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MEDIATION

INTRODUCTION

Of all the available ways to bypass court, the process that has attracted the most attention and endorsement since the first edition of this book is mediation. It is now a feature of many dispute resolution regimes in both the public and the private sectors, and is applied to a wide range of disputes from collective bargaining to construction deficiency claims, from debt collection to defamation, from workplace health and safety to warranty coverage disputes.

This chapter contains an overview of mediation with an emphasis on its use in civil disputes in Canada. Our goal is to show the average reader and interested student of dispute resolution — as opposed to the seasoned mediator — the basic aspects of mediation and what it involves on a practical basis. We concede that there are many orientations towards mediation and many valid philosophical debates about how it ought to be practised, but we will not be able to do justice to these concerns in the space of a single chapter.

In the simplest terms, mediation is a constructive conversation led by a disinterested[1] person, and the purpose of the conversation is to give the people involved choices about what they can do to address the issues or dispute that separates them. Some of the choices that they develop at mediation may be better than the status quo, some may be worse, or all of them may be unsatisfactory. Nevertheless, it is up to the participants to decide how they wish to proceed. The disinterested person — the mediator — influences the conversation in a variety of ways and may[2] contribute options or ideas about what can be done, but he or she does not have the authority to impose a legally binding outcome on the participants.

The kinds of situations that the authors are asked to mediate tend to be ones where there is a defined dispute or set of issues such that the mediation is a goal-oriented exercise to explore settlement within a fixed period of time. Some form of adjudication — by a judge, arbitrator, or administrative tribunal — is pending, threatened or possible, and participants are trying to

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1 As elsewhere, "disinterested" is used in the sense of "impartial" or "not involved in the dispute" as opposed to "not interested.

2 We use the word "may" to indicate that this is a possibility and not a defining feature of mediation. Some mediators intervene in the substance of the dispute more and some less or not at all. It all depends on the mediator.

avoid going that far. In these kinds of mediations, preserving or restoring a relationship tends to be a secondary or collateral feature for the participants; their primary goal is usually to remove a more immediate source of distress such as a threat to their profitability, reputation or personal integrity. Even in mediations where family members are in conflict about who gets custody of the family photographs, or in dysfunctional workplaces where co-workers avoid each other at the water cooler, the notion of an improved relationship can seem remote, even impertinent at the time of mediation, and indeed it often is in the short term. Real restoration takes time and the mediation session may only be the beginning of a much longer process.

Mediators like to talk about what they do during mediation sessions, and participating lawyers like to explain the kind of advocacy that they bring to the table, but everyone who participates in mediation has an important role to play, above all the "parties" — those directly involved in the dispute. Whether the parties are individuals, businesses, government, or other public and private bodies, they are the principals, the main participants, and their role is to be actively involved in the conversation, sharing their concerns, contributing their intelligence, and, at the end of the day, deciding whether to cooperate to bring the dispute to an end. Readers are encouraged to keep the primacy of the parties in mind throughout this entire chapter even when it digresses to describe how mediators go about their work, for mediators and mediation exist to serve the parties as opposed to their lawyers or other professional advisors, and most certainly not to serve mediators themselves.

THE ELUSIVE DEFINITION

Mediation is sometimes called "assisted negotiation" because the parties try to resolve their differences through give and take with the mediator's help. But beyond generalities, mediation does not readily lend itself to an all-encompassing definition. A comprehensive definition is elusive because mediation appears in many different guises, and these are largely determined by the philosophy of conflict resolution that the mediator and/or the mediation program adopt.

There are multiple models of mediation that embody different approaches. Authors Boule and Kelly identify four models that are based on distinctive paradigms — settlement mediation; facilitative mediation; transformative mediation; and evaluative mediation. The differences in these models can be understood by looking back at the neighbour dispute described in Chapter 3 where one landowner filled a depression in his backyard with gravel causing the adjacent landowner's yard to flood. These neighbours got into a tug of war over the matter and ended up in a lawsuit. If the neighbours were to take part in what Boule and Kelly call settlement mediation, a mediator would encourage them to bargain incrementally over a

sum of money that would satisfy the neighbour with the flooded yard. If they took part in facilitative mediation, the mediator would help them problem solve around interests (as illustrated in Chapter 3). If they took part in transformative mediation, the mediator's involvement would largely involve listening and supporting them to appreciate their own sense of agency while at the same time extending empathy to each other. And if the neighbours took part in evaluative mediation, the mediator would influence them to make choices to resolve their dispute within a range of anticipated legal outcomes.

If these examples sound like caricatures, they are. Moreover, as Boule and Kelly observe, in practice mediation can display the features of two or more of these models[3] so that there is no one pure or absolute model of mediation.

Author Cinnie Noble identifies five types of mediation from the literature,[4] some of which overlap with Boule and Kelly — interest-based; transformative; narrative; insight; and solution-focused. Noble explains how these types of mediation promote one or more assumptions about what the process is all about — problem solving, settlement of specific issues, personal moral growth, forward-thinking possibilities, joint storytelling, interest-based resolution, and/or achieving insight into the beliefs that inform our behaviours.

But readers should not be overwhelmed. Both authors have worked with and observed many practising mediators, and one of us has interviewed and assessed dozens of experienced mediators for a practising mediation credential. Based on our experience and lively conversations with colleagues over the years, we would observe that mediation tends to involve some aspect of *all* of the features described in the literature. What varies is the emphasis that the mediator gives to any particular factor and whether or not the mediation process makes these factors overt or covert.

