MEDIATION
Training Manual

Bhutan National Legal Institute

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Training Manual

Bhutan National Legal Institute
Thimphu, Bhutan

“ ངབཅས་རའི་ འབྲུག་རྒྱལ་ཁབ་ནང་ སྲོན་དང་ཡུ་ ཚམ་ཚུ་གི་སྐབས་ལུ་ཡོད་མི་ ནང་ཁ་ནང་སྒྲིག་གི་སྟོལ་འདི་ མར་ཉམས་དོ་ཡོད་པའི་ མངོན་གསལ་ཅིག་བྱུངམ་ཨིན་མས། དེ་ཡང་ དཔེ་འབད་བ་ཅིན་ ཁྲིམས་འདུན་ཚུ་ནང་ རྩོད་གཞི་མངའ་ཤོས་ཅིག་ར་ དངུལ་འབྲེལ་ དང་གཉེན་འབྲེལ་ལུ་བརྟེན་པའི་ རྩོད་གཞི་ཚུ་འོངམ་ཨིན་མས། འདི་ཚུ་ ལེགས་ཤོས་སྒེ་དཔྱེ་ཞིབ་འབད་དེ་བལྟ་བ་ཅིན་ ཨིན་ཅི་མིན་ཅི་ར་ ཁྲིམས་ཀྱི་འདུན་སར་ ཐུག་དགོ་པ་ཅིག་ མིན་འདུག་ཟེར་མནོ་ཁ་མས། ཁྲིམས་ཀྱི་འདུན་སར་ཐུག་སྟེ་ རྩོད་གཞི་ཁྱེ་དགོ་པའི་བསྣང་ལས་ མི་སེར་ཉམ་ཆུང་ཚུ་ལུ་ དུས་ཚོད་དང་ཟད་འགྲོ་ ག་ཅི་གི་ཐད་ལས་འབད་རྒྱང་ སྐབས་མ་བདེ་ཁ་སྟོམ་ཡོད། ང་བཅས་ར་ ཚམ་ཐུན་ཆ་ གཉེན་ཉེ་ཁ་ཚུ་དང་གཅིག་ཁར་ ཞ་རྒྱ་ར་ མཉམ་གཅིག་ཡུན་རིངམ་སྟེ་སྟོངཔ་ད་ དུམ་གྲ་རེ་ སྐབས་བདེ་ཁ་དང་མ་བདེ་བའི་དཀའ་ངལ་ འཐོན་ནི་དེ་ རང་བཞིན་ཅིག་ཨིན། དེ་བཟུམ་མའི་ དཀའ་ངལ་རེ་ཐོན་མ་ད་ དཀའ་ངལ་སེལ་ནི་གི་ ཐབས་ལམ་དྲག་ཤོས་འདི་ ནང་ཁ་ནང་སྒྲིག་འདི་ཨིན། ང་བཅས་རའི་ གཡུས་གོ་ཚུ་ ནང་ ཉེ་མ་འབད་བ་ཅིན་ མི་ཆ་ཤོས་ གོ་ཤེས་ཉན་ཤེས་ ཐོ་ཁྲིད་ཚུགས་མི་ལེ་ཤ་ཅིག་ ཡོད་དོ་བཟུམ་ དཔེས་ནར་ས་འབདཔ་ད་ ཁྱེད་ བཅཱ་འཐུ་གྲྭབ་མི་ མི་སྟེའི་འགོ་ཁྲིད་པ་ ཚུ་ཨིན་ལས་ མི་སྟེའི་ནང་ སྐབས་མ་བདེ་ཚུ་སེལ་ནི་གི་དོན་ལས་ སྐབས་བདེ་ཀོག་ཀོ་ ཡོད།

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མི་དབང་རྒྱལ་སྲས་མོ་ཙེ་འབོད་ནམས་བདེ་ཆེན་དབང་ཕྱུག་མཆོག་གིས་ སྤུ་ན་ཁ་ལུ་སྦྲེ་ ནུབ་ཕྱོགས་རྫོང་ཁག་།། གི་དམངས་མི་ཚུ་ལུ་ ནང་ཁ་ནང་འགྲིགས་སྟོང་བརྡར་གྱི་འགོ་ཁྲིད་གསུངས་བཤད་བཅུད་དོན།

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EXECUTIVE SUMMARY

The Bhutan National Legal Institute (BNLI) is the training and research arm of the Judiciary. Established in February 2011 under the *Judicial Service Act of Bhutan 2007*, the Institute is mandated to facilitate the Judiciary in the fair and efficient administration of justice. It also assumes a greater responsibility in ensuring access to justice by providing legal information and discourses to the judicial personnel and to the general public. In its endeavor to promote access to justice, the Institute has committed to decentralize the justice system by promoting alternative dispute resolution mechanisms in the country. Therefore, under the visionary leadership of HRH Princess Sonam Dechan Wangchuck, Hon. President, the Institute has initiated a nation-wide mediation training program since 2012 with the objective to revitalize and institutionalize the age-old practice of mediation in the Kingdom.

Mediation remains a substantial pathway for dispute resolution in Bhutan. Mediation is encouraged and promoted for several reasons. First, mediators reduce the burden on the courts, permitting the Judiciary to focus attention and resources on a smaller docket of cases requiring a higher level of legal sophistication. Second, amicable resolution of disputes in the communities have minimized or mitigated the divisive effects of the litigation, and preserved the age-old culture of inter-dependence and harmonious co-existence of people in the communities. Third, the time and cost savings to disputants of an informal mediation process reduces the burden of justice on individuals and communities.

Mediation as a means of dispute settlement has been practiced in Bhutan since the 8th century. It has traditionally been the dispute resolution process of first choice, with adversarial litigation being introduced much later, as necessitated by the introduction of judicial processes into Bhutanese society. With the establishment of formal justice system in Bhutan since 1960s, there was a paradigm shift in the dispute resolution spectrum. People started to trust the formal adjudication system more than the informal process where even the trivial cases were referred to the court of law which otherwise would have been settled amicably in the community itself.

This paradigm shift could be due to several reasons. First, the courts were vested with legitimate power and authority to decide the case, and second, qualified judges were appointed in various courts in the Kingdom. Third, the capacity of the Local Government (LG) Leaders to resolve the disputes was inadequately matched against the increasingly erudite litigants. The conventional method of resolving the disputes lost its lustre and popularity. People's trust and confidence have shifted more towards the Judiciary than the informal resolution of dispute.

For the reasons stated, it was found indispensable to legitimise the LG Leaders to settle the disputes amicably. Therefore, the *Local Government Act of 2009* empowers the LG leaders to resolve the disputes referred to them through mediation. The LG leaders need to adapt with the changing times, and their mediation competency, knowledge and skills need to be upskilled. Therefore, BNLI has initiated development of the capacity of the LG leaders with skills and techniques which are indispensable for mediation. The BNLI has trained around 2025 LG leaders on mediation skills and techniques as of now (2012 - 2021). This figure does not reflect the mediation trainings imparted to other relevant stakeholders such as civil servants, labour officers, Paralegal Service Providers, Gewog Administrative Officers, trainees of the Post-Graduate Diploma in National Law, etc. This training has not only revitalised the customary practice of *Nangkha Nangdrig* in Bhutan, but also integrated internationally accepted standards of conduct and best practices of mediation. In keeping with the local customs and practices, the Institute after extensive research came out with the idea of "*Thuenlam Model of Mediation*"

which is unique to Bhutan. For that reason, a uniquely blended style of mediation, combining both facilitative and evaluative feature, is proposed. The name *"Thuenlam"* is suggested for this uniquely Bhutanese model as it is well-known and understood in Dzongkha word which holds meaning and relevance for all ages and socio-economic groups in Bhutan.

This intervention was a success story. In its *National Mediation Reports* published by the BNLI, figure shows a total of 39,823 cases have been resolved through mediation in the communities by the LG leaders from 2012 - 2021. The figures are quite heartening and inspiring for the Thuenlam Mediators as well as for the Institute. And for that reason, mediation elsewhere is treated as a parallel justice system; not an alternative to formal justice system.

In addition to the customary mediation practices in the *Chiwogs* and *Gewogs*, the BNLI and the Judiciary has established *Court-Annexed Mediation Unit* (CAMU) in all the Courts across the country in 2019. Since then, the Institute has trained a total of 142 bench clerks as judicial mediators. And till date, the CAMU has resolved a total of 1,437 cases through mediation according to the *Court-Annexed Mediation Report* of 2020 and 2021. Thus, these figures amply suggest that mediation is widely practiced and it's a useful tool for dispute settlement.

Mediation is one of the modes for attainment of *"Peace and Harmony"* in the society. In furtherance of this noble objective, the BNLI is ever committed to provide mediation trainings to LG leaders, bench clerks and other relevant stakeholders. Therefore, the Institute is pleased to compile a *Mediation Training Manual 2022.* This *Manual is* intended to serve as a guide for facilitators who will train community-based mediators and judicial mediators to help resolve disputes in a fast and cost-effective way. This *Manual* can also usher in uniformity and consistency in the training approaches, its contents and mediation practices.

(Pema Needup)
Director General
Bhutan National Legal Institute

CHAPTER 1
INTRODUCTION

Dispute Resolution

"No man is an island." Humans are by nature social animals. They depend on interaction and community to survive. However, when they live together, disputes are bound to arise. As the Bhutanese aphorism says, *"even the scoops and stirring spoons get into conflicts when kept together for a long time"*, conflicts are inevitable in life. It takes two to have a dispute. Conflict is a fundamental human trait. And a conflict free harmonious society is impossible. Conflict will always occur. Conflict and dispute are inevitable and persuasive aspects of life. However, a dispute has to be resolved or settled through varied dispute resolution mechanisms.

> "Peace is not absence of conflict; it is the ability to handle conflict by peaceful means."
>
> **- Ronald Reagan**

Dispute resolution or dispute settlement is the process of resolving disputes between parties. The term 'dispute resolution' is sometimes used interchangeably with 'conflict resolution', although conflicts are generally more deep-rooted and lengthier than disputes.

Disputes are damaging, expensive, and time consuming. They affect individuals, communities, organizations, government, and the economy.

Dispute resolution processes fall into two major types:

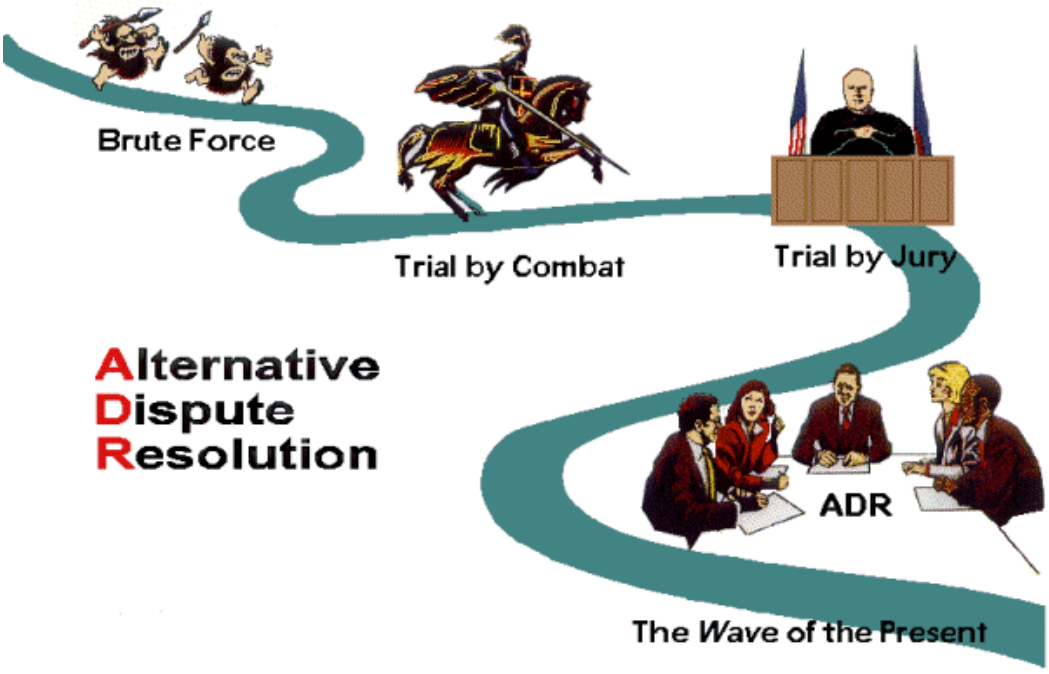
1. Adjudicative processes, such as litigation or arbitration, in which a judge, jury or an arbitrator determines the outcome; and
2. Consensual processes, such as negotiation, conciliation and mediation, in which the parties attempt to reach agreement.

Evolution of Dispute Resolution

The people think of dispute resolution primarily in terms of court litigation. Access to courts to remedy wrongs and enforce legal rights is central to any legal system. We have created a system of rules to ensure fair trials and provide a finely tuned system of public justice. However, litigation, with all of its procedural protection, is slow, costly and relatively inflexible.

The Wave of the Past

The picture below shows a path of resolution of dispute evolved from the ancient times to the present day.



The first picture shows two primitive persons – one being chased by the other each carrying spears. This picture depicts how people in the past resolved disputes by resorting to brute forces and obviously the stronger and the bigger ones emerged victorious and the weaker ones were vanquished or eliminated. This was the age of the 'survival of the fittest' – 'live and let die' as propounded by Charles Darwin.

The second picture shows a man on horseback with a lance (trial by combat). Here too, reason and logic did not prevail much; still the force was dominant except that the means of fighting has improved (use of horse and lance for maximum damage).

The third picture shows a judge sitting in a court (trial by judge or jury). This symbolizes dawning of civilization – age of reason and science. People do not take matter in their own hands. Their security was protected by the state which in turn required people to give up certain freedoms for greater good of the society (social contract). A third neutral person on behalf of the State or the Crown called judges/jurors resolved the disputes. People were not allowed to wreck vengeance on the aggressor; instead, the court-imposed sanctions on the offenders on behalf of the society.

The Wave of the Present – ADR is the Solution

The last picture shows the disputants sitting around a table on equal footing with a mediator. This symbolizes ADR in which the parties are not required to subject to the orders given by judges in the courts, but tailored decisions suited to their needs through amicable settlement of disputes in their communities. And today emphasis is more on ADR than the formal litigation mainly to save time from the lengthy and cumbersome trial procedures and costs of litigation.

ADR: A tool for Peace and Happiness

Though documentation is scant, it is believed that nearly every community, country, and culture have a long history of using various methods of informal dispute resolution. Mediation, for instance, must have probably existed for nearly as long as humans have lived together. Mediation has chiefly emerged as part of the trend to explore, particularly in legal or quasi-legal disputes, alternatives to formal, expensive litigation.

"Mediation is not new; it's a new way of thinking."

Evolution of Mediation in Bhutan

Since the first body of laws in Bhutan was codified only towards the end of 1950s, before that, the Bhutanese resolved their disputes mostly through mediation. One can therefore say that ADR is not a new concept in Bhutan. The history of ADR goes way before 1950s. Since the 8th century, the informal systems of dispute resolution were being practiced in Bhutan.

The Bhutanese have always preferred to resolve their disputes outside the court through mediation rather than going to the court of law. ADR is not an unfamiliar practice in Buddhism and to the Bhutanese legal system. The system of *Barmi* (middleman), where the ordinary people resolve the problems of ordinary people, without involving the lawyers and other legal professionals is widely practiced in Bhutan. The embedded Buddhist value of *"the winner begets hate"* has been a fundamental foundation to boost compassion and harmony amongst the people in the Bhutanese society.

The age-old concept of dispute resolution through mediation and reconciliation between conflicting parties outside the courts through the formal legal process has played an important and vital role since the 8th century. Even after the institution of the formal legal system and the establishment of the court system in the early 1960s, mediation was still the cornerstone of dispute resolution in Bhutan. The concept of ADR started developing and gaining more popularity with time, especially after the enactment of the Civil and Criminal Procedure Code (CCPC) in 2001. In line with the provisions of the CCPC, the courts encouraged the people to resolve their disputes through negotiations. Under the CCPC the parties were given the liberty to opt to settle their disputes outside the courts through mediation either before or after instituting the suit in the court at any stage of the proceedings. The adoption of the Constitution of Bhutan in 2008 was a major step towards the development of ADR in Bhutan.

Article 21 Section 16 of the Constitution states, "Parliament may, by law, establish impartial and independent Administrative Tribunals as well as Alternative Dispute Resolution Centres."

Therefore, ADR is a concept that emerged in the Constitution as *'Dham Kha Chengi Khendhum.'* However, in Bhutan, mediation as a form of ADR has been an integral part of Bhutanese culture and tradition and is locally known as '*Nangkha Nangdrik*' which is a form of out of court settlement of disputes. It is generally understood as an intervention from a third-party person where the *Barmi* (middleman), assuming the role of an advisor, tries to make parties understand the benefits of settling internally, without having to go to the court. For centuries, mediation was the primary dispute resolution mechanism. It was mainly based on the principles of "*compassion and peaceful co-existence*" of the community-oriented Bhutanese society.

- For Bhutan, the traditional mediation *(nangkha nangdrik)* has been the primary dispute resolution mechanism; not an alternative to litigation.
- Formal justice system developed only in the early 1960s.

Mediation during the Lord Buddha

The concept of "internal settlement" existed even during the time of the Buddha. In Kosambi, there was a group of monks who were fighting and quarreling. So, the Buddha summoned them and, using his spiritual authority as teacher, taught them the six principles of cordiality and harmony (Saraniyadhamma). The Buddha stressed the importance of kindness in actions, words and thoughts both in public and in private. The Buddha is said to have prevented a war between the Sakyans and the Koliyans. The dispute arose because of a drought of the Rohini river. The water was not enough to irrigate the crops of both clans and so each one said they wanted to save at least their crops so that the other clan could come and get some from them. However, the farmers were not able to agree and reported what happened to the Minister of Agriculture who in turn reported it to the king who decided to wage war. On that occasion the Buddha stood among both parties and was able to persuade them not to go to war. He called both kings and asked them the motivations for which they wanted to destroy one another. After that, he engaged them in reasoning. The Buddha asked: "How much are Khattiyas worth, great king?" - "Khattiyas are beyond price, reverend sir." - [thus, the Buddha answered] "It is not fitting that because of a little water you should destroy Khattiyas who are beyond price." They were silent." Thus, we can

see how the Buddha used his spiritual authority and the blood relationship he had with his kinsmen to let the two kings reflect on the value of life with respect to the problem over water, silently suggesting a different approach to solve the conflict.

In this way, over the centuries, Buddhist monks have often been harnessed by Kings to help negotiate an end to a war. In fact, even the Buddha struggled with a lifelong conflict with is cousin, Devadatta. Buddha also intervened countless times in dispute between his disciples, often over issues of correct practice. In many instances, he served as an arbiter. At other times, the Buddha acted more as a mediator. The Buddha empasized on conciliation, arbitration, negotiation and forgiveness, over discord and conflict. Buddha said, *"Mediation brings wisdom and the absence of mediation fosters ignorance."* Hence, Buddha widely encouraged internal setllement between parties.

"You should respect each other, follow my teachings and refrain from disputes; you should not, like water and oil, repel each other, but should, like milk and water, mingle together."
- Lord Buddha

Mediation during Guru Rinpoche

The negotiation of a border dispute between *Sindharaja*, ruler of Bumthang region and *Nawoche,* King of a neighboring Kingdom in India by *Guru Padmasambhava* in the 8th century may be considered as the earliest recorded mediation process in Bhutan. Guru Padmasambhava arranged a meeting between the two Kings to resolve their boundary dispute and was eventually successful in settling the dispute. The mediation was held at a place called Nabji-Korphu *(mNah-sbis-dkor-phug Lhakhang)* in Trongsa. *Nabji lhakhang's* name comes from *'naboed',* which means *"taking an oath."* The two Kings erected a monolithic stone pillar (*rDo-ring* as pictured above) at the venue as a symbol of the successful mediation, which can be seen even to this day at Korphu Lhakhang. The two kings took an oath of non-violence against each other in the presence of Guru Rinpoche. The handprints of both kings and the Guru Rinpoche can be seen on a monolithic stone pillar. Since then the concept of *Nangkha-Nangdrik,* (Bhutanese terminology for mediation) as a form of informal dispute resolution mechanism or ADR has been in practise and it has become an integral part of our Bhutanese custom and culture.

Mediation during Zhabdrung Rinpoche

Zhabdrung Ngawang Namgyal promulgated the first set of laws and codification of these laws were completed in 1652. This indeed marked the commencement of the concept of law in Bhutan. Laws were instituted in a lawless places and valleys were settled which were hitherto not inhabited. Peace became a system of government used by the Civil Administration known as *'Zhiwai Zhung Yog'* – "government servants of peace" as opposed to violent government. Thus, mediation is believed to have emanated from the monastic community because people trusted monks for, they could read and write. Also, the monks occupied important position in the society because of their religious influences. Even to this day, religion has a strong influence on the society and people tend to listen and respect their wisdom.

Mediation during the First King of Bhutan

The First King Gongsar Ugyen Wangchuck earned international acclamation and respect for his exemplary negotiation skills when he successfully mediated the trade disputes between the Tibet and the British India in 1904. The then Trongsa Penlop joined the Younghusband Mission to Tibet in 1904 and played a role as mediator, using the long-established ties between Tibet and Bhutan to help the British negotiate a favourable agreement. Bhutan then operated firmly within the British sphere

of influence and Ugyen Wangchuck was popular after his role as mediator with both the British and the Bhutanese. This resulted in the foundation of the hereditary monarchy of Bhutan when Ugyen Wangchuck was elected King of Bhutan in 1907.

Past-Practice of Mediation

- Direct negotiation based on the principle of "apology and forgiveness" was widely practiced.
- *Barmi* (middleman) used to be village elders, *Chipons, Tshogpas, Gups, Mangmis, Chimis* who were untrained and unskilled but known and trusted in the community.
- *Barmi* accepted nominal fees *(Barzin)* in cash or kind but never demanded from the parties.
- Unstructured (informal) process – purely at the convenience of the *Barmi* and parties.
- Mediation sessions - Joint Sessions were largely held while private caucuses were rarely held.
- Co-mediation – parties either chose a common mediator or chose independent mediators.
- Only male mediators used to mediate.
- Shuttle mediation was was widely practiced – *Barmi* used to carry the messages back and forth between the parties.
- No formal written agreement.
- No confidentiality of mediation process either.

Current-Practice of Mediation

- Direct negotiation is rarely practiced – involves third-party neutrals.
- Mediation is being conducted rarely by village elders but mostly by *Tshogpas, Mangmis, Gups* and *Jabmis* who are now trained mediators.
- Mediation services at Gewogs are provided *pro bono* but lay mediators/*Jabmis* charge nominal fees.
- Focuses on structured process.
- Joint sessions and private caucuses are equally practiced.
- Co-mediation is also practiced.
- Focuses on formal written agreement.
- Now we have female mediators too.
- Confidentiality is strongly maintained.

Two Types of Mediation Process – Mediation in Bhutan is presently occurring in two ways.

1. Community Mediation

– First, it is being used independently of the court system as a means of resolving dispute at the community level.

2. Court-Annexed Mediation – Mediation process after registration of court cases – parties have the option either to go for Court-Annexed Mediation (CAM) or to the Community Mediation Centres at Gewogs.

Court-Annexed Mediation Unit (CAMU) has been institutionalized in every Court since 2019.

Legislative Sources of ADR

Almost all statutes contain specific provisions requiring the disputes to be resolved through mediation process first, before resorting to litigation. In addition, judges are mandated to inform parties of their right to mediation during the preliminary hearing and adjourn the court proceedings if the parties so request. The importance of negotiated settlements has been recognized by the judicial system as a means to enhancing access to justice. Article 21(1) of the Constitution charges the judiciary with the task of enhancing access to justice, a task that is made easier when the formal court system sensibly co-exists with the judicial mediation.

> With Constitution that has committed to the pursuit of Gross National Happiness, mediation process that promotes continuing relationships and goodwill assume greater importance.

The formalization of ADR in the Bhutanese context can be traced to the following statutes:

- Sections DA 3-1 and DA 3-2 of the Thrimzhung Chhenmo, 1959;
- Section 150 of the Civil and Criminal Procedure Code, 2001;
- Article 21(16) of the Constitution of the Kingdom of Bhutan, 2008;
- Section 150 of the Civil and Criminal Procedure Code (Amendment) Act, 2011;
- Section 84(i) of the Local Government Act, 2009 and Amendment Act, 2014;
- Section 48 of the Mines and Minerals Act, 1995;
- Section 108 of the Bankruptcy Act, 1999;
- Section 55 of the Municipal Act, 1999 (Repealed);
- Sections 59-61 of the Environment Assessment Act, 2000;
- Section 20 of the Sales Tax, Customs and Excise Act, 2000;
- The Company Act, 2000;
- Article 13 of the Cooperatives Act, 2001;
- Section 45 of the Income Tax Act, 2001;
- Section 11 of the Electricity Act, 2001;
- Section 15 of the Geog Yargay Tshogchung Chathrim, 2002 (Repealed);
- Section 12 of the Dzongkhag Yargay Tshogdu Chathrim, 2002 (Repealed);
- Sections 20 of the Road Act, 2004;
- Sections 20 and 21 of the Tenancy Act, 2004;
- Section 30 of the Evidence Act, 2005;
- Section 29 of the Bhutan Information, Communications and Media Act, 2006;
- Sections 185-210 of the Labour and Employment Act, 2007;

- Section 56 of the Land Act, 2007;
- Section 88 of the Civil Society Organizations Act, 2007;
- Sections 48-52 of the National Environment Protection Act, 2007;
- Section 83 of the Religious Organizations Act, 2007;
- The Construction Development Board Manual, 2007;
- The Procurement Rules and Regulations, 2009;
- Section 60 of the Water Act, 2011;
- Sale Tax, Customs and Excise (Amendment) Act, 2012;
- Sections 92-93 of the Consumer Protection Act, 2012;
- The Alternative Dispute Resolution Act, 2013;
- Section 221 of the Contract Act, 2013;
- Section 248 of the Road Act of Bhutan, 2013;
- Sections 91-92 of the Tenancy Act, 2015;
- Section 392 of the Companies Act, 2016;
- Sections 155-156 of the Customs Act, 2017;
- Section 65 of the Information, Communications and Media Act, 2018; and
- Chapter 19 of the Bhutan Civil Service Rules and Regulations, 2018.

CHAPTER 2
BASIC CONCEPT OF ADR

Why ADR?

Prior to the formal justice system in 1960s, people resolved disputes amicably through mediation *(nangkha nangdrik)*, which became the primary dispute resolution mechanism. This was very appropriate in a small and inter-dependent society steeped in the Buddhist values of compassion, non-violence and peaceful co-existence. Our laws essentially revolved around the values of *Lhachhoe Gewa Chu* and *Michhoe Tsangma Chudrug* and Gross National Happiness (GNH). In the countryside, litigation is considered disruptive of social harmony. The fact that people preferred amicable resolution of disputes over litigation is evident from the popular saying that *'it is better to lose in the villages than win in the courts.'* Besides, it preserves our age-old culture of peace, compassion and social harmony which is a distinct feature of our national identity.

Today, with the increasing number of cases, and the use of the legal system to resolve disputes, a dissatisfaction has arisen over the years in terms of costs, time, delays, and procedural formalities inherent in the legal system.

What is ADR?

The acronym *"ADR"* stands for the Alternative Dispute Resolution. It is also known as External Dispute Resolution or Appropriate Dispute Resolution. In general, ADR is the term which refers to a group of processes through which disputes, conflicts and cases are resolved outside of formal litigation procedures. It is sometimes called *'out of court settlements.'*

ADR should not be viewed as alternative; rather it should be given a right place and be treated at par with the court system. ADR is a norm and it's going to stay here now and for the future.

Goals and Objectives of ADR

The following are goals and objectives of ADR:

- To enhance access to justice for all users;
- To relieve court congestion, as well as prevent undue cost and delay;
- To preserve, improve or restore relationships among disputants;
- To provide more effective dispute resolution;
- To increase satisfaction of the users; and
- To strengthen community vitality, and to achieve the greater objective of Gross National Happiness.

Advantages of ADR

ADR has numerous advantages over litigation:

- Faster and less expensive;
- Flexible and responsive to the individual needs of the parties involved;
- Informal;
- Parties have more faith and confidence in the nature of the process;
- Confidential;
- Preserves goodwill among the parties; and
- Creates win-win outcome.

"Better to lose in village than win in a court of law."
- Bhutanese Proverb

Types of ADR

ADR is generally classified into at least four types:

a) Arbitration;
b) Negotiation;
c) Conciliation; and
d) Mediation.

a) Arbitration which is equivalent to *'Nangdrik Chhamkha'* in Dzongkha is a formal process in which the people in dispute present their case to an independent third person (the arbitrator), and are bound by that person's decision (award). Arbitration can be either voluntary or mandatory and can be either binding or non-binding. **[Refer ADR Act of Bhutan, 2013 for Arbitration Procedures]**

Arbitration is a *procedure* in which a *dispute* is submitted, *by agreement of the parties,* to one or more *arbitrators* (Arbitral Tribunal) who make a *binding decision* (award) on the dispute. The term *"arbitration"* refers to any process in which a private third-party neutral renders a decision, or *"award,"* regarding a dispute after hearing evidence and argument, like a judge. Arbitration comprehends a wide variety of procedures, similar in varying degrees to litigation and usually intended as a partial or complete substitute for court trial.

Sec. 182 of ADR Act 2013 defines arbitration as:

"Arbitration" shall refer to the *process* by which an *arbitrator* appointed by parties or by the Centre, as the case may be, *adjudicates* the *disputes* between the parties and gives an *award* by applying the provisions of this Act insofar as they refer to arbitration.

Arbitration is consensual

- Arbitration can only take place if both parties have agreed to it;
- In the case of future disputes arising under a contract, the parties insert an arbitration clause in the relevant contract; and
- An existing dispute can be referred to arbitration by means of a submission of agreement between the parties.

Parties choose the arbitrator(s)

- Parties can select a sole arbitrator together; and
- If they choose to have a three-member arbitral tribunal, each party appoints one of the arbitrators; those two persons then agree on the presiding arbitrator.

Arbitration is neutral

- Parties are able to choose such important elements as the applicable law, language and seat of the arbitration; and
- This allows them to ensure that no party enjoys a home court advantage.

Arbitration is a confidential procedure

- Protects the confidentiality of the existence of the arbitration, any disclosures made during that procedure, and the award;
- The award is final and easy to enforce;
- The parties are free to agree on the number of arbitrators provided that such number shall not be even (Arbitral Tribunal consists of a sole arbitrator or usually a panel of three arbitrators); and
- An arbitrator is basically a private judge appointed with consent of both the parties.

