that suit their particular needs, to complement or as an alternative to the often limited and more formal non-Aboriginal systems and services (courts, police etc) available at present.

The main problem seems to be not so much in the research as many sound and practical recommendations often result, but rather in the implementation. Recommendations resulting often transform into creatures of a completely different form and disposition once they are translated to government policy and programs, often with the result of further disempowerment of the communities and a re-enforcement of the dependency on outside or expert assistance or intervention.

Conclusion

The C.J.P. has now had some five years of experience of mediating in Aboriginal and Torres Strait Islander communities as well as the regular involvement of A. & T.S. I. clients and mediators through our four regional centres of Brisbane, Rockhampton, Townsville and Cairns. This experience when combined with the knowledge gained through implementing the pilot mediation project in the Hopevale community has provided valuable insights and lessons for our staff and mediators on what works best and what doesn't when providing dispute resolution services to Aboriginal people generally.

The pilot project on the Hopevale community was intended to serve as a model that other communities could learn from and adapt to suit local requirements. The outcomes indicate that while the training has helped people develop skills in dealing more effectively with disputes and a broad range of conflict at a community level, the more formal process of mediation that was taught has been adapted to suit local requirements.

While no formal mediations have been conducted using the complete process they were trained in, the mediators have applied the skills using less formal methods that appear to be more compatible with the social patterns and requirements of the community. This in itself has been a valuable outcome as it provides a guide to how training and ongoing support can empower community members to design and deliver local solutions to local problems.

To what extent alternative dispute resolution as practised by the C.J.P. will be adapted to indigenous needs and processes is not yet clear. Also yet to be determined is the value to be placed on such adaptation by our Program and its political masters. Will adaptations which deviate in significant respects from the idea of mediation we hold up be regarded as a measure of success or failure of the Aboriginal mediation initiative? Only the people who are involved with and affected by the initiative will be able to assess whether the efforts have been worthwhile or not. We believe that the results to date are very encouraging although only time can tell where the journey will take us.

When considering why Aboriginal people may be more reluctant than the general population to bring family conflicts to mediation, it is useful to consider that the main impact of past policies and practices governing the lives of Aboriginal people has been most heavily experienced in the breaking up of families. What was the foundation of Aboriginal existence, strength and stability was attacked and torn apart. Little wonder that most Aboriginal people now guard their rights to govern decisions about their families most jealously, and cannot give trust freely.

Finally, a word on the issue of empowerment as it relates to dispute resolution, particularly in Aboriginal communities. Over the last two decades the policies of empowerment and self-determination over decisions affecting Aboriginal lives have steadily replaced, at least in principle, the assimilation and integration policies of the past. Paternalism, however, remains a stubborn thorn in the side of all efforts to empower Aboriginal people and communities. Add to this the delays and further frustration caused through lengthy "consultation" to plan and implement projects and the accountability measures (strings) and it is little wonder why Aboriginal people generally lose faith in the government's ability to put the principles of empowerment into place.

If governments and other agencies were to provide the necessary access to information, resources (including funds) and support to enable Aboriginal people to decide for themselves the design, implementation and measurement of their own projects, with no strings attached, maybe then we could say with some confidence that real empowerment as recommended in so many reports and studies, is truly being practised, and not just preached. Maybe then Aboriginal people could once again live without the police, courts and prisons being such a dominating feature of everyday life.

Finally, it needs to be kept in mind that the present dilemmas suffered by Aboriginal people in obtaining appropriate services, and by governments in providing those services, only exist because Aboriginal communities are so dependent on governments for their very existence. If they had an independent and adequate economic base, the current debate about empowerment would become irrelevant and would drift out of the consciousness and policies of governments and become a practical concern of each community, where it belongs.

REFERENCES

Astor, Dr Hilary (1991) *Mediation and Violence Against Women*, a position paper presented for the National Committee on Violence Against Women, Office of the Status of Women, Canberra.