One of our colleagues who uses an interest-based and settlement-oriented approach mediated a multi-million dollar lawsuit over an allegedly defective piece of equipment that caused fatal injuries and property damage. The award-winning designer maintained that the accident was due to operator error, and doubted the motives of the company that was suing him. He resisted any exploration of the design process or questions about his design assumptions. But after several days of mediation, the designer recognized that unless he revised his beliefs about his own infallibility and the motives of the others, the dispute was going nowhere. He said as much to the mediator and added, "This is what you have been trying to say to me

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[3] L. Boulle and K.J. Kelly, *Mediation - Principles, Process, Practice* (Markham, ON: Butterworths, 1998), at 30–33.

[4] C. Noble, *Conflict Management Coaching: The Cinergy Model* (self-published, 2012), at 21–26.

all along. But until now, I couldn't admit it, even to myself." Our colleague would never presume to say that mediation is a mandate to bring about personal insight and growth in any of the participants, but that is one of the things that happened in that commercial mediation.

BASIC CHARACTERISTICS

Despite its many guises, there are a few generalizations that can be safely made about mediation:

- Mediation is a *private* or *confidential* dispute resolution process. Mediation sessions are not open to the public, and the participants and the mediator typically promise each other that the discussion and outcome will not be shared with anyone else. For instance, one of our colleagues recently mediated the terms of a collective agreement and the only people present during the mediation were representatives of the employer, negotiating representatives from the union, and the lawyers for each side. Mediation conversations are considered to be off the record and not for public consumption or sharing.[5] This does not mean that mediation must be limited to disputes of a private or personal nature such as whether one individual owes money to another or how much severance a company should pay a terminated employee. Mediation can also be used for disputes with a public interest component — such as disputes with an environmental or public resource element, or complaints that members of the public make about regulated health care professionals — provided the public interest is taken into account in the ultimate resolution. Mediators who work for administrative tribunals or regulatory bodies understand this: if a dispute involves a violation of the provincial health and safety legislation in circumstances where an employee was injured, for example, the public interest would not be served simply by making the injured person whole. Some recognition of the employer's statutory obligations would also be required in the settlement.
- Mediation is a *consensual* process and, as discussed in Chapter 1, is intended to develop a mutually acceptable end result, such as a settlement agreement or a future arrangement that all of the participants agree with. If the mediator's efforts cannot bring the parties together — such as where a homeowner wants $35,000 for water damage to her home and the insurance company is only prepared to pay $5,000 — then the mediator cannot impose a monetary (or other) settlement on them.

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[5] For more about confidentiality and other legal concepts that pertain to mediation, see Chapter 7.

- Mediation is often *voluntary*, meaning that the participation of the parties takes place by choice: they do not have to use mediation but may decide to do so at their option. Disputing business partners or buyers and sellers of agricultural commodities can choose to negotiate their differences with the assistance of a mediator. Sometimes participation in mediation is *mandatory* or *compulsory*, such as in the Ontario Mandatory Mediation Program where the rules of civil procedure require that mediation take place as a condition of proceeding to trial, or where a court has issued an order that the parties must mediate specific issues within a certain time frame.
- Mediation is an *informal* process because it is based on a conversational format that most people find less intimidating than an adversarial process like arbitration.[6] Mediation still has a discernible order or structure, and some mediators like to lay down "ground rules" that they expect the participants to follow, but no one needs to master any ritualized skills or behaviours in order to take part in mediation.
- Mediation is a process of *influence* where everyone involved is either persuading or being persuaded to change their views and behaviours as the conversation progresses. The dynamic between participants alters as a result of mutual influence, and new possibilities open up for them. One person may come with a very fixed idea of how an issue can be resolved say, through the payment of money, but in discussion with the mediator and the others present may be influenced to see how a non-monetary item such as an acknowledgement or apology would also provide value. Of course, the degree to which participants are open to influence varies from highly resistant to the very receptive. One of the authors conducted a mediation where a financial institution sent a representative at the far end of the scale. At the start of the mediation the representative said, "I'm a rookie in this process but I aim to make it work for me." Then at the first available opportunity he demanded of the mediator, "Opinions, opinions, opinions...I want to have your opinion about this situation so I can determine what my company ought to do in this particular situation."

CONTRACTING FOR MEDIATION

Although mediation is an informal process, it is typically conducted pursuant to written terms of reference. When mediation is used in a voluntary context, the participants and the mediator sign something called a "Mediation Agreement" or "Agreement to Mediate". Figures 4-1 and 4-2 contain two samples for readers to consider.

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[6] For more information, see Chapter 9, Arbitration.

In some contexts, the terms of reference for mediation may be standardized or available as a template[7] or codified as mediation rules established by a mediation organization[8] like the ADR Institute of Canada's *National Mediation Rules and Code of Conduct for Mediators* (as amended August 3, 2012). Agencies, boards, and commissions will also have established terms of reference. For a concrete example, readers can visit the website of the Canadian Human Rights Tribunal and view its Evaluative Mediation Procedures[9] which describe a process where a tribunal member will evaluate the relative strengths and weaknesses of the positions advanced by the parties and may provide the parties with a non-binding opinion as to the probable outcome of the inquiry.

Figure 4-1

Mediation Agreement — Sample #1

NAMES OF PARTIES AND COUNSEL: [insert]

AGREED MEDIATOR: [insert]

TIME AND PLACE OF MEDIATION: [insert]

PRE-SESSION CONFERENCE CALL: [to discuss who will attend, dates for disclosure and summaries, and other procedural matters]

PRE-MEDIATION SUMMARIES: Short statements of fact and issues in contention to be exchanged and sent to mediator by [insert].

PARTICIPATION/AUTHORITY TO SETTLE: Appropriate representatives of each party will attend with authority to settle the dispute in the mediation session.

CONFIDENTIALITY: All aspects of the mediation including prior disclosure shall be treated as confidential settlement discussions, and the mediator shall not, in any event, be asked to testify in court. He or she will retain no record of the mediation.