Types of Arbitration

1. Domestic Arbitration;
2. International Commercial Arbitration;
3. Institutional Arbitration (one where a specialized institution is appointed and takes on the role of administering the arbitration process); and
4. Ad hoc Arbitration (one that is not administered by an institution.)

b) Negotiation which is equivalent to *'Deydrik or Thuendrik'* in Dzongkha is a voluntary process without intervention of third parties. It involves people in dispute communicating directly, either by speaking or in writing, to try to reach an agreement. If agreement is reached, it is binding and enforceable as contract. The process is usually informal, unstructured, private and confidential**.**

c) Conciliation which is equivalent to *'Zhithuen'* in Dzongkha is a voluntary process in which the people in dispute try to reach an agreement with the assistance and advice of an impartial person (a conciliator), who acts as a neutral third-party. If both the parties sign the settlement agreement, it shall be final and binding on both parties.

Like mediation, conciliation is a voluntary, flexible, confidential, and interest-based process. The main difference between conciliation and mediation proceedings is that, at some point during the conciliation, the conciliator can provide advice with regard to the merits of the dispute and can even suggest terms for settlement. This provides more opportunities for conciliators to influence the dispute resolution process, but it also requires more responsibility. Often, conciliators need to be experts with regard to the laws that influence their particular field of practice or have other expertise which they provide to disputing parties when requested. A mediator, by contrast, will in most cases and as a matter of principle, refrain from making such a proposal. Like in mediation proceedings, the ultimate decision to agree on the settlement remains with the parties.

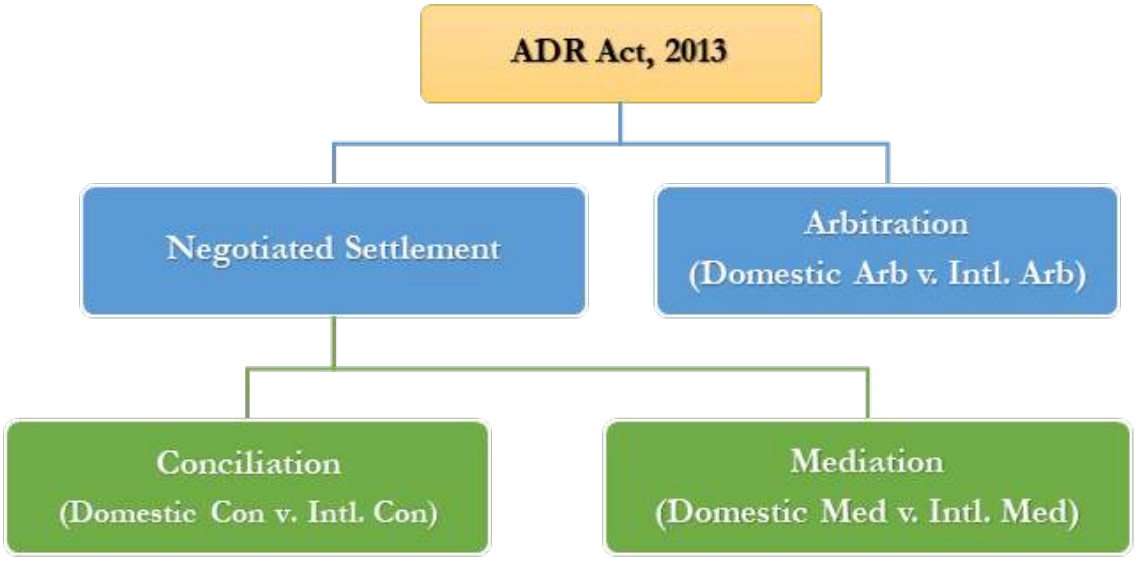
> "Conciliation is a process in which the parties to a dispute, with the assistance of a neutral third party (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise or determine the process of conciliation whereby resolution is attempted, and may actively encourage the participants to reach an agreement."

Conciliation Process

The process has five stages:

1. **Preparation and Conciliator's Opening Statement**
    - The opening statement includes a brief description of the role of the conciliator and participants, the conciliation process and any ground rules.
2. **Parties' Opening Statement**
    - Each party or their representative tells a story about the dispute from their perspective.
    - Emerging interests, needs and options for resolution are identified for use later in the conciliation.
3. **Joint Session and Discussion**
    - The conciliator will take an active role, summarizing views and options and may also discuss with the parties the strengths and weaknesses of their case.
    - The conciliator encourages parties to communicate directly with each other. The parties' interests are further clarified.
    - This provides the basis for joint problem-solving, generating options for solution and may be followed by further joint sessions where necessary.
    - During this stage, the parties may take a break from joint session to give lawyers instructions and consider offers and counter-offers or advice.
    - There may be a need for additional joint sessions.
4. **Private Caucuses**
    - The conciliator may hold private meetings with each of the parties.
    - The conciliator may reality test alternatives and options and comment about possible outcomes and the strengths and weaknesses of each party's case.
5. **Concluding Session**
    - During this stage, the conciliator will assist the parties to narrow the issues in dispute.
    - The conciliator facilitates final negotiations and fine-tuning of the agreement.

- If the matter has not resolved, the conciliator will discuss with the parties the next steps to be taken, including the need to obtain any further material. Alternatively, the conciliation may need to be adjourned or terminated.



d) **Mediation** which is equivalent to *'Nangkha Nangdrik'* in Dzongkha is a voluntary process, where an impartial mediator helps the parties to negotiate towards resolving their conflict. The mediator has no power to impose an outcome on disputing parties. The solution has to come from the parties. Mediator is one who helps people reach their own settlement. The process is consensual, informal, private and confidential.

e) **Collaborative Law** - In some countries, collaborative law is considered as the fifth forms of ADR process which allows both parties involved and their lawyers to enter into negotiation to finalize any legal aspects of their separation or divorce without attending court.

- Deals with family law disputes (divorce, child custody, matrimonial property, alimony, child support);
- Consists of two clients and their respective attorneys working together toward the sole goal of reaching at negotiated settlement; and
- Child psychologists or accountants assist the lawyers and their clients.

f) **Hybrid or Mixed Processes** – Another benefit of ADR is the ability to be flexible and modify each process to be used in conjunction with one another. This mixture of the primary processes is known as *combined processes or hybrids*. Following are the more common hybrids and combination processes:

i. **Med-Arb** has features of both mediation and arbitration. The parties first try to resolve their disputes through mediation. If that does not resolve it, then the process switches to a binding arbitration.

ii. **Arb-Med** is a process that combines the benefits of arbitration and mediation. Here the process first starts with an arbitration proceeding. If that does not work, then the parties work with a mediator to attempt to resolve their conflict.

iii. **Facilitative-Evaluative** – While facilitative is an ideal process, evaluative process may be necessary when facilitative process fails to achieve a desired outcome.

g) **Online Dispute Resolution (ODR)** is a form of dispute resolution which uses technology (such as e-platforms, video conference, e-mails, chats, etc.) to facilitate the resolution of disputes between parties.

- ODR is the norm and it's going to stay here now and for the future.
- ODR may not be effective in mediation since mediation has to deal with emotions and psychology of the parties.
- ODR may not be effective in negotiation either. However, ODR has been found to be effective in arbitration.

The ADR Continuum

As depicted in Figure 1, all dispute resolution process occupies a continuum, ranging simple and informal, to complex and formal. Processes that occupy the left side of the continuum are consensual: they try to resolve disputes informally through mutual agreement. The best example is direct negotiation between the parties themselves. Processes that occupy the right side of the continuum are adjudicative: they resolve disputes through litigation, an adversarial process that employs formal rules of evidence and procedure, to reach a decision based on the law and the facts. In between are the various ADR processes, like mediation, which tend to favor the left side of the continuum. Unlike adjudication, mediation does not attempt to find fault or legal liability, or observe formal rules of procedure or evidence. Rather than a third party decides the outcome, the parties decide.

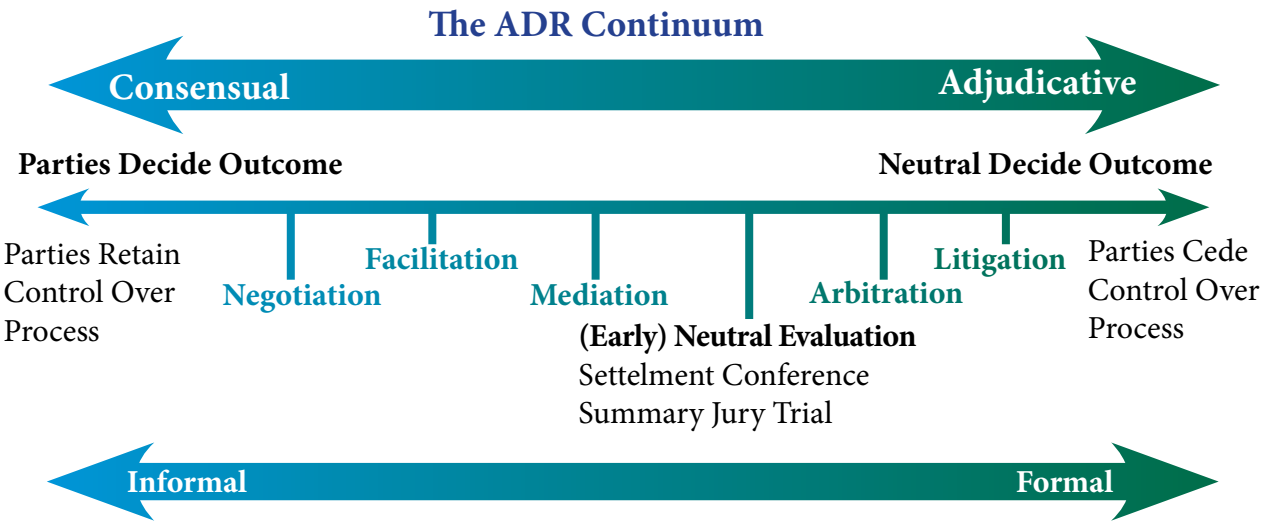


Figure 1. The ADR Continuum

CHAPTER 3
UNDERSTANDING CONFLICT

The Dynamic and Nature of Conflict

Conflict is dynamic. Wherever people live and work together, there will be conflict. Indeed, conflict is an inevitable and persuasive aspects of life. Conflict is a natural part of life. Conflict is a fundamental human trait. Conflict is what we make it. The heart of every dispute is a conflict, i.e., a state of discord that exists when the needs and interests of one person differ from those of another.

What is Conflict?

Conflict is derived from a Latin word *'conflictus'*, which means collision or clash. Conflict means dispute or disagreement or argument or misunderstanding between two or more people. A conflict arises when two or more people or groups perceive that their values or needs are incompatible – whether or not they propose, at present or in the future, to take any action on the basis of those values or needs. Conflict emerges when disagreements, differences, annoyances, competition or inequities threaten something important. Addressing conflicts early, when they are just beginning to ripen, helps avoid disputes later on. If conflict is dealt with in a healthy way, a solution that satisfies everyone can be generally found. Conflict has its negative side. It may hurt feelings and fracture relationship. Conflict is a crisis and, in every crisis, lies an opportunity for growth and positive change. Therefore, conflict is an opportunity. Mediation offers people a chance to experience the positive opportunity in conflict.

> "Dialogue is the most effective way of resolving conflict."
>
> **– Dalai Lama**

Brainstorming Activity: Understanding Conflict

Description:

- Most discussions of conflict start by defining what conflict is, and facilitators use different methods and techniques for discussion. For effective learning, instead of facilitator defining the conflict, it might be appropriate to kick-start by asking "how participants feel about conflict?" Personal impressions are helpful for understanding how people experience a particular event or relationship. For example, the experience shows that when some people are asked to give their feeling about conflict, they describe conflict as "a snake" which is too egoistic or "a tortoise" which does not move any faster. Others describe it as "an ugly bitch" or even "hell".

Objective:

- This activity will help participants to be aware of the conflict and to define in their own understanding.

Timing: 10 minutes

Course of Action:

- Individually, participants should complete the question: "*What thoughts and images come to your mind when you hear the word CONFLICT???*" Write three words.
- Compare your words with a person next to you and share your words and explain.
- Based on these three key words, define the conflict in your own understanding.

Remarks: Activity to be done before the session commences.

Debrief: 5 minutes

Some Key Definitions

Definition	Key Terms	Authors
Conflict is		
… is a struggle between opponents over values and claims to scarce status, power and resources	Struggle opposition scarcity	Coser (1956)
… are bargaining situations in which the ability of one participant to achieve his ends is dependent on the choices or decisions that the other participant makes.	strategy bargaining dependence	Schelling (1960)
… is a dynamic process in which structure, attitudes and behaviours are constantly changing and influencing one another.	structure attitudes behaviours	Galtung (1969)
… takes place whenever incompatible activities occur. One party is interfering, disrupting, obstructing, or in some other way making another party's actions less effective.	incompatibility interference effectiveness	Deutsch (1973)
… is a process in which two or more parties attempt to frustrate the attainment of the other's goals. The factors underlying conflict are threefold: interdependence, differences in goals, and differences in perceptions.	goals interdependence perceptions	Wall (1985)
… is a perceived divergence of interest, or a belief that the parties' current aspirations cannot be achieved simultaneously.	interests aspirations beliefs	Pruitt and Rubin (1986)
… are communicative interactions amongst people who are interdependent and who perceive that their interests are incompatible, inconsistent or in tension.	communication interdependence tension	Conrad (1991)
… understood as incompatible activities – occurs within co-operative as well as competitive contexts. Conflict parties can hold co-operative or competitive goals.	incompatibility co-operation competition	Tjosvold and Van de Vliert (1994)
… is the interaction of interdependent people who perceive incompatible goals and interference from each other in achieving those goals.\	interaction interdependence incompatibility	Folger, Poole and Stutman (1993)
… is an interaction between actors (individuals, groups, organisations, etc.) where at least one actor senses incompatibilities between their thinking, imagination, perception, and/or feeling, and those of the others.	interaction incompatibility impairment	Glasl (1994)

Myths and Realities of Conflict

Myth	Reality
Conflict is bad	Conflict is a natural part of life
Conflict is always a contest	All conflicts can be approached with "win-win" in mind
There is one right way to handle conflict	There are potential uses and limitations to all styles

What is Dispute?

Dispute is derived from a Latin word *'disputare'* meaning to discuss or argue. A dispute is an argument or disagreement or controversy between people or group on particular issue. A dispute arises when two or more people or groups perceive that their interests, needs or goals are incompatible and they seek to miximise fulfilment of their own interests or needs, or achievement of their own goals (often at the expense of the others).

Conflict vs. Dispute

- Dispute is a short-term disagreement that can result in the disputants reaching some sort of resolution; it involves issues that are negotiable.
- If left unchecked and unexplained, a dispute can easily turn into a conflict.
- Conflict is long-term with deeply rooted issues that are seen as non-negotiable.
- Conflict will not revert back as dispute.

Continuum of Tension

Life comprises of several differences between and among people, groups and nations. There are cultural differences, personality differences, differences of opinion, and situational differences, and if not resolved at its infant stage, lead to disagreements. Disagreements cause problem, and unresolved problem can become a dispute. Dispute then turns out into the conflicts and if not managed can lead to violence and even a dreadful war. These brief descriptions are illustrated in a graphical representation which is otherwise known as *Continuum of Tension.*

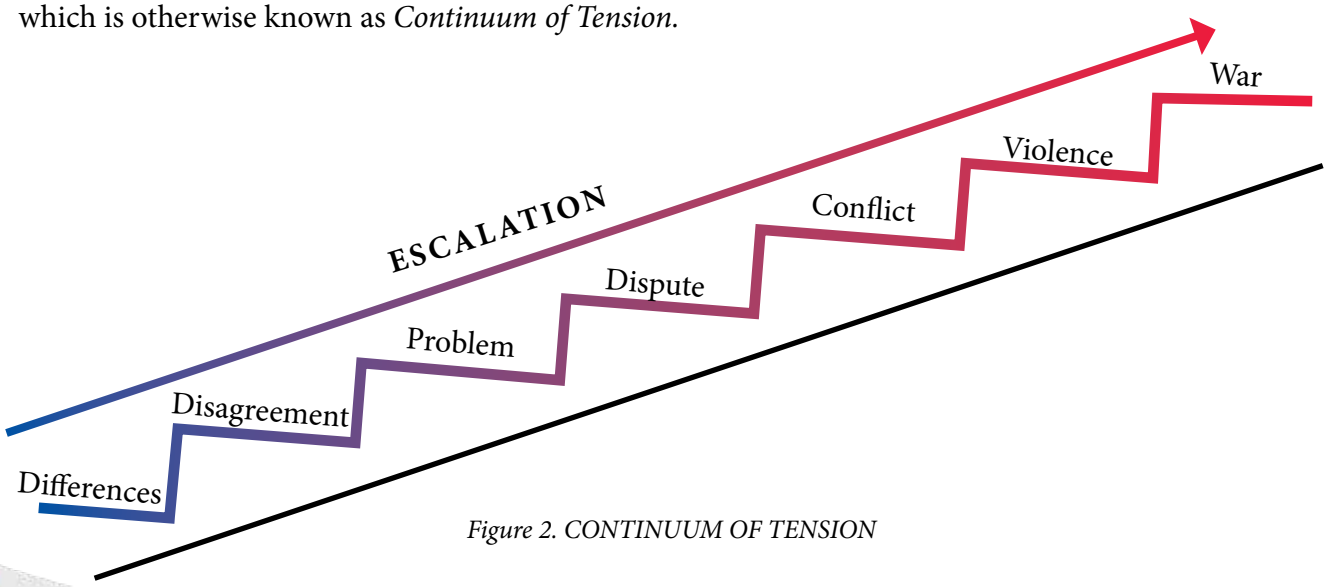


Figure 2. CONTINUUM OF TENSION

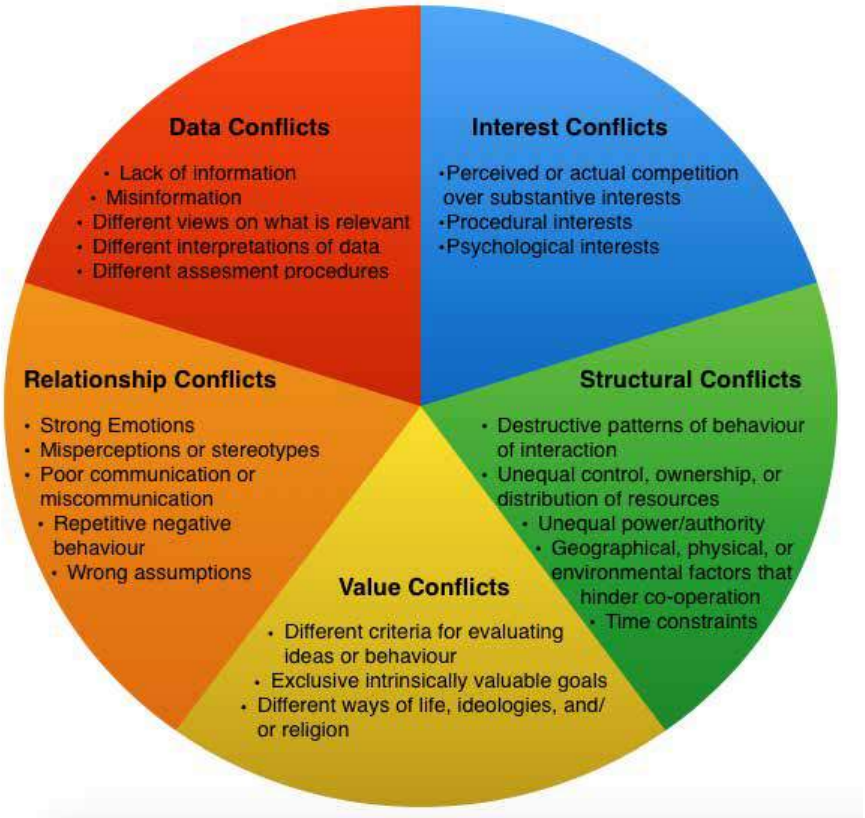
Causes or Sources of Conflict

The first step in resolving conflict is identifying its cause. Conflict can arise from different lifestyles, roles, values, different views, symbolic actions, structural deficiencies and systemic problems, habit, power, change or fear of change, language, individual and group dysfunction, and the (perceived) unfairness of distribution of assets, wealth, power, or land.

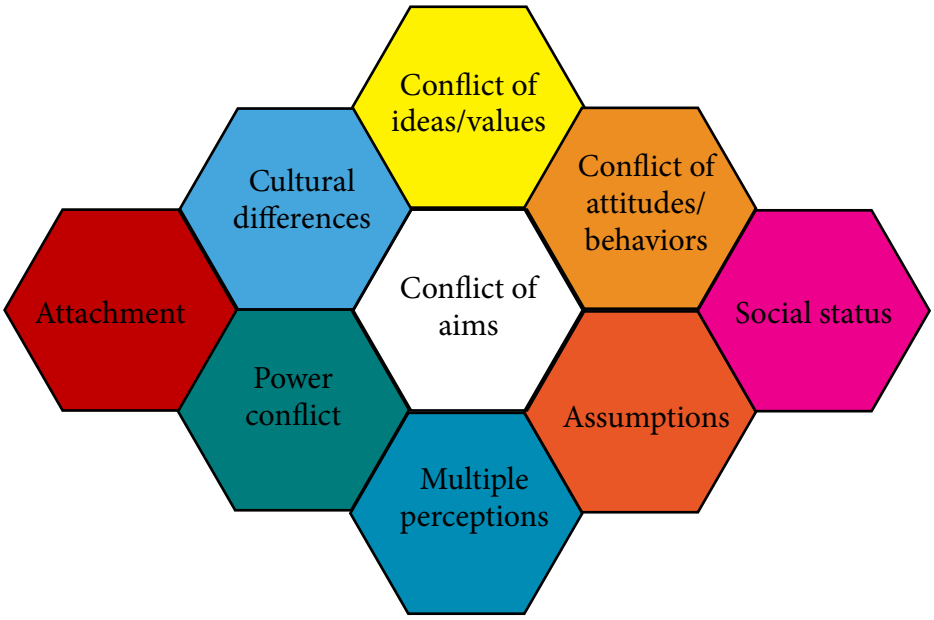
Values and needs are often closely related. Values are those beliefs that have significance for an individual. They can include, but are not limited to, religious, political, social, and moral beliefs. Cultural values help humans to create world-views and influence the way in which they see the world and construct their reality.

Causes of conflict can be proximate or immediate, or can be hidden or underlying and require careful analysis and communication with the conflicting parties to uncover. Underlying conflict manifests itself in the cumulation of disputes, extreme responses to disputes or a lack of capacity to deal with them despite considerable effort to resolve them. A number of models have been developed to assist in identifying the source of conflict.

One such model is known as **"Moore's Circle of Conflict"** developed by Christopher Moore.



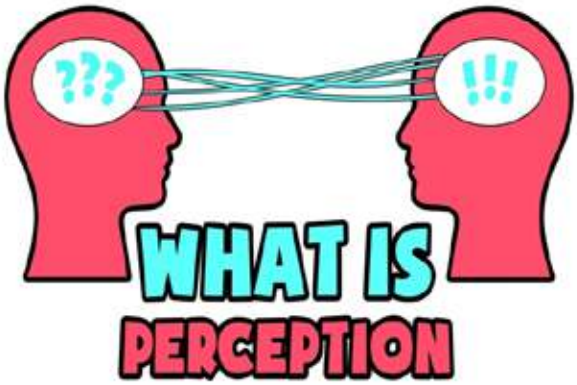
Summary of Sources of Conflict



Multiple Perception – A Holistic Understanding of Disputes

There are two types of people in this world: those who view the glass as half-full and those who see the glass as half-empty. This phenomenon is called perception, and our perceptions profoundly impact how we experience life. "Perception molds, shapes, and influences our experience of our personal reality. Perception is merely a lens or mindset from which we view people, events, and things" [Linda Humphreys, PhD.] In other words, we believe what we perceive to be accurate, and we create our own realities based on those perceptions. And although our perceptions feel very real, that does not mean they are necessarily factual.

What is perception?



Perception comes from the Latin word *"percepio"* meaning receiving and collecting. A *perception* is that which is perceived. Perception is an active process of creating meaning by selecting, organizing, and interpreting people, objects, events, situations, and activities. Perception is the way how a person understands something. Different people may have different perceptions for the same thing since most of the times, the perception is shaped by the society in which the person lives. Thinking pattern of an individual is decided by a number of factors. Cultural values, beliefs, myths, attitudes, education, rules, laws, etc. in a particular community may have a major impact on the way of a person thinks. Further, the thinking pattern may be characterized by the past generations as well.

Perception is the cause of conflict. All of us see the world through our own lens, and difference in perceptions of events can cause conflict, particularly where one person knows something that the other person doesn't know, but doesn't realize this conflict can often occur. Our perceptions define how we see a dispute; its nature, those responsible, the degree of fault, the existence and extent of the injury, and the appropriate remedy, are all filtered by our perceptions. Perceptions are inherently subjective and personal to each of us. For that reason, no two people will ever see a dispute the same way. Disputants typically perceive their side to be the "right" side and the other side to be the "wrong" side, and they develop positions based on those perceptions. Quite often, individuals believe that what they think is true and they understand most of the things based on the surface level only. For example, let us take the mirage. A person who is in the desert may see the mirage and he/she might consider it water and follow it until they reach there. However, it may take a lot of time for them to understand that it is just an illusion. Also, some perceptions are really hard to prove false. So, the mediator's first challenge is to tap into those perceptions, and understand how each side may view the same issue so differently. The mediator must then acquaint the parties with the other side's point of view. An understanding of perception is crucial for a mediator to understand the conflict holistically because no truth is told in pieces and no two people are alike. How our perceptions can lead to misunderstanding and conflict. Therefore, the mediator should be in a position to defuse the perceptions by putting one party into another party's shoes.

> "The golden rule of conduct is mutual tolerance-seeing that we will never think alike and we shall always see the truth in fragments and from different points of view."
>
> **- Mahatma Gandhi**

Importance of Multiple Perceptions

- Perception plays a very important role in shaping the personality of an individual.
- Perceptions differ from person to person. Each individual perceives the same situation differently. For example, I see a cat. And you see a dog. I see a young lady. And you see an old lady. Because of differences in perceptions, a conflict arises between the perceivers.
- Perception is not reality just because you think something is real doesn't make it reality.
- We assume that the way we see things is the way they really are or the way they should be. Our attitudes and behaviors grow out of those assumptions.
- Perception affects the outcome of our behaviour because we act on the basis of what we see and think.
- Perception is central in interpreting the world around us.

Types of Perception

- Colour perception
- Visual perception
- Speech perception
- Size perception
- Motion perception

Perception vs. Reality

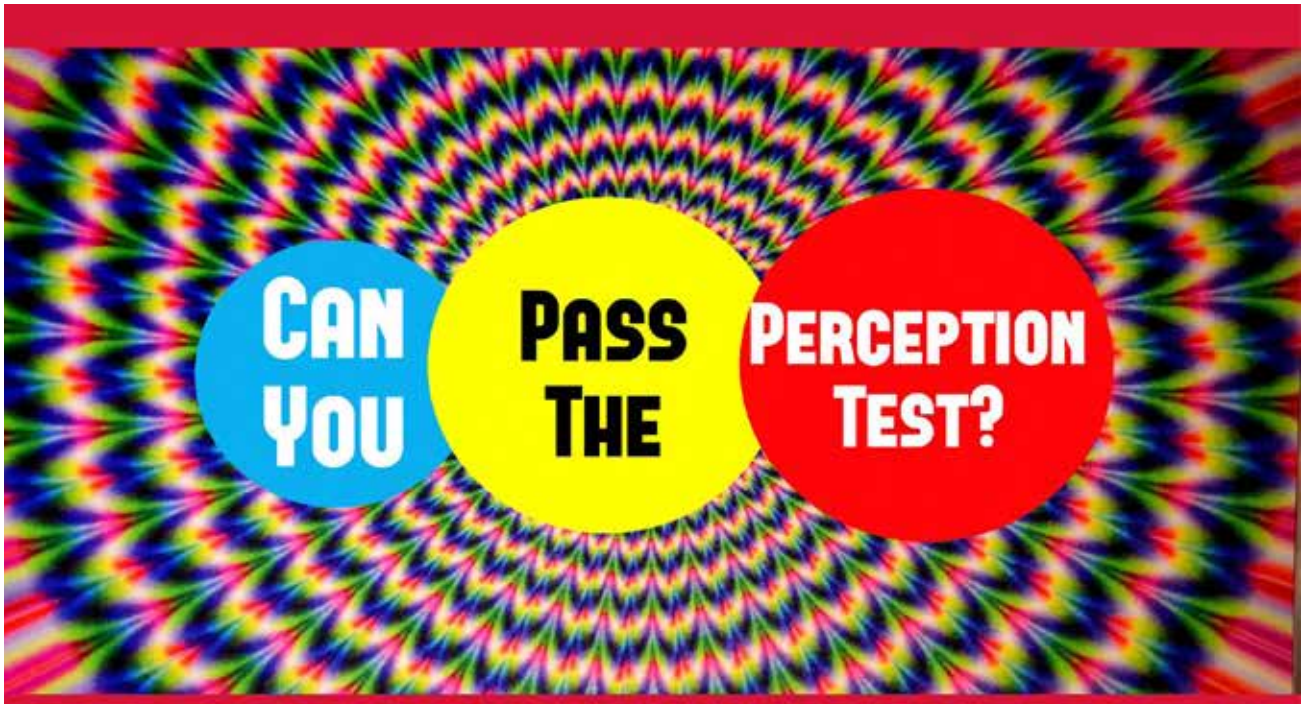
Each individual has his or her own perception of reality. The implication is that because each of us perceives the world through our own eyes, reality itself changes from person to person. While it's true that everyone perceives reality differently, reality could care less about our perceptions. Reality does not change to adapt to our viewpoints; reality is fact; reality is truth. Reality, however, is not always a known, which is where perception of reality comes in. While reality is a fixed factor in the equation of life, perception of reality is a variable.

Between Image and Reality: How We all Perceive the World

There are two men in a hospital, on opposite sides of a room. They can't see each other, but they're close enough to speak. Weeks go by. One man describes a view outside a window to the other: white clouds, blue skies, birds flying by. The man listening starts to get envious - he does not have a window, only a blank wall in his field of vision. The man describes the changing views: fantastic windstorms, sunsets, rain showers, until he is well enough to leave the hospital. The man by the blank wall begs to be moved to the other's bed, to see the view he has been told about. But when he's moved, he discovers there is no window. There never was. What the man described was only his imagination. The creation of imagery had no reality to support it.

- Perception is the way how a person understands something.
- Varies from person to person.
- Affects outcome of one's knowledge, attitude, and beliefs.
- Can be wrong or right.
- Can be biased.
- Can be negative or positive.
- It's person's choice.

- Reality is the truth and the actual existence of something.
- Does not depend on people.
- It is not affected by these.
- It is always right.
- Can't said to be biased or unbiased.
- It can't be described as positive or negative.
- It's not a choice.