Chadbourne, Rod (1992) *An Evaluation of the Aboriginal Alternative Dispute Resolution Project*, International Institute for Policy and Administrative Studies, Edith Cowan University, Perth.

Christie, Nils (1977) "Conflicts as Property", *The British Journal of Criminology*, Vol.17, No.1, January.

Community Justice Program (1993) *Hopevale Community: Mediation Training Manual*, Department of Justice and Attorney-General, Brisbane, May.

Community Justice Program (1992) *Talk About It*, Department of Justice and Attorney-General, Brisbane.

Hazelhurst, Kayleen M. (1994) *A Healing Place: Indigenous Visions for Personal Empowerment and Community Recovery*, Central Queensland University Press, Central Queensland University, Rockhampton.

Moore, Christopher (1989) *The Mediation Process*, Jossey-Bass Publishers, San Francisco, London.

Nolan, Christine (1993) *Alternative Dispute Resolution in Aboriginal and Islander Communities - The Community Justice Program's Experience*, Department of Justice and Attorney-General, Brisbane.

Rowse, Tim (1992) *Remote Possibilities: The Aboriginal Domain and the Administrative Imagination*, North Australia Research Unit, Australian National University.

Williams, Nancy, M. (1987) *Two Laws: Managing Disputes in a Contemporary Aboriginal Community*, Australian Institute of Aboriginal Studies, Canberra.

Ethical Issues in Mediation

WORKSHOP

by

Linda Fisher - Director, Couple and Family Mediation Service
Relationships Australia, New South Wales

I would like to begin this workshop by listing some of the generally-accepted roles and responsibilities of a mediator as practised in our society:

- neutrality
- confidentiality
- being non-judgemental
- accountability
- allowing self-determination by the parties
- maintaining the voluntariness of mediation
- impartiality
- power balancing
- facilitation
- third party negotiation

Speaking for myself - although by the numbers here today I believe I speak for many of you - I recall that after I finished my mediation training and first began to practise as a mediator, I thought it would be fairly easy to comply with such a list. But as I have become older and perhaps a little wiser - or simply just more realistic, pragmatic and less idealistic about mediation - I realise there are often difficulties in maintaining these roles and responsibilities.

I also question - as I am sure many of you do - whether in all cases I should do so. And if I do not, then what might be the consequences? And indeed if I do so, what might be the consequences?

I would like to pose various scenarios, hypothetical instances in family mediation, and ask you to think about the ethical dilemma for the mediator in each case. I have no answers, but I believe the questions need to be asked, and considered carefully.

Confidentiality

Let's begin with confidentiality. What does it actually *mean* if a mediator has to maintain confidentiality? What are the restrictions placed on a mediator?

Some programs have confidentiality provisions enshrined in legislation. The Community Justice Centres Act, 1983, for instance, has provisions on privilege and secrecy.[1] Mediators working with Community Justice Centres take an oath of secrecy regarding matters disclosed during or incidentally to a mediation session.

---

1 See Community Justice Centres Act, 1983. Part V, 28(1-7), 29(1-2).

Further, evidence of anything said or of any admission made in a mediation session is not admissible in any proceedings before any court, tribunal or body. Exceptions are where all persons named during, or in attendance at, the mediation session consent to admission, or where there are reasonable grounds to believe that disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property.[2] Family Court mediators, too, have protection under the Family Law Act.

Community mediators, such as those working for agencies like Relationships Australia, Unifam, or Centacare, do not. Most of these agencies ensure that their participants to mediation sign an Agreement to Mediate, a contract covering, inter alia, confidentiality and the limits of that.[3]

The proposed amendments contained in the Family Law Reform Bill 1994 provide that evidence of anything said, or any admissions made during the course of mediation is not admissible in any court. It also requires all community mediators to take an oath or make an affirmation with respect to the secrecy of matters raised during the mediation session. However, the Family Law Act requires or authorises disclosure in certain circumstances.[4] This will smooth out the anomalies presently existing between Family Court mediators and community mediators, but raises other contentious issues, many outside the scope of this particular workshop.[5]

An issue worth considering, however, is that there will remain the existing anomaly that only 'mediation of matters in relation to parents, children or parties to a marriage' is subject to these provisions, and has legislative protection.[6] Mediators who work with disputing parties in other family configurations (such as parent/adolescent mediation, peer mediation, extended family mediation) or who formulate cohabitation agreements, or work with separating de facto couples (including same sex couples) who are separating and who only have property issues to negotiate, are not covered. These mediators would still have to specify in an Agreement to Mediate where they stand on the issue of confidentiality.

