These materials were provided by Kevin Fenwick and Glen Gardner of Mediation Services, Saskatchewan Justice for the Saskatchewan Legal Education seminar “Performing Effectively as Counsel in Mediation.”
“We believe that individuals should have the option and the ‘tools’ to settle differences with dignity and control in a non-threatening environment”.

MISSION STATEMENT

Mediation Services is a branch of the Saskatchewan Department of Justice whose aim and purpose is to enhance the understanding-and acceptance of mediation as a valid means of dispute resolution.

GOALS

Mediation Services will enhance the role of mediation in dispute resolution by:

• Providing professional mediation services to parties in conflict;
• Keeping abreast of and being actively involved in the development of mediation at the local, national and international levels;
• Providing technical expertise and assistance to both the public and private sectors;
• Providing training in communication, conflict resolution and mediation/negotiation to the public and private sectors, the school systems, youth organizations and community organizations;
• Supporting "grass roots" community-based mediation programs;
• Undertaking public relations.
Mediation Services was established as a part of the Department of Justice in 1988 to provide and encourage the provision of mediation services to the public. Since that time, we have mediated thousands of disputes in a wide variety of areas. Our experience includes family and estate matters, commercial and financial issues, court-annexed mediation programs, expropriation and surface rights disputes, site-specific environmental and land use policy mediation and facilitation, grievance mediation and organizational conflict. In addition, we have been involved in a number of large-scale facilitation projects including Treaty Land Entitlement and collective bargaining. Mediation Services provides its services to both the public and private sectors.

Mediation Services also provides education services, training, and technical assistance to various levels of government and to the private sector. These include government departments, agencies and Crown corporations, various school and health boards and associations, aboriginal organizations, the Canadian Bar Association and Saskatchewan Legal Education Society Inc. In addition, training has been provided for hundreds of individuals who expressed an interest in the field of conflict resolution either for career enhancement or personal development.

Mediation Services is recognized in Canada and the United States for its expertise in conflict resolution and for its efforts in establishing mediation as a valid, effective method of conflict resolution. Mediation Services has provided educational instruction at many national and international mediation conferences including the National Conference on Conflict Resolution and Peacemaking, Montreal, Quebec; the National Conference on Conflict Resolution and Peacemaking, Portland, Oregon; the Academy of Family Mediators Conference, Eugene, Oregon; and Interaction '96, an international conference of professionals in dispute resolution in Edmonton, Alberta sponsored by The Network.
Mediation Services maintains offices in Regina and Saskatoon. Mediators reside throughout the province. All the mediators have extensive training and practical experience in mediation and other forms of alternate dispute resolution. They bring unique and diverse backgrounds to the organization and a wide range of education and business experiences with degrees in law, social work, agriculture, engineering, commerce, education and theology.

One result of the wide range of backgrounds of the mediators is an interdisciplinary approach to training. All trainers have received their core mediation training from one or more of the Centre for Dispute Resolution in Boulder, Colorado, J.ames Melamed, former Executive Director of the Academy of Family Mediators, or the Justice Institute of British Columbia. The trainers also draw on the experience that Mediation Services has acquired by conducting thousands of mediations.

In addition to their core training and extensive experience, the trainers also draw on additional training and professional development acquired from many conferences and continuing education programs.

All trainers hold memberships in one or more of the following associations:

- Mediation Saskatchewan and Family Mediation Canada
- Society for Professionals in Dispute Resolution
- Network: Interaction for Conflict Resolution
- Academy of Family Mediators
WHAT IS MEDIATION

There is no universally recognized definition of mediation. The word "mediation" is used to describe a wide range of approaches to conflict resolution. While all of these approaches are valid, confusion can result if time is not taken to make sure that everyone involved clearly understands what process is being used when a speaker says the word "mediation".