DISCLOSURE: Key documents to be exchanged prior to the session.

ROLE OF MEDIATOR: The mediator will at all times act impartially toward all participants and will maintain confidentiality with respect to the dispute. The mediator will not provide legal advice or therapy, will not coerce a settlement and will not impose his or her judgment on any party.

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7 See, for instance, "Template of a Mediation Agreement" (The Sport Dispute Resolution Centre of Canada, September 2012), online: <http://www.crdsc-sdrcc.ca/eng/documents/TemplateMediationAgreementEN2012.pdf> or ADR Institute of Canada, "Standard Form Agreement to Mediate" (as amended April 15, 2011), online <http://www.adrcanada.ca/resources/documents/Schedule_B_National_Mediation_Rules_2011April15-2.pdf>.

8 For a list of institutional rules, see International Mediation Institute, Mediation Rules, online: <https://imimediation.org/mediation-rules>.

9 Online: <http://www.chrt-tcdp.gc.ca/NS/about-apropos/trp-rpt-eng.asp>.

Figure 4-1

Mediation Agreement — Sample #1 (cont'd)

TERMINATION: Any party may withdraw from the mediation at any time and for any reason. The parties may agree to terminate the session, either because a settlement has been reached, or otherwise. The mediator may terminate the mediation if he or she believes that the process has become unproductive or that settlement is unlikely.

COSTS AND FEES: [mediator and room costs, whom to pay and when]

We agree to the above terms and indicate our intention to make a serious attempt in the mediation to resolve this dispute:

DATE: [insert]

Figure 4-2

Mediation Agreement — Sample #2

1. PARTIES: [insert]

agree to mediate certain differences with [insert] as mediator.

2. DATE:

3. TIME:

4. PLACE:

5. TERMS OF MEDIATION:

The parties agree to abide by the Terms of Mediation, attached.

6. ISSUES:

The issues to be mediated as understood at this time are summarized as follows: [insert]

7. COSTS OF THE MEDIATION:

The costs are as set out in Schedule "A". Unless there is an exception set out below, the parties agree to share the fees and expenses related to the mediation equally, but shall be jointly and severally responsible to [insert] for any unpaid or outstanding fees and expenses. The parties shall each bear their own legal expenses, if any.

Exceptions:

Figure 4-2

Mediation Agreement — Sample #2 (cont'd)

8. SIGNING INDIVIDUALLY:

Each party may sign a separate copy of this agreement, which, when so signed and delivered to the mediator, shall be an original copy even though not signed by the other parties. All such separately signed copies shall together constitute evidence of all parties' consent to be bound by this agreement.

9. CONSENT TO THIS AGREEMENT:

Each of us has read this agreement and willingly agrees to proceed with the mediation on the terms contained in it.

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TERMS OF MEDIATION

1. Mediation is a voluntary and informal settlement process by which the parties try to reach a solution that is responsive to their joint needs. Their participation in the process is not intended to alter their existing rights and responsibilities unless they expressly agree to do so.
2. The mediator is a facilitator only, is not providing legal advice, legal representation or any other form of professional advice or representation, and is not representing any party. The mediator's role is to assist the parties to negotiate a voluntary settlement of the issues if this is possible.
3. The parties will send to the mediation representatives with full, unqualified authority to settle and understand that the mediation may result in a settlement agreement that contains binding legal obligations enforceable in a court of law.
4. The parties will discuss the matter with the mediator individually or together, in person or by telephone, with a view to achieving settlement.
5. Throughout the mediation the parties agree to disclose material facts, information and documents to each other and to the mediator, and will conduct themselves in good faith.
6. Statements made by any person, documents produced and any other forms of communication in the mediation are off-the-record and shall not be subject to disclosure through discovery or any other process or admissible into evidence in any context for any purpose, including impeaching credibility.
7. The parties will deliver to the mediator and exchange with each other a concise statement of the issues and the problem as they see it in a reasonable period of time prior to the first mediation session, which in this case is on or before [*insert*].
8. No party will initiate or take any fresh steps in any legal, administrative, or arbitration proceedings related to the issues while the mediation is in progress.

Figure 4-2

Mediation Agreement — Sample #2 (cont'd)

9. Either during or after the mediation, no party will call the mediator as a witness for any purpose whatsoever. No party will seek access to any documents prepared for or delivered to the mediator in connection with the mediation, including any records or notes of the mediator.
10. Other than what is stated above, the mediation is a confidential process and the parties agree to keep all communications and information forming part of this mediation in confidence. The only exception to this is disclosure for the purposes of enforcing any settlement agreement reached. The mediator will not voluntarily disclose to anyone who is not a party to the mediation anything said or done or any materials submitted to the mediator, except:
    a. to any person designated or retained by any party as a professional advisor or agent;
    b. for research or educational purposes, on an anonymous basis;
    c. where ordered to do so by a judicial authority or where required to do so by law;
    d. where the information suggests an actual or potential threat to human life or safety.
11. The parties are responsible for obtaining their own independent professional advice, including legal advice or representation, if desired; the mediator is not providing same. The mediator has no duty to assert or protect the rights of any party, to raise any issue not raised by the parties themselves or to determine who should participate in the mediation. The mediator has no duty to ensure the enforceability or validity of any agreement reached. The mediator will not be liable in any way, save for his/her wilful default.