---

2 Further, under Part V, 28(7) ' . . . a mediator . . . is not liable to be proceeded against for misprision of felony in respect of any information obtained in connection with the administration or execution of this Act'.

3 For example the Relationships Australia (NSW) Agreement to Mediate states: "This is a confidential service with the exception of information relation to serious crime of serious threat of harm to either an adult or child. No information will be provided voluntarily by the mediators to persons outside the Couple and Family mediation Service on matters discussed or agreements reached in the mediation sessions. We will not require the mediators to give evidence or produce documents in subsequent legal proceedings."

4 See *Discussion Paper: Community and Private mediators: Proposed Mediation Regulations,* Attorney-General's Department, Civil Law Division, September 1995, p.4 regarding 'Confidentiality' which states that the Family Law Act requires disclosure . . . 'if a mediator has reasonable grounds for suspecting that a child has been abused or is at risk' . . . and authorises disclosure 'if a mediator has reasonable grounds for suspecting that a child has ben ill treated . . . or has been exposed or subjected . . . to behaviour which psychologically harms the child'.

5 The debate concerns issues around training, monitoring and quality control of all mediators operating as 'family and child mediators' under the protection of the Family Law Act.

6 Op cit, p.2.

Another issue is that 'a mediator when performing the functions of a mediator shall have the same protection and immunity as a Judge of the Family Court . . . exempting mediators from civil liability . . . for anything said or done by them acting as mediators'.[7]

In any event, whether a mediator does have a statutory obligation to maintain confidentiality, or has contracted with participants using an Agreement to Mediate, or indeed is working privately, that undertaking to maintain responsibility may well pose an ethical dilemma.

Scenario No. 1: The Limits of Confidentiality

Imagine yourself in a joint mediation session. The wife says to her husband:

"Kate has told me what you've been doing to her. She's only ten years old. How could you? Don't you ever touch her again."

The husband answers:

"You know your daughter's lying. Why would I touch her? She's always trying to make trouble between us. She's just jealous."

There has been an allegation made of child sexual abuse, and the allegation has been denied. There is no evidence, after all, of danger or injury to any person, or abuse to a child. Or is there? Is there reasonable ground to believe that disclosure is necessary? Remember that even if the mediator has reasonable grounds for suspecting that the child is 'at risk', there is no requirement to notify.

What should the mediator do? What should the mediator say? How should the mediator proceed? Should the mediation be terminated?

Would it make any difference if the mediator were - in his or her "other life" - a school counsellor? A lawyer? A police person? A Family Court counsellor? What is the mediator's responsibility while mediating if an allegation of child abuse is made? Are the reporting obligations any different?

Scenario No. 2: The Limits of Confidentiality

Let us consider, now, the same allegation, this time made by the wife to the mediators in a confidential caucus.

"My daughter Kate, who's only ten, told me that Kevin's been touching her while I'm at work. I tackled him about it and he said that Kate's only lying because she's jealous of us. What am I to do?"

What might be the dilemma in this case for the mediator, and what are the ethical issues?

---

[7] Op.cit, p4. This is of particular concern given the lack of guidelines or specification of a base training requirement of family and child mediators under the Act.

If a mediator has given an undertaking not to disclose to either party what is discussed with the other party in private session, where does that place the mediator in a case such as the above?