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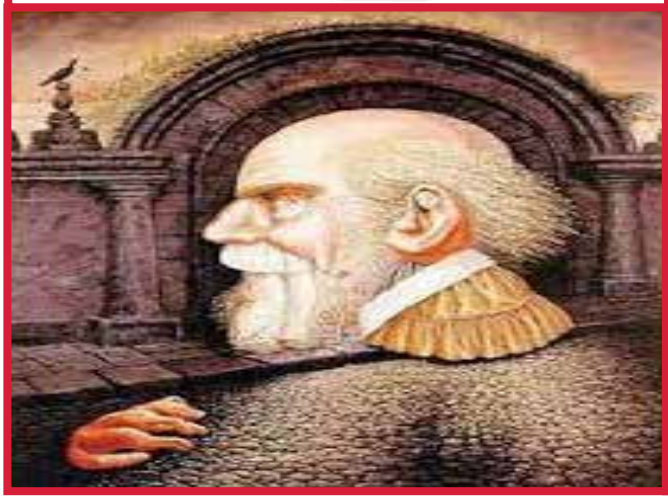
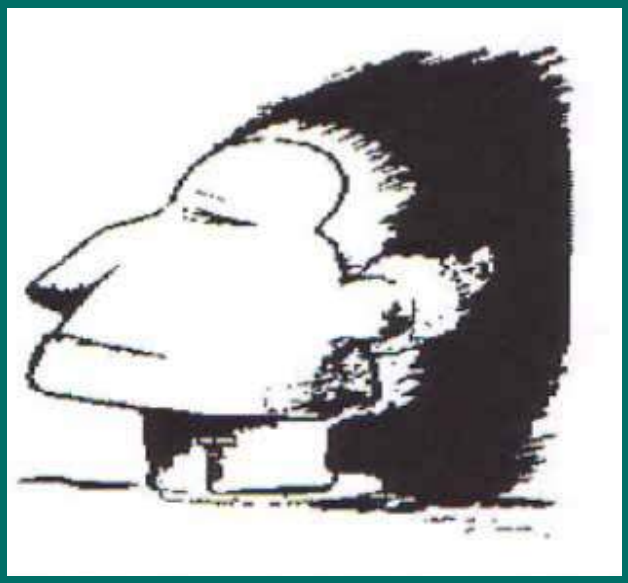
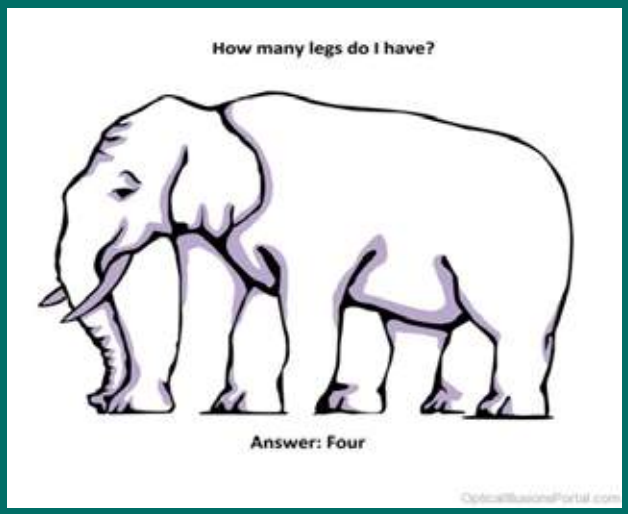
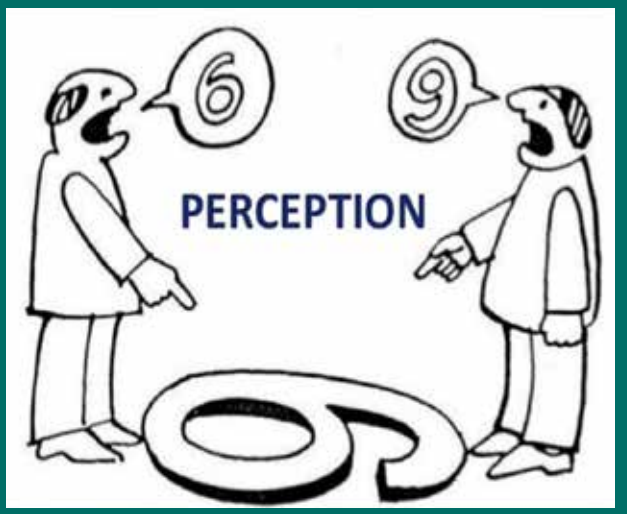


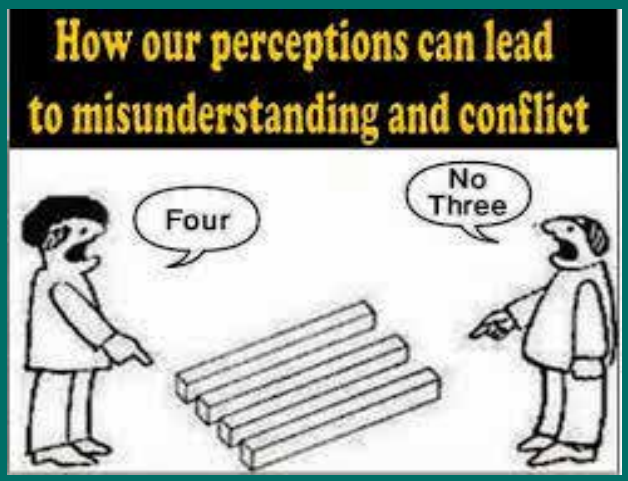
Do you see a person, a face, or something else entirely?

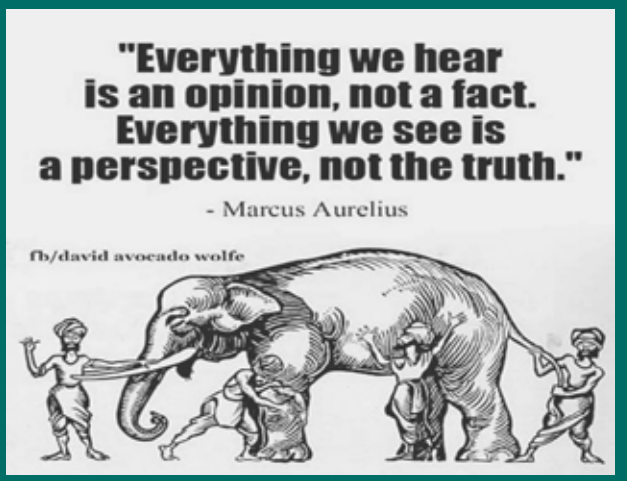


Young or Old Lady









Understanding Multiple Perceptions

- Narrate the story of *"the Six Blind Men and the Elephant."*
- Show a video animation clip (the Balcony Girl).
- In the clip, the boy assumes that the beautiful girl is looking at him. He therefore tries to impress the girl by lifting heavy weights beyond his capacity. When the reality or the truth dawns upon him that the girl is blind, the weight crushes him and he lands in the hospital.
- Illusion influences him to lift heavy weights.

Activity: Multiple Perceptions

Objective:

- To make the participants get the holistic view of the dispute.

Instructions

- Ask any participant to go to the door and look outside.
- He/she will report back to the class what he/she saw outside.
- Trainer should write down on the whiteboard what he/she saw outside (his/her perceptions).
- Repeat with other participants.
- They have to stand and look out from the same door where the first participant stood and looked out.
- This activity has to be done before the session starts.

Group Activity: Visual Perception

Purpose:

- This activity highlights individual's ability to recognise object by hearing their visual characteristics and illustrates the importance of perception and attention to detail in gathering information.

Objective:

- Participants must guess an object through hearing some physical description of it.

What You Need

- A blank chart paper and a marker pen for each group.
- A collection of 10 items in a cardboard box. For example, items include: a mug, a hole puncher, car keys, a wallet, etc.

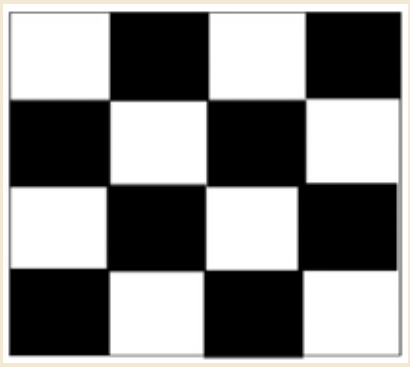
Setup

- Select one of the participants randomly or ask for a volunteer and assign him or her as the *describer*.
- The describer has to look into the box, pick an item and describe it in such a way that the other participants won't be able to see the object.
- The describer should describe the object using characteristics such as shape, colour, texture and size for 1 minute.
- The describer shouldn't mention the use or the composition material of the item.
- All other participants should write down what they think each item being described is.
- At the end of the tasks, participants should write down their guesses on a flipchart and compare the accuracy of their choices.

Timing

- *Explaining the test:* 2 minutes
- *Activity:* 3 minutes
- *Group feedback:* 5 minutes

Group Activity: How Many Squares?



Timing

- Explaining the test: 1 minute
- Activity: 5 minutes
- Group feedback: 5 minutes

Instructions

1. Project illustration on the wall.
2. Ask participants to look at the squares and decide how many squares they can find in the illustration. They should not discuss their conclusions with other group members.
3. After one or two minutes, ask them to write their answers on flip-chart paper.
4. Ask participants to explain their answers to the group. Continue the discussion until the correct answer (30) has been given.

What You Need

- A blank chart paper and a marker pen for each group.

Answer: 16 (1×1) square 9 (2×2) squares 4 (3×3) squares

1 (4×4) squares [16+9+4+1=30]

Buddhist understanding of a conflict

Many Buddhists will point to the five poisons or five negative emotions as the root of all conflict.

The Five Poisons are:

1. Desire or Attachment;
2. Anger or Aggression;
3. Ignorance or Delusion;
4. Pride; and
5. Envy or Jealousy.

The Five Poisons དུག་ལྔ

1. Desire འདོད་ཆགས།
2. Anger ཁོང་ཁྲོ།
3. Ignorance མ་རིག་པ།
4. Pride ང་རྒྱལ།
5. Jealousy ཕྲག་དོག།

Types of Conflict

The conflict can be classified into the following five types:

1. **Intrapersonal conflict** – conflict with oneself

   Examples

   - Generally feeling badly about oneself
   - Divorce
   - Death
   - Illness
   - Poverty
   - Emotional distress
   - Insecurity

2. **Interpersonal conflict** – conflict between people

   Examples

   - Poor cooperation
   - Bullying
   - Sexual harassment
   - Power struggles
   - Problems with customers
   - Religion
   - Difference of opinions

3. **Intragroup Conflict** – Conflict within a group or team, when members conflict over goals or procedures

4. **Intergroup Conflict** – Intergroup conflict is when conflict between groups inside and outside an organization disagree on various issues. Conflict can also arise between two groups within the same organization, and that also would be considered intergroup conflict.

5. **Organizational conflict** – conflict caused by unsuitable systems

   - Systems, rules and the like.
   - Lack of clarity about the division of responsibility between the different departments.
   - The way the assignment is divided or planned.
   - Too much pressure on work and deadlines and too much stress.

Effects of Conflict

- Stressful and stress affects health.
- Damages relationships.
- Decreases productivity.

- Expensive legal costs.
- Further escalates conflict and violence.
- Inspire creativity or positive opportunity to solve problems.

Nine Stages of Conflict Escalation

Many people have conducted research in the area of conflicts and how they escalate. One such researcher is Austrian Friedrich Glasl, from the University of Salzburg, who has written a Ph.D thesis on conflict and reconciliation.

Glasl divides his model into nine stages, each stage representing a phase in the conflict. The model illustrates how a conflict escalates if it is not handled constructively. It also illustrates how a conflict develops from the point where 'you have the conflict' (stages one and two) to the stage where 'the conflict has you' (stages three and beyond), where the parties to the conflict are no longer able to act constructively.

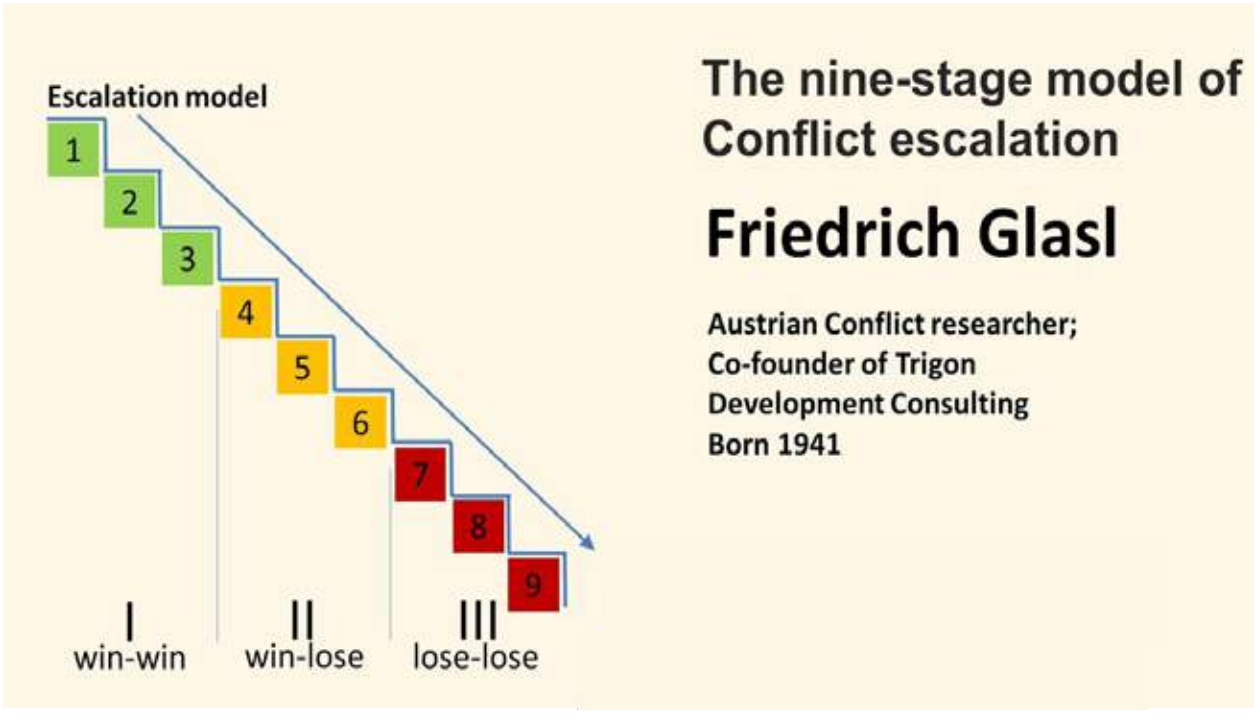
Stages one to three can be defined as "a conflict about conflict". From stage four and beyond, the conflict is about how to resolve the conflict. Unfortunately, conflicting parties quite often find it impossible to agree on how to resolve their dispute. At stage three and beyond, the parties are no longer able to find a solution without the help of others.

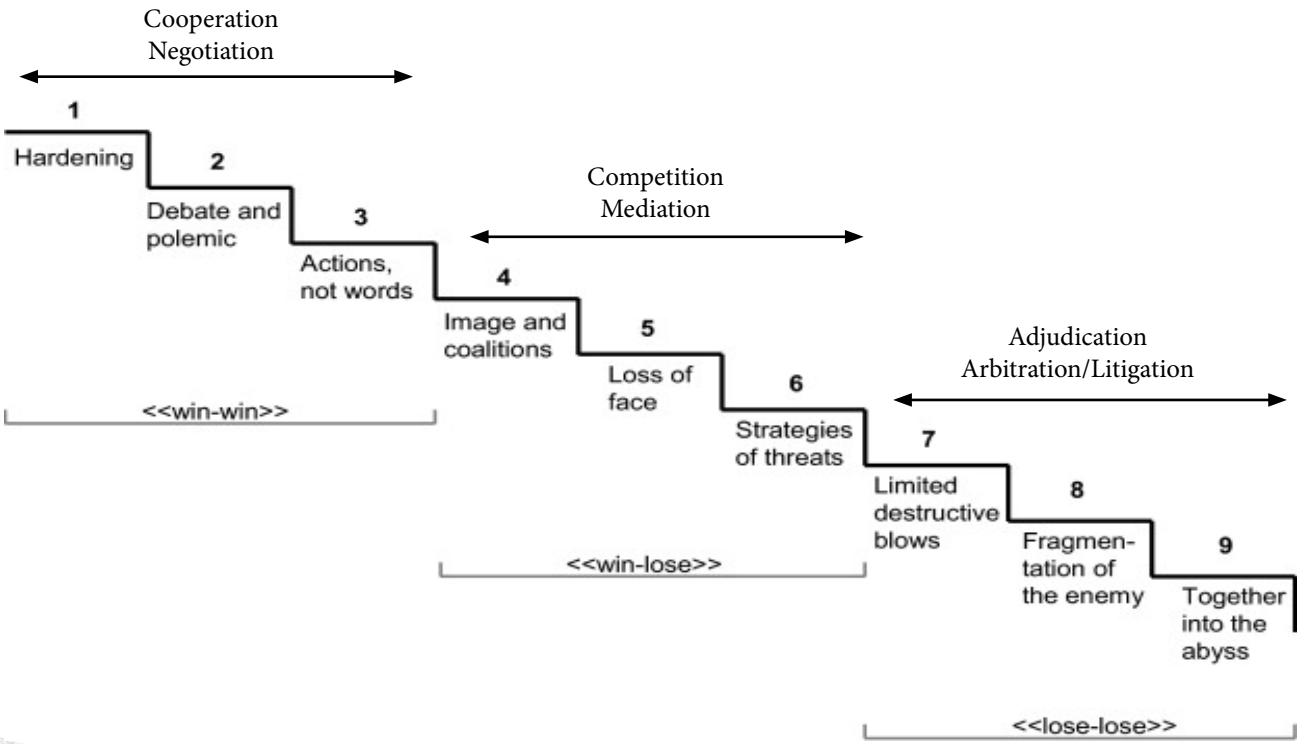
The first stage is the stage of disagreement. At this stage, one is still able to separate the person from the problem, attacking the problem but not the person.

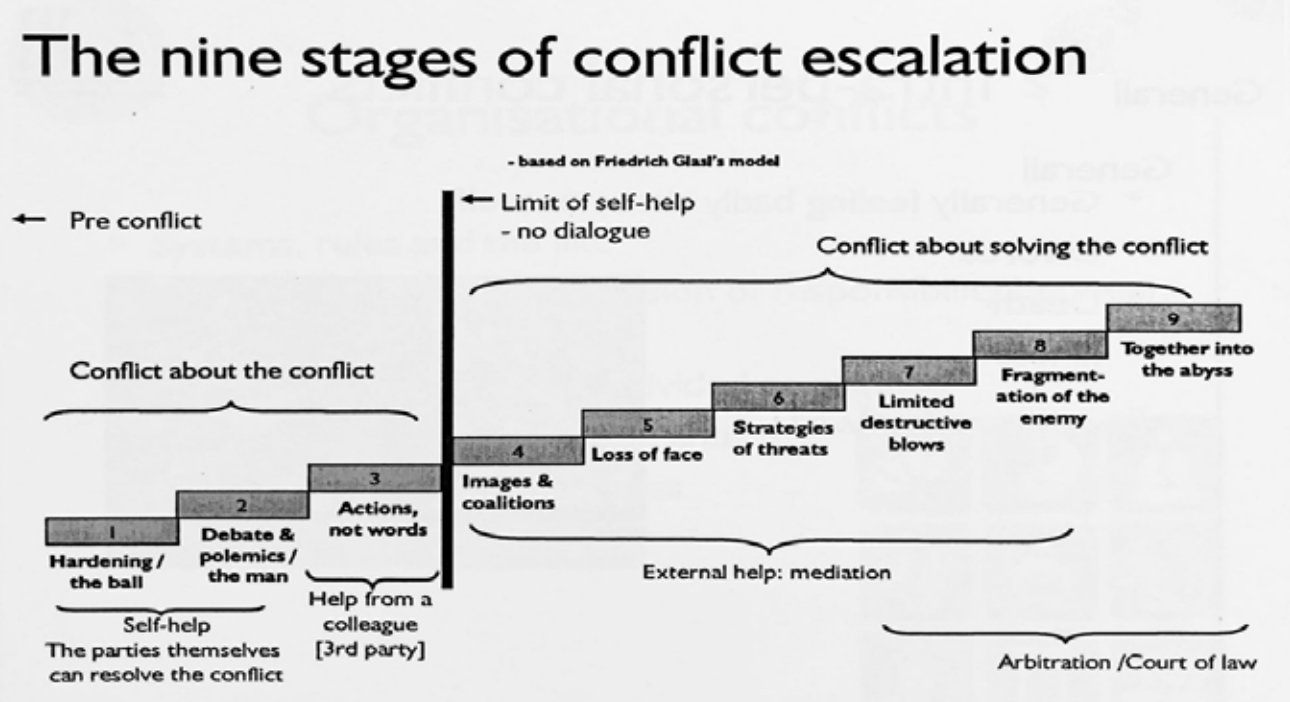
> "The biggest problems in the world could have been solved while they were still small."
> **- Witter Bynner**

The next stage is that of debate and polemics, where collaboration gradually turns into a competition. The focus changes, and instead of discussing the problem, the issue becomes personal. At the first two stages of the model, the parties are still able to solve their conflict without the help of a third party. The third stage is where each party starts to act on its own. Dialogue and conversation gradually stop. Winning has become of the utmost importance, and the desire for collaboration has disappeared. Trust and honesty have also disappeared. At this stage of the model, the parties are no longer able to solve their conflict on their own, and will need support from third parties who are witnesses to the conflict. At the fourth stage, dialogue has ceased completely. The conflicting parties no longer talk with each other, but only about each other. At this stage, the parties will begin to make coalitions. From the fourth stage until the last stage of the conflict escalation model, the parties need help from an impartial third party, as they are no longer in a position to resolve the conflict on their own. At the fifth stage, the conflicting parties continue their reptilian instinctive and emotional attacks on their opponent and notions such as morals and ethics are abandoned. The conflicting parties have 'lost face' in front of each other as a result of intentionally harmful remarks expressed in public. The sixth stage is characterized by threats, which give rise to counter-threats from the other party. "Violence begets

violence." At the seventh stage, threats have turned into action. If the seventh stage is about destruction, the eight stage is characterized by elimination. The ninth stage is total destruction, "together into the abyss", as we have seen with suicide bombers, who consider self-destruction to be acceptable, as long as the opponent suffers the greater damage.







LEVEL 1: WIN-WIN

Stage 1: Hardening/Problem

- Disagreement
- Separate a person from the problem.
- Attack the problem but not the person.
- Possible to cooperate or collaborate towards win-win solution.
- Takes the interest of both parties into consideration.
- Self-help – parties themselves can resolve the conflict (negotiation).

Stage 2: Debate and Polemics

- Collaboration gradually turns into a competition.
- Instead of focusing on the problem, the issue becomes personal.
- Everybody insists on his point of view-competing.
- Parties can still be able to solve the conflict without the help of a third party.
- Possible to collaborate or cooperate through negotiation.

Stage 3: Actions, not words

- Talking no longer helps, party starts to act on its own.
- Dialogue and conversations have completely stopped.
- No cooperation or no collaboration.
- Only Winning-competition.

- Distrust and negative expectations.
- Help from a colleague-third party.

LEVEL 2: WIN-LOSE

Stage 4: Images and Coalitions

- Dialogue has ceased completely.
- Parties no longer talk with each other, but only about each other.
- Parties begin to make coalitions.
- No longer have the ability to solve their conflict on their own.
- Need the assistance of a neutral third party.
- Mediation method is the best option.

Stage 5: Loss of Face

- Parties attack directly and personally.
- Loss of morality and mutual trust.
- Parties have lost face in front of each other.
- Parties demand an apology from the other.
- Or try to see the other humiliated.

Stage 6: Strategies of threats

- Threats and counter threats from the other party.
- Violence begets violence.
- Competing
- Begin to threaten litigation, public exposure through press or try to damage each other's reputation in other ways.

LEVEL 3: LOSE-LOSE

Stage 7: Limited destructive blows

- Threats have turned into action.
- Destruction
- Opponent is no longer perceived as a human being.
- Values and virtues take a backseat.
- Parties are suing each other.

Stage 8: Fragmentation of the enemy

- Bringing about total breakdown/collapse of the enemy system.
- Elimination

Stage 9: Together into the abyss

- Total destruction – destruction of enemy even at the cost of self-destruction.

- Total confrontation.
- No going back.
- Willingness to cause severe damage to the opponent.

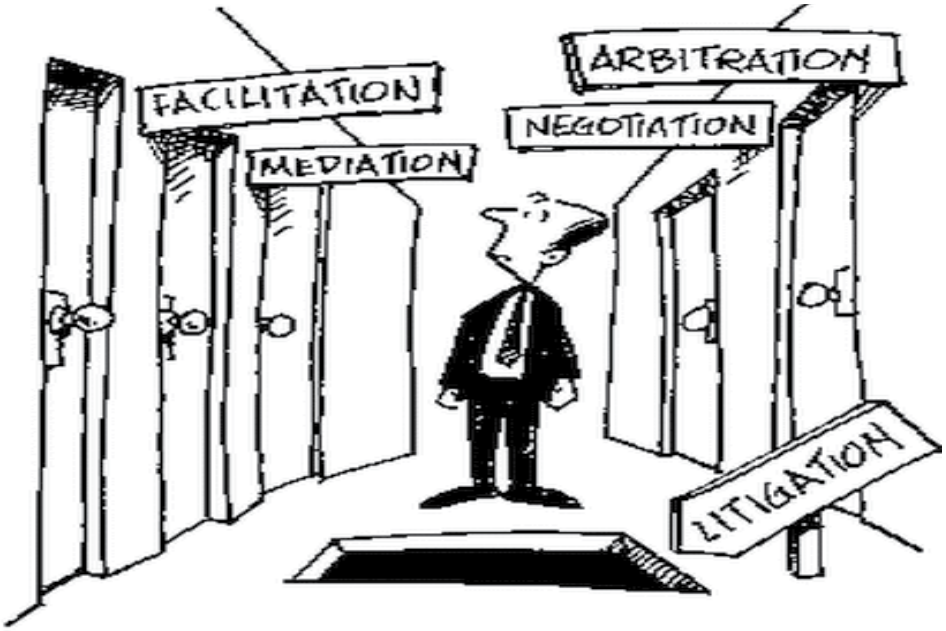


Figure 4. Abyss represents litigation

Strategies for Responding to Conflict/Conflict Management Styles

Conflict management is the process for handling disputes and disagreements between two or more parties. Conflict management styles are the different ways that individuals address, engage in and resolve conflict. There is not one single method for handling conflict. Each situation may call for a different method to manage it. People respond to conflict in varied ways. One person will retreat into silence; another will openly confront; a third will begin to negotiate. The same person may respond differently to different types of conflict. These reactions arise not only from the nature of specific conflicts, but also from personal history, which deeply shapes each person's attitudes and beliefs about conflict. This section examines five typical responses to conflict or five conflict management styles.

Objective

- Is to minimize the negative factors that are influencing the conflict and encourage all participants to come to an agreement.
- When conflict is not managed properly, it can be destructive and ruin relationships by creating some dissenting feelings.
- Unmanaged conflict can create feelings of opposition not only in the people directly experiencing the conflict, but also in people observing or even hearing about the conflict.
- When conflict is properly managed, it can be healthy.
- Conflict management is a necessary skill for all aspects of life.

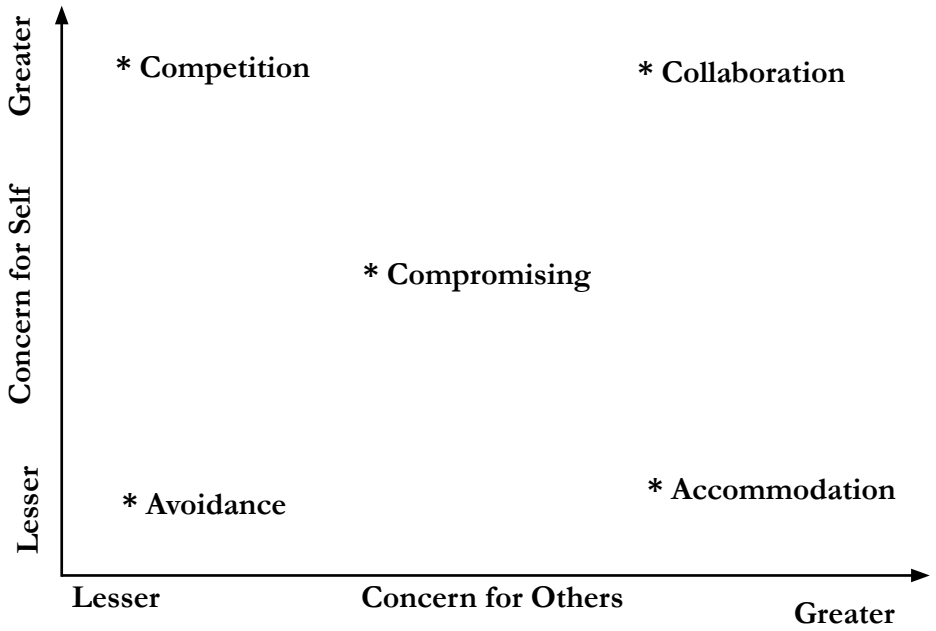


Figure 5. A two-dimensional representation of the possible conflict styles of approaches that a person can use in resolving conflict

The vertical axis represents the degree of "concern for self" exhibited by a person trying to resolve a conflict in which he or she is involved. The horizontal axis exhibits the degree of "concern for others" in the conflict.

A model called the ***"Thomas-Kilmann Model"*** was designed by two psychologists, Kenneth Thomas and Ralph Kilmann. Let's consider these five typical responses to conflict:

1. **Avoidance** – when a person would prefer to pretend the conflict does not exist and does not want to actively engage with the other person to attempt to resolve the conflict.
2. **Accommodation** – when a person simply gives the other person what they want in order to resolve the conflict.
3. **Competition** – when a person actively tries to 'win' the conflict and does not care at all about the other person's needs.
4. **Compromise** – a 'give-and-take' approach to resolving the conflict, where a person gives up some of what they want in order to get part of what they want.
5. **Collaboration** – where both parties work together to see if they can come up with a resolution that meets both of their needs.

It is difficult to say that any given response is always the best one. For example, in some cases avoiding the conflict might be the appropriate response (for instance, if th e matter is really trivial and raising it with the other person will make a mountain out of a mole hill). However, generally speaking, the effective management of conflict is best promoted by a collaborative approach. This is because a

collaborative approach is based on strong communication and attempts to take into account both parties' needs and concerns. Each of these approaches is appropriate in some circumstances, and inappropriate in others. Difficulties arise when an individual uses one or two approaches exclusively.

> "When the only tool you have is a hammer, every problem looks like a nail."