THE STAGES OF MEDIATION

In our experience, no two mediations look the same because there are many variables to take into account, including the nature of the dispute, the identity and preferences of the participants, and the training of the mediator. Nevertheless, a typical civil mediation passes through three basic stages that can be abridged or expanded according to circumstances. These are: Stage 1 — Joint or Plenary Session; Stage 2 — Individual Meetings; and Stage 3 — Bargaining or Constructing the Settlement.[10] Figure 4-3 diagrams what a three-stage mediation may look like, beginning with scenario 1 and

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[10] We gratefully acknowledge our colleague, Dominique F. Bourcheix, Mediator and Arbitrator of Montreal, Quebec who first condensed mediation into these practical steps.

continuing with other possible configurations when the process is adapted to the participants and their needs.

As the date for the mediation meeting approaches, participants will be involved in various pre-mediation activities such as preparing and exchanging written briefs, engaging in conflict coaching,[11] and thinking through their intended strategy and tactics for the pending conversation. They might also check out online tools and resources such as the ones available at no charge through the International Mediation Institute,[12] including its "Concise Case Analysis & Evaluation Tool".[13] Then, when the date arrives, all participants convene — in person, for our purposes, although they can also be present by telephone, videoconferencing or other electronic means.

Stage 1 — Joint or Plenary Session: Exchange of Information and Understanding the Issues Together

When everyone is assembled on the day of the mediation meeting and any necessary introductions have taken place, the mediator convenes the participants — individuals, corporate or organizational representatives, lawyers or other professional advisors, and any support people or observers[14] — in the same room in what is known as a *joint session* or *plenary session*. There, the mediator makes some opening remarks to put everyone at ease and to let the participants know what to expect by way of general procedure as the mediation progresses. After that, the joint session continues with direct exchanges of information among the participants, and each side has an opportunity to speak about the issues or the dispute from its own point of view. The notion is to equalize the distribution of relevant information or, if you like, have all participants contribute to the "shared pool of meaning"[15]. In this session, all participants hear the same information from the same sources at the same time.

During Stage 1, the participants do not actively negotiate with each other, identify choices, or make final decisions about how to resolve the matters at issue. Instead, they explain things, ask and answer questions from

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11 See Chapter 3, "Constructive Conversations in Action".

12 Online: <https://imimediation.org>.

13 Online: <https://imimediation.org/private/downloads/0Af3ZGU3PGhmdgh99anhpA/Olé!%20Case%20Evaluation%20Tool.pdf>.

14 The identity and purpose of such additional people — when they are even present — will vary from case to case. Individual participants sometimes like to bring another person along for moral support, for instance, and if they do the mediator will need to clear with all participants where, when and how those additional people will take part in the process.

15 See the section entitled "What is a Constructive Conversation" in Chapter 2, "Constructive Conversations".

the mediator and the other participants, and gain a broader understanding of the issues that separate them.

There are many ways that Stage 1 can proceed. Each participant might simply tell its story and speak informally about its experiences, perceptions and concerns. Or participants can deliver prepared statements and engage in oral advocacy about their preferred positions. For example, in a slip and fall claim against a municipality, the 16-year-old skateboarder may describe how the accident has impacted his life, sports, and studies, and his lawyer may add why the facts and the law justify a significant monetary award in the skateboarder's favour. In response, the municipality or its insurer may explain how the injuries, though real, are relatively minor in nature and justify at most a nominal payment and, perhaps, suggest that the 16-year-old was not taking care or even using the sidewalk for its intended purpose at the time of the mishap.

In addition to oral presentations and depending on the case, the participants may examine photographs, videotapes, digital recordings, plans, maps, letters, documents, or other physical items to orient the mediator and/or inform the others present. Sometimes, as in a complex multi-party construction case, the information exchange begins not with oral presentations from the parties but with the mediator synthesizing what he or she has learned from reading their written briefs and expert reports.

The exchanges in Stage 1 are not always conciliatory or constructive; they can be adversarial or even antagonistic and can raise the level of conflict and discomfort among participants especially if people feel they have a lot to lose or if there is cynicism and lack of trust based on past dealings. For these reasons, some participants and mediators prefer to dispense with Stage 1, considering it too high risk in relation to potential gains. For instance, adult siblings who are aligned against each other in a dispute about their parents' estate often do not want to sit in the same room at the start of the mediation — or at all, if they can help it. But if participants resist an initial joint session, they and their professional advisors forfeit the opportunity to receive information first-hand, to learn the same things as other participants, and to form their own impressions about what is possible on the day of the mediation. Often, at the start of mediation information is fragmented or distorted through a partisan lens. It is only when the parties persist in a joint information exchange that they can begin to appreciate each other's facts, evidence, interpretations, arguments, or attitudes in a new way. As difficult as it may be, Stage 1 is the place to be open to new and different information, and to be alert for cues and clues that may ultimately lead to settlement.

One of the authors mediated a dispute where an entrepreneur was suing a public relations specialist for breach of contract. The entrepreneur began with the conviction that the specialist had singlehandedly defeated his

ambitions for industry dominance by losing a significant business opportunity through — as the entrepreneur saw it — deliberate actions or gross incompetence. The Stage 1 discussions, however, suggested that the entrepreneur was operating under a set of firmly held but private assumptions about what the specialist would do and that there had either been a series of unfortunate miscommunications between them or, at the very least, a highly ambiguous written contract. Because both the entrepreneur and the specialist heard the same things in the joint session, they were able to form direct impressions and make the best use of what they learned to settle their differences. Had the author conveyed the information to them second-hand in her role as mediator, its impact would have been entirely different.