What could, or should, the mediator do in this instance? What other considerations need to be taken into account: for instance, if the mediator chooses to terminate the session at that point (whether she or he reports the allegation to the authorities or not), might she or he be placing either the mother or her child in jeopardy? What might the wife's partner do if he thought his behaviour had been discussed?

Is it the mediator's role to question the husband as to the truth of the allegation? Can the mediator do so and still maintain caucus confidentiality? *Should* the mediator do so?

The wider issues, too, need to be considered:

- Should the mediator report an allegation, without proof? If yes, then to whom?
- What constitutes "reasonable grounds"?
- If the issue is investigated and no evidence is found to support the allegation, is the mediator liable, even given the provisions regarding immunity or misprision of felony?
- Should the mediator disclose at the beginning of any mediation that in addition to statutory reporting of information disclosed regarding serious threat or harm to persons or property, there is also an obligation on the mediator to report any suspicion formed during the session regarding serious threat or harm?
- Whose "rights" need to be protected: the wife's? the child's? the husband's? the mediator's? the agency's?

Neutrality

A mediator routinely informs parties that she or he is "neutral and impartial". What does this actually *mean* in practice? What, really, is "neutrality"?

For example, sometimes it happens in mediation that a mediator is confronted with evidence of a threat which is judged to be serious, or an allegation is made by one party about the other. In addition to considering the *limits of confidentiality* in such a case, there is also the question of whether the mediator breaches another responsibility, neutrality, by taking on board the allegation or "buying into" the dispute rather than allowing the parties to come to their own decisions about matters.

Scenario No. 3: Neutrality

Imagine you are told in confidential caucus by an older man of a threat towards him by his son, the other party at mediation:

"My son has threatened to break both my legs if I go to the police about the matter."

On questioning about whether he is frightened, he says: "Yes, very frightened."

Is it the mediator's responsibility to question the party further about the truth of the matter discussed? What should the mediator do, when at this stage it is an allegation and it is disclosed in confidential caucus?

If the older man is the first party seen in confidential caucus, should the mediator then see the son, or disband the mediation? If the older man is the second party seen in confidential caucus, and the son has not disclosed the same information, should the mediator recall the first party and question him further, or continue with a joint session?

To disband the mediation at that point (with or without any explanation to the younger man) may well put the older man at greater risk; to encourage the older man to contact the police may do the same, and will also breach the duty of neutrality.

What is the appropriate way to proceed?

Scenario No. 4: Neutrality

Again, take the same scenario: this time, it is the younger man you are seeing in confidential caucus. He says:

"I told my father that if he goes to the police about it, I'll break both his legs, and I will."

On questioning by the mediator about whether he is very angry about the matter, he simply says: "Oh yes."

Is it the mediator's responsibility to point out that this constitutes a serious threat and that the mediator is obliged to report it as such? And if so, to whom would the report be made? Or is it the mediator's responsibility to maintain neutrality and continue with the mediation?

If the younger man is the first party seen in confidential caucus, and the father does not disclose the threat in his caucus (that is, after the mediator has been given the information by the younger man), should the mediator somehow raise the issue? If the mediator - however subtly - warns the older man that he is in danger, what happens to the question of confidentiality of caucus? If the father does indeed disclose the threat, should the mediator encourage him to contact the police, the mediator being aware of the potential seriousness of the situation?

Is this so different from the alleged child sexual abuse hypothetical, in that the younger man has actually *told* the mediator that he has threatened his father?

Alternatively, what happens if the mediator does and says nothing, the mediation finishes, the father goes to the police, and the son does break his father's legs? Can the mediator be sued?

Disclosure

I have outlined some instances when the mediator must make a decision whether or not to disclose something heard in mediation. The issues to be considered include deciding on the proper *limits of mediation*, where a mediator's obligation to confidentiality might or should stop, and where a disclosure might leave a mediator in regard to the law or legal sanctions.