Mediation can be defined as follows:

• Facilitated negotiations.
• A problem-solving process in which a third party helps others to reach a settlement.
• Helping people have difficult conversations.
• The intervention, into a dispute or negotiation, of an acceptable impartial and neutral third party who has no authoritative decision making power, to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of the issues.
• A process to foster participant empowerment and mutual recognition.
• Facilitated communications for agreement, resolving a past dispute and/or creating agreement for the future with the assistance of an impartial facilitation.

For the purposes of these materials mediation is defined as follows:

• A collaborative problem solving process in which an impartial party helps those in a dispute to communicate so they can more clearly understand their differences and make informed voluntary choices about how to address those differences in a way that best satisfies their needs.
There is no simple definition of mediation. I have observed in my mediation work that mediators, disputants and their advisor will use the term "mediation" in their discussions without clearly articulating what sort of process they have in mind and what might be their expectations of that process. It is therefore important to be clear about what model is being employed so that the expectations of the mediator, the disputants and their advisors can coincide.

There are a number of mediation models and most models reflect some elements of other models. There are seldom pure applications of any model. Often, these models can be distinguished on the basis of whether their primary objective is the settlement of specific substantive issues (settlement mediation) or resolution of conflict (full mediation). These notes offer a comparison of settlement mediation and full mediation. While some generalizations are made for the purpose of comparison, it is hoped that the following demonstrates the need to be clear about what process is being contemplated.