That said, at the beginning stages of mediation, participants might be incapable of evaluating the quality or utility of the available information. One of our colleagues mediated a dispute about an intricate piece of machinery in a factory. Stage 1 was long and challenging. After a two-hour exchange of information among several experts representing the parties, the mediator asked if they were satisfied that they had properly summarized their positions. Everyone declared satisfaction and said that there was nothing more to add. Our colleague then explained that to him as a disinterested person the presentations were both general and non-responsive and that even with the best will in the world, it was impossible to understand what was defective among the 22 components of the machinery in the factory, let alone appreciate what corrective action had been taken, at what cost and to what effect. It was therefore useless, our colleague said, to begin a discussion about who was responsible for what: there were simply too many questions outstanding. When the parties agreed to go back over things, item by item and in detail, they were able to reduce the scope of their dispute by identifying areas of agreement and disagreement and creating a more manageable list of contested issues.

Stage 2: Individual Meetings — Feedback to and from the Parties & the Mediator

Once the information sharing is complete in Stage 1, the mediator and/or the participants recognize that it is time to move to Stage 2. That is the stage where the mediator meets privately with each side and its professional advisors to the exclusion of the other side(s) in what is called an *individual meeting*, a *caucus*, a *time out*, or a *one-on-one session.* Before beginning Stage 2, the mediator will explain what use, if any, will be made of information that is conveyed privately in these individual meetings. The two general ways of proceeding are that:

- the mediator may take *nothing* out of an individual meeting without a party's express permission; or

- the mediator may take *anything* out of an individual meeting that has not been specifically identified as confidential.

In a Stage 2 individual meeting, the parties give feedback and get feedback from their lawyers and experts as well as from the mediator. It is an opportunity to evaluate and integrate what they learned in Stage 1 and to determine how to use that to advance their conversation with the other side. But the parties are not yet ready to actively bargain or make any final decisions about how to resolve the matter.

There are many different types of exchanges that go on in the privacy of an individual meeting.

Sometimes participants just need an opportunity to react privately and to share those reactions with the mediator. The individual who sat quietly through innuendo about his or her integrity or who resisted reacting to being called a "welfare bum" will be clear and explicit about how offensive the comments were and may express hurt, resentment, anger, or frustration — any one of a number of justifiable reactions that require no more of an intervention on the mediator's part than respectful listening.

Or a person might want to share and get feedback about what seemed to be happening in Stage 1 — *Did you notice that he said they plan to use this as a 'learning experience?' That sounds encouraging, doesn't it?* Or *He seemed rather more determined to be recognized as the sole author of those training materials than I had anticipated. How much do we care about having our name on them too?* Or, *She did not speak when we were together but she rolled her eyes when I talked about how hard it was for me to be solely responsible for our son. Do you see any way that I can get through to her?* Stage 1 opens up all kind of observations and interpretations, and Stage 2 is the place to analyze and explore them.

Stage 2 is also an appropriate time for participants to ask for and receive feedback from the mediator who may independently offer or volunteer impressions and observations. As a disinterested person who has been privy to an overview of the conflict by reading material from all participants before the mediation and/or being present during Stage 1, the mediator may also have a view about the merits of each party's case or its overall position. In our experience, participants often value this view: it is as if the mediator's impressions are a proxy for the ultimate assessment of a trial judge, arbitrator, or tribunal, and participants use what the mediator says to measure their own chances of success in the event that they do not reach a settlement at mediation.

One of the authors mediated a dispute over an alleged oral contract between the estate of a disabled individual and his caregiver. Although the caregiver's relationship with the deceased began on a voluntary, even charitable basis, the caregiver claimed that she ultimately looked after the

individual in exchange for a monthly support allowance. In Stage 2 of the mediation, the caregiver and her lawyer expressly petitioned the mediator, "What do you think of our chances in court? And we really want to know what you think about the 'optics' of the situation?" The author was willing to share her impressions as a disinterested observer, and the caregiver took those impressions into account when deciding how far she was willing to compromise.

At another mediation, one participant began to itemize for the author how he and his wife could earn extra money to fund their lawsuit instead of settling it: he could work overtime and take on additional assignments; his spouse could work through her holidays; they could start to cut back on certain things at home; and so forth. They would need about $60,000 — quite a bit of after-tax money — to get to trial. But somehow the participant was not at ease with his plan and asked the mediator for assurance: "What would you do if you were me?" The mediator replied, "I can't answer that. I can't pretend that I am you. People make decisions for different reasons and your reasons may not be mine. Speaking only for myself, I would look at things in terms of my life energy: how much life would I have to give in exchange for the $60,000 and is there something else I would rather be doing? In other words, is this the highest and best use of my life?" Did the author go too far? To her relief, the participant said that conserving his energy made sense to him especially after a recent bout of ill health that caused him to value life differently, a personal experience that the author had knowledge of. The participant then spent the rest of Stage 2 determining the best way to respond to a settlement offer that he had previously rejected.

If the parties are open to feedback during Stage 2, their attention may be directed to things that did not occur to them and they may be surprised at what they learn. Another of our colleagues mediated a dispute between commercial parties who were debating the correct interpretation of the words in a regulatory regime, and each was convinced that his interpretation would prevail. However, the mediator pointed out a third, equally likely interpretation that would leave both sides worse off than the status quo. This interpretation had never been considered and the risk that the regulatory body might adopt this third interpretation gave the parties an incentive to work out a solution on their own.

Stage 2 is a stage of analysis, consolidation, and synthesis when participants take into consideration their pre-mediation preparation plus what they learned in Stage 1. They add to that feedback from their own professional advisors as well as feedback from the mediator who is able to approach the problem in an objective and detached way without any partisan obligations. By the end of Stage 2 participants will have a better sense of the evolving conversation and a revised appreciation of what stands between them and settlement — risks and opportunities, questions and explanations, pathways and impediments. With the mediator's help they will begin to understand

what is and is not possible in the mediation and what they can do or refrain from doing to make settlement more likely. But mediation is not a unilateral affair: nothing changes unless the participants communicate, and Stage 3 is the place for them to do this in an effort to construct a mutually acceptable resolution.