Three components of a Dispute

ISSUES:

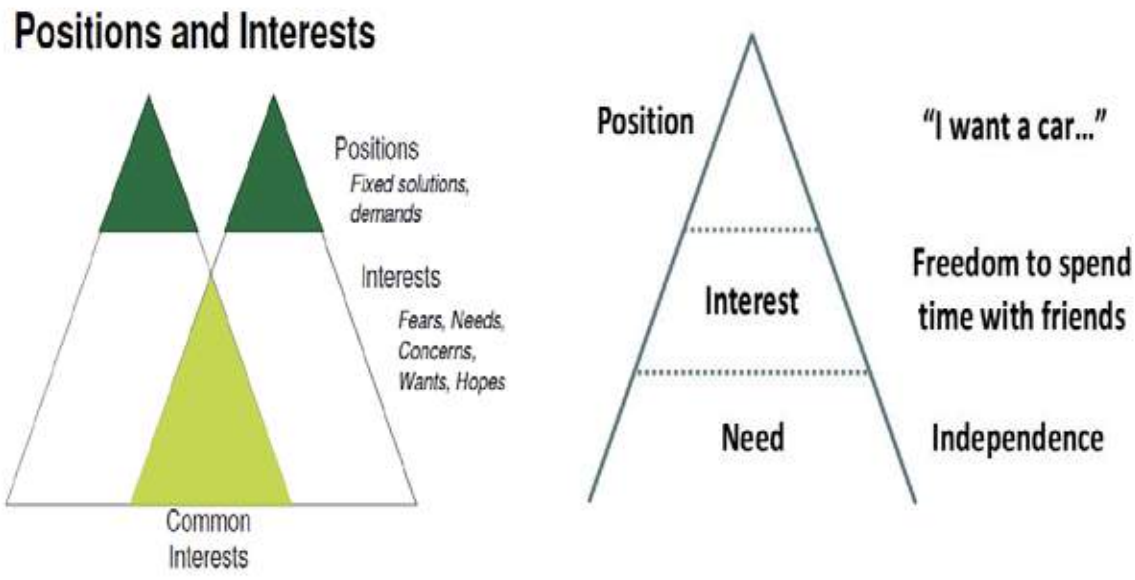
- An issue is what the dispute is about.
- What you disagree about?
- An issue is a problem to be resolved, a subject or topic that can be negotiated.

POSITIONS:

- A **POSITION** is what I want or demand? – Fixed demands from the other side. **(WHAT)**
- What you want?
- Demands – can only be met in one way.

INTERESTS:

- An **INTEREST** is the underneath why I want it. **(WHY)**
- Why you want it?
- Interests – can be incorporated in many ways.
- Needs – can be fulfilled in countless ways.

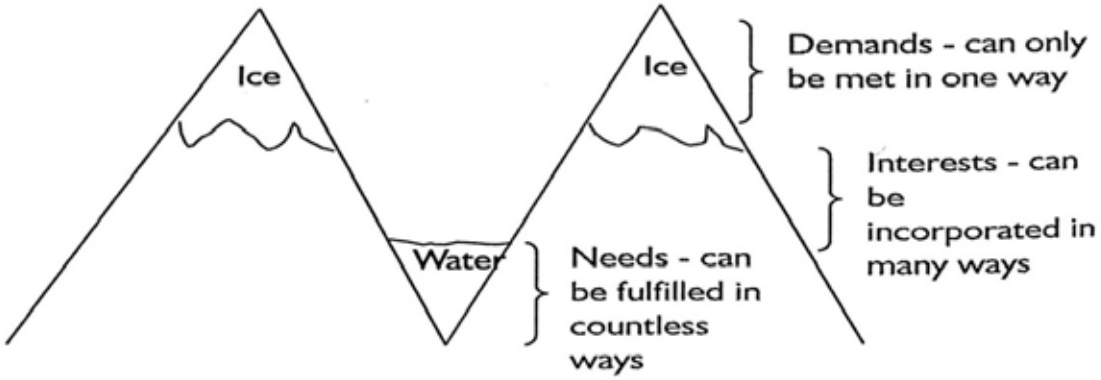


What are Interests?

- Needs and Interests are interchangeably used.
- Interests are the needs, hopes, fears, and desires that drive our actions and underlie our positions in negotiations.
- Interests are underlying (hidden) desires, needs, wants, concerns, fears, worries or goals that people want to achieve in a conflict situation.
- We enter negotiations because we have interests that we are hoping to meet or satisfy.
- Identifying interests is not always as easy as it sounds.
- In any negotiations, there are two sets of interests to consider: your own interests and the interests of the other party.

"Interests motivate people; they are the silent movers behind the hubbub of positions. Your position is something you have decided upon. Your interests are what caused you to so decide." – **Getting to Yes**

The relationship between two parties' demands, interests & needs



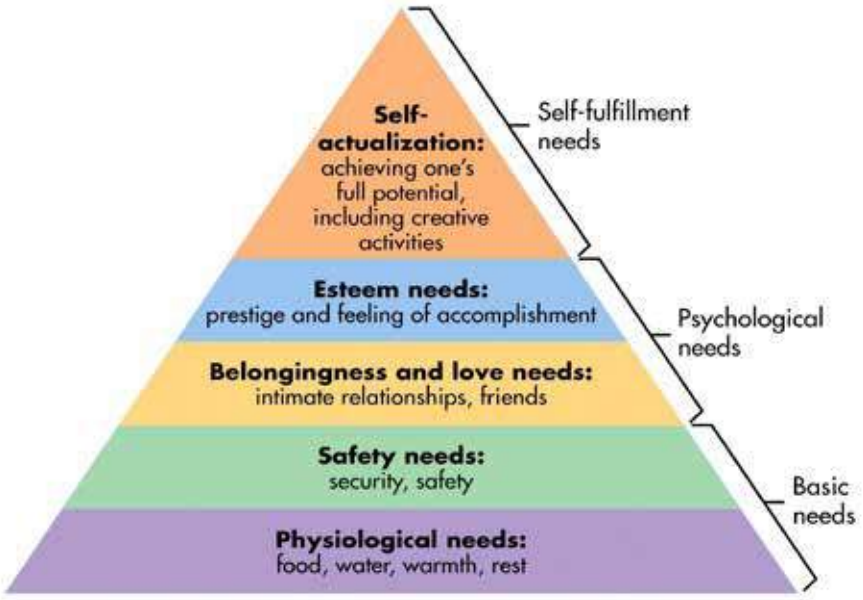
Demands – can be fulfilled in one way
Interests – can be fulfilled in many ways
Needs – can be fulfilled in countless ways

How to identify needs and interests?

- Active listening
- Empathetic listening
- Dig deeper by asking **"WHY"** questions

The Hierarchy of Needs

Abraham H. Maslow (1098-1970), was an American psychologist with a doctorate in psychology. In his book from 1954, *Motivation and Personality*, he describes his motivation theory, or the factors that cause us to act the way we do. Behind every action, interest and claim, there is always a need. Needs are regarded as the cause of our feelings. If we have all our needs satisfied, we feel joy. If we don't have all our needs satisfied, we feel anger or sorrow.



(Figure 6. Maslow's Hierarchy of Needs)

The 5 needs can be described as follows:

1. Physiological Needs

The base level of hierarchy of needs comprises the physiological needs such as air, water, food, sleep, physical movement, the need to expel human waste, and protection against wind and weather, physical pain and other discomforts. It is simply the need to stay alive. The next set of needs – which are higher in the hierarchy – will only come into play when the physiological needs have been met. If these needs are not satisfied the human body cannot function optimally. If you are hungry, your other needs will be put aside until you have satisfied your hunger.

2. Safety and Security Needs

The second level covers the psychological, practical and emotional need for safety, financial security, social stability, orderliness (law and order) and protection, as well as the need to do away with anxiety and fear.

3. Social Contact Needs

The third level comprises the social values of unity, love, friendship, and affinities with individuals or groups. This need arises only when the physiological needs and the need for safety and security have been fulfilled.

4. Self-esteem Needs

The fourth level comprises the values of self-respect, confidence, status, dignity, performance, feeling knowledgeable, believing that something can succeed, behaving as a decent human being and being perceived as such. The need to be respected arises when the physiological, safety and security, as well as social contact needs, have been met.

5. Self-actualization Needs

This level refers to the realization of a person's potential, self-fulfillment, seeking personal growth and peak experiences. Maslow describes this level as the desire to accomplish everything that one can, to become the most that one can be.

CHAPTER 4
NEGOTIATION THEORY, TECHNIQUES AND ITS PRACTICE

What is Negotiation?

Negotiation is a part of life. Everyone negotiates something every day. Negotiation is a basic means of getting what you want from others. It is back-and-forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed (as well as some that may simply be different). Negotiation is defined as *"where two or more people together attempt to reach agreement on some matter"* (anon). Negotiation is a consensual bargaining process in which the parties attempt to reach agreement on a disputed matter. It's a voluntary process without intervention of third parties. It involves people in dispute communicating directly, either by speaking or in writing, to try to reach an agreement. The process is usually informal, unstructured, private and confidential.

Why does one negotiate?

a. To put across one's viewpoints, claims and interests.
b. To prevent exploitation/harassment.
c. To seek cooperation of the other side.
d. To avoid litigation.
e. To arrive at mutually acceptable agreement.

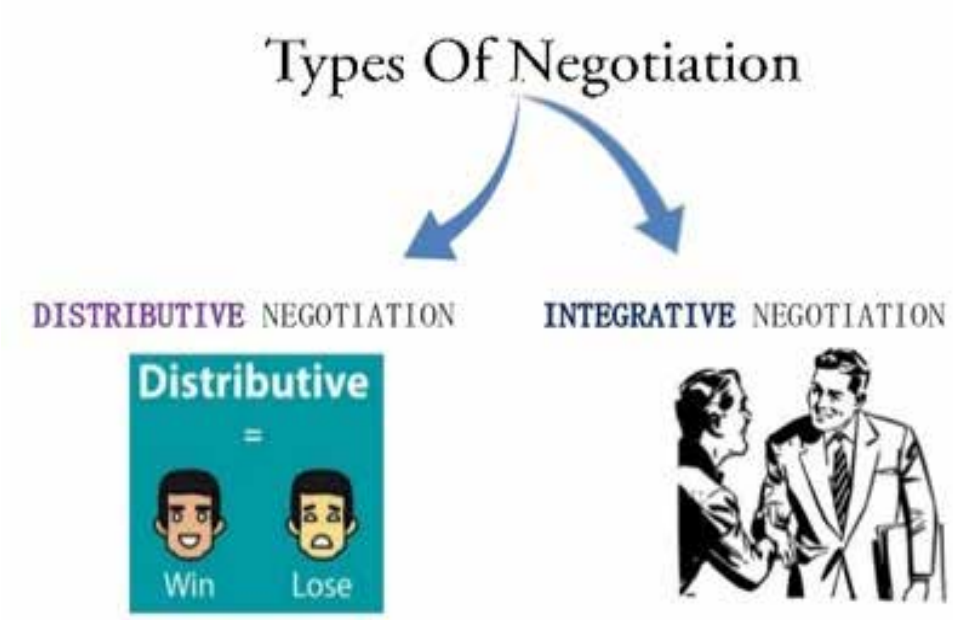
Daniel Druckman (1997) describes the main school of thoughts in negotiation theory to four approaches:

1. Negotiation as puzzle solving;
2. Negotiation as a bargaining game;
3. Negotiation as organizational management; and
4. Negotiation as diplomatic politics.

Approaches to Negotiations

There are two types of approaches to negotiations.

1. Competitive negotiation; and
2. Co-operative negotiation.



1. Competitive/Adversarial Approach

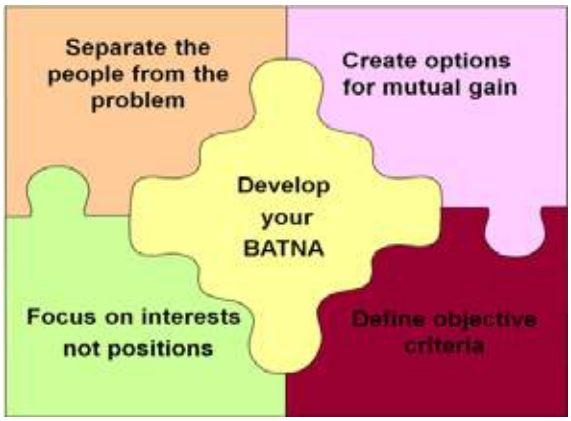
- Also known as distributive negotiation or positional-bargaining.
- Purpose of bargaining is to obtain the best possible result at the expense of the other side.
- Zero-sum bargaining - it assumes a fixed amount of value or a fixed pie.
- Goal is to pay as little as possible or obtain as much as possible.
- Parties' relationships and other intangibles are not of primary importance.
- Identifies his wants and interests only and not of others.
- Central mission is to WIN.
- Sees negotiation much as a litigator sees a trial (adversarial).
- Results into WIN-LOSE outcome.

2. Cooperative Problem-Solving Approach

- Also known as integrative or interest-based negotiation - integrates parties' needs and underlying interests.
- It's a collaborative approach to the issues at stake, turning parties from adversaries into partners looking for a common solution to a common set of problems.
- Doesn't view 'pie' as fixed (expand the pie).
- Restores trust and rebuilds the relationship between the parties, minimizing the chances of conflict reoccurrence.
- Helps the parties to approach the solution in a WIN-WIN manner.

Principles of Negotiation

Any negotiation based on merits and interests of the parties are principles of negotiation. The five basic elements of principled negotiation as listed by Fisher, Ury, and Patton are:



a) Separate the people from the problem

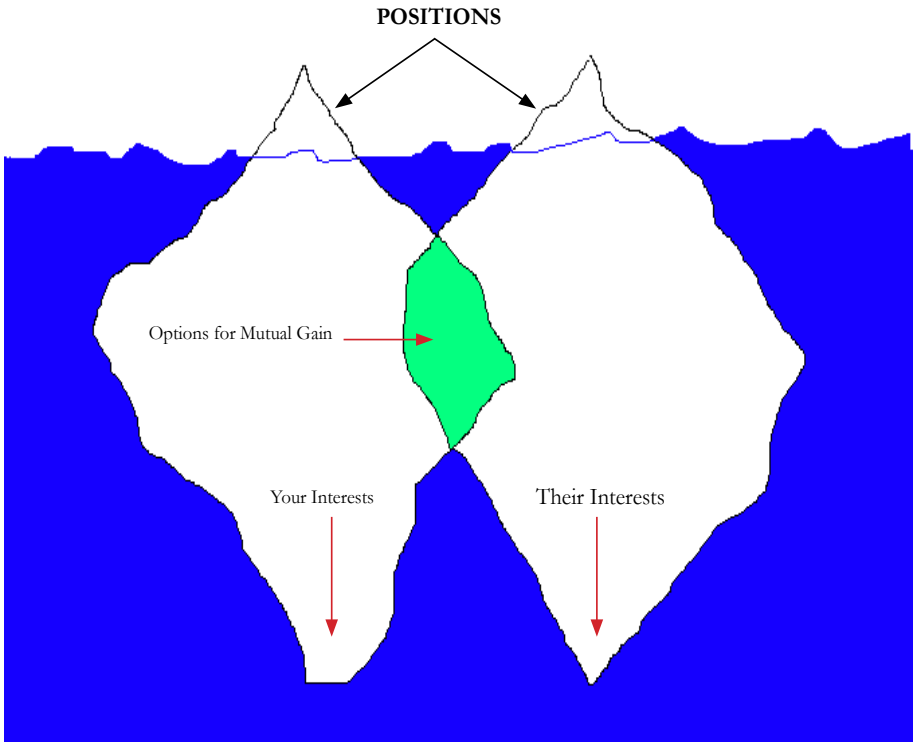
- The negotiators should focus on attacking the problem posed by the negotiations, not each other. *"Be soft on the people, hard on the problem."*

b) Focus on interests, not positions

- Distinguish positions, which are what you want, from interests, which are why you want them.

c) Invent options for mutual gain

- Having identified the interests, develop multiple options to choose from; decide later.



The Orange Story

The story is told of two sisters (Wangmo and Selden) quarrelling over one orange. Both want the whole orange and the argument escalates before mum steps in. In an effort to stop the fighting and to be fair to both children, mum grabs the orange and cuts it straight down the middle to give each child an equal half. Does this solve the conflict? What should they do? If only girls had spoken to each other to explain what they wanted. Instead, the sisters had focused on each other's position (the *what*) and not on each other's interest (the *why)*. If only mum had stopped to ask both girls what it is they needed out of the orange. Then both of their needs could have been met. Wangmo could have carefully peeled off the orange rind to flavour a cake and Selden could have squeezed the orange for its juice.

d) Insist on using objective criteria

- Try to reach a result based on standards independent of will.
- Commit yourself to reaching a solution based on principle, not pressure.

e) Know your Best Alternative to a Negotiated Agreement (BATNA)

- In any negotiation (or mediation), the parties must be aware of what their alternatives are if they don't reach agreement. What can I do on my own if we fail to resolve this? Knowing your BATNA serves as a benchmark when further negotiation makes sense, and when it doesn't. Every participant in mediation should think about the answers to these four questions:

  1) What is the best outcome I can achieve through mediation?

  2) What can I do on my own to serve my interests if the mediation breaks down and we fail to agree?

  3) Which of these options is the best?

  4) Is this option better or worse than what I can achieve through a mediated settlement?

If a resolution that can be achieved in mediation is better than one's BATNA, stay and mediate for that resolution. If it's worse than the BATNA, walk away.

f) Know your Worst Alternative to a Negotiated Settlement (WATNA)

- This is the worst alternative that a party faces, if it does not reach an agreement at mediation.

What is Bargaining?

Bargaining is a part of the negotiation process. In the social sciences, bargaining or haggling is a type of negotiation in which the buyer and seller of a good or service debate the price or nature of a transaction. If the bargaining produces agreement on terms, the transaction takes place. It starts when the parties are ready to discuss settlement terms. It is a technique to handle conflicts.

Types of Bargaining used in Negotiation

There are different types of bargaining. Negotiation may involve one or more of the types of bargaining mentioned below:

1) Distributive Bargaining

It is a customary, traditional method of bargaining. In distributive bargaining, the parties are dividing a fixed resource. It may lead to an impasse because sometimes parties do not explore creative solutions for agreement. It takes time and parties may take extreme position. It focuses on allocation of fixed limited resources (fixed pie) between the parties. It could lead to a win-lose result or a compromise where neither party is particularly satisfied with the outcome. The two forms of distributive bargaining are:

a) Right-Based Bargaining

This form of bargaining focuses on the rights of parties as the basis of negotiation. The emphasis is on who is right and who is wrong.

b) Positional Bargaining

It is characterized by primary focus of the parties on their positions (offers and counter-offers). It is the basic pattern of negotiation and is often the first method people adopt. This is a competitive negotiation strategy. Each side takes a position, argues for it, and makes concessions to reach a compromise.

Example:

Husband and wife are quarrelling in a room. Husband wants window open; wife wants it shut. They continue to argue about how much to leave open – a crack, halfway, three quarter way.

DON'T BARGAIN OVER POSITIONS

- Arguing over positions produces unwise outcomes.
- Arguing over positions is inefficient.
- Arguing over positions endangers an ongoing relationship.
- When there are many parties, positional bargaining is even worse.

Negative consequences of Distributive Bargaining are:

1. By taking rigid stands, the relationship is often lost.
2. Creative solutions are not explored and the interests of both parties are not fully satisfied.
3. Time consuming.
4. Both parties take extreme positions often resulting in impasse.

2) Interest-based Bargaining

It is developed as mutually beneficial agreement based on the facts, law and interests of the parties. It is a collaborative negotiation strategy leading to mutual gain for all parties. It preserves or enhances relationships. It focuses on underlying interests of the parties.

Example: The story of two sisters quarrelling over one orange. They decide to cut the orange in to two halves and share it, although both are not happy as it would not adequately satisfy their interests. The mother comes in to enquire what is the real interests of each one. One says that she needs the juice of one orange and the other says that she needs the peel of one orange. The same orange could satisfy the interests of both parties. Both sisters go away happy.

Three steps in interest-based bargaining:

a) Identifying the interests of parties.
b) Prioritizing the parties' interests.
c) Helping the parties develop terms of agreement/settlement that meets their most important interests.

3) Integrative Bargaining

It is a bargaining in which the parties 'expand the pie' by integrating the interests of both parties and exploring additional options and possible terms of settlement. It involves creative problem-solving techniques. It helps the parties to overcome an impasse by exploring the additional terms of settlement.

Example:
Parents are quarrelling in the room. Daughter comes into the room and enquires about the quarrel. Father says that the cold air blowing on his face is making him uncomfortable. Mother says that the lack of air circulation is making the room stuffy and she is uncomfortable. Daughter opens the window of the adjoining room and keeps the connecting door open. Both parties are happy. The cold air is not directly blowing into father's face and mother is comfortable as there is adequate air circulation in the room.

As the interests and needs of both parties have been identified, it's easier to integrate the interests of both parties and find a mutually acceptable solution.

Negotiation Stages and Approaches

Stages in a negotiation are like that in a mediation. A skilled win-win negotiator will proceed through the following four stages:

1. **Getting Ready to Negotiate** – Planning, Preparation and Setting Goals.
   - "A goal without a plan is just a wish."
   - "You'll never hit the target if you don't aim."
   - "Begin with the end in mind." – Stephen R. Covey

2. **Exchanging and Refining Information** (Use Communication Skills and Techniques)

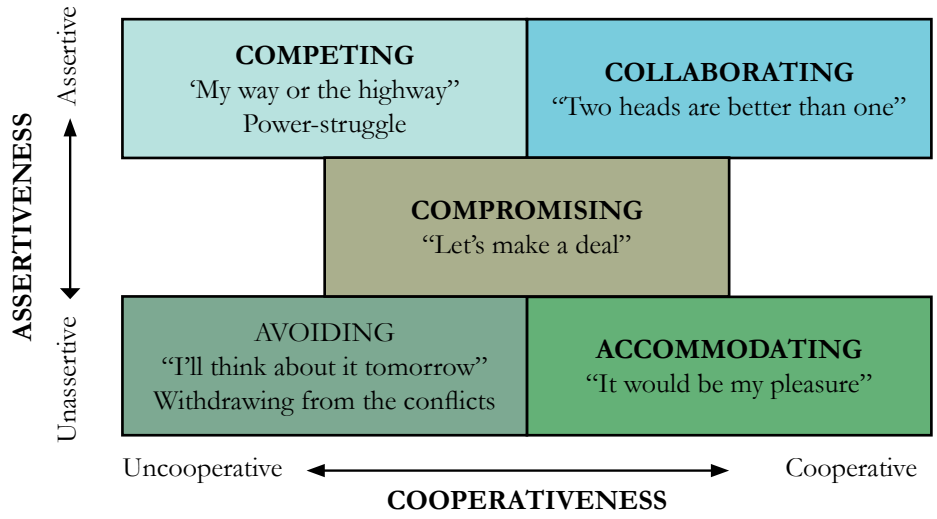
3. **Bargaining** – more associated with the competitive/ distributive approach.
   - Making demands and offers – concessions are the compromises you make after your opening offers.
   - Give-and-take – the horse trading – what the parties are willing to give up in order to reach an agreement.

4. **Closing** – Finalizing and Writing Agreements (Inventing possible solutions for mutual again)

Negotiation Styles – The Five Conflict-Handling Modes

The *Thomas-Kilmann Conflict Mode Instrument (TKI)* is designed to assess an individual's behaviour in conflict situations – that is, situations in which the concerns of two people appear to be incompatible. In such situations, we can describe a person's behaviour along with two basic dimensions: **(1) assertiveness,** the extent to which the individual attempts to satisfy his or her own concerns, and **(2) cooperativeness,** the extent to which the individual attempts to satisfy the other person's concerns. The five categories of negotiation styles are:

1	**Avoiding Style**	**Unassertive and Uncooperative:** Neither a party confronts the problem nor addresses the issues.
2	**Accommodating Style**	**Unassertive and Cooperative:** Neither he insists on his own interests nor accommodates the interests of others. There could be an element of sacrifice.
3	**Compromising Style**	**Moderate level of Assertiveness and Cooperation:** He recognizes that both sides have to give up something to arrive at a settlement. He is willing to reduce his demands. Emphasis will be on apparent equality.
4	**Competing Style**	**Assertive and Uncooperative:** The party values only his own interests and is not concerned about the interests of others. He is aggressive and insists on his demands.
5	**Collaborating Style**	**Assertive, Cooperative and Constructive:** A party values not only his own interests but also the interests of others. Collaboration is the only way forward.



COMPETING
- It's a 'win-lose' strategy.
- Power struggle – might is right.
- *'My way or the high way'.*
- There will be only one winner.
- Causes disruption of relationship.
- Parties' underlying (hidden) needs and interests are not taken into consideration.

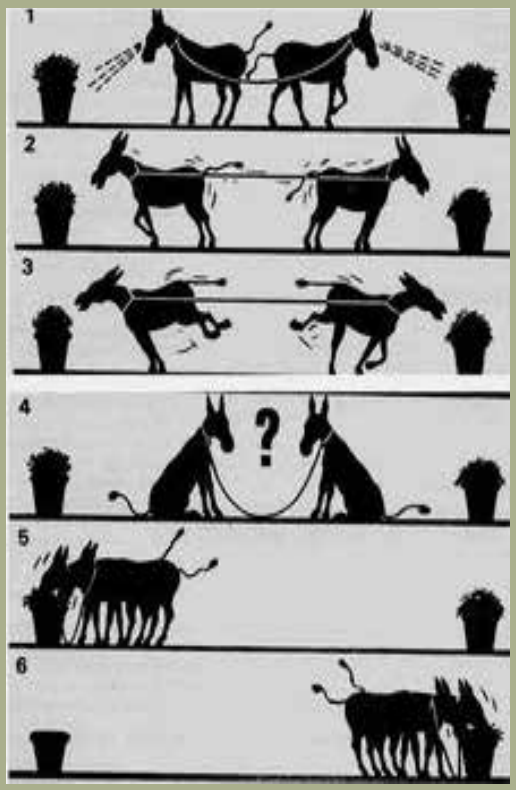
COLLABORATING
- This is the ideal outcome: a Win-Win situation.
- All win strategy.
- Satisfies all sides.
- *"Two heads are better than one."*

COMPROMISING
- This is likely to result in a better result than win/lose, but it's not quite win/win.

AVOIDING
- This is where everyone pretends there is no problem. (a Lose-Lose situation)

ACCOMMODATING
- On the surface, harmony is maintained, but underneath, there is still conflict. (a Win-Lose situation)

Negotiation Donkeys/A Tale of Two Donkeys



Competitive or Collaborative Technique?

What does the above picture depict?

- There are several different ways to solve conflicts.
- 1 & 2: Pulling against each other - competing (no one wins)
- 3: Not willing to compromise (no one wins)
- 4: Willing to compromise (win-win/lose-lose)
- 5 & 6: Working together to make things fair for both people (collaboration) – (Both wins)

Activity: How to Share Chocolate (Role-Play in Pairs)

Objective:

- To identify underlying interests.
- To understand conflict management styles.

Rules of sharing chocolate

- Exercise to be done in pairs.
- Chocolate may not be divided into smaller pieces.
- You have 5 minutes to complete the exercise.
- If there is no agreement reached within 5 minutes as to how to share the chocolate, no one gets any chocolate.

CHAPTER 5
CONCEPT OF MEDIATION

What is Mediation?

Mediation is one forms of ADR. It is a process in which an impartial third party assists disputants in finding a mutually acceptable solution to their conflict. It is voluntary, informal and confidential process. It can be conducted by a single or more mediators.

Mediation is a non-binding negotiation process, in which a neutral third person facilitates the disputants in arriving at a mutually acceptable settlement. To assist the parties, the mediator uses specialized negotiation and communication techniques to arrive at dispute resolution.

Mediation is a process in which an impartial third party facilitates the resolution of a dispute by promoting amicable agreement by the parties to the dispute. A mediator facilitates communication, promotes understanding, assists parties to identify interests, uses creative problem-solving techniques and enables parties to reach their own agreement.

Mediation is a process that promotes the self-determination of participants and in which participants, with the support of a mediator:

a) communicate with each other, exchange information and seek understanding;
b) identify, clarify and explore interests, issues and underlying needs;
c) consider their alternatives;
d) generate and evaluate options;
e) negotiate with each other; and
f) reach and make their own decisions.

Mediation is a conflict resolution process in which a mutually acceptable third party, who has no authority to make binding decisions for disputants, intervenes in a conflict or dispute to assist the parties to improve their relationships, enhance communications, and use effective problem-solving and negotiation procedures to reach voluntary and mutually acceptable understandings or agreements on contested issues.

What is Mediation?

- Mediation = Facilitated Negotiation
- A decision-making process where the mediator helps the parties to isolate issues, identify their interests and reach a solution they can live with…
- Litigation is about the past – Mediation is about the future…

Advantages of Mediation

- Voluntary
- Participatory
- Speedy, efficient, and economical
- Simple and flexible
- Informal, cordial and conducive
- Fair process
- Maintains/improves/restores relationships
- Confidential
- Parties have control over the outcome
- WIN-WIN situation

"Discourage litigation, persuade your neighbours to compromise whenever you can. Point-out to them how the nominal winner is often a real loser in.... fees, expenses, and waste of time."
- Abraham Lincoln

"The plaintiff and defendant in an action at law are like two men ducking their heads in a bucket, and daring each other to remain longest under water." **– Samuel Johnson**

COMPARAISON BETWEEN MEDIATION AND LITIGATION	
MEDIATION	**LITIGATION**
Voluntary for both	Voluntary for one
Simple rules	Complex rules
Informal	Formal; rigid
Parties decide issues	Lawyers decide issues
Private and confidential	Public
Flexible solutions possible	Only legal remedies
Parties control outcome	Judges decides outcome
About perceptions	Search for truth
Win/Win situation	Win/Lose or Lose/Lose situation
Mediation is about future	Litigation is about the past

Existing Models of Mediation

The types of mediation will depend on the nature and types of disputes. The six contemporary practice models of mediation are:

1. Expert Advisory Mediation (Alexander)
2. Wise Counsel Mediation (Alexander)
3. Settlement or Evaluative Mediation (Boulle)
4. Facilitative Mediation (Boulle)
5. Transformative (Alexander) or Therapeutic Mediation (Boulle)
6. Customary or Traditional Mediation (Alexander)

(Reading material: "The Mediation Meta Model: Understanding Practice" by Nadja Alexander)

Mediative Approaches and Techniques

Mediators use a variety of techniques to resolve legal disputes. Indeed, mediation is a craft that can be executed in different ways, depending on a mediator's expertise, the preference of the clients, and the nature of the dispute in question. The two most common styles of mediation are facilitative and evaluative.