<table>
<thead>
<tr>
<th>FULL MEDIATION</th>
<th>SETTLEMENT MEDIATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Most often used in cases where ongoing relationship issues are viewed as</td>
<td>Most often used where ongoing relationship issues are not viewed as important or not</td>
</tr>
<tr>
<td>important, such as family disputes, business partnerships, estate matters,</td>
<td>immediately obvious such as personal injury, debt collection, dissolution of business,</td>
</tr>
<tr>
<td>workplace interventions, etc.</td>
<td>etc.</td>
</tr>
<tr>
<td>More common where how you reach an <em>agreement</em> is as important as the</td>
<td>More common where getting a <em>settlement</em> is the primary objective.</td>
</tr>
<tr>
<td>agreement.</td>
<td></td>
</tr>
<tr>
<td><em>Agreement</em> is viewed as a likely by-product of a good process. Lack of</td>
<td><em>Settlement</em> is viewed as the objective, therefore, lack of settlement is viewed as</td>
</tr>
<tr>
<td>agreement does not equate to failure.</td>
<td>failure.</td>
</tr>
<tr>
<td>The mediator is more strictly confined to a process role. Substantive knowledge</td>
<td>The mediator can be viewed as a process leader and resource person, therefore,</td>
</tr>
<tr>
<td>of the subject area of the dispute is not viewed as essential and may even be</td>
<td>substantive knowledge of the area in dispute may be viewed as helpful, even</td>
</tr>
<tr>
<td>viewed as detrimental to an effective process.</td>
<td>important to an effective process.</td>
</tr>
<tr>
<td>The mediator will be less interventionist and directive (*), as well as more</td>
<td>The mediator will be more interventionist and directive (*), but less able and</td>
</tr>
<tr>
<td>able and inclined to adapt the process to disputants' needs.</td>
<td>inclined to adapt the process to disputants' needs.</td>
</tr>
<tr>
<td>Takes more time and may appear slow in evolving.</td>
<td>Often works within shorter time frames and therefore may seem &quot;high pressure&quot;.</td>
</tr>
<tr>
<td>Essentially, the assumption is that the process will take the time it needs to</td>
<td>Usually only one meeting contemplated.</td>
</tr>
<tr>
<td>take. Usually, more than one meeting is contemplated.</td>
<td></td>
</tr>
<tr>
<td>Allows for more learning by the participants.</td>
<td>Allows for only minimal learning by the participants.</td>
</tr>
<tr>
<td>Participants work harder in this process and appear to have higher satisfaction with it.</td>
<td>The mediator and advisors of the participants are likely to do more work in this process. Participants may feel less satisfaction.</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Lawyers (**) or other support or advisory people are more clearly in a support or advisory role.</td>
<td>Lawyers (**) and other support people more likely to fill advocate or spokesperson role.</td>
</tr>
<tr>
<td>Lawyers and other support people are less likely to attend every meeting.</td>
<td>Lawyers and other support people more likely to attend meetings.</td>
</tr>
<tr>
<td>Will tend to be more supportive of lawyer/client relationship and not hurtful to lawyer/lawyer relationships</td>
<td>Will have a greater potential for injury to lawyer/client relationship as well as lawyer/lawyer relationships.</td>
</tr>
<tr>
<td>More likely to emphasize and foster collaboration.</td>
<td>Can foster competitive or adversarial approaches.</td>
</tr>
<tr>
<td>Allows for more effective use of an interest-based problem solving approach and the development of more integrative solutions.</td>
<td>Often requires working with more distributive or positional approaches. If interest-based problem solving is used, it is usually only at the front end to determine what position needs to be taken in settlement discussions.</td>
</tr>
<tr>
<td>Allows for consensus building.</td>
<td>Requires more emphasis on avoiding impasse or impasse breaking techniques.</td>
</tr>
<tr>
<td>Used to discover and develop information, define issues, analyze alternatives, as well as reach agreement.</td>
<td>Most often used after information has been discovered and developed, issues identified, alternatives analyzed, etc. in some other process.</td>
</tr>
<tr>
<td>Mediation is viewed as a whole process.</td>
<td>Mediation is viewed as a &quot;closing&quot; step.</td>
</tr>
<tr>
<td>Will usually take more time but is likely create greater satisfaction and innovative outcomes, thereby increasing durability. Durability and satisfaction are most likely to be important to the parties when agreements are not &quot;final&quot;, i.e. parenting, business arrangements, etc.</td>
<td>Will usually move more quickly, but may not allow for greater satisfaction and innovative outcomes, thereby reducing durability. In cases where outcomes are final, lack of durability may not be a large concern to the parties, i.e. personal injury or debt collection.</td>
</tr>
<tr>
<td>This is the process most often in the minds of mediators when they speak of mediation.</td>
<td>This is the process most often in the minds of non-mediators when they speak of mediation.</td>
</tr>
</tbody>
</table>
Some feedback from mediation participants indicate that while participants rate more intervention/directive mediators with a lot of substantive knowledge as stronger and more competent, the participants reach fewer agreements and express less satisfaction with the agreements. Mediators who are less directive and interventionist, and who lack substantive knowledge, are viewed as weaker and less competent but participants reach more agreements and express higher levels of satisfaction with their agreements.

Lawyers may be more certain of their skills and more comfortable in settlement mediation. It is more familiar to them, and is often compared to a pretrial conference. Mediators can often feel uncomfortable with what they feel are pressure and manipulation techniques common in settlement mediation.

WHAT LAWYERS AND MEDIATORS SHOULD BE ABLE TO EXPECT FROM EACH OTHER

Mediation assumes that a team approach (mediator, disputants, lawyers, other advisors, support people) will be used to help disputants work through to resolution. As part of this team, mediators and lawyers should have certain expectations of each other.

Lawyer's Expectations of Mediators

- Respect for their specialty (knowledge of the law).
- To be treated in a respectful, collegial manner.
- The mediator will offer a good process and explain the process decisions that are made.
- Candidness.
- Mediators will act to promote safety for the client.
- Confidentiality.

Mediator's Expectations of Lawyers

- Respect for their speciality (knowledge of conflict resolution).
- To be treated in a respectful, collegial manner.
- Lawyers will provide thoughtful, thorough legal analysis to the client.
- Lawyers will provide client and mediator will have access to lawyer when necessary.
- The lawyer will be open about particular interests of the lawyer, where those interests exist.
PRINCIPLES OF MEDIATION

COllaborative/Co-operative

• People work together to find a mutually acceptable outcome to their dispute.