Stage 3: Bargaining — Constructing the Settlement

Stage 3 begins once the participants have concluded their individual meetings with the mediator and determined how they want to proceed. At this stage they begin to bargain and to explore with the other participants whether a mutually acceptable resolution can emerge from the day's conversation. While there is nothing stopping participants from reconvening in a joint session and continuing to discuss their differences face-to-face, Stage 3 often takes place through the mediator who goes back and forth between the parties, trying to assemble the foundations of a settlement. Bit by bit, through trial and error, the parties and the mediator develop ideas, eventually constructing something that all participants find sufficiently palatable. Where issues are distributive,[16] — how much it will cost for a full and final release in a wrongful dismissal action — they negotiate a number through offers and counter-offers, or come up with some principles or formulae to arrive at an amount. Where issues are integrative and lend themselves to an interest-based analysis — how to dismantle a longstanding business relationship on an amicable basis — they generate and evaluate options to see whether and how their various interests can be met.[17] When everyone can say yes to everything on the table, a settlement is achieved. It can then be recorded in the form of minutes of settlement, points of agreement, or a memorandum of understanding. If further documentation, such as a formal release, is required, it is typically prepared afterwards. If the parties attended the mediation without lawyers or other professional advisors, the settlement can be provisional until they have obtained the necessary advice.

Readers should appreciate that Stage 3 does not need to involve offers and counter-offers; there are other ways to approach agreement. When working as a mediator, one of the authors prefers to construct a general settlement outline or "picture" with elements that everyone finds acceptable, rather than introducing the notion of offers. Before getting specific in a business dispute, she confirms that the parties want to move in the same general direction. Do they want to work to re-establish their relationship or to dismantle it on amicable grounds? Depending on their choice, what topics of items do they each want to see within the picture frame? In one instance, a firm of dispute resolution practitioners acknowledged that their

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16 For a discussion of *distributive* and *integrative* problems see Chapter 2.

17 For more on interests and interest-based negotiation, see Chapters 2 and 3.

relationship had outlived its useful purpose and were able to identify some basic elements for a settlement. Instead of fighting over the dissolution of their firm, the disgruntled partner would leave with her current work-in-process and sell her interests to the remaining partners within 90 days. They would jointly work out the words and means to inform the clients and professional colleagues of the new arrangements. Of course, this was not a final settlement, but it was the beginning of a mutually acceptable resolution that was refined through various iterations as the mediation progressed.

Throughout Stage 3, the mediator is more than a passive conduit, mechanically transmitting offers or ideas from one party to the other. The mediator is very actively helping each side to do some or all of the following:

- understand what is important to them and what priorities they assign to their goals;
- figure out how to put words to their ideas and communicate them effectively;
- understand what the other side is looking for and what they are not looking for;
- determine whether and how they can address the needs of the other side;
- get a sense of what is possible and what is realistic in the mediation, and given the dynamics of the session predict whether a proposal is likely to be accepted and why;
- evaluate and respond to offers and proposals from the other side; and
- keep their emotional charge under control so that they are responding, not reacting, to what is happening in the mediation.

It is not necessary for participants to be separated from each other all during Stage 3; it may be entirely appropriate for some or all of them to reconvene in another joint session. One of the authors mediated a dispute between a company and its former senior manager who took a job with a competitor. The company wanted to thwart the new employment and, at least in the legal papers, alleged that it would suffer irreparable harm if the competitor were able to hire its former manager. Based on Stage 1, the competitor and manager spent a lot of time in Stage 2 trying to draft a set of voluntary restrictions that would be acceptable to the company only to have their hard work summarily rejected at the beginning of Stage 3. Sensing a fundamental misunderstanding about what the company was looking for, the author brought all of the participants back together in a joint session. Asked why the carefully crafted voluntary restrictions would not work, the company president said, “It’s way too complicated. It’s going to take too much monitoring and too many resources.” And then he added, “All I really care about are the customers that come up for renewal in the next six months.”

This was entirely new. The company president had not previously narrowed down his concerns. Even so, the others did not hear what he had said and continued to try to sell their original proposal. It was the author, as the disinterested mediator, who was in a position to notice the new information and recognize its significance. "Wait a minute", she said. "Didn't the president just say all he really cares about are the customers coming up for renewal in six months? If that's the case, then many of these other restrictions are beside the point." The president confirmed that his concern was actually much narrower than he had led everyone to believe in Stage 1, and the senior manager and competitor readily agreed to a provision that was the basis of a final settlement.

Figure 4-3 shows some of the ways that mediation can be configured with the parties meeting in joint and individual sessions at various points in the process. Figure 4-4 summarizes the typical stages of mediation discussed above.

Figure 4-4
Stages of a Typical Civil Mediation

PRE-MEDIATION ACTIVITIES	
CONTRACTING	• Initial contact with mediator • Optional preliminary meeting (in person or conference call) • Agreement to Mediate
PREPARATION	• Prepare & exchange written briefs • Exchange key documents • Mediator and parties' individual preparation for the mediation session
STAGE 1. JOINT OR PLENARY SESSION — EXCHANGE OF INFORMATION & UNDERSTANDING THE ISSUES TOGETHER	
• Mediator orientation & introductory remarks • Mediator summary of issues (optional) • Participant "presentations" ▪ Informal storytelling ▪ Prepared remarks ▪ Oral advocacy • Examination of tangible items like documents, plans, photographs • Questions ▪ To and from participants ▪ From mediator	