What happens if a mediator, however, discloses a confidence *unintentionally*? Take the following three scenarios:

Scenario No. 5: Disclosure

Two mediators hold a confidential caucus with both parties (business colleagues) separately before bringing them into joint session. One mediator begins the joint session by saying:

"Bill and Joan, we've been discussing with each of you what you think is a fair price, and Joan, you were telling us in private session that although you are prepared to offer $5,000 to Bill, you would prefer to settle on a figure of around $3,000."

Scenario No. 6: Disclosure

Two mediators hold a confidential caucus with each party. At the time of the second caucus, the figure the second party gives as her "bottom line" is written on a notepad by one of the mediators, and not covered; it is apparently seen by the first party on returning to the mediation room. One mediator begins the joint session by saying:

"Bill and Joan, we've been discussing with each of you what you think is a fair price. Bill, perhaps you might begin by telling us what you would be prepared to negotiate around."

Bill says: "As you know, I was intending to offer Joan $5,000 in settlement, but now that I see from your notes she is prepared to take $3,500, I'll offer her that. Take it or leave it."

Scenario No. 7: Disclosure

Parties (two women who are neighbours) come to mediation for their second session. One of the two mediators says:

"It's nice to see you both again. How have things been since you were here?"

One party says:

"I thought you said that everything we discussed here was confidential? I went to a party last week, and Joan from down the road was there. She told me that she knows you. And that you told her we'd been to you for mediation."

The other party says:

"Joan's such a chatterbox. Now everyone in the street will know what's been happening. It's not fair."

What comments do you, as mediator have on these situations? I cannot accept the comment that it would not happen to any of you, that "real" mediators would never make those mistakes: any of those scenarios can happen to any of us.

Important issues to be debated are those regarding negligence:

- What has happened to the relationship between mediator and client in each case?
- Are there differences of degree or differences in kind between these scenarios?
- Would there be a difference if in Scenario 5 and Scenario 6, the amount at stake was increased to $5 million?
- Would there be a difference if in Scenario 7, the parties were the Chief Executive Officers of two multi-national and multi-million dollar earning enterprises?
- Where does a mediator's duty of care lie?
- Where do mediators stand legally if one (or both) of them disclose to a third party unconnected with the case that people known to them have come to mediation, even if the mediators insist they did not disclose anything that was discussed?
- Where do mediators stand legally if one (or both) divulge a caucus confidentiality, however unintentionally?
- Are both mediators equally responsible for a disclosure made by one in the session?
- Are the mediators or either of them exempt from civil liability in any of the above scenarios? Should they be?
- What recourse, if any, might the client have?
- Given the provisions of immunity proposed for family and child mediators, and the existing Community Justice Centres provisions on misprision of felony, what sanctions can be invoked?

My contention is that the overriding consideration should be:

- What might be done to retrieve the damage caused to parties, to the outcome, and to the reputation of mediation?

Conclusion

It is clear that there are no absolutes, no "givens" about our roles and responsibilities as mediators. There are only guidelines which we can accept - or reject - as the circumstances of each dilemma unfold. The principles of neutrality, confidentiality, self-determination, impartiality, power balancing, and so on are not always maintained. Our practice is informed by both our personal experience and our professional experience: what we do depends on the particular circumstances of the case and on who we are.

Today has shown, from the varied responses and spirited debate amongst you, that although mediators may "know" where they stand as mediators, their conduct in mediation is ultimately governed by their own feelings, attitudes, values and beliefs as an individual, by their agency's particular ethos, the other "hats" they may wear, and their judgement of what is right for those particular parties at that particular time.

We need to remember, however, that we must also wear the consequences of our actions, and so must our clients. Responsible mediation practice demands that we acknowledge its limitations.

REFERENCES

Baruch Bush, R.A., *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, National Institute for Dispute Resolution, NIDR, Washington D.C., 1992

Folberg, J. & Taylor, A., *Mediation: A Comprehensive Guide to Resolving Disputes Without Litigation*, Jossey Bass, San Francisco, 1984

Kressel, K. & Pruitt, D. (eds), *Mediation Research: The Process and Effectiveness of Third Party Intervention*, Jossey Bass, San Francisco, 1989