Interest-Based

• The mediation process identifies and explores interests in order to arrive at an outcome that will meet as many of the needs and concerns of the disputants as possible.

Self-Determination

• The mediator respects the right and ability of people to solve problems in their own way. The participants are responsible for making the decisions that will affect them based on their values, beliefs and standards.

Voluntary Participation

• People must choose mediation voluntarily - in order to choose it they must understand the process and continue to understand it through its various stages.

• People are free to leave mediation at any time.

Reaching Agreement

• Agreements are reached voluntarily and consensually - all participants have veto power.

• There is no compulsion to reach agreement - not agreeing is always an option.

Confidential

• The mediator and participants agree that any information exchanged during mediation is kept confidential. This allows participants to discuss their situation openly and candidly without fear of repercussions.

• Any limits to confidentiality must be disclosed at the beginning of mediation.
Egalitarian

- The participants are relatively equal in power in the context of the mediation and in their ability to represent their own interests.

- If the mediator or the participants feel this equality is not present, the mediator must address the imbalances to "level the playing field" in a way that is satisfactory to the participants for mediation to proceed.

Informed Decision-Making

- Participants must have the opportunity to acquire any information or seek any advice they deem necessary, to explore any options they think possible, to reflect on any consequences that might result, and/or to take whatever time they need so that their decisions will be informed ones.
# A COMPARISON OF PROFESSIONS

<table>
<thead>
<tr>
<th></th>
<th>LAW</th>
<th>MEDIATION</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>BASIC PROFESSIONAL</strong></td>
<td>Justice and equity are best served via the adversarial process in which competing parties substantiate the validity of their interests before a neutral representative of the state in whose hands ultimate power resides (i.e., judge).</td>
<td>Equity and human welfare are best served through techniques of conflict resolution negotiation resulting in the maximum degree of individualisation and self-determination on the part of the disputing parties.</td>
</tr>
<tr>
<td><strong>CLIENTS SERVED</strong></td>
<td>Individuals in conflict with the law or each other.</td>
<td>Disputing parties.</td>
</tr>
<tr>
<td><strong>CUSTOMARY PROFESSIONAL OBJECTIVES</strong></td>
<td>Protection of one client’s interests.</td>
<td>Reorganization of relationships to include: (1) achievement of independence, (2) maintenance of the rights and responsibilities of each client.</td>
</tr>
<tr>
<td><strong>PROFESSIONAL STRATEGIES</strong></td>
<td>Development of negotiation strategies to be utilized by the lawyer on behalf of the client so that the client realizes maximum gains and minimal losses in the dispute. Also included are information and advice in the relevant law.</td>
<td>Development of interpersonal communication between clients; balancing the interests and needs of all parties; suggesting alternatives for compromise; developing a balance of power and legitimacy between the parties; assuring minimal losses to all parties.</td>
</tr>
<tr>
<td><strong>PROFESSIONAL ORIENTATION</strong></td>
<td>Advocacy.</td>
<td>Conflict Management/Resolution.</td>
</tr>
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CHARACTERISTICS OF A MEDIATOR

The principles of mediation require the mediator to have the following characteristics:

Impartiality

- Impartiality refers to the attitude of the mediator. The mediator is required to be unbiased, that is:
  - the mediator does not favour one participant over another,
  - the mediator does not conduct the mediation in a way that would favour a particular outcome.
- Impartiality does not mean the mediator has no personal opinions; it means that the mediator does not allow those opinions to influence the conduct of the mediation.

Neutrality

- Neutrality refers to how fairness guides the mediator's relationship with and treatment of the participants.
- Neutrality:
  - demonstrates the mediator's impartiality, and
  - treats the participants in a way that is most likely to achieve equality between them during the process in order to
    - arrive at an outcome that the participants judge to be fair
- Neutrality does not mean that the mediator relates to or treats all participants equally or the same, rather that the mediator treats all participants fairly so that they can participate effectively in the process.
- Impartiality and neutrality are not necessarily recognized by the participants as being present at the beginning of mediation, but are achieved by and judged by the participants as having been achieved as a result of the mediation process.