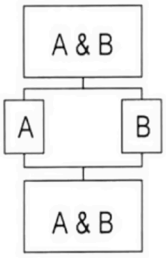
STAGE 2. INDIVIDUAL MEETINGS — FEEDBACK TO AND FROM THE PARTIES & THE MEDIATOR

- Mediator clarifies use of information from individual meetings
- Participants privately share:
  - Observations
  - Impressions
  - Interpretations
  - Reactions
  - Feelings
- Input from professional advisors
- Input from mediator, including view of merits
- Analysis, consolidation, synthesis of Stage 1 and 2 results
- Identify possibilities and next steps

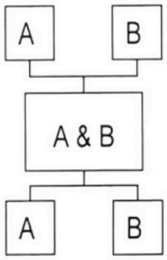
STAGE 3. BARGAINING — CONSTRUCTING THE SETTLEMENT

- Trial and error; incremental steps
- Integrative issues:
  - Identify & priorize interests
  - Generate & test options
  - Evaluate options
- Distributive Issues
  - Develop offers
  - Exchange offers and counter offers
- Review comprehensive settlement; test against alternatives
- Commit to settlement
- Document settlement

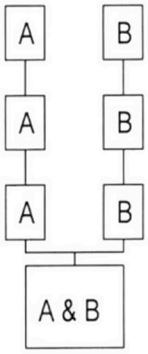
1. This Mediation begins and ends with a plenary session. One caucus in between.



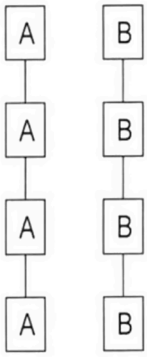
2. This Mediation begins and ends with caucuses. One plenary session in between.



3. This Mediation consists of a series of caucuses culminating in a final plenary session.

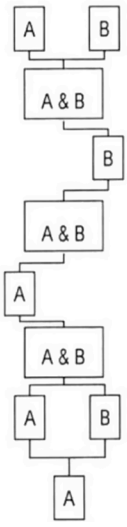


4. In this Mediation, the parties never meet in a plenary session; the mediator goes back and forth in a series of caucuses.



These mediations show that symmetry is not necessarily always present in a mediation format:

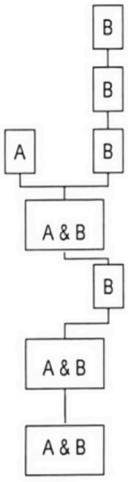
5.



In #5, each side requested a caucus at different times.

In #6, Party B required more attention. B could be an employee and A an institutional employer, for example.

6.



WHAT DO MEDIATORS ACTUALLY DO?

A number of years ago, some Canadian mediators were informally asked to reveal what interventions or tactics they rely on when conducting the mediation process.[18] In response, they began by explaining their overall or "big picture" view of what mediation is all about:

> The "mission" or "goal" or "objective" (used interchangeably) of mediation is to assist in creating an environment in which all parties are able to make a (subjectively) good decision, all things considered.
>
> Until proven wrong, I assume that the parties are there because they want a deal and my job is to help them find that deal. It is as if they are in a room and they want out. My job is to help them find the exits.
>
> As a mediator, my job is not to create a deal. My job is to uncover one if it exists.
>
> I frame the mediation process as a decision-making process, not a settlement process. The goal of a mediation, to me, is to give the parties better information so they can decide whether to settle or proceed. My role, in concert with that of counsel (if there are counsel), is to get the best information out so that the clients can make an informed choice.
>
> Getting a deal is a big picture strategy but it is not my overriding strategy. Mine is to have each party make an informed decision about settlement. That means I help them hear each other, help them understand their own and the other's interests, and see all possible ideas for settlement. Then, I don't care if they settle.
>
> My job is to help the parties to determine whether and how they might settle. It's not simply about getting a deal, although that is often important. The parties have to see if they can create something better than they currently have. If so, they will settle. But, if the status quo remains appealing, they will stick with that, and rightly so.

Beyond this big picture, aerial view, what do mediators actually do to assist participants during the mediation process? In describing the three general stages of mediation we have given some indication by means of illustrations from actual cases. Here are some additional instances of mediator interventions in a list that does not claim to be exhaustive or universal. Before reviewing the list, readers are invited to remember that mediators bring different orientations to the process. If a participant says, "They cheated me", some mediators would repeat, "They cheated you", even in a joint session. Other mediators would neutralize the remark in an effort to make it palatable to the other side: "You didn't get what you felt entitled to." Still others would castigate the speaker: "We'll never get anywhere if you talk like that. Speak on your own behalf not about the others." And then there are those who would be more blunt: "Who cares?

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[18] This segment originally appeared in *The Advocates' Quarterly* in the fall of 2001 under the title "Mediator Strategies and Tactics".

Do you want the offer that's on the table or not?" These different orientations are reflected below:

1. Some mediators try to destabilize people's perceptions and narratives, particularly when they condemn or demonize others or attribute negative motives to them. "They lied when they said that they took the report off their website. It's still there now", says the person who was criticized in the report. "That's a possibility", acknowledges the mediator. "But I got the impression that they actually believe it was removed. Why don't we ask them what steps they took to remove it. And in the meantime, why don't you call the report up on your laptop so we can all see what you are referring to."
2. Some mediators attempt to influence people's predictions of success if they take their dispute to arbitration or court in order to make them focus on the risks of proceeding further if they do not settle. As mentioned earlier in this chapter these mediators offer themselves as proxies for the arbitrator or judge who would decide the legal case. "I know that you think this clause in the tender documentation is clear so that you had no duty to enquire about pre-existing conditions", the mediator says, "but when I read this as I was preparing for the mediation session, I saw it differently. Would you be interested in hearing what I thought it meant?"
3. Some mediators insist upon or encourage certain standards of behaviour on the theory that this suppresses or controls destructive emotions and fosters logical problem-solving.[19] "Listen, counsel", says the mediator, "It might not be a good idea to use the word 'extortion' again. Come to think of it, I don't recommend the phrase 'shaking the tree' either."
4. Some mediators control the content of the conversation. They tell people what they can and cannot talk about or how they should approach the issues between them. "You can unwind the cobwebs from your relationship one strand at a time", the mediator says to the longtime business associates. "Or, you can blast them off all at once with 200 lbs per square inch of pressure. That's me — 200 lbs per square inch."[20]
5. Some mediators make pronouncements or offer information in the belief that it will make a difference to participants: "Sir, I know you want your job back, but if you were successful at this tribunal, you'd be sent back to grievance arbitration, not put directly back to work."