Of course, these mediation styles are by no means mutually exclusive. Even if a mediation is almost entirely facilitative, there are likely to be occasions where the parties ask the mediator for an evaluative opinion on a particular subject. Similarly, a mediator who is seeking to facilitate communication will often draw on aspects of transformative mediation in order to assist the participants in understanding each other's perspectives, interests and positions. Meanwhile, every evaluative or transformative mediator is continually drawing on aspects of the facilitative mediation that forms the backbone of all forms of mediation.

Facilitative Mediation

- Facilitative mediation is the backbone upon which every mediation is built – considered an ideal form of mediation because it creates optimal environment for negotiation.
- Facilitative approach incorporates elements of the transformative approach.
- Mediator is in-charge of the process, while parties are in-charge of the outcome.
- Parties are responsible for identifying underlying interests through direct communication, with the mediator acting as a facilitator.
- Mediator encourages the parties to develop possible options for mutual gain through various inquiry techniques, and selecting the solutions that work the best for them.
- Mediator does not suggest the best solution or provide evaluation or can't predict as to the possible solutions and outcomes of the case.
- Mediator meets most often in joint sessions and rarely in private caucuses with parties.
- Mediation is mostly conducted by lay mediators without legal background.
- Also known as "*interest-based mediation*" because it integrates the interests of both parties.
- There is a high degree of party autonomy and self-determination.
- Facilitative mediation is generally the simplest form of mediation, because the mediator's role is to merely act as a "referee" who facilitates the parties with negotiation.

Evaluative Mediation

- Evaluative mediation focuses on the legal rights of the parties rather than their needs and interests.
- Evaluative mediator may provide an advisory opinion as to the relative legal merits of the parties' case or on the outcomes of court litigation or other processes.
- Mediator assesses the strengths and weaknesses of each side's case and proposes position or right-based compromise agreements.
- Mediator using this mediation style evaluates based on legal rights and fairness and urges parties to settle or accept a particular settlement proposal or range.
- This type of evaluation requires a mediator with legal expertise - evaluative mediators are often retired judges, lawyers, attorneys and those who has law background.
- Mediator meets most often in private caucuses with the parties and their attorneys, practicing "shuttle diplomacy."
- Evaluative mediation is also often effective for legally or informationally sophisticated participants by providing each party with objective feedback that weighs the relative pros and cons of each argument.

Core Principles of Mediation

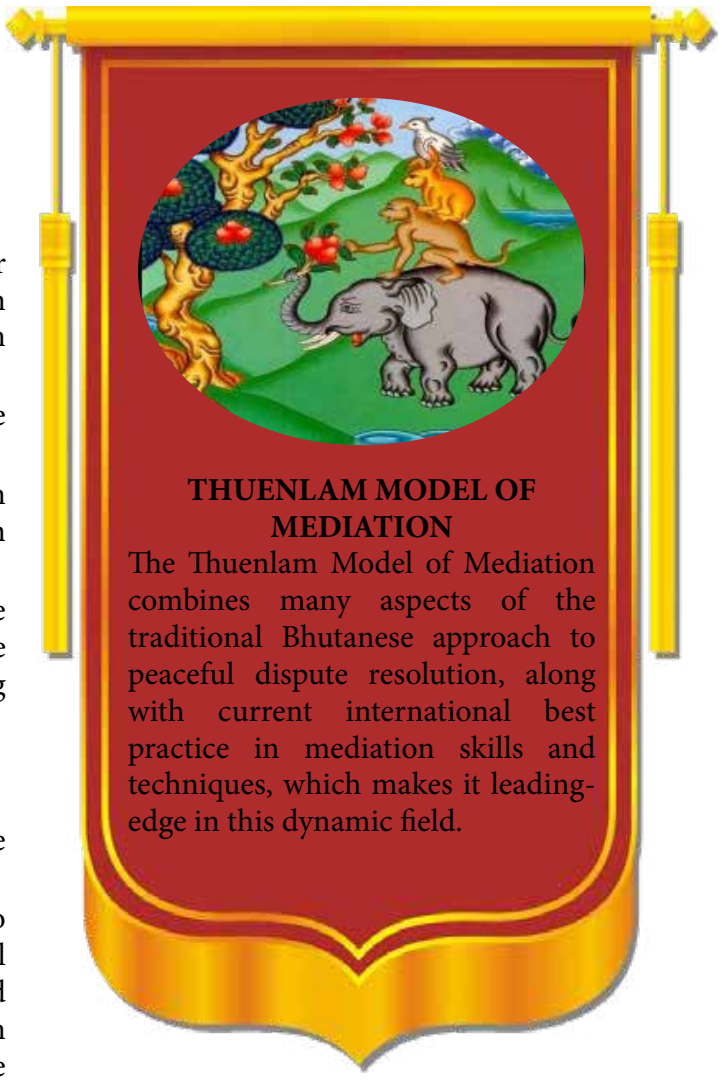
Mediation fundamental principles are:

1. Voluntariness

- Mediation is voluntary process.
- Parties have the power to decide for themselves whether to participate in mediation, whether to settle, and on what terms.
- Mediator has no power to decide the dispute or impose a solution.
- This right of self-determination is an essential element of the mediation process.
- Any party may withdraw from the mediation process at any stage before its termination and without assigning any reason.

2. Neutrality and Impartiality

- A mediator shall conduct the mediation in an impartial manner.
- If at all time the mediator is unable to conduct the process in an impartial manner, the mediator is duty bound to withdraw from the mediation process, and any party, at any stage may withdraw from the process.
- Neutrality, impartiality and independence are assets of a mediator.



THUENLAM MODEL OF MEDIATION

The Thuenlam Model of Mediation combines many aspects of the traditional Bhutanese approach to peaceful dispute resolution, along with current international best practice in mediation skills and techniques, which makes it leading-edge in this dynamic field.

- Mediator's role is solely to assist each party equally.
- Mediator must remain neutral as to the outcome of a mediation at all times.

3. Confidentiality

Confidentiality is at the heart of a mediation. The ability to maintain confidentiality in mediation is essential to the effectiveness of the process.

- **Who:** All participants, mediators and outsiders are obliged to keep confidential everything that transpires during a mediation.
- **What:** All aspects of a mediation are confidential and remain known to only the parties and the mediators.
- Mediator shall keep confidential all information, arising out of or in connection with the mediation, including the fact that the mediation is to take place or has taken place, unless compelled by law or public policy grounds.
- All memoranda, work products and other materials contained in the case files of a mediator or mediation program are confidential.
- Any communication made in or in connection with the mediation which relates to the controversy being mediated, including screening, intake and scheduling a dispute resolution proceeding, whether made to a mediator or dispute resolution program staff or a party, or to any other person is confidential.
- Any information disclosed in confidence to mediators by one of the parties shall not be disclosed to the other parties without permission or unless compelled by law.
- Views expressed or suggestions made by a party in a mediation in respect of a possible settlement of the dispute.
- Statements or admission made by a party in the course of mediation.
- Proposals made by the mediator.
- A document prepared solely for purposes of the mediation.
- Not to disclose anything said during a mediation process to public or media (no publication or recording in any form).
- **Where:** Generally, confidentiality of a mediation is absolute and cannot be used by either party or any other person in litigation.
- **When:** Confidentiality must be maintained during and after mediation process.

Steps to Ensure Mediation Confidentiality

- Mediator must inform the parties of their responsibility to maintain confidentiality during the mediator's opening statement.
- Mediators shall not record the details of the deliberations.
- Publicity is prohibited.
- Parties and mediators to sign the confidentiality agreement before the session begins.

Confidentiality and its Exceptions

There are some exceptions to confidentiality as outlined below. The mediator has the responsibility to explain that confidential materials and communications are not subject to disclosure in discovery or in any judicial or administrative proceeding except:

- where all parties agree, in writing, to waive the confidentiality;

- in a subsequent action between the mediator and a party for damages arising out of the mediation;
- statements, memoranda, materials and other tangible evidence, otherwise subject to discovery, which were not prepared specifically for use in and actually used in the mediation;
- where a threat to inflict bodily injury to self or others is made;
- where communications are intentionally used to plan, attempt to commit, or commit a crime or conceal an ongoing crime;
- a mediated agreement signed by the parties shall not be confidential, unless the parties otherwise agree in writing; and
- allegations of child abuse are not confidential as mediators are mandatory reporters of such information.

WHY CONFIDENTIALITY?

- Confidentiality encourages participation in mediation to genuinely negotiate in order to reach a resolution.
- To protect the privacy of parties and the mediator's liability.
- Privacy is an incentive for many to choose mediation.
- To protect the mediator from testifying as a witness.

4. Self-determination

- Mediation is based on principle of self-determination by the parties.
- Parties be allowed to reach a voluntary and uncoerced agreement.
- Any party may withdraw from mediation at any time.

5. Participate in good faith

- Parties to participate in the negotiated settlement proceeding in good faith and with intention to settle the disputes.

Disputes where mediation is appropriate

Mediation may be effective in following conditions:

1. Parties want to settle the dispute in good faith.
2. There is need for parties' reconciliation and preservation of their relationships.
3. Avoid trial.
4. Parties want prompt resolution.
5. Parties want control over outcome.
6. Complicated case.
7. Confidentiality desired by parties.

Disputes where mediation is not appropriate

Mediation may not be appropriate in following conditions:

1) Parties do not participate in the negotiated settlement proceeding in good faith with the intention to settle dispute.
2) Parties want a judicial determination and a binding legal precedent.
3) Power imbalance which makes fair agreement unlikely.
4) Where one or both parties do not cooperate with full disclosure.
5) Complicated and complex cases involving public policy, constitutional matter.
6) One party suspect that other party intends to use the mediation to escalate the dispute.
7) Where confidentiality is at stake, future mediation may not be effective.
8) If the mediators are inexperienced, untrained and unskilled for some cases require specific knowledge and expertise in that field.
9) Where at least one of the parties has a strong aversion to the process.
10) Mediation may not be effective in the violent cases.

Cases that can be mediated

Most civil cases can be mediated.

Examples:

- Land and boundary disputes
- Inheritance disputes
- Matrimonial dispute
- Family disputes
- Real estate and property disputes
- Monetary (recovery of debt) disputes
- Employment disputes
- Business and merchant disputes
- Contracts
- Construction disputes
- Rental disputes
- Insurance claims
- Tortious liability
- Compensation/claims for accidents
- Civil defamation
- Consumer disputes
- Small claims
- Neighbourhood disputes etc.

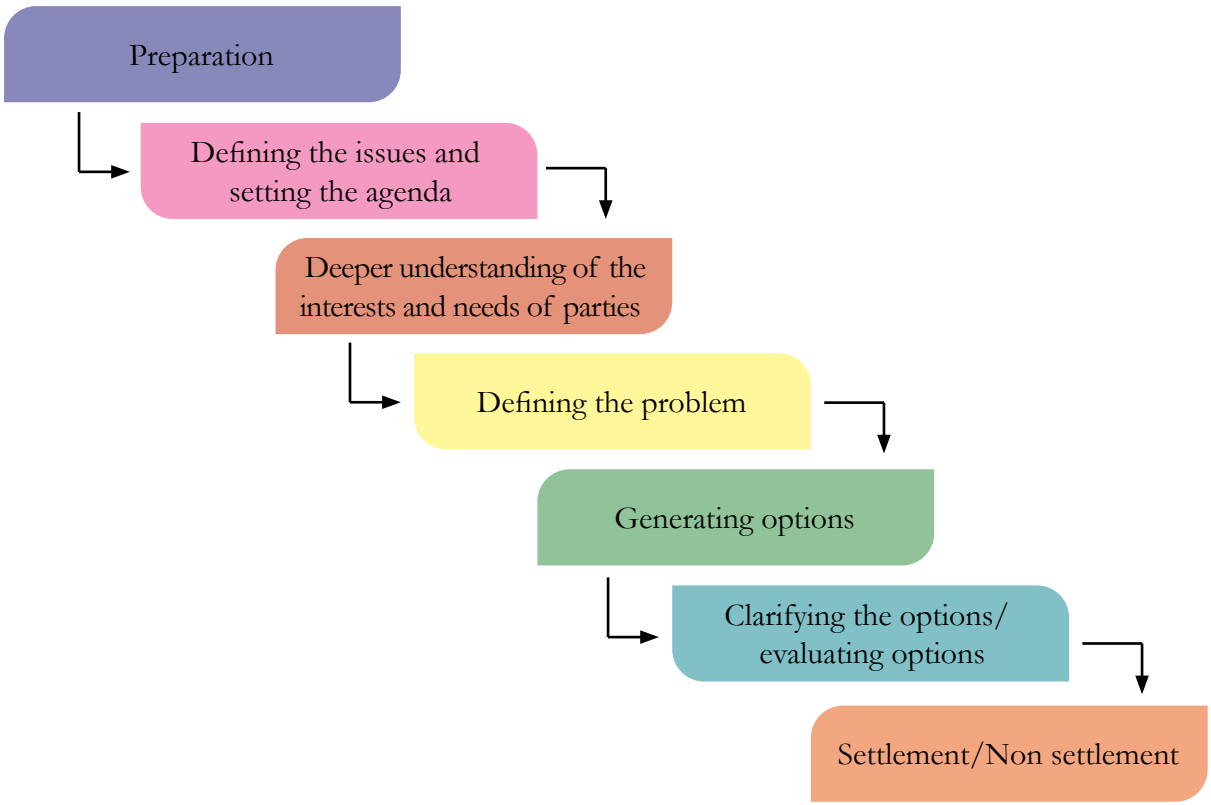
Cases which cannot be mediated

- Criminal cases, however, cannot be mediated.
- Marital disputes without marriage certificates [Kha 9.1 and 9.3 of the Marriage Act of Bhutan 1980] cannot be mediated without leave of the court.
- Judgments rendered by the competent Courts [finality of the judgments]
- Sothue (child support allowance) may not be mediated in the best interest of the child.
- Subject-matter of taxation.
- Other matters which are against public policy or morality.

CHAPTER 6
PROCESS/STAGES OF MEDIATION

The Mediation Process/Stages

Mediation is a process of assisted negotiation in which a neutral person helps people to reach agreement. The process varies depending on the style of the mediator, the nature of the dispute, and the wishes of the parties. Mediators apply a wide variety of techniques. There is no best way to mediate a dispute. Though informal, mediation is a structured process that focuses the parties on generating options for resolving their differences. In doing so, the mediator uses the five functional stages of mediation, viz., (i) Pre-Mediation (ii) Mediator's Opening Statement (iii) Parties' Opening Statement (iv) Generating Options and Solutions (v) Settlement/Agreement. These functional stages are used in an informal and flexible manner so that the mediation process gains momentum, following a specific and predictable course as illustrated below.

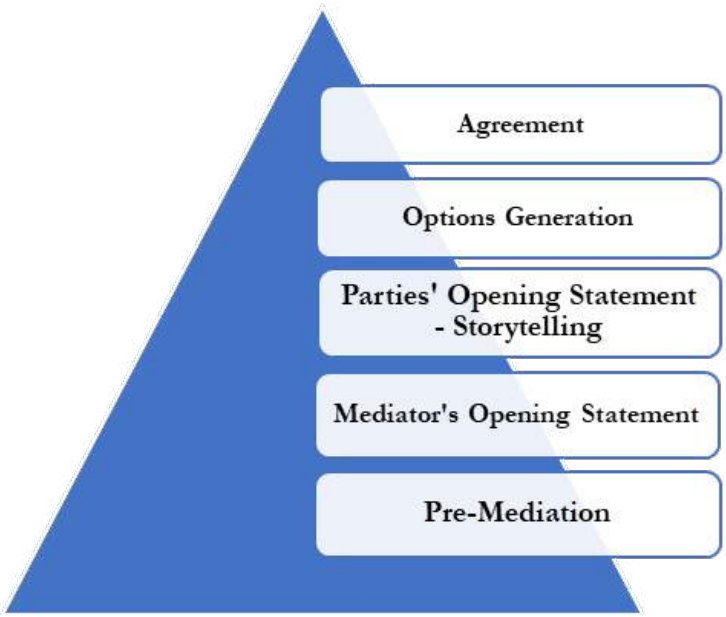


The Stages of Mediation Process

Because mediation is informal, mediators and parties have a great deal of freedom to modify the process to meet their needs. In practice, good neutrals vary their approach significantly to respond to the circumstances of particular cases. That said, the functional stages of the mediation process are:

1) Pre-Mediation
2) Mediator's Opening Statement
3) Parties' Opening Statement
4) Generating Options and Solutions
5) Preparing Settlement Agreement

The following pyramid shows the phases of mediation process described above.



Stage 1: Pre-Mediation

Goals:

- Setting the stage for mediation is critical part of the mediation process – advance preparation and step-by-step approach are keys to a successful outcome.
- Contact made by the lawyer(s) or party(ies) with the mediator.
- Assessing the dispute by the mediator.
- Developing relationship with lawyer(s) and the party(ies).
- Determining as to appropriate venue and time.
- Who should be present?
- What information the mediator will receive beforehand?
- Mediator preparing himself emotionally and psychically.
- Use of mediation sessions.
- Set up of mediation chambers.

"If I had six hours to chop down a tree, I'd spend the first four hours sharpening the axe." – **Abraham Lincoln**

"Every battle is won before it is fought." – **Sun Tzu**

Stage 2: Mediator's Opening Statement

The opening statement is an important phase of the mediation process. The mediator explains in a language and manner understood by the parties and their counsel, the following objectives:

- Welcoming, introductions, making initial connections.
- Outlining how the process works along with procedures.
- Developing trust in the mediator and the process.
- Establishing an environment that is conducive to constructive negotiations.
- Motivating the parties for an amicable settlement of the dispute.
- Describing the role of the mediator.
- Covering ground rules.
- Establishing neutrality.
- Establishing control over the process.

(i) Welcome the Parties

Goal: "*To set an informal tone and to put parties at ease*"

- Mediator greets everyone.
- Mediator welcomes the lawyers and/or parties to the session.
- Escorts the parties into the room and to their seats.
- Assign specific seats to the parties.

(ii) Seating Arrangement in the Mediation Chamber

There is no specific or prescribed seating arrangement. However, it is important that the seating arrangement takes care of the following:

- Place for the mediation should be located in a safe, neutral place that provides for adequate confidentiality.
- Space should be uncluttered, orderly and provide for an informal atmosphere.
- Supply the room with appropriate literature, paper, pencil, forms, whiteboard, etc.
- Be aware of the dynamics created by having parties face to face across the table, or sitting on one side of the table facing you, or using no table at all. Whatever arrangement you use, be sure that you do not appear aligned with one or the other of the parties.
- Mediator can have eye-contact with all the parties so that can facilitate effective communication with the parties.

- Each of the parties and his counsel are seated together.
- All parties present feel at ease, safe and comfortable.

(iii) Introduction

Goal: *"To set a positive tone"*

- Mediator introduces himself – his expertise, experience etc. [It should be completed within 2-3 minutes]
- Congratulate parties on agreeing to come to mediation.
- Mediator briefly describes his previous contact with parties, first meeting.
- Ask parties/counsels/other participants to introduce themselves.

(iv) Describe Mediation Process

Goal: *"To educate the parties"*

- Explain purpose of mediation to the parties.
- Explain the different stages of the process.
- Mediation is voluntary and based on the consent of the parties.
- Need and relevance of joint sessions or private caucuses.
- Use of whiteboard, note taking.

(v) Describe Role of Mediator

Goal: *"To develop trust and confidence in the mediator"*

- Mediator does not represent either party.
- Non-judgmental; helps the parties to find their own resolution of dispute.
- Do not propose and impose solution.
- Merely assists parties in evolving options for settlement.
- Carries proposals back and forth (shuttle diplomacy).
- Do not offer legal advice but ensures legality of the agreement.
- A manager of process.
- Facilitates communication between parties.
- Develops terms of settlement based upon interest of parties.
- Establish ground rules.

(vi) Advantages of mediation

Goal: *"To encourage the parties to use mediation process and discourage litigation"*

- Voluntary
- Informal and flexible
- Self-determination
- Private and confidential
- Speedy, efficient, and economical
- Preserves relationships
- Win-Win outcome

(vii) Confidentiality

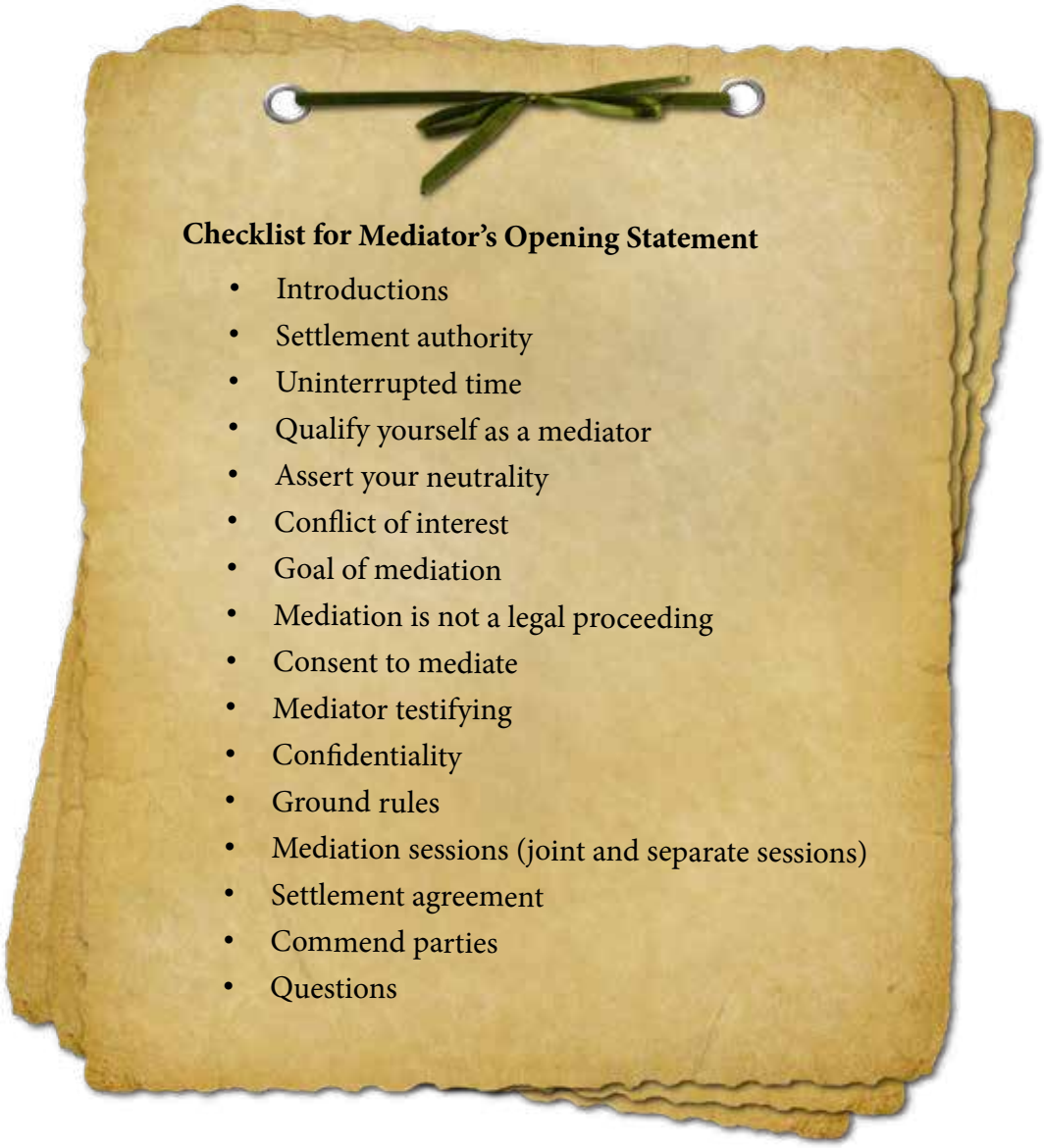
Goal: *"To encourage participation in mediation by protecting privacy of the parties"*

- Explain the ground rule of confidentiality to the parties.
- Anything disclosed during mediation shall remain confidential.
- Explain whether confidentiality is requirement of law or agreement of the parties.
- Information will not be used against them subsequently.
- Explain the requirement to sign on the confidentiality agreement before the commencement of the mediation.

(viii) Explain Ground Rules

A mediator shall explain the following ground rules:

- Parties/counsel shall address only to the mediator.
- Do not interrupt each other.
- Refer to one another by first names, not 'he' or 'she'.
- Do not insult each other.
- Observe courtesy.
- Refrain from using foul/abusive/vulgar language.
- Complainant may speak first, then respondent.
- Parties may call for breaks when needed.
- Only parties or their authorized representatives to attend mediation.
- Adequate opportunity shall be given to all parties to present their views.
- Discuss time constraints for the mediation.
- Do you have questions?
- Are you ready to proceed?



Checklist for Mediator's Opening Statement

- Introductions
- Settlement authority
- Uninterrupted time
- Qualify yourself as a mediator
- Assert your neutrality
- Conflict of interest
- Goal of mediation
- Mediation is not a legal proceeding
- Consent to mediate
- Mediator testifying
- Confidentiality
- Ground rules
- Mediation sessions (joint and separate sessions)
- Settlement agreement
- Commend parties
- Questions

Activity: Mediator's Opening Statement (Dyads)

Purpose:

- To make the participants learn how to make the mediator's opening statement.

Instructions

- Activity to be done in pairs.
- A starts and B listens (3 minutes)
- Switch roles (3 minutes)
- Free-flow conversation (1 minute)
- Debriefs not necessary.

Stage 3: Parties' Opening Statement

Objectives:

- To give each party the opportunity to describe her/his view of the dispute.
- To inform each party of the other party's version of the dispute.
- To inform the mediator of the nature of the dispute and the relationship between the parties.

The mediator invites each party to tell their story and to state their demands. Mediator advises all parties to wait for their turn, not to interrupt or disturb the one talking and asks all other participants to refrain from intervening and keeping their questions and comments after the opening statements of the parties.

Conventionally, the party asserting the claim (plaintiff) goes first. The other party (defendant) is to listen carefully and make notes. It is equally important that the mediator listens closely to the opening statements, paying full attention to the issues as articulated by the parties. Many times, the issues as defined by the parties in their openings are different from those articulated in the complaint or grievance.

Often the mediator can learn from party's opening statement the hidden concerns or interests motivating the dispute and sometimes can even discover the real source of the problem. This type of information is invaluable later when getting the parties to turn their attention away from their positions and toward their interests.

Parties' opening statements can provide clue as to how far apart the parties are at the onset. This will give the mediator an initial view of the challenge ahead as well as helping to determine when and if caucuses should be utilized. Of course, the attitudes of the parties and the ability of each party to articulate their positions will also be evident. This information will assist the mediator in determining who may be in need of caucuses more often and how much the mediator will need to assist the parties in understanding the other party's views on the issues.

(i) The Conduct of Mediation Sessions

- Session – means "meeting"
- During the Mediator's Opening Statement, the mediator should inform the parties of the mediation sessions.

(ii) Types of Mediation Sessions

(a) Joint Session

Most mediations begin with a joint session in which all of the parties and their lawyers are present.

Objectives

- Gather information and to know the backgrounds of a dispute.
- Organization of information.
- Provide opportunity to the parties to hear the perspectives of the other parties.
- Understand perspectives, relationships and feelings.
- Understand facts and issues.

- Understand obstacles and possibilities.
- Ensure that each participant feels heard.
- Allows both sides to observe opposing counsel and parties.
- Allows the parties to communicate directly with each other.
- To assume control over the process.
- Usually comes at the start of the mediation and at the end if a settlement is reached.

This stage begins with the mediator allowing both parties to briefly make a statement about the problem(s) or issue(s). Ordinarily the party who files the case should be invited to speak first but with brevity. The events should be asked to present in chronological order. The joint session is the first opportunity for the parties and the mediator to interact.

DIRECTING THE PROCESS:
The mediator is in charge of the process of the session, not the outcome. If one party talks a lot, encourage the other to speak up. If a topic is not being resolved successfully, move to another.

Role of the Mediators in Joint Session

During the discussion period, the mediator will:

- Encourage full, active participation of both parties.
- Listen. Ask very few questions.
- Jot down various issues.
- Take mental notes on what is hearing, seeing and sensing.
- Clarify and summarize statements that may be misinterpreted or not understood.
- Identify underlying interests of the parties.
- Prevent either party from monopolizing discussion.
- Provide periodic summaries of the discussion.
- Call a recess or caucus when appropriate.
- Assist in exploring alternatives.
- Do not alienate the other party.
- Manage outbursts and interruptions.
- Maintain neutrality and impartiality.
- Maintain environment conducive to agreement.
- Allow some exchange of communication between the parties.
- Parties who talk non-stop should be asked to summarize.
- Help disputants to hear each other's perceptions.
- Continue to actively listen.
- Clarify areas of agreement and disagreement.

PAUSING: "Silence can be golden. Pauses can be pregnant." Don't be afraid to wait sometimes after a significant statement. Another may emerge.

Techniques *[Use communication skills -See Chapter 10]*

- Active/Effective Listening.
- Verbal and non-verbal.
- Questions -begin with broad open-ended questions.
- Empathy with neutrality.

(b) Private Caucus

If the parties are unable to communicate with each other, the mediator should shuttle between the two, even if that means moving between caucuses rather than presiding over increasingly contentious joint sessions. *'Caucuses'* are private meetings the mediator conducts with each party at a time during the course of mediation. The conversation of a mediator with single party is known as single session or caucus. It is optional and is arranged after conclusion of joint session. In single session, mediator meets with each of the parties with counsels separately. During single session, the parties interact with mediator in confidence. The parties speak more freely in absence of other party.

If the mediator has a separate meeting with one party, he must have a separate meeting with the other party too, even if he does not have important things to discuss. The timing of holding the separate session may be decided by the mediator at his discretion. There can be several separate sessions or sub-caucuses. The mediator could revert back to a joint session at any stage of the process if he feels the need to do so. When caucusing within the context of a regular joint session, the separate sessions need to be relatively short (15 to 20 minutes). When the separate sessions take place between two consecutive joint sessions, longer meetings are appropriate. In either event, the separate sessions should be about equal in length.

Objectives

- Understand the dispute at a deeper level.
- Provide a forum for parties to further vent their emotions.
- Provide a forum for parties to disclose confidential information which they do not wish to share with other parties.
- Understand the underlying interests of the parties.
- Helps parties to realistically understand the case.
- Encourage parties to generate options and find terms that are mutually acceptable.
- Provide a forum for parties to come to the terms by evaluating the strengths and weaknesses of the case.
- Explore the advisability of accepting a settlement offer or making a counteroffer and help parties reach common goal.