No Authoritative Decision-Making Power

- The mediator does not make decisions or judgments about an appropriate outcome to a dispute.
• The mediator does not determine who is "right" or "wrong", apportion blame or allocate awards.

• The mediator assists participants to identify their own and each other's interests so they can work toward a solution that will meet as many of the interests as possible in ways that are acceptable to the participants.
MEDIATOR'S ROLES

The principles underpinning mediation and the characteristics required of mediators (impartiality/neutrality, etc.) determine the roles and functions the mediator assumes to assist participants.

Co-ordinator

- Schedules meetings, arranges facilities, arranges support services, etc. - generally organizing participants so they can concentrate on problem-solving.

Procedural Facilitator

- Provides a process, establishes meeting formats, focuses discussions, and ensures that the agreed upon procedural steps and behavioural guidelines are adhered to.

Communicator

- Since people's communication skills often deteriorate when they are in conflict, the mediator helps the disputants to understand the conflict and each other by conveying their thoughts, feelings and beliefs in a form they can hear.

Reframer

- Interprets and restates aspects of the conflict more positively so that it can be seen as manageable and solvable.

Coach

- Assists novice, unskilled or unprepared negotiators to recognize and improve their skills and assists experienced negotiators to maximize the skills they already possess.

Sounding Board

- Helps participants better assess their interests, issues and options.

Innovator

- Brings new perspectives to open up participants' thinking so they can generate a variety of options.
Role Model

• Interacts collaboratively and respectfully with participants to demonstrate positive, conflict-resolving behaviour.

Legitimizer

• Normalizes conflict and the emotions surrounding it.
• Legitimizes that people have interests/needs that have to be addressed for conflict resolution to take place.

Reality Tester

• Challenges perceptions and assumptions to ensure a realistic assessment of the conflict and options for resolution.

Scapegoat

• Allows parties to "save face" by moving responsibility to the mediator or the process for a difficult decision that the parties feel is necessary but may be unpopular.

Durability Tester

• Raises questions related to the durability or workable implementation of a solution as it is being developed. This prevents rushing to agreement without considering the possible pitfalls or drawbacks in any particular option.

Educator

• Teaches participants more productive and positive communication, negotiating sills and collaboration.

Balancer

• Assists the parties to negotiate effectively by helping them address real or perceived inequality of power.
MERITS OF MEDIATION

While no dispute resolution process can guarantee specific outcomes, mediation generally produces or promotes the following:

Mutually Satisfactory Outcomes

Parties are generally more satisfied with solutions that have been mutually agreed upon than those imposed by a judge or arbitrator.

High Rate of Compliance

Parties are more likely to follow through on commitments and comply with the terms of mutually satisfactory arrangements than they would if the agreement had been imposed upon them.

Comprehensive & "Customized" Agreements

Mediated agreements can cover procedural and psychological issues, not just the substantive ones. Parties can tailor the agreement to suit their particular situation.

Educational

Parties can learn practical problem-solving techniques that can be used to solve future disputes.

Control and Predictability of the Outcome

Mediation allows parties to control the outcome of their dispute and predict the gains and losses resulting from the resolution much more accurately than in other forms of dispute resolution.

Relationship-Oriented

Mediation can preserve or enhance a relationship or end one in a more amicable way.

Personal Empowerment

Parties are empowered by a process that allows them to speak for themselves, explore alternatives, collaborate with others, and choose a solution using their own criteria and standards.
Implementable Agreements

Mediated agreements can outline detailed procedures for implementation, thereby enhancing the likelihood that the parties will comply with the terms of the agreement.

Durable Agreements

Agreements that address all parties' interests, are collaboratively arrived at, and include implementation detail are more likely to hold over time.