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[19] Not surprisingly, some mediators think just the opposite and would argue that controlling people's behaviour is a way of both disrespecting and disempowering them.

[20] Paraphrased from an entertaining and educational address to the ADR Section of the Ontario Bar Association by Justice Warren Winkler of the Ontario Superior Court at the Annual ADR Award of Excellence Luncheon (June 2003).

6. Some mediators help people frame offers and proposals that will be attractive or palatable to the other side. “I don’t think she’s looking for you to say that you were wrong. My sense is that it’s more important for her to hear that you appreciate how it hurt her and affected her life. If you’re willing to do that we can think about what words that you would be comfortable with.”
7. Some mediators transmit or reformulate necessary information in more diplomatic terms than those used by the participants to increase the chances that the recipient will hear it. The mediator does not run off and repeat words like “malingerer”, “welfare bum” or “crook” because the mediator can see with greater clarity than the aggravated participant that the other participant will be offended. Instead the mediator talks about the need for the other side to be satisfied about matters of proof.
8. And some mediators excavate interests and pick up on topics that get lost or overlooked in the heat of the moment. “Wait a minute”, says the mediator, “He just said that he won’t stand in the way of the business licensing his invention to someone else. He just wants to make sure that he is identified as its inventor. Since you say that your primary goal is making money from the invention, would you object to recognizing him in the licence as the inventor?”

WHO CAN USE THE TITLE “MEDIATOR”?

The answer to this question has not really changed in Canada in 20 years. Anyone can use the title mediator: there are no barriers to entry in the field of mediation, no standard process of approval, and no single set of criteria to be met, educational or otherwise. Unlike dentistry, medicine, or law, mediation has no licensure — meaning no governmental grant of permission to practise based on prescribed levels of education, training, experience or performance.

That said, there is an increasing move towards professionalizing the field. Many informal and formal forms of certification exist by which mediators are admitted to rosters, named in standing offers for government services, made members of mediation groups, or granted designations by private mediation organizations like Family Mediation Canada[21] or ADR Canada Inc.[22]

Mediation training is big business: readers who search the term on the internet will find a dizzying array of options offered by universities, community colleges, associations, and private service providers. Mediation

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21 See Family Mediation Canada, online: <http://www.fmc.ca/certification>.

22 Online: <http://www.adrcanada.ca/resources/designation.cfm>.

can be studied on a part-time or full time basis at the continuing education, undergraduate, or graduate level, and with general or specific applications, for example, *Introduction to Mediation & Ethics*; *Court and Criminal Related Justice Mediation*; *General Insurance Mediation*; *Advanced Commercial Mediation and Negotiation*; *Identifying Control and Abuse in Pre-Mediation*; and *Online Facilitation Skills for Mediation*.

Context-specific criteria have been developed for specialized mediation programs. There are specific things that mediators must show in order to qualify. These range from minimal educational or training criteria, demonstration of skills through role playing, videos, peer review or a practicum, examinations, detailed descriptions of work done and specific, detailed reference letters.

Of course, all of this assumes that mediation is a discrete, identifiable activity carried out by individuals who can be accurately categorized as "mediators" for general or specific applications, but that level of precision and exclusiveness does not exist, nor perhaps should it. Recently one of the authors attended a workshop conducted by an individual who develops and officiates at non-denominational rituals for births, deaths, weddings, and other life events. That individual would never dream of calling herself a mediator. And yet, she gave a credible description of what sounded like mediation. As a disinterested person, she facilitated a conversation — and brought about agreement — among five adult siblings with divergent views about how to mark the life and death of their father, who was their last remaining parent. The process had all the hallmarks of mediation: It was private, consensual, voluntary, informed, and involved mutual influence. It brought together participants with disparate views and by means of conversation helped them to reach to a mutually acceptable agreement.

Then there is a mandate that one of our colleagues performed for a large national organization in order resolve a dispute between two co-workers in a particular department. In performing this work our colleague:

- clarified the mandate and the respective roles of those involved;
- met individually with the two co-workers first;
- got some sense of what the parties were looking for and assessed their levels of flexibility and willingness to compromise;
- convened and led a plenary session with both co-workers;
- facilitated communication at the plenary session and promoted mutual understanding;
- brokered the delivery and acceptance of an apology from one co-worker to another; and
- helped the parties frame a practical agreement for how they would interact and work together in the future.

This resembles many workplace mandates that the authors have conducted under the label of "mediation", and yet our colleague self-identifies as an organizational development consultant, has never participated in or seen a mediation, and has never taken a mediation course in his life.

These two examples are a reminder that mediation is actually an amalgam of skills, models and theories imported or borrowed from many other fields — psychology, counseling, law, change management, organizational development, industrial relations, religion, philosophy, and so forth — with a level of folk wisdom thrown in. In the last several decades, this combination has been packaged as a service called "mediation" but the envelope is demonstrably permeable. Perhaps mediators need to reconsider their drive towards professionalism and the notion of exclusivity, for when it comes to helping others resolve their difference, there may be more reasons to expand the size of the tent than to restrict admittance.