When to Use Separate Sessions

- When mediating complex, multiparty disputes, the use of separate sessions can be quite essential for expediting negotiation among parties.
- When parties are stuck, at an impasse, and find that they cannot make any movement, the use of separate sessions may be a useful strategy to get them moving again or to examine what their alternatives are if they do not reach agreement.
- When emotions are getting out of hand and the mediator has lost control of the process separate meetings can serve to inhibit the nonproductive interactions between the parties.
- When one or both parties are having difficulty identifying and stating their issues in the presence of the other party. In separate meetings it is often easier to verbalize concerns because the other party is not there to react. The mediator can also help the party strategize ways for raising difficult topics when they return to the joint session.
- When one or both of the parties find it difficult to explore and discuss possible solutions in the presence of each other. It may be easier to think creatively when the other party is not present to react to ideas that are being explored. Having talked about possibilities in separate sessions makes it easier to verbalize them when the joint meeting is reconvened.
- When the mediator suspects that one or both parties is feeling threatened, it can be important to explore their fears and anxieties in separate sessions to determine whether to continue mediation or find ways to minimize the sense of threat.
- When one of both parties need some reality testing in order to help them move things forward in negotiation. The mediator can help the parties look at what the alternatives are or what will be the outcome should agreement not be reached in mediation.
- When the mediator suspects that there is an elephant in the room, parties are withholding information, or have ulterior motives for participating.

Strategies

- Assure confidentiality both at the beginning and at the end of individual session.
- Reinforce rapport with each party.
- Explore possible solutions.
- Help parties explore consequences of not arriving at an agreed upon solution (real testing).

Precautions

- Keep individual session short or fix time limit.
- Do not appear to favour one side.
- Decide when caucus is necessary.
- Decide what you want to accomplish.
- Formulate agenda.
- Separate sessions are not meant to be used as an escape for the mediator when things are becoming difficult in joint session. It is always a discretionary call as to when it can be beneficial for the parties to work separately.

(c) Sub-Sessions[Caucuses]

The separate session is normally held with all the members of one side to the dispute, including their advocates and other members who come with the party. However, it is open to the mediator to meet them individually or in groups by holding sub-sessions with only the advocate(s) or the party or any member(s) of the party.

- Mediator may also hold sub-sessions only with the advocates of both sides, with the consent of parties. During such sub-session, the advocates can be more open and forthcoming regarding the positions and expectations of the parties.
- If there is a divergence of interest among the parties on the same side, it may be advantageous for the mediator to hold sub-session(s) with parties having common interest, to facilitate negotiations. This type of sub-session may facilitate the identification of interests and also prevent possibility of the parties with divergent interests, joining together to resist the settlement.

(d) Shuttle Diplomacy

A joint session is not always the rule. Some mediations start with a separate caucus [caucus model] with each side, rather than a joint session. There may be some parties who do not feel comfortable or just don't want to face the other parties especially in the emotionally charged disputes. The shuttle diplomacy is a conflict resolution process used when parties cannot meet in person, due to distance or discomfort. When serving as a liaison between the two parties, the mediator's role in shuttle diplomacy is to carry:

- Messages
- Requests
- Proposals
- Questions

Reality-Testing [Reality-Checking]

After gathering information and allowing the parties to vent their emotions, the mediator makes a decision whether it is necessary to challenge or test the conclusions and perceptions of the parties and to open their minds to different perspectives. The mediator can then, in order to move the process forward, engage in reality-testing.

Objectives:

- To foster a more realistic assessment of the viability of the positions or interests.
- To help move a party from a positional bargaining approach to a more realistic discussion of interests.

Reality checking may sound like evaluative mediation, but it's not. The facilitative mediator does not evaluate anything; the parties conduct the evaluation. The mediator merely invites a more objective analysis by asking open-ended questions that are designed to stimulate a realistic appraisal of the party's options if the case does not settle. Suitable questions might be asked to the claimant how he or she would meet the burden of proving a *prima facie* case, or ask how he or she would defend the claim if it went to the court. Or perhaps the mediator could ask each party how they would approach the case, hypothetically, if their roles were reversed. Other questions could explore the procedural aspects of litigation or other formal procedures and what the effect would be, including costs, time and impact on continuing working relationships.

Reality-testing is particularly useful when the parties are *"pro se"* (without representation), and may not have given their cases much critical attention, but it's also useful even when parties have legal representation. Reality-checking may involve any or all of the following:

(a) A detailed examination of specific elements of a claim, defense, or perspective;

(b) An identification of the factual and legal basis for a claim, defense, or perspective or issues of proof thereof;

(c) Consideration of the positions, expectations and assessments of the parties in the context of the possible outcome litigation;

(d) Assessment of the monetary and non-monetary costs of litigation and continued conflict;

(e) Assessment of witness appearance and credibility of parties;

(f) Inquiry into the chances of winning/losing at trial; and

(g) Consequences of failure to reach an agreement.

Techniques of Reality-Testing

Reality-testing is often done in the private caucus by:

- Asking effective questions;
- Evaluating the strengths and weaknesses of the respective cases of the parties, without breach of confidentiality;
- Inquiring into the chances of winning/losing at trial; and/or
- Consequences of failure to reach an agreement (BATNA/WATNA/MLATNA analysis).

(I) Asking effective questions

- Mediator may ask parties questions that can gather information, clarify facts or alter perceptions of the parties with regard to their understanding and assessment of the case and their expectations.

Examples of effective questions:

- **Open-ended Questions**:
  a) Tell me more about circumstances leading up to the signing of the contract.
  b) Help me understand your relationship with the other party at the time you entered the business.
  c) What were your reasons for including that term in the contract?

- **Closed Questions:**
  a) It is my understanding that the other driver was going at 60 kilometers per hour at the time of the accident, is that right?
  b) On which date the contract was signed?
  c) Who are the contractors who built this building?

- **Questions that bring out facts:**
  a) Tell me about the background of this matter.
  b) What happened next?

- **Questions that bring out positions:**
  a) What are your legal claims?
  b) What are the damages?
  c) What are their defenses?

- **Questions that bring out interests:**
  a) What are your concerns under the circumstances?
  b) What really matters to you?
  c) From a business/personal/family perspective, what is most important to you?
  d) What do you want from divorce?
  e) What is this case really about?
  f) What do you hope to accomplish?
  g) What is really driving this case?

(II) Discussing the strengths and weaknesses of the respective cases of the parties

- Ask the parties or counsel for their views about the strengths and weaknesses of their case and other side's case.
- Ask questions such as 'How do you think your conduct will be viewed by a Judge? or
- Is it possible that a judge may see the situation differently? or
- I understand the strengths of your case, what do you think are the weak points in terms of evidence? or
- How much time will this case take to get a final decision in court? or
- How much money will it take in legal fees and expenses in court?

(III) Considering the consequences of any failure to reach an agreement (BATNA/WATNA/MLATNA analysis)

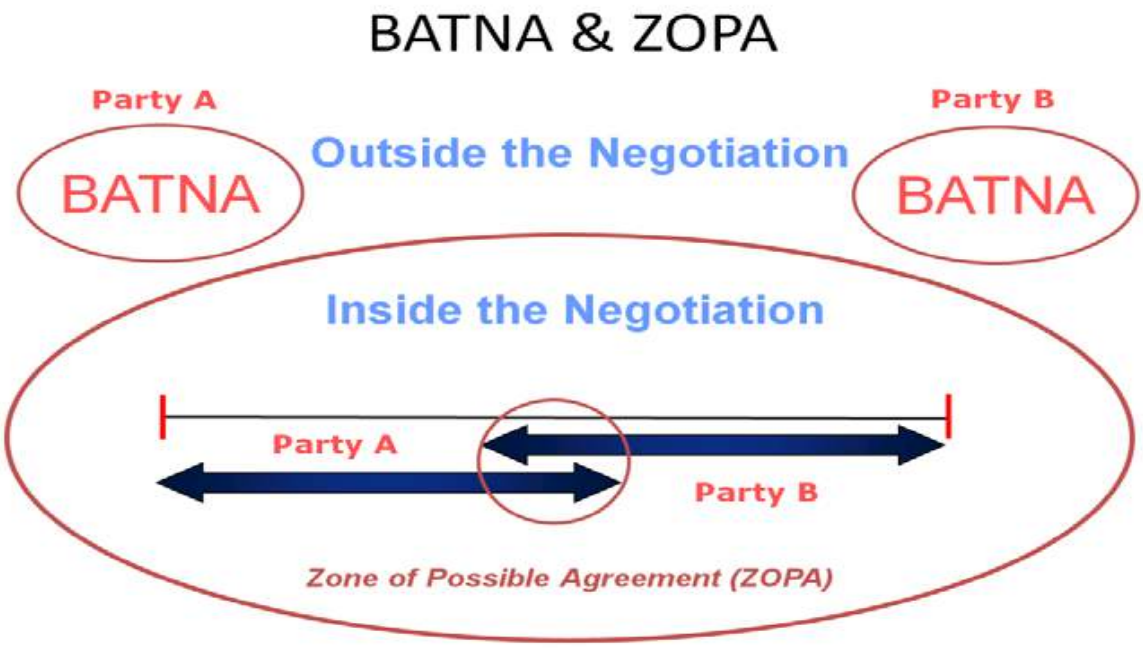
One technique of reality-testing used in the process of negotiation is to consider the different alternatives to a negotiated settlement. In the context of mediation, the alternatives are 'the best', 'the worst', and 'the most' likely outcome if a dispute is not resolved through negotiation in mediation. As part of reality-checking, it may be helpful to the parties to examine their alternatives outside mediation (specifically litigation) so as to compare them with the options available in mediation. It is also helpful for the mediator to discuss the consequences of failing to reach an agreement e.g., the effect on the relationship of the parties, the effect on the business of the parties etc.

- **BATNA** stands for *'Best Alternative to a Negotiated Agreement'* – a party will never agree to settle for less than could have been achieved in other ways.
- **WATNA** stands for *'Worst Alternative to a Negotiated Agreement'* - this is the worst alternative that a party faces, if it doesn't reach an agreement at mediation.
- **MLATNA** stands for *'Most Likely Alternative to a Negotiated Agreement'* – most probable result a party would ultimately achieve if it called off negotiations, for example, by terminating mediation.
- **ZOPA** stands for *'Zone of Possible Agreement'* – is considered an area where two or more negotiating parties may find common ground or common goal. It is this area where parties will often compromise and strike a deal.

- A ZOPA is a bargaining range in an area where two or more negotiating parties may find common ground.
- A ZOPA can only exist when there is some overlap between each party's expectations regarding an agreement.
- If negotiating parties cannot reach a ZOPA, they are in a negative bargaining zone. For example, let's say that A wants to sell his mountain bike and gear for Nu.700 to buy new skis and ski gear. B wants to buy the bike and gear for Nu.400, and can't go any higher. A and B have not reached a ZOPA; they are in a negative bargaining zone.

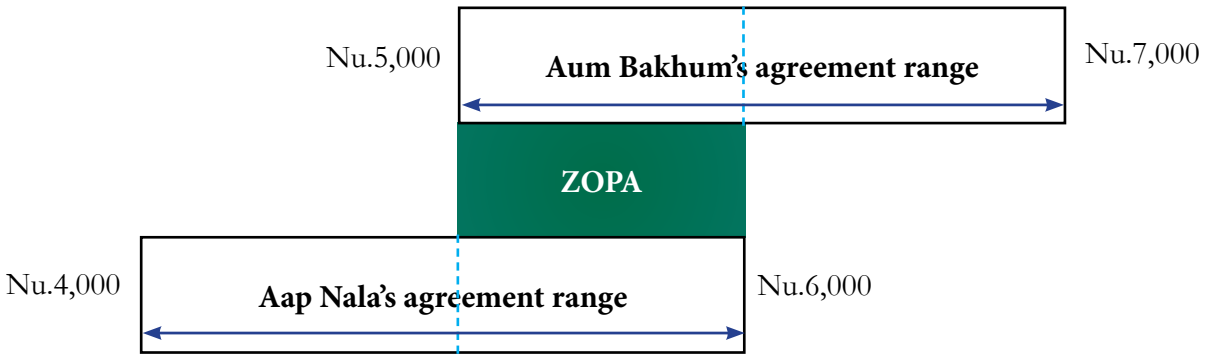
Relationship between BATNA and ZOPA

Unlike BATNA, which is the best option *outside* the negotiation, ZOPA exists only *inside* the negotiation, to narrow differences between the parties to make a negotiated solution possible. Figure 7 illustrates this relationship.



(Figure 7. BATNA and ZOPA. The ZOPA occupies the circled area where each party's range of acceptable options overlaps. An agreement within this zone should be possible.)

A simple example involving a negotiation for the purchase of a used fridge illustrates how ZOPA works. Aum Bakhum is selling her fridge. She is asking Nu.7,000, but is willing to accept Nu.5,000 if that's the best offer, she can get. Her goal in any negotiation over price is her asking price of Nu.7,000; her walk-away point is her minimum acceptable offer, Nu.5,000. Her range of acceptable outcomes is between Nu.5,000 and Nu.7,000. Aap Nala wants to buy Aum Bakhum's fridge, but wants to pay as little as possible. He offers Nu.4,000, but is willing to pay up to Nu.6,000. His goal is Nu.4,000; his walk-away point is Nu.6,000. Aap Nala's range of acceptable outcomes is between Nu.4,000 and Nu.6,000. When Aap Nala's and Aum Bakhum's ranges of acceptable outcomes are combined, there's an overlap between Nu.5,000 and Nu.6,000. This is the ZOPA, where an agreement on price is possible.



(Figure 8. In this example, the ZOPA is the range between Nu.5,000 and Nu.6,000, where each party's range of acceptable outcomes overlap.)

Stage 4: Generating Options and Solutions

Goals: *"To come up with as many reasonable alternatives as possible"*

So far, parties have described for each other and the mediator the background of their dispute, identified most if not all issues to be discussed, developed a mutually acceptable agenda, and (through joint and private sessions) begun to clarify some of the needs and interests to be satisfied. Now, the central task of the mediator is to develop mutually acceptable options for understandings or agreements.

Beginning with the first issue for resolution, assist the parties in generating possible solutions. Working with one issue at a time, it is important that the parties generate as many possible options for each issue as they can. There is an important ground rule, which the mediator needs to introduce at this time. The ground rule is that ideas that are being presented by the parties may not be evaluated or reacted to at this time. All they are doing is generating possibilities. Evaluation of the options will come as a next step. The following are some possible ways to assist the parties in generating options.

Using a Negotiation Strategy

- After the participants have framed the issues and created an agenda, they can identify possible solutions and begin to engage in negotiations.
- Distributive bargaining
- Integrative bargaining
- Party's best alternative
- Offers and demands

a) Identify (and clarify) as many options as possible for the solution:

- Ask the parties to invent as many options as possible for the solution.
- Begin by identifying options you have heard from the disputants in the earlier stages of the mediation process to check if they would like to have them identified as possible options now.
- Participants should fully understand each proposed solution, without allowing clarification to turn into evaluation.
- Discourage evaluation until a number of possible options have been proposed.
- Separate inventing from deciding.

b) Ask Open-ended Questions:

- Ask open-ended questions to help the parties think about what might work for them.
- It is helpful to explore what they have thought about or talked about in the past or even what they have tried in the past.

c) Brain Storming:

- Encourage the parties to engage in "brain storming".
- Technique used to generate options for agreement.
- Invite the parties to put on the list of options, anything that comes to their mind, even if it may appear to be unrealistic at first.

There are 2 stages to the brain storming process:

1. Creating options for solution
2. Evaluating options for solution

1. Creating options for solution:

- Encourage parties to freely generate options that meet their needs and concerns.
- Remind the parties that there is no commitment from either side at this stage.
- Encourage parties to think outside the box and to be creative in their option generation.
- All options to be written down so that they can be systematically evaluated later.

2. Evaluating options for solution:

- Discard options that any party perceives as "impossible'.
- Combine similar options.
- Prioritize the options.
- Be open to new options to make sure they satisfy all parties' needs.
- Based upon the evaluation, help the parties to choose the best option. This will become part of the final written agreement.

d) Exchange of Offers:

- Ask the parties what they would like to offer each other. This is especially useful for parties who are trying to extract concessions from each other, which often results in the building up resistance and defensiveness.
- Mediator carries the options/offers generated by the parties from one side to the other.

Stage 5: Preparing Settlement Agreement

Goal: *"To support the parties in executing an agreement that can work for both parties"*

(A) Where there is a settlement

When parties to a dispute reach settlement, the agreement should be memorialized in a written settlement document. A settlement agreement is a contract, and as with every contract, the parties are free to negotiate over every term. Once the parties have agreed upon the settlement, the parties and their advocates re-assemble and the mediator ensures that the following steps are taken:

1. Mediator orally confirms the terms of settlement.
2. Such terms of settlement are reduced to writing.
3. Agreement is signed by all parties to the agreement and the counsel if any representing the parties.
4. Mediator should also affix his signature on the signed agreement, certifying that the agreement was signed in his/her presence.
5. A copy of the original signed agreement is furnished to the parties.
6. A copy of the original signed agreement is retained with the Community Mediation Center for official record.
7. A copy of the original signed agreement is sent to the referral court for passing appropriate order in accordance with the agreement.
8. Memorializing the agreement as soon as possible after settlement is the best way to ensure that it is reduced to an enforceable form; if the parties "sleep on it" for too long before reducing the agreement to writing, they may begin to have second thoughts and attempt to avoid the oral agreement.
9. Check if the agreement is fully understood by the parties.
10. Check if the agreement is SMART.
11. Mediator thanks the parties for their participation in the mediation and, congratulates all parties for reaching a settlement.

Written Agreement

The most common method of memorializing a settlement reached during mediation is to prepare a written agreement signed at the end of the mediation session by all the parties. For the agreement to be enforceable, it must satisfy the following conditions:

1. Clearly specify all material terms agreed to;
2. Should be drafted in plain, precise and unambiguous language;
3. Should be concise;
4. Should clearly state, Who, What, When, Where and How?; and
5. Should be executed in accordance with law.

SMART is an acronym for Specific - Measurable - Achievable - Realistic - Time-Bound. Applying this model to the mediation agreement means that the terms of the agreement must:

1. Specific - be clear and detailed;
2. Measurable - include milestones that can measure the progress of the implementation;
3. Achievable - be in line with parties' goals and interests;
4. Realistic - fall inside the parties' capacities and resources; and
5. Time-bound - have a clear timetable for implementation.

Ingredients of the Agreement

Chapter 23 of the Civil and Criminal Procedure Code of Bhutan 2001, Chapters II and III of the Contract Act of Bhutan 2013, Chapter XII of the Alternative Dispute Resolution Act of Bhutan 2013, and Chapter 4 of the Evidence Act of Bhutan 2005 lay down the ingredients of a legally admissible agreement.

(B) If no agreement is reached:

- Terminate the mediation.
- Not required to assign any reason for non-settlement.
- Reconvene for a new mediation session at a later date.
- Follow up with the lawyers or parties through telephone or e-mails.
- Resume hearing in case of Court-Annexed Mediation.

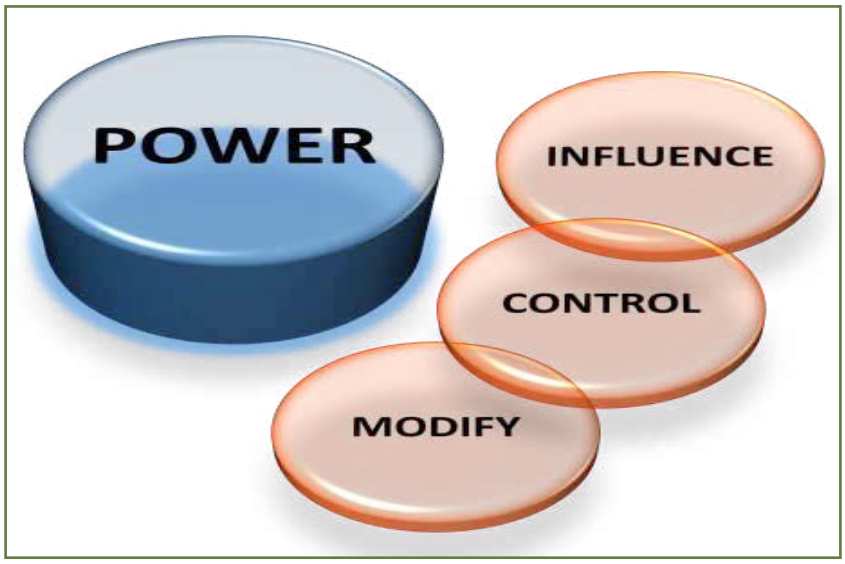
Checklist for Mediators

1. Mediator as transcriber.
2. Validate the terms of settlement.
3. Check if terms are fully understood by all parties and counsels if any.
4. Check if the agreement is SMART.
5. Check if the agreement is signed by all parties and mediator.
6. Check if the original copy is furnished to parties.
7. Retain one original copy and/or send one to the referral courts.
8. Check if the agreement is legally enforceable.

CHAPTER 7
POWER IMBALANCE AND IMPASSE IN MEDIATION

(I) What is Power?

Each party will always have some power. No one is ever totally powerless. Power is the ability to influence the decision-making processes of people whom we are in a relationship of interdependence with. The power is defined as capability of a person or group to modify the outcome of benefits, or costs of another in the context of a relationship. Power can be defined as the ability of a person in a relationship to influence or modify an outcome. For the present purposes, power is defined as the ability of a party to achieve their desired negotiated outcome. In negotiation or mediation, it allows parties to use leverage and to force others to accept their terms of agreement.



(II) Perceptions about Power

The perception of power is more important than actual power. Therefore, a party will be at an advantage when he/she perceives himself/herself to be more powerful and he/she will be at a disadvantage when he/she perceives the other party to be more powerful than him/her.

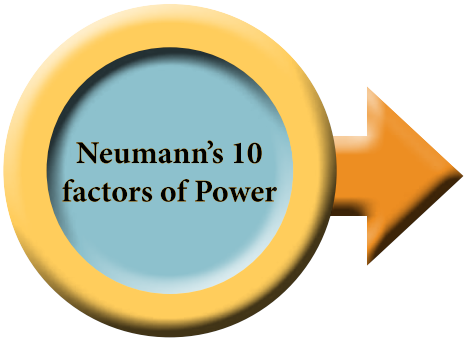
(III) Sources of Power in Mediation

Difficult situations and impasse often arise in mediation when parties perceive a power imbalance between them. Below are common sources of power encountered in mediation:

- Formal Authority
- Expert/Information Power
- Associational Power
- Resource Power
- Procedural Power
- Sanction Power
- Nuisance Power
- Habitual Power
- Moral Power
- Personal Power

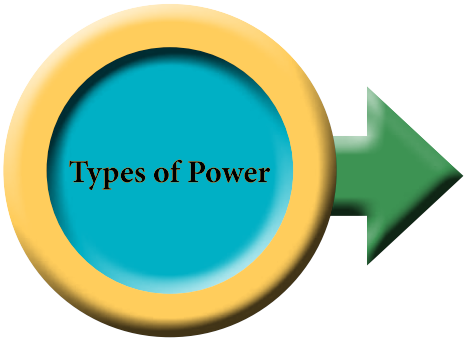
1. **Formal Authority:** Formal authority refers to an association with the formal government or other authorities.
2. **Expert/Information Power:** Often parties in a mediation conference possess different amounts of information on negotiation strategies, legal rights and obligations, financial and other matters.
3. **Associational Power:** Refers in general to power that is derived from association with other powerful people or organizations.
4. **Resource Power:** Means control over financial assets and other resources. One party has more time, money, legal advice, and other assets that strengthen his or her position.
5. **Procedural Power:** The power to influence the process of dispute resolution.
6. **Sanction Power:** Refers to the ability to punish the other party. Implied threats of harm or the threat to evict people or destroy certain assets are sometimes encountered during the process.
7. **Nuisance Power:** Refers to the ability to annoy and distract the other party in the negotiation. Continued emotional aggravation of conflict tends to wear most people out. After a while, a disputant is willing to pay any price just to end the contact and hopefully return to a normal life.
8. **Habitual Power:** Means the ability to maintain the status quo.
9. **Moral Power:** Moral power can be tapped by appealing to moral values and social or religious norms and standards.
10. **Personal Power:** These are the personal characteristics of the parties in mediation.

(IV) Factors of Power



- Belief System
- Personality
- Self-esteem
- Gender
- Selfishness
- Force/Size
- Income/Assets
- Knowledge/Experience
- Status/Age
- Education/Qualification

(V) Types of Power



(French & Raven)
(Psychologists, 1950s)

- Positional/Formal Power
- Referent Power
- Expert Power
- Reward Power
- Coercive Power
- Connection Power
- Informational Power

1. **Positional/Formal Power**
    - Often called "legitimate" power.
    - This power comes from having an official position.
    - For example, the CEO of a Company can fire workers below them.
2. **Referent Power**
    - Influence that comes from being liked by others.
    - For example, a popular, charismatic student may create a new fashion trend at school.
3. **Expert Power**
    - Influence that comes from having exceptional skills.
    - For example, a talented carpenter may have a lot of power in a town that needs furniture.
4. **Reward Power**
    - The ability to give out rewards for desired behaviour.
    - For example, a parent may reward his child with money in exchange for excellence.

5. **Coercive Power**
    - The ability to offer punishments to deter certain actions.
    - For example, a cop can arrest thieves.

6. **Connection Power**
    - The ability to offer access to certain people or resources.
    - For example, an agent can introduce an actor to a film producer.

7. **Informational Power**
    - Influence that comes from knowledge and information (knowledge is power).
    - For example, a spy may know the location of an enemy base.

(VI) What is Power Imbalance?

The mediator should anticipate that parties coming to mediation do not possess equal power. The mediation process, by its very nature, tends to balance power between parties. Power imbalance is defined as *"unequal distribution of such abilities in persons." An imbalance of power simply means that the parties that are participating have different sources and levels of power.*

(VII) Effects of Power Imbalance

- Mediation may not be effective if there is a power imbalance.
- Danger is that weaker parties will be unable to assert their position or needs and will accede to agreements which are not in their best interests.
- Mediation will end up with agreements that are not fully informed or voluntary.
- Unequal parties will produce unequal agreement or no agreement at all.
- Lead to termination of mediation process.

(VIII) Power Dynamics

Power dynamics describe how power affects a relationship between two or more people. Power dynamics is the study of how power is negotiated. Power dynamics come in many different forms.

- Leadership Power Dynamics – e.g., between great leaders and poor ones.
- Social Power Dynamics – e.g., social status, rich and poor, gap between haves and have-nots, etc.
- Economic Power Dynamics – e.g., gap between rich and poor nation.
- Relationship Power Dynamics – male and female, husband and wife, teacher and student, parent and child, victim and perpetrator in domestic violence case etc.
- Workplace Power Dynamics – e.g., employers and employees, supervisors and supervisees, bullying and harassment, etc.
- Politics Power Dynamics – e.g., between majority and minority.
- Legal Power Dynamics – e.g., unrepresented party and represented party.
- Healthcare Power Dynamics – e.g., robust physical health and poor physical health.
- Communication Power Dynamics – e.g., intellectual and non-intellectual, excellent language fluency and poor language fluency, etc.

(IX) Dealing with Power Imbalance in Mediation

There is rarely a conflict where the power is equally balanced between two parties. The perception of power imbalances between the parties is common in mediation and negotiation. Balancing power is an important part of mediation. It is a skill that mediators must cultivate. Mediating parties often have different types and levels of power, which they may use to push their agenda and manipulate the agreement to say what they want it to say. The following are some ways in which the mediator addresses power differences:

- Help weaker parties realize the power of the mediation process to obtain optimal solutions.
- Help stronger parties realize the joint gains and low costs of mediated outcomes that cannot be obtained by unilateral imposition.
- If power imbalance is too great – refer to the Court where judge can protect the disempowered.
- If the imbalance is too great, may have to suspend the mediation.
- Terminate the mediation process – "Not getting agreement is better than getting a bad agreement."
- Give parties the opportunity to tell their full story and insist that the other side listens without interruption.
- A compassionate listener.
- Access to more information.
- Legal assistance if necessary.
- Enforce the mediation ground rules.
- Use of co-mediation.
- Deciding who may speak and controlling the duration of time each person may speak.
- Reality testing - Use the caucus session to talk with both parties about the strengths and weaknesses in their cases.
- By reality-testing with both parties, the mediator may be able to help weaker party to have a significant leverage over another powerful party.

(i) Impasse in Mediation

During a mediation, the impasse occurs when neither party is willing to compromise any further on an issue. When parties reach impasse, they are likely to regard it as the end of the negotiations.

In mediation, the 'impasse' means and includes stalemate, standoff, deadlock, bottleneck, barrier or hindrance. Sometimes parties fail to reach an agreement resulting in deadlock. Impasse may not be due to overt conflict but rather due to resistance to workable solutions or exhaustion of creativity. Impasse is a situation in which no progress is possible especially because of disagreement between conflicting parties.

"When you are at the edge of a cliff, sometimes progress is a step backward."
- Anonymous

(ii) Why does impasse occur?

Impasse may be due to various reasons; it may be due to an overt conflict between the parties. It can be used as a tactic to put pressure on the opposite party. It can be used to help parties analyze and negotiate constructively. There may also be valid or legitimate reasons for the impasse.

(iii) Stages when impasse may arise

(a) At the time of opening statement: It may be due to refusal of party to participate in mediation or by causing interruptions or due to other reasons.

(b) In a joint session: It may be due to accusations made by parties against each other. It may be due to use of abusive language or by making inflammatory or provocative statements.

(c) In a private session or caucus: It may be due to proposal offered by a party which is entirely in his favour and interests.

(d) At the time of arriving at or drawing up of the settlement: It may be due to either or both parties being adamant about the wording, format and content of the settlement.

(iv) Kinds of Impasse

1. Emotional Impasse
2. Substantive Impasse
3. Procedural Impasse

1. Emotional Impasse

- Personal animosity
- Mistrust
- False pride
- Arrogance
- Ego
- Vengeance or
- Fear of losing face

2. Substantive Impasse

- Lack of knowledge of facts and/or law
- Limited resources
- Lack of bargaining powers
- Incompetence of the parties
- Interference by third parties
- Standing on principles
- Ignoring the realities
- Adamant attitude of the parties

3. Procedural Impasse

- Lack of authority to negotiate or to settle
- Power imbalance between the parties
- Mistrust of the mediation process and the mediator

(v) Dealing with impasse

The mediator shall make use of his/her creativity and try to break impasse by resorting to suitable techniques which may include the following:

(a) Mediator's proposal.
(b) Take a break or resume another day.
(c) When a particular process is unproductive, change the process.
(d) Meet with the attorneys or parties separately in private caucus – shuttle diplomacy.
(e) Role reversals by asking party to place himself/herself in the position of the other party and try to understand the perception and feelings of the other party.
(f) Involving the co-mediator or any third-party neutral in case of negotiation.
(g) Setting a deadline for next sessions.
(h) Propose a bracket or numbers (horse trading-offers and counteroffers)
(i) Changing the venue and setting (e.g., sitting arrangement).
(j) Using hypothetical situations or questions to help parties to explore new ideas and options.
(k) If all else fails, suggest (or threaten) ending the mediation.
(l) Starting all over again.
(m) Use of silence or or use of pause.
(n) A sincere, well-timed apology often opens up a discussion or breaks an impasse. Note the importance of sincerity.
(o) Careful use of good humour.
(p) If the parties haven't left, it is not over. Keep talking.
(q) Reality testing.
(r) Inventing or generating new options and evaluating options for agreement (Brainstorming).
(s) Acknowledging and complementing the parties for the efforts they have already made.
(t) Focusing on the underlying interests of the parties.
(u) Holding hope.
(v) Ascertaining from the parties the real reason behind the impasse and seeking their suggestion to break the impasse.

CHAPTER 8
SOLE AND CO-MEDIATION

(A) What is Sole-Mediation?

In sole-mediation, one mediator works with both parties from start to finish. As sole-mediation involves a single mediator, it is cost effective and can be quick and convenient to schedule a number of meetings. The disadvantage of sole-mediation is that the process may break down if an issue arises that is outside the scope of the mediator's expertise. Also, it may not be that effective in case of multi-party complex cases.

(B) What is Co-Mediation?

According to Rendon: *"Co-mediation is a mediation involving multiple mediators, usually two, who is in some way may complement each other by gender, personality, culture, professional background or other ways in a manner that can improve the quality of both the mediation process and its outcome."* Co-mediation involves two or more mediators working together as a team to assist the parties in dispute resolution. It is a process that parties might wish to consider in multi-party complex cases, as well as cases requiring gender balance or technical expertise. Co-mediation is not necessary for all cases, but is a helpful tool that should be considered for multi-party and emotionally charged cases.

(C) Why Co-Mediate?

Some reasons as to why a co-mediation method might be chosen include:

- When two heads are better than one.
- To provide extra set of eyes and ears to help resolve dispute.
- To mentor new mediator.
- To combine skills and expertise.
- To provide a balance of, for example, gender, culture, or age.

(D) Potential Advantages and Disadvantages of co-mediation

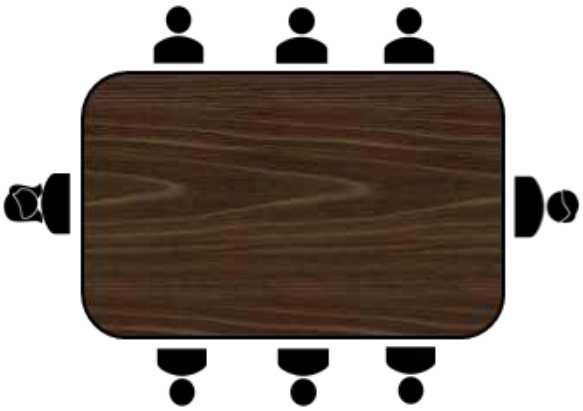
The following list summarizes some of the potential advantages and disadvantages of using a co-mediation method:

Advantages of co-mediation

- ☑ Modelling of co-operative behaviours.
- ☑ More ideas: two heads are better than one, and provide a greater potential for perspective taking.
- ☑ More easily managing practical aspects, such as maintaining eye contact, monitoring engagement, and observing body language and visual clues.
- ☑ Enhanced accountability to the process, both to clients and to the other mediator.
- ☑ Effective but it requires careful preparation, planning, and communication between the mediators, as well as between the mediators and the parties.
- ☑ Helpful tool for multi-party and emotionally charged cases - eg., insurance cases, construction cases, family disputes, commercial cases, employment cases etc.
- ☑ Eases the load and tension of mediation, especially in difficult cases and multi-party situations.
- ☑ Enables mediators to learn from each other, including less experienced mediators learning from more experienced mediators.
- ☑ A party has a better chance of feeling a sense of trust and confidence with at least one of the two mediators.
- ☑ There is a "check and balance" on mediators' possible biases or shortcomings.
- ☑ Make the mediation more efficient by division of tasks between the mediators.

Disadvantages of co-mediation

- × Resources intensive: lack of flexibility; time frames and costs can blow-out.
- × Power imbalances can be play-out between mediators.
- × One mediator may monopolize/dominate the process.
- × Ego-both yours and the co-mediators.
- × Philosophical differences or style differences that are incompatible/intractable may arise.
- × Different policy, procedures, and paperwork.
- × Conflict and competition among co-mediators can make mediation more difficult.
- × Time-consuming as mediators have to negotiate about their roles and responsilbilties.
- × Can be perhaps expensive.
- × Disunity.
- × Imbalance in gender, personality, culture, or professional background.



Co-mediation Setting

(E) Guidelines for co-mediation

The mediator and co-mediator are equally involved in, and responsible for, steering the mediation process, in accordance with an agreed delineation of roles and responsibilities that is established at the outset.

1. Choose a co-mediator with a similar vision of mediation's goal and compatible strategies for executing the mediator's job.
2. Give leadership roles to co-mediators.
3. Strategically use the seating arrangement to maximise opportunities for success.
4. Assign specific tasks to each mediator to make the mediation as efficient and productive as possible.
5. Use the opening statement to set the right tone for the co-mediation.
6. Adopt the principle of non-competition among mediators.
7. If one the mediators gets stuck, the other one could try to intervene.
8. If one mediator is focused on whether the content is being brought out appropriately, the other one could manage the process.
9. If one mediator conducts the interviews, the other one could for example extract further information and conclude or draw conclusions from the responses, or consider the parties' mutual relations and the feedback they generate from one another.
10. While one of the mediators is speaking, the other one could focus on what is happening as between the parties by way of their reactions, body language, etc.
11. If one of the mediators should become particularly preoccupied, for example, with watching the reaction of one of the parties, the other mediator could focus on communication patterns. For example, how the parties relate to one another, what they say to each other, how they react, during the opening phase, to hearing the other party's version of the story or facts, feelings and thoughts.
12. The mediators can agree to a secret code of communication between themselves, as to whether or not they would like the other's intervention or assistance. For example, they could place a pen or pencil on a table, visible to them both. While one mediator is speaking, she could place the pen with the nib facing her, to indicate that she wishes to handle things and steer the proceedings herself and does not wish the other mediator to intervene. On the other hand, if the pen is placed in a neutral position, it is left open for both mediators to speak or intervene as they see fit.

It can often be difficult for a mediator and co-mediator to coordinate and steer the mediation process together, as they do not have prior experience working together. It is, therefore, important to agree on their respective roles and responsibilities prior to the mediation commencing.

CHAPTER 9
ROLE OF MEDIATORS AND CODE OF CONDUCT FOR MEDIATORS

Mediation is a way of resolving conflicts where two or more parties decide to reach an agreement with a support of a third, neutral party that guides them through the process. It is an informal and non-adversarial process intended to help disputing parties to reach a mutually acceptable solution.

(A) Who is the Mediator?

Known by various names such as, *barmi, go-between, negotiator, peacemaker, conciliator, facilitator, middleman, referee,* etc., a mediator is a person who conducts mediation. A mediator is a neutral third party who assists both the parties to arrive at an amicable settlement of dispute. The mediator focuses on organizing and facilitating the communication between the parties, supports the parties to explore and express their interests and needs. The mediator is not a judge nor an arbiter, does not make decisions for the parties and does not impose her/his will on the parties. The mediator encourages parties to work collaboratively and intervenes to neutralize threats or intimidation. The mediator ensures that both parties have equal access to relevant information and are heard during the mediation process. In our context, mediation is usually being conducted by a lawyer, a retired judge, a retired civil servant, a retired soldier, a monk, a village elder, a local government leader or any lay mediators.

(B) Roles of a Mediator

The functions of a mediator are to:

(i) facilitate the process of mediation;

(ii) assist the parties to evaluate the case to arrive at a settlement.

(i) Facilitative Role

A mediator facilitates the process of mediation by:

- creating a conducive environment for the mediation process;
- explaining the mediation process and its ground rules;
- facilitating communication between the parties using the various communication skills and techniques;
- identifying the barriers to communication between the parties and removing them;
- gathering information about the dispute;
- developing terms of settlement based upon interest of parties;
- identifying the underlying interests of the parties;
- maintaining control over the process and guiding focused discussion;
- managing the interaction between the parties;
- assisting the parties to invent options for settlement;
- motivating the parties to agree on mutually acceptable settlement;
- maintaining neutrality and assisting the parties to find their own resolution of dispute;
- assisting the parties to reduce the agreement into writing;
- ensuring legality of the agreement; and
- acting as a 'sponge' to absorb the parties' feelings and frustration.

(ii) Evaluative Role

A mediator performs an evaluative role by:

- helping and guiding the parties to evaluate their case through reality-testing;
- assisting the parties to evaluate the options for settlement; and
- carrying proposals back and forth (shuttle mediation).

(c) Qualities of a Mediator

It is necessary that a mediator must possess certain basic qualities which include:

- complete, genuine and unconditional faith in the process of mediation and its efficacy;
- ability and commitment to strive for excellence in the art of mediation by constantly updating skills and knowledge;
- sensitivity, alertness and ability to perceive, appreciate and respect the needs, interests, aspirations, emotions, sentiments, frame of mind and mindset of the parties to mediation;
- highest standards of honesty and integrity in conduct of and behaviour;
- neutrality, objectivity and non-judgmental;
- good listening and communicating skills;
- empathy;
- tenacity and good problem-solving skills;
- adaptability, creativity and quick in making sense of a situation;
- can think "out of the box";
- self-control and the ability to establish authority;
- patience, persistence and perseverance;
- appearance, demeanour and credibility; and
- open-mindedness and flexibility.

Group Activity: Qualities of a Mediator
Instructions

- Divide the class into groups.
- Provide a blank chart paper and a marker pen to each group.
- Make the participants to draw a sketch of a person (10 minutes)
- Make them to write down the qualities of a Mediator.
- Debrief (5 minutes)

(D) Ethics and Code of Conduct for Mediators

The *Ethical Code of Conduct* is intended to instill and promote public confidence in the mediation process and to guide the mediators in discharging their professional responsibilities. Public understanding and confidence are vital to a strong mediation program. Persons serving as mediators are responsible for conducting themselves in a manner that will merit the confidence of parties. This *Ethical Code of Conduct* applies to all the mediators – both within and outside the Court-Annexed Mediation Unit.

Objectives:

- To provide guiding principles for mediators' conduct;
- To provide a means of protection for mediation participants; and
- To promote confidence in mediation as a process for resolving disputes.

1. **Promote Self-Determination**

   A mediator must conduct mediation according to the principle of self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. A mediator should ensure that there is no domination by any party or person preventing a party from making his/her own decision. It is a fundamental principle which each mediator should respect and encourage.

2. **Practice Impartiality**

   Impartiality means freedom from favoritism, bias or prejudice in both conduct and appearance. A mediator must conduct mediation in an impartial manner and avoid conduct that gives the appearance of partiality. Impartiality is crucial for the mediation process. The mediators have a duty to remain neutral throughout the mediation, i.e., from beginning to end. Their words, manner, attitude, body language and process management must reflect an impartial and even-handed approach. If the mediator is at any stage unable to be impartial, the mediator is obliged to discontinue the mediation.

3. **Avoid Conflict of Interest**

   A mediator must avoid mediating in cases where they have direct personal, professional or financial interest in the outcome of the dispute. Before commencing the mediation, a mediator must disclose all actual and potential conflicts of interest. Disclosure must also be made if conflicts of interest arise during mediation. All disclosures must be made as soon as practicable after the

mediator becomes aware of the interest or the relationship. After making disclosure, the mediator may proceed with the mediation if all parties agree and the mediator is satisfied that the conflict will not preclude the proper discharge of the mediator's duties. As long as one party wishes for the mediator to abstain, a new mediator must be appointed.

4. **Maintain Confidentiality**

   Mediation being confidential in nature, a mediator shall be faithful to the relationship of trust and confidentiality imposed on him as a mediator. The mediator must keep confidential all information arising out of or in connection with the mediation. And any information disclosed in confidence to mediators by one of the parties must not be disclosed to the other parties.

5. **Ensure quality of the mediation process**

   A mediator shall work to ensure a quality process and to encourage mutually respectful behavior among the parties. A quality process requires a commitment by the mediator to diligence and procedural fairness. If a mediator believes a party is intentionally abusing the process, the mediator should encourage the party to alter the conduct. If the person does not alter his/her behavior, the mediator may terminate the mediation, doing so in a way that preserves any confidential communications. In addition, a mediator shall not make promises regarding the results of the process.

6. **Competency**

   Mediators have a duty to know the limits of their competence and ability in order to avoid taking on assignments they are not equipped to handle and to communicate candidly with the parties about the background and experience. Mediators must be competent and knowledgeable in the process of mediation. Relevant factors include proper training and continuous updating of their education and practice in mediation skills, having regard to any relevant standards or accreditation schemes.

7. **Non-Acceptance of Bribery or Favors**

   A mediator must not, in any capacity or situation, accept any bribe or favor offered by any person in relation to mediating a dispute. A bribe or favor includes, but is not limited to, the acceptance or payment of any of these services from either of the parties or their representatives or their intermediaries - monetary benefits, meals, alcohol, sexual favor of any kind, or gift of any kind.

8. **Ensure Voluntariness**

   The mediators must respect the voluntary nature of mediation and must recognize the right of the parties to withdraw from the mediation at any stage. Although some parties come to mediation because they are required to do so (e.g., ordered by a judge, or compelled to mediate under a dispute resolution clause in a contract), they must have the right at a certain point to walk away from the table. In other words, even in a mandatory mediation setting, the parties' duty is to participate in good faith and make an effort to negotiate a resolution. However, mediators should remind the parties that any agreement they reach must be a product of their own free will, and therefore, they may withdraw from the process if it is not moving in the direction of an agreement that they prefer to the alternative - i.e., continuation of the dispute or resolution of it in some other manner.

9. **Facilitate Informed Consent**

Settlement of dispute must be based on informed consent. Although, the mediator may not be the source of information for the parties, mediator should try to ensure that the parties have enough information and data to assess their options of settlement and the alternatives to settlement. If the parties lack such information and data, the mediator may suggest to them how they might obtain it.

10. **Do no harm**

Mediators should avoid conducting the mediation process in a manner that may harm the participants or worsen the dispute. Some people suffer from emotional disturbances that make mediation potentially damaging psychologically. Some people come to mediation at a stage when they are not ready to be there. Some people are willing and able to participate, but the mediator handles the process in a way that inflames the parties' antagonism towards each other rather than resolving. In such situations, the mediator must modify the process (e.g., meet the parties separately or meet the counsel only) and if necessary, withdraw from mediation when it becomes apparent that mediation, even as modified, is inappropriate or harmful.

11. **Discharge duties to third parties**

Just as the mediator should do no harm to the parties, s/he should also consider whether a proposed settlement might harm others who are not participating in the mediation. This is particularly important when the third parties affected by a mediated settlement are children or other vulnerable people (such as the elderly or infirm). In some cases, the affected third parties might be the general public - e.g., in a case involving allegations of faulty construction of a public project, such as a bridge or highway. Since third parties are not directly involved in the process, the mediator may have a duty in some cases to ask the parties for information about the impact of the settlement on others and encourage them to bring the interests of one or more third parties to bear on the discussions in the mediation.

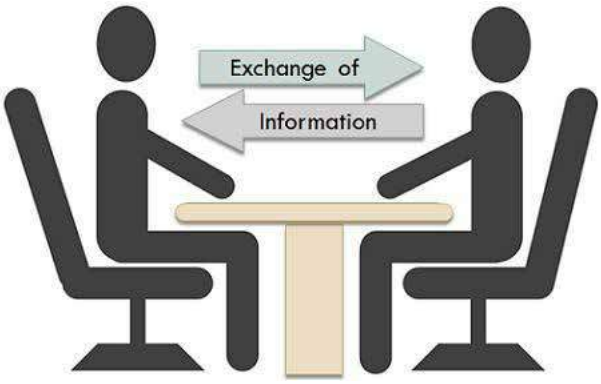
12. **Commitment to Honesty and Integrity**

For a mediator, honesty means, among other things, full and fair disclosure of:

- his qualifications and prior experience;
- direct or indirect interest if any, in the outcome of the dispute;
- any fees that the parties will be charged for the mediation; and
- any other aspect of the mediation which may affect the party's willingness to participate in the process.

CHAPTER 10
COMMUNICATION IN MEDIATION

(1) What is Communication?



Communication is derived from a Latin word *"communicare"*, which means to share, or to make common (Weekley, 1967). Communication is defined as the process of understanding and sharing meaning (Pearson and Nelson, 2000). The sharing of information between diferrent individuals through a common system of symbols, signs or behaviours and written content is called communication. Communication is conveying a message to another, in the manner in which you want to convey it. For example, a message of disapproval of something can be conveyed though spoken words or gestures or facial expressions or all of them. Communication is the process of passing information (sending) and understanding (receiving) the same from one person to another through verbal or non-verbal means. Communication is also information sent by one person to another to be understood by the receiver in the same way as it was intended to be conveyed.

(2) Purpose of Communication

Communication is not just talking and listening. Communication is the process of information transmission. The intention of communication is to convey a message. The purpose of communication could be any or all of the following:

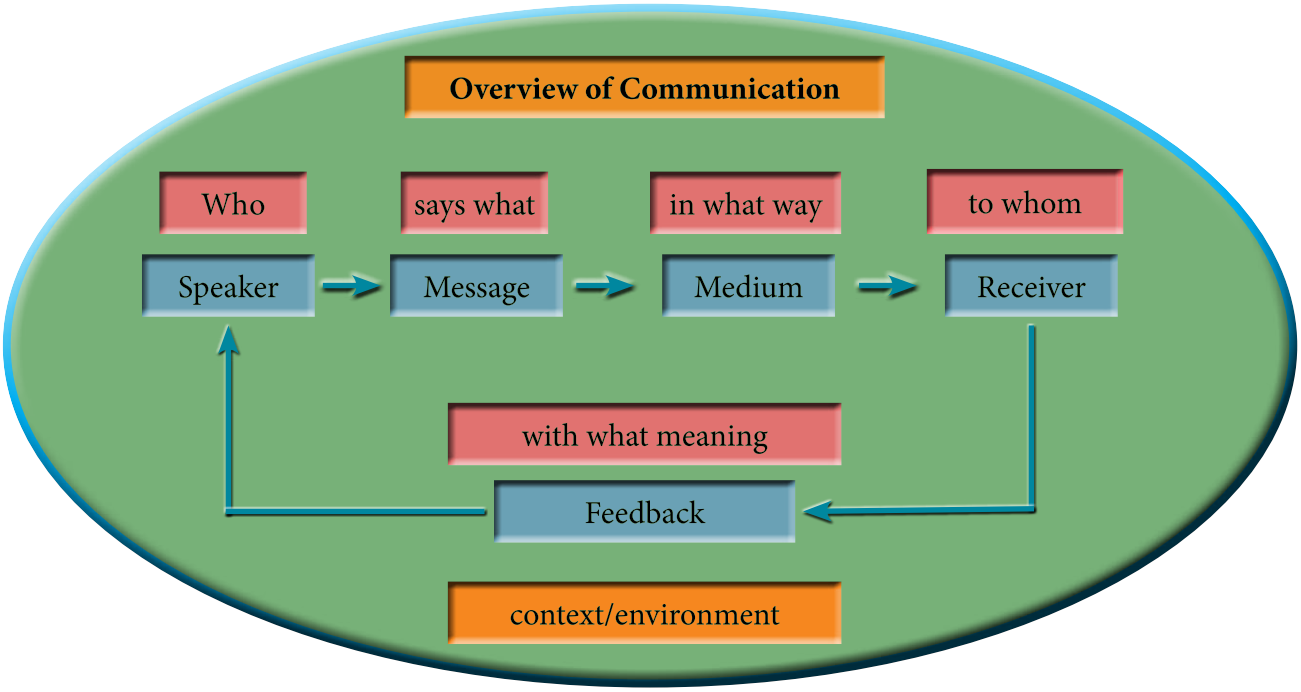
- To express our feelings/thoughts/ideas/emotions/desires to others.
- To make others understand what and how we feel/think.
- To derive a benefit or advantage.
- To express an unmet need or demand.

(3) Process of Communication

Communication is initiated by a thought or feeling or idea or emotion which is transformed into words/gestures/act/expressions. Then, it is converted into a message. This message is transmitted to the receiver. The receiver understands the message by assigning reasons and attributing thoughts, feelings/ideas to the message. It evokes a response in the receiver who conveys the same to the sender

through words/gestures/act/expressions. Consequently, a communication would involve:

- A Sender – person who sends a message.
- A Receiver – person who receives the message.
- Channel – the medium through which a message is transmitted could be words or gestures or expressions.
- Message – thoughts/feelings/ideas/emotions/knowledge/information that is sought to be communicated or subject of information in sender's mind.
- Encoding – when the sender transforms his thoughts, ideas or concepts into verbal speech or a written message.
- Decoding – interpretation of information or message from the perspective of the receiver.
- Response – answer/reply to a communicated message.



Communication can be a one-way or two-way process:

- One-way Communication – when the information conveyed by the sender is received by the receiver - eg., a letter or broadcasting.
- Two-way Communication – after receiving a message, if the recipient responds to the sender, then communication becomes a two-way process - eg., a phone call.

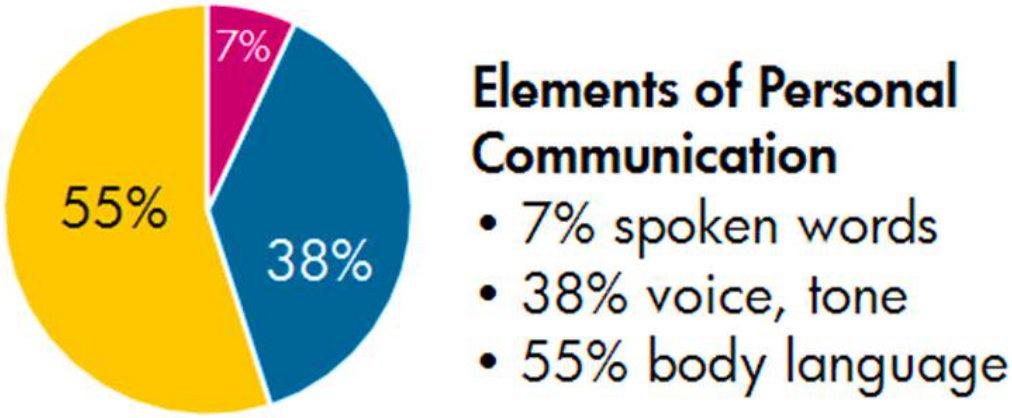
(4) Importance of Communication

Communication plays a vital role in human life.

- It helps in sharing information between individuals.
- It helps people to develop relations with others.
- It helps in transferring information from one place to another.

(5) Types of Communication

Communication may be verbal, non-verbal, written and visual. Communication could be through words – spoken or written, gestures, body language, facial expressions, etc. Studies reveal that in any communication, 55% of the messages that people communicate are communicated non-verbally through body language, 38% are communicated through paralanguage (non-verbal aspects of speech such as intonation), and only 7% are communicated verbally.



Verbal and Non-Verbal Communication

(A) Verbal Communication

Verbal communication is the use of words to share information with other people. It encompasses all communication using spoken or oral words.

(B) Written Communication

- Written signs or symbols are used to communicate.
- Message can be transmitted via email, letter, report, memo, etc.
- Written communication is influenced by vocabulary and grammar, writing style, precision and clarity of the language used.

(C) Non-Verbal Communication

Non-verbal communication refers to the transmission of information or message from sender to receiver without the use of spoken words. Many times, non-verbal behaviour of parties conveys a different message. It encompasses body language, tone, demeanour, attitude, facial expression, hand movement, eye contact and other modes of non-verbal expression. Non-verbal communication is more spontaneous and under less conscious control and therefore can provide a more accurate portrayal of disputants than verbal communication alone. Some of the important aspects of non-verbal communication are as under:

- Half of the human communication is non-verbal.
- People communicate strongly without words.
- Feelings, thoughts and attitudes can be communicated without saying a word.
- Reveals emotions, feelings without giving information.
- Relevant for gathering essential information beyond the content of what is being said.
- Awareness of non-verbal communication helps to understand others better.

It is important for a mediator to pay adequate attention to non-verbal communications that take place throughout the mediation. It is important for a mediator to analyze the message sent by the parties through such non-verbal communication.

Non-Verbal Communication includes:

- Kinesics or Kinaesthetic (body language)
- Haptics (touch)
- Proxemics (space distancing)
- Chronemics (time language)
- Sign language
- Paralanguage

(D) Visual Communication

Visual Communication is delivering information, messages and points by way of graphical representation, or visual aids. It includes slides presentation, diagrams, physical models, drawings and illustrations.

(6) Levels of Communication

- Interpersonal communication
- Intrapersonal communication
- Small group communication
- One-to Group Communication
- Mass Communication

(7) Requirements for Effective Communication

(a) Use simple, plain, clear language.
(b) Avoid difficult words and phrases.
(c) Avoid unnecessary repetition.
(d) Be precise, cogent and logical in use of words.
(e) Have clarity of thought and expression.
(f) Respond with empathy.
(g) Ensure proper eye-contact.
(h) Be patient, attentive and courteous during listening.
(i) Avoid unnecessary interruptions.
(j) Have good listening abilities and skills.
(k) Avoid making statements and comments or responses that could cause a negative effect.

(8) Causes of Ineffective Communication

(a) Difference in perception i.e., where the sender's message is not understood correctly by the receiver.
(b) Misrepresentation and distortion of the message by the receiver.
(c) Differences in language and expression.
(d) Poor listening abilities and skills.
(e) Lack of patience.
(f) Withholding or distortion of valuable information by a third party/intermediary, where a message is transmitted by the sender to the receiver through such third party/intermediary.

(9) Barriers to Effective Communication

a) Physical Barriers

- Lack of congenial environment.
- Lack of proper seating arrangements.
- Presence of third parties.
- Lack of sufficient time.

b) Emotional Barriers

- Temperaments of the parties and their emotional quotient.
- Feelings of inferiority, superiority, guilt or arrogance.
- Fear, suspicion, ego, mistrust or bias.
- Hidden agenda.
- Conflict of personalities.

(10) Communication Skills in Mediation

At the core of mediation and conciliation processes are communication skills. Both, mediation and conciliation, are focused applications of interpersonal communication skills. Communication skills are used as some of the major tools in conflict resolution to change the negative interactions of the parties to positive and constructive engagement with each other and the conflict itself. Effective mediation requires the mediator to build trust and understanding. A mediator needs to communicate with concerned parties effectively. A good mediator needs to encourage the parties to communicate with each other and with mediator himself. Hence, effective communication between all the participants in mediation is necessary for the success of mediation.

Communication skills in mediation include:

(A) Active Listening
(B) Listening with Empathy
(C) Body Language
(D) Questioning
(E) Dealing with Cultural Differences

Difference between Hearing and Listening

We must bear in mind that there is a significant difference between hearing and listening. While hearing, one becomes aware of what has been said. While listening, one understands the meaning of what has been said.

Hearing:

- Hearing is the act of perceiving sound by the ear.
- If you are not hearing-impaired, hearing simply happens.
- Hearing is passive.
- Doesn't require conscious effort.
- Involuntary.

Listening:

- Listening involves conscious efforts to perceive the sound.
- Listening requires concentration so that your brain processes meaning from words and sentences.
- Listening is active process.
- Requires conscious effort.
- Voluntary.

When we listen, we do so in a variety of ways, including the following:

- Background Listening (As when someone asks for water and is brought a glass with water in it.)
- Routine Listening (As when we are not interested in details.)
- Active Listening (As when we care about the person.)
- Creative Listening (As when we are looking for solutions.)
- Entrepreneurial Listening (As when we are listening in an effort to create something new.)
- Empathetic Listening (As when we are listening as though we were the person who is speaking.)
- Committed Listening (As when we feel our lives depend on our listening.)

Different Types of Listening

Broadly, there are three types of listening:

- Passive listening or Inactive listening;
- Active/Attentive/Mindful/Effective listening; and
- Empathic listening.

(A) Passive or Inactive Listening

- Passive listening is hearing what a person says without responding to the speaker but merely listens.
- In passive listening, nothing of the speaker's words goes into the mind of the listener.
- *"In one ear and out the other"* – You hear the words, but your mind wanders and no communication takes place.
- Passive listening is a one-way communication.

(B) Active or Mindful Listening

Mediators are facilitators of the communications between disputants as well as good models of effective listening and communication. In order to establish and maintain rapport and to guide the mediation process, careful, accurate listening by the mediator is essential. Active listening is when you pay full attention to the person who speaks with you and reacts to the ideas presented by the speaker. In active listening, the listener pays attention to the speaker's words, body language, and the context of the communication.

Mindful Listening

"The most precious gift we can offer others is our presence. When mindfulness embraces those, we love, they will bloom like flowers."

- Thich Nhat Hanh

Active listening involves:

- Listening to understand, not to answer [*Habit 5: "Seek first to understand, then to be understood"* – Most people do not listen with the intent to understand; they listen with the intent to reply - From the 7 Habits of Highly Effective People by Stephen R. Covey]
- Understanding the meaning behind the words, and their importance to the speaker.
- Understanding the substantive content of what is being communicated.
- Giving feedback to let the parties know their message has been received.
- Listen out for feelings that are not directly expressed.
- Active listening is a two-way communication.
- "The 80/20 Principle" - Spend 80% of their time listening and 20% talking.

- "We are born with one tongue and two ears so that we can hear from others twice as much as we speak."
- "We have two ears and one mouth, so we should listen more than we say." – Zeno of Citium
- "There's a reason why God gave us two ears and only one mouth." – Mark Twain

[Moral: Talk less; listen more]

Anecdote

"Lord Ganesha's ***Big Head*** inspires us to think big and think profitably; the ***Big Ears*** prompt us to listen patiently to new ideas and suggestions; the ***Narrow Eyes*** point to deep concentration needed to finish tasks in hand, well quickly; the ***Long Nose*** tells us to poke around inquisitively to learn more, and the ***Small Mouth*** reminds us to speak less and listen more."

Activity (Dyads): Active Listening – ".....Is What I Heard What You Said"

Instructions

- Activity to be done in pairs.
- A is the speaker, and B is the listener.
- Facilitator will provide a topic to speak about.
- A should speak for no less than two minutes.
- Then reverse the roles, and repeat (2 minutes).
- Then each person explains to the other what they "heard" him or her say.
- The speaker provides feedback on whether what was heard was what was meant (1 minute).
- Debrief in the entire group about how well they did, what was hard, what went well, and draw some conclusions as it fits your content.

Mediators need to be highly effective listeners in order to accomplish the following purposes:

- Creating a safe environment.
- Developing rapport.
- Narrowing the focus to relevant issues.
- Building unconditional acceptance regardless of the beliefs, ideas and conduct of the parties.
- Identifying and summarizing each person's ideas, perceptions and issues.
- Clarifying the issues and interests.

Following are the commonly used techniques of active listening by the mediator:

1. Summarizing
2. Reflecting
3. Reframing or Rephrasing
4. Acknowledging or Responding
5. Deferring
6. Encouraging precision – clarifying
7. Bridging
8. Restating
9. Paraphrasing or Reformulation
10. Use of silence
11. Apology
12. Setting an agenda

1. Summarizing

Summarizing is one of the most important skills of a mediator. Some experienced trainers and practitioners even suggest that whenever a mediator gets stuck and does not know how to progress the conversation further, they should summarize. It certainly slows down the conversation and creates some breathing space for the parties, and the mediator, which often leads to a constructive turning point or way forward. Summaries should be concise, and capture the essence of what a party has said.

When to Summarize

- At the conclusion of one-party rendition of his/her perception of the situation.
- At the conclusion of Stage 3, it is important to summarize the key points of what both parties have said.
- In the Problem-Solving stage, when the parties are identifying possible options, it is important to summarize the key parts of each option and the range of possible options.
- When preparing to write an agreement, the mediator needs to summarize all the solutions the parties have come up with.
- A useful time to summarize is when the mediator(s) are confused and have a difficult time to make sense of things. This gives the parties an opportunity to help the mediators put things into perspective.

2. Reflecting

Reflecting is a communication technique used by a mediator to confirm that the parties have heard and understood the feelings and emotions expressed by a speaker. Reflecting is giving feedback and interpreting what speaker has said. Reflecting is a restatement of feelings and emotions in terms of the speaker's experience.

Examples:

- "So, you are feeling frustrated."
- "Let me see if I understand what you just said ... Is that correct?"

3. Reframing or Rephrasing

Reframing is restatement of words, phrases or ideas into neutral, nonjudgmental or even positive terms. Reframing is a communication technique used by the mediator to help the parties move from *Positions* to *Interests* and thereafter, to problem-solving and possible solutions. It accomplishes five essential tasks:

- Converts the statement from negative to positive.
- Converts the statement from the past to the future.
- Converts the statement from positions to interests.
- Shifts the focus from the targeted person to the speaker.
- Reduces intensity of emotions.

Examples:

- From negative ("she is never there when I need her.") to positive ("You would like to have her help.")
- From past ("He didn't . . .") to future ("He's lying." to "You see it differently.")
- From a focus on the other person ("She never . . .") to focus on the speaker ("You are interested in . . .")
- From a focus on a problem ("The problem is the bad performance evaluation she gave me." to focus on the issue ("The issue is the outcome of the performance evaluation.")
- From a position ("He has to pay me Nu.5,000.") to an interest ("You want to be compensated for your efforts.")
- From a complaint ("He doesn't listen to me.") to a request ("It sounds like you want to be heard.")

Remember

Whenever you reframe or rephrase, you are taking one or more statements and changing them in some form or fashion. Always remember to **validate**! *Never assume* that your rephrasing or reframing is accurate until it is confirmed by the speaker.

Activity (Dyads): Reframing

Think of ways to reframe the following:

- "He just wants to get rid of me."
- "He is under the total control of his mother all the time."
- "He has never showed an interest in caring for the children before."
- "She wants to take me for all I'm worth."
- "He (my supervisor) is always looking out for himself."
- "He is always late for work and then we never get the job done on time and I don't get to see my kids in the evening!
- "I demand Nu.15,000 in damages to pay for medical costs and the pain and suffering.

4. Acknowledging or Responding

In acknowledgement, the mediator verbally recognizes what the speaker has said without agreeing or disagreeing. This way mediator assures the speaker has been heard and understood.

Examples:

- "I can see you feel really angry right about that." or "I can appreciate now why you feel that way."
- "If I understand you correctly, you see the problem this way... Here is how I see it." "Would you like to know how I see it?"
- "I appreciate your efforts," or "That's a good point."

5. Deferring

A specialized communication technique where the mediator postpones the discussion of a topic until later. While deferring, a mediator should write down the topic he has deferred and re-initiate the discussion of the topic at the right time.

6. Encouraging Precision

The mediator can encourage parties when they need reassurance, support or help in communicating.

Examples:

- "Please tell me more.", "I'm interested in what you are thinking and feeling." "I would like to know your reactions..."
- "What you said makes things clear" or "this is useful information"
- "When you say 'tired of', what do you mean?"
- Mediator can nod and smile, look them in the eye, and occasionally interject such as 'I see," "Go on," or "Really."

7. Bridging

A technique used by a mediator to help a party to continue communication.

Examples:

- "And……."
- "And then……". The word 'And' encourages communication whereas the word 'But' could discourage communication.

8. Restating

In this, the mediator restates the statement of the speaker using key or similar words or phrases used by the speaker, to ensure that he has accurately heard and understood the speaker.

Examples:

- "My husband does not give me the attention I need." Mediator restates "Your husband does not give you the attention you need."
- "The proposal is unworkable." Mediator restates "I see that you are frustrated with how the discussions are proceeding."

9. Paraphrasing or Reformulation

A paraphrase is a concise response to the speaker which states the essence of the other's content in the listener's own words. Paraphrasing means to state, in one's own words, in a brief sentence, the facts and feelings that were heard as a result of listening to the party(s) speaking. One of the primary goals of paraphrasing is to develop and maintain rapport with the disputants. Paraphrasing is a form of active listening in which a sincere attempt is made to understand what the party(s) are saying and to provide feedback which clearly conveys that they have been understood.

Purpose of Paraphrasing:

- To convey that you understand what the party has been saying.
- To clarify in your own mind what the disputant is saying. If you have missed or misunderstood something important to the speaker, a paraphrase gives him/her an opportunity to clarify.
- To get more information. Often paraphrasing encourages the speaker to say more about a situation and its importance.
- To convey acceptance and acknowledge the disputant(s) experience and feelings.
- Paraphrasing can be used to manage communication when one person tends to talk a lot. It provides a way to acknowledge the speaker, convey understanding and then to shift to the other party.
- Paraphrasing can be used to slow things down when the party(s) are moving faster than the mediator(s) can realistically follow.
- To help both parties understand each other. Paraphrasing is as much for the benefit of the party who is listening as the party who is speaking.

Examples of Paraphrasing

- "So, what you are saying is that……."
- "Ok – you are very busy with……."
- "So, you are actually ……."

10. Use of Silence

A very important communication technique. The mediator should feel comfortable with the silence of the parties allowing them to process and understand their thoughts. A mediator is required to understand the relevance of pauses and silences of the parties during mediation. Sometimes an important piece of information is revealed after a period of silence.

Silence can be helpful to the speaker because it:

- allows the speaker to dictate the pace of the conversation.
- gives time for thinking before speaking.
- enables the speaker to choose whether or not to go on.
- demonstrates interest, respect and patience.
- gives an opportunity to observe the speaker and pick up non-verbal clues.

11. Apology

It is an acknowledgment of hurt and pain caused to the other party and not necessarily an admission of guilt. Parties should be carefully and adequately prepared by the mediator when a party chooses to apologize.

Example:

- "I am sorry that my words/act caused you hurt and pain. It was not my intention to hurt you."

12. Setting an agenda

In order to facilitate better communication between the parties, the mediator effectively structures the sequence or order of topics, issues, positions, claims, defences, settlement terms, etc. It may be done in consultation with the parties or unilaterally. For example, when tensions are high it is preferable to select the easy issue to work on first. The mediator may determine what is to be addressed first so as to provide ground work for later decision-making.

Guidelines for Active Listening

- Give your full attention to the speaker. Attention is the most valuable gift we can give to others. If there are people in your life you care about, be sure to give them a few minutes of your full attention every day. They will bloom like flowers.
- Take time- while the other person is talking, spend the time listening to what they are actually saying, rather than thinking of what you are going to say in response.
- Listen out for feelings that are not being directly expressed.
- Pay attention to verbal as well as the non-verbal messages.
- Beware of your own non-verbal behavior – whether your body language signals that you are listening.
- Show empathy by being patient and non-judgmental/non-critical.
- Resist the urge to interrupt or reject what the other person is saying.
- If you disagree, repeat the other person's viewpoint before putting forward your own.
- Ask for more information or invite the other person to elaborate on his or her view-points.
- Listen out for hidden or underlying messages - people do not always express themselves clearly.
- Be careful with asking the question "why" because it may seem judgmental.

Barriers to Active Listening

(i) **Distractions:** They may be external or internal. The sources of external distractions are noise, discomfort, interruptions, etc. The sources of internal distractions are tiredness, boredom, preoccupation with own problems, anxiety, impatience, etc.

(ii) **Pre-judging:** A mediator should not prejudge the parties and their attitude, motive or intention, e.g., someone as foolish, unqualified or unhelpful.

(iii) **Blaming:** A mediator should not assign responsibility to any party for what has happened.

(iv) **Dreaming:** A mediator should not be absent-minded or inattentive.

(v) **Advising:** The mediator should not assume the role of advisor or counselor or adjudicator. He should only facilitate resolution of the dispute.

(vi) **Disagreeing/Arguing:** The mediator should not argue with the parties or try to impose his own views on them.

(vii) **Being directive:** The mediator should not force the parties to accept his views or direct the parties to do anything against their free will.

(viii) **Inadequate time:** There should be sufficient time to facilitate attentive and patient listening.

(ix) **Language:** The language difference can also hamper the effective listening.

(x) Lack of interest

(xi) Disability

(xii) Discomfort with the topic

(xiii) Distance

Mindful Communication

The three parts to these skills are mindful listening, looping, and dipping.

1. Listening means giving the gift of attention to the speaker.
2. Looping means closing the loop of communication by demonstrating that you have really heard what the person is saying. For example, while A speaks, B listens actively. After that, B repeats back to A what he thinks he heard. B may start by saying, "What I heard you say was...."
3. Dipping means checking in with yourself, knowing how you are feeling about what you are hearing.

(C) Empathetic Listening

In the mediation process, empathy means the ability of the mediator to understand a situation from another person's point of view and conveying that understanding without expressing agreement or disagreement with that person. Empathy is the ability to project oneself into the personality of another person in order to better understand that person's emotions or feelings. Empathy is the ability to experience and understand what others feel while maintaining a clear discernment about your own and the other person's feelings and perspectives.

- When we listen empathetically, we try to understand the situation through the other person's eyes.
- Empathy is not sympathy. In empathy the focus of attention is on the speaker whereas in sympathy the focus of attention is on the listener.
- In empathic listening, you listen with your ears, eyes and hearts.
- You listen for feelings, for meaning.
- You use your right brain as well as your left brain.

Examples:

Wife:	"I had such a hard day at work"		
Husband:	"I am so sorry; you had a hard day at work" (focus is on listener/husband)	-	Sympathy
Husband:	"You had a hard day at work, mine was worse" (focus on listener/husband)	-	Sympathy
Husband:	"You feel it was hard for you at work today. Would you like to talk about it?" (focus on speaker/wife)	-	Empathy

Empathy is Not Psychologizing or Agreeing

Empathy is often confused with something called "psychologizing," or speculating in psychological terms or on psychological motivations, often in an uninformed way. For example, let's say you are explaining your problems to your boss, and midway through, your boss interrupts you to explain how your problems have to do with your presumed childhood issues and some other things he might have read about in pop psychology. He is psychologizing, not empathizing. When we psychologize, we are actually dismissing the problem, not understanding it. If, instead, your boss listens intently to you with full attention, tries to understand what your problem means to you at both a cognitive and visceral level, and does all that with kindness, he is empathizing. Empathy does not necessarily mean agreeing. It is possible to understand another person at both an intellectual and visceral level with kindness, and still respectfully agree.

Disagreeing with empathy is a lot like that. It is the mark of a developed mind to be able to understand and accept another's feelings without agreeing to it.

"It is the mark of an educated mind to be able to entertain a thought without accepting it." **- Aristotle**

How to Increase Empathy

Empathy can be increased by:

- showing kindness. Kindness is the engine of empathy; it motivates you to care, and it makes you more receptive to others, and them to you. The more kindness you offer to people, the better you can empathize with them.
- perceiving similarity. The more we perceive somebody to be just like us, the more we empathize with him or her. To become more empathetic, we need to create a mind that instinctively responds to everyone with kindness and an automatic perception of others being *"just like me."*

Sympathy v. Empathy

In sympathy, the subject is principally absorbed in his own feelings as they are projected into the object and has little concern for the reality and validity of the object's special experience. Sympathy bypasses real understanding of the other person, and that other is denied his own sense of being.

Empathy, on the other hand, presupposes the existence of the object as a separate individual, entitled to his or her own feelings, ideas, and emotional history. The empathizer makes no judgments about what the other should feel, but solicits the expression of whatever he does feel and, for brief periods, experiences these experiences as his own. The empathizer oscillates between such subjective involvement and a detached recognition of the shared feelings. Secure in his sense of self and his own emotional boundaries, the empathizer attempts to nurture a similar security in the other.

Guidelines for Empathetic Listening: Madelyn Burley-Allen offers these guidelines for empathetic listening:

1. Be attentive (mindfulness): Be interested. Be alert and not distracted.

2. Be non-critical: Allow the speaker to bounce ideas and feelings off you. Don't indicate your judgment. When we are kind, we can listen better to feelings.

3. Indicate you are listening by:

- Making brief, non-committal responses ("I see…..")
- Giving non-verbal acknowledgement, for example by nodding your head.
- Inviting the speaker to say more: for example, "Tell me about it" or "I would like to hear about that".

4. Follow good listening ground rules:

- Don't interrupt.
- Don't change the subject, or move in a new direction.
- Don't rehearse a response in your head.
- Don't interrogate with continual questions.
- Don't give advice.
- Do reflect back to the speaker.

5. Don't let the speaker "hook" you emotionally: Don't get angry or upset or allow yourselves to get involved in an agreement.

Activity: Empathetic Listening (Dyads)

Prompt: *"Talk about a time when you overcame a challenge"*

- **A** talks and **B** listens (2 minutes)
- **B** says "What I heard you feel is...." then **A** gives feedback and **B** responds until **A** is satisfied (2 minutes).
- Switch roles (2 minutes)
- Free-flow of conversation (1 minute)

(D) Body Language

Appropriate body language indicates that the listener is attentive. It conveys to the speaker that the listener is interested in listening and that the listener gives importance to the speaker.

Body language includes:

- Facial expression
- Eye-contact/gaze
- Gestures
- Postures
- Personal appearance

In case of mediators, the following can demonstrate an appropriate body language:

(i)	Symmetry	- It reflects mediator's confidence and interest.
(ii)	Comfortable look	- It increases the confidence of the parties.
(iii)	Smiling face	- It puts the parties at ease.
(iv)	Leaning gently towards the speaker	- It is a sign of attentive listening.
(v)	Proper eye-contact with the speaker	- It ensures continuing attention.

A mediator should use his/her body to convey that he/she is listening.

- Make frequent eye-contact.
- Keep your body oriented toward the speaker (try leaning toward the speaker, but don't get too close).
- Indicate you are listening by nodding your head and through facial expression.
- Make sure you exhibit the same non-verbal communication for both sides.
- Watch the parties' non-verbal communications. The mediator needs to observe what the speaker's body is saying, as well as observing how the listening party is reacting. How do the parties react while the mediator is speaking?

SOLER is key element of non-verbal communication indicating to the speaker that listener is giving full attention.

S	Face party with	**Shoulder** square	Show full concentration to the speaker
O	Adopt an	**Open** posture	Show you are open to hear and accept what the party wants to say
L	Sometimes	**Lean** gently toward the party	A sign of being involved
E	Maintain	**Eye-contact**	Shows continuing attention and involvement
R	Be relatively	**Relaxed**	Because your attention is genuine

Group Activity : Body Language (Emotion Game)

Objective	This exercise will help participants understand the emotions through body language.
Time Needed	10 Minutes
Materials	The facilitator should be carrying a number of cards on which different kinds of emotions are written, for example, Diarrhoea, Singing, Anger, etc.
Course of Action:	• Ask two volunteers to play this game. If the participants are less than 30 in numbers, facilitator can ask all of them to stand up and make two lines facing each other. • Give one card to one volunteer and ask him not to look on it. Simultaneously, ask the participants not to read what's written on the card. • Ask him/her to place the card on the forehead. • Ask the other volunteer facing to act in a way which shows the emotion written on the card. He/she should not speak or make any sound. • While one is acting, the person (whose card is placed on the forehead) should say what is written on the card.
Remarks	Ensure to do this exercise until every participant gets an equal opportunity.

De-brief: Discuss the following in the plenum:

- How well could the group members spot the emotion?
- What clues did they use?
- Would verbal and para-verbal clues make it easier to identify the body language?

Key Learning Points

- In mediation, parties may show different emotional expressions – angry, tensed, sick, etc. – and it is one of the skills of the mediator to decode the real-life situation and identify them from the expression.
- In some cases, parties in mediation would be reluctant to open up, and often it becomes difficult for the mediator to proceed. It is the mediator who needs to analyse the body language and makes the parties ease and comfortable.
- The appropriate body language of the listener indicates to the speaker that the listener is attentive. It conveys to the speaker that the listener is interested in listening and that the listener gives importance to the speaker.

(E) Asking the Right Questions

In mediation, questions are asked by the mediator to gather information or to clarify facts, positions and interests or to alter perception of parties. Questions must be relevant and appropriate. However, questions should be used sensitively. Timing and context of questioning are important. Questions should not indicate partiality, judgment, and criticism.

Basic purpose of questioning is to:

- show mediator is listening.
- gather and organize information.
- encourage parties to talk.
- show empathy and support.

Types of Questions

(a) Open-ended questions
(b) Closed questions
(c) Hypothetical questions
(d) Leading questions
(e) Narrowing questions
(f) Checking questions
(g) Neutral questions
(h) Miracle questions

Inquiry Techniques

- WHY? - covers causes and motives
- WHAT? - covers contents and objectives
- HOW? - covers modes and methods
- WHO? - covers those interested and responsible
- WHEN? - covers timing and phases

Remember: Avoid asking **"WHY"** questions as it may sound judgmental.

(a) Open-ended Questions

Open-ended questions are useful in exploring the disputants' perspectives and understandings. The use of open-ended questions helps guard against the mediator(s) inadvertently imposing their own issues and agendas into the mediation process. They are broad and general in scope. Open-ended questions can't be answered with "yes" or "no".

Open-ended Questions help to:

- Encourage the speaker to talk and to open up.
- Allow the parties to control direction of discussion.
- Allow the parties to present views and ideas from their own perspective.
- Facilitate options generation.

Examples:

- Can you tell me more about the subject?
- What suggestion do you have?
- Please tell me your story……
- Tell me about your situation/problem…..
- How did you get to the point of. . . . . .?
- In what way could you. . . . . .?
- How do you see the situation?
- Could you have done things differently?
- What worked well when the relationship was at its best?

(b) Closed Questions

Closed questions are limited in scope, specific and focused. The response to these questions may be either "yes" or "no" or a very short response and may close the discussion on the particular issue.

Closed questions are appropriate when you:

- require a specific answer or information.
- focus on a particular point in the discussion.
- give the other person a clear idea of what you want to know.
- help eliminate misunderstandings.
- guide discussion toward a specific problem.

Examples:

- "What date did you agree for the delivery?"
- "Where did you meet last time?"
- "How much was the contract worth?"
- "On which date was the contact signed?"
- "What colour shirt was the man wearing?"
- "What is the total amount of your medical bills?"
- "Were you present in the market when the event occurred?"

(c) Hypothetical Questions

Hypothetical questions allow parties to explore new ideas and options. It helps to formulate offers and reality-test.

Examples:

- "What would happen if..."
- "What could it look like if you could..."
- "If you could get an early settlement, then...?"
- "What if the disputed property is acquired by Government?"
- "What if your husband offers to move out of the parental house and live separately?"
- "If you were him, what would you do?"

(d) Leading Questions

In mediation, leading questions are never appropriate. Leading questions takes the process where the mediator wants to go rather than where the disputants need to go. Leading questions are ones in which the question itself suggests the answer. Such questions can discourage parties from providing more information and therefore are generally not helpful in mediation.

Examples:

- "A right solution here is to do this, isn't it?"
- "Don't you think it might be better to...?"
- "You live in Thimphu, correct?"
- "You are 21, aren't you?"
- "Is this the woman you robbed?"
- "Your name is Dorji?"
- "It rained yesterday?"
- "Red is your favourate colour?"
- "You were at home on Monday night, right?"
- "You were drunk at the time, weren't you?"
- "You met with the landlord on March 1, didn't you?"
- "Were you going to talk to the landlord about terminating your lease?"
- "Was the landlord angry when she heard the news?"
- "Did you think that he was being dishonest', 'Did you ask anyone else to help?"

(e) Narrowing Questions

Narrowing questions are questions that help the parties to focus on a particular issue when they get side-tracked. For example, 'Tell me more about the car', 'Concentrate on...'

(f) Checking Questions

This helps to clarify the mediator's understanding and to emphasize certain party statements.

Examples:

- 'Is it correct that...?', 'Did you say...?'
- 'So, you feel...', 'That was painful…'
- 'So, what you are saying is....'
- 'Am I right that your main goal is to....'
- 'Am I correct that your major fear is….'

(g) Neutral Questions

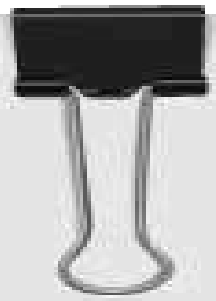
This helps to examine a situation without value judgments on behalf of the mediator. For example, 'What speed...?', 'What size was it?'

(h) Miracle Questions

If the person is unable or unwilling to formulate constructive suggestions, then a miracle question can sometimes act as a catalyst in the process.

Examples:

- Try closing your eyes and imagining that the problem was gone! How would you feel?
- Imagine that you had a magic wand and that, with one wave of the wand, you could solve the problem. What would you do?
- Imagine that the problem was X's. What do you think he or she would do in that situation?



Activity: Open, Closed, and Leading Questions

Identify the question types in the examples below. O-Open. C-Closed, L-Leading

Would you say that you were pleased with the outcome?	**O**	**C**	**L**
Isn't it true that you made the phone call?	**O**	**C**	**L**
Don't you agree that a crime has been committed?	**O**	**C**	**L**
Did you pick up the children last night?	**O**	**C**	**L**
You reacted negatively to her response, did you not?	**O**	**C**	**L**
How did you react when he told you?	**O**	**C**	**L**
Was your supervisor nearby?	**O**	**C**	**L**
Was your supervisor upset with you?	**O**	**C**	**L**
Have you thought about possible options?	**O**	**C**	**L**
How would you describe the incident Friday afternoon?	**O**	**C**	**L**
How do you see things differently Pema?	**O**	**C**	**L**
How much is the house worth?	**O**	**C**	**L**
Can you tell me more about your performance evaluation?	**O**	**C**	**L**
How do you see the situation?	**O**	**C**	**L**

(F) Cultural Differences

Due to the fundamental difference between the cultures that have been presented, the encounter of different cultures in mediation can influence both the process as well as the outcomes of mediation, even when the parties appear to outwardly share many commonalities. An understanding of cultural issues is essential for mediators. Mediators who develop effective cultural analyses are often more successful in avoiding cultural misunderstandings than are mediators who posit cultural differences as irrelevant or as being amenable to being set aside within the professional culture of mediation.

In contemporary conflict resolution practice almost every mediation or conciliation is imbued with issues of cultural difference and difference in meaning-making, therefore we consider it of utmost importance that mediators understand about their own cultural backgrounds and the cultural underpinnings of the facilitative processes that they use and how these can impact on parties from different cultural backgrounds.

Our individual experience of culture shapes and informs our attitudes and approach to resolving conflicts. Sometimes disputing parties come from different cultural background. These cultural differences can affect the communication among the participants in a mediation:

- Differences in people's methods of communication (such as direct vs. indirect and low-context vs. high-context communication);
- Their views of themselves in relation to others (individualist vs. collectivist); and
- Their view of themselves in relation to the environment (control, harmony, constraint).

Awareness of cultural diversity is an important for a mediator in helping parties feel comfortable, trust the process, and work towards resolution. The mediator should remember that all of us are culturally unique and differ in how we solve the problems we face in everyday life and mediation. The mediator should be aware of his/her own uniqueness in terms of, among others, expression of emotion, body language (eye-contact, silence, inflection of voice), style of communication, importance given to the guidelines and/or structure of mediation, and comfort with conflict. The mediator should be aware of how his/her own behaviour can affect the participants' interaction in mediation.

Some thoughts about culture

Culture is one of the most common words in our vocabularies, but also one of the most difficult words to understand. Culture can refer to the way people dress, what they eat, which religion they follow, how they respect their elders and peers, and to a million other characteristics. Beneath the surface level of appearance lie the deeper levels of culture, the values and worldviews. What has shaped a certain way of clothing? What values lie beneath particular dietary requirements that we often easily attribute to "culture"? And what happens when these deeply personal and communal worldviews meet other worldviews that may uphold different values or understand human existence in a different way?

Sometimes a conflict develops. When we think about culture and conflict we often think about negative terms: culture wars, clashes of culture, incompatibility and denial of human rights. However, those often-awkward encounters with different cultures can also spark enormous creativity and be the catalyst for much-needed renewal. Culture lies at the heart of this renewal. Because culture affects all of us at the core of our being, it also lies at the core of our understanding of conflict and how we deal with conflict.

Popular myths about culture

- An individual possesses but a single culture.
- Culture is custom, tradition, surface-level etiquette.
- Culture is timeless, especially so called "traditional" ones.
- Culture is simply one more variable in conflict resolution.
- Culture is homogenous.
- Culture is a thing.

What does the literature say about culture?

Here we paraphrase a number of descriptions and definitions of culture by well-known conflict resolution scholars and anthropologists:

- One of the two or three most complicated words in the English language (Raymond Williams).
- The lens through which we see the world (Kevin Avruch, John Paul Lederach).
- The collectively shared, often subconsciously held, assumptions about what is natural and normal; it represents how things simply are (Johan Galtung).
- The conceptual paradigm in which all behaviours originate (Stella Ting-Toomey).
- A large part of cultural schemes is subconscious: Culture has 'an underlying, hidden level […] that is highly patterned – a set of unspoken, implicit rules of behaviour and thought that controls everything we do. This hidden grammar defines the way in which people view the world, determines their values, and establishes the basic tempo and rhythms of life. Most of us are either totally unaware or else only peripherally aware of this' (Edward T. Hall).
- The man-made part of the environment (including architecture, instruments, values, norms, beliefs, rituals, ideas, paintings poems etc.) (Melville J. Herskovits)
- Cultures are fluid, always changing (Michelle LeBaron).

Dealing with Cultural Differences

- Do as the Roman's do - Good advice when negotiating across cultural differences.
- Develop cultural fluency.
- Respect the cultural differences.
- Prepare to adapt the cultural differences.
- Retain cultural neutrality - Do not judge.

CHAPTER 11
LEADERSHIP AND TEAMWORK IN MEDIATION

Self-leadership

"What we need is not a Leader to lead the Masses – we need Leadership of the Self."

-His Majesty The King

What is Leadership?

Leadership is a skill. It is not inborn, dependent on money, power, or titles. It is something everyone does at multiple points throughout their lives, whether they consider themselves leaders or not. We all have led someone somewhere, sometime, and can do it again – consciously, collaboratively, and effectively. Leadership is the ability of an individual or a group of individuals to influence and guide followers or other members of an organization. Leadership involves making sound and sometimes difficult decisions, creating and articulating a clear vision, establishing achievable goals and providing followers with the knowledge and tools necessary to achieve those goals.

Importance of Leadership

Leadership is an important function of management which helps to maximize efficiency and to achieve organizational goals. Leaders shape our nations, communities, and organizations. We need good leaders to help guide the subordinates and make the essential large-scale decisions that keep the organizations moving.

The following points justify the importance of leadership:

1. **Initiates action** - An effective leader is a person who starts the work by communicating the policies and plans to the subordinates from where the work actually starts.
2. **Motivation** - A good leader motivates the employees with economic and non-economic rewards and thereby gets the work from the subordinates.
3. **Providing guidance** - A leader has to not only supervise but also play a guiding role for the subordinates. Guidance here means instructing the subordinates the way they have to perform their work effectively and efficiently.
4. **Creating confidence** - Confidence is an important factor which can be achieved through expressing the work efforts to the subordinates, explaining them clearly their role and giving them guidelines to achieve the goals effectively. It is also important to hear the employees with regards to their complaints and problems.
5. **Building morale** - Morale denotes willing co-operation of the employees towards their work and getting them into confidence and winning their trust. A leader can be a morale booster by achieving full co-operation so that they perform with best of their abilities as they work to achieve goals.
6. **Builds work environment** - Management is getting things done from people. An efficient work environment helps in sound and stable growth. Therefore, human relations should be kept into mind by a leader. He should have personal contacts with employees and should listen to their problems and solve them. He should treat employees on humanitarian terms.
7. **Co-ordination** - Co-ordination can be achieved through reconciling personal interests with organizational goals. This synchronization can be achieved through proper and effective co-ordination which should be primary motive of a leader.

Types of Leadership

Leadership can be broadly grouped into 6 categories:

1. Authoritarian or Autocratic Leadership - hierarchical, controlling, competitive leaders who take responsibility and make decisions for others. For example, "Do as I say or Follow me."
2. Participative or Democratic Leadership - collaborative leaders who inspire, encourage, empower, facilitate, critique, support and share responsibility and are there to serve. Given that it aligns interests, we can refer to it as "*mediative leadership*."
3. Delegative or Laissez-faire Leadership – focuses on delegating initiative to team members.
4. Transactional Leadership – use transactions between a leader and his or her followers – rewards, punishments and other exchanges – to get the job done.
5. Transformational Leadership – inspires his or her followers with a vision and then encourages and empowers them to achieve.
6. Self-leadership.

Leadership Qualities or Skills

- Honesty and Integrity

  "The supreme quality of leadership is unquestionably integrity." – Dwight D. Eisenhower, the 34th President of USA

- Delegation and Empowerment
- Effective communication – communicating with insight

- Self-awareness – knowing one's internal states, preferences, resources and intuitions (emotional awareness, accurate self-assessment, self-confidence)
- Gratitude
- Knowledge
- Motivation

  "If your actions inspire others to dream more, learn more, do more and become more, you are a leader." – John Quincy Adams
- Empathy or Compassion
- Compassionate leadership is the most effective leadership
- "Seek first to understand, then to be understood" – Stephen R. Covey
- Empathy helps us build trust
- Courage or willpower
- Respect
- Accountability

  "A good leader takes little more than his share of the blame and little less than his share of the credit" – Arnold H Glasow
- Consistency
- Selflessness
- Visionary outlook
- Creativity and Innovation

  "Innovation distinguishes between a leader and a follower" – Steve Job

Leadership in Mediation

- Mediators are natural leaders; leaders are natural mediators.
- Mediative leaders inspire collaboration, stimulate synergistic connections, support honest interactions, build trusting relationships, and encourage self-management, diversity and integration between people.
- Mediative leaders connect people through problem-solving, dialogue, and collaboration, so they can intelligently co-create solutions.
- Mediative leaders listen, empower others, generate trust, build relationships, and negotiate collaboratively (including with competitors).
- Mediators are *ubiquitous* leaders, who can prevent and resolve conflicts, lead, follow, and build consensus.

Boss vs. Leader