Economical Process

Mediation is generally less expensive than other forms of dispute resolution, particularly litigation.

Rapid Settlements

When parties want a quick resolution, mediation can be a good choice as adversarial processes may be lengthy.
WHEN MEDIATOR INVOLVEMENT IS MOST EFFECTIVE

Absence of the following conditions does not make third party involvement/mediation impossible. However, disputes which meet many of these conditions are more likely to settle than those having met only a few or none. Disputes which meet only a few of these conditions may still be mediatable, but will require more time, participant effort and skill in the mediator.

Mediator involvement is most effective when:

• The parties most effected by the conflict can participate directly in the process.
• The parties feel safe to candidly discuss their concerns or needs.
• The number of parties is limited and the dispute has not spread to others.
• The issues in dispute are not overwhelming in number.
• The parties have a history of co-operation and successful problem-solving.
• The parties indicate an intention to address all of the issues.
• The parties do not have a long history of adversarial relations or prior litigation.
• If parties have had a long history of adversarial relations of prior litigation, they are able to see the need for a different approach and recognize the injury that has been caused by that history.
• The hostility and anger between the parties is moderate or low.
• The parties have, or may have the need for an ongoing relationship.
• The parties are prepared to work with each other in good faith.
• The desire for resolving the dispute is high.
• The parties accept the intervention and assistance of a third party.
• There is some reason to resolve the issues, be it time, diminishing benefits, an unpredictable outcome, or personal satisfaction.
• There are adequate resources to effect a resolution. Limited resources create more competitive relationships.
• The parties have leverage -- the ability to influence each other.

• There is a reasonable balance of negotiating ability between the parties. One or all parties may need assistance to help maximize negotiating ability.

• There are no psychological barriers (i.e. drug or alcohol abuse; mental or emotional states) which make it impossible for a party to exercise judgement or fulfil commitments.
"SUCCESSFUL" MEDIATION:

It is natural for us to want to do well at whatever it is we are doing. It is no different for mediators. We all want some reassurance that we are doing good work. Humans are social animals. We need feedback from others. That need can sometimes impede our efforts, however, if we use an inappropriate measure of success.

Although participants often come to mediation wanting to have their problem "settled," a settlement does not necessarily mean that there has been a successful mediation. Nor does lack of settlement mean that the mediation was unsuccessful. There are times when every mediator is tempted to shortcut the process in order to achieve a settlement. If the parties are close to agreement, but are not quite there, sometimes it appears easy to "ram" something through or tell them what you think they should do.

Almost by definition, however, a settlement that is imposed on the parties by the force of will of the mediator or another participant, is a poor settlement. It is much more likely to fail. And even if it does not fail but simply needs revision or review at a future time, the participants may be unwilling to come back to mediation or use collaborative problem-solving for that review if their procedural needs were not met the first time because of the mediator's shortcut.

There is a saying in the legal profession that "a poor settlement is better than a good law suit." That may be true in the traditional adversarial legal system, but it is not true in mediation. Some would suggest that the opposite is true, that no settlement at all is better than a poor settlement. If the choice is between no settlement and a poor or forced settlement, at least the former leaves the door open for the parties to come back at a better time.

It is inappropriate for the mediator to work too hard to achieve "settlement." If the mediator feels that he must achieve settlement with the participants, he is probably putting his own needs ahead of theirs. There is no room in this business for ego. The most successful mediator is not the one with the most "notches on the gun" for the most settlements reached.

Settlement is not the purpose of mediation, but an outcome of a good mediation, provided that the time is right for the participants to reach settlement. Most mediators view their work as developing "resolution" not just "settlement". There will be participants whose primary need at a particular time is settlement. If that is their real need, which may be different than a perceived need, settlement may be the desired outcome. For others resolution will be the desired outcome.

Perhaps the test of success in mediation is a simple one. Are the parties better off after the mediation than they were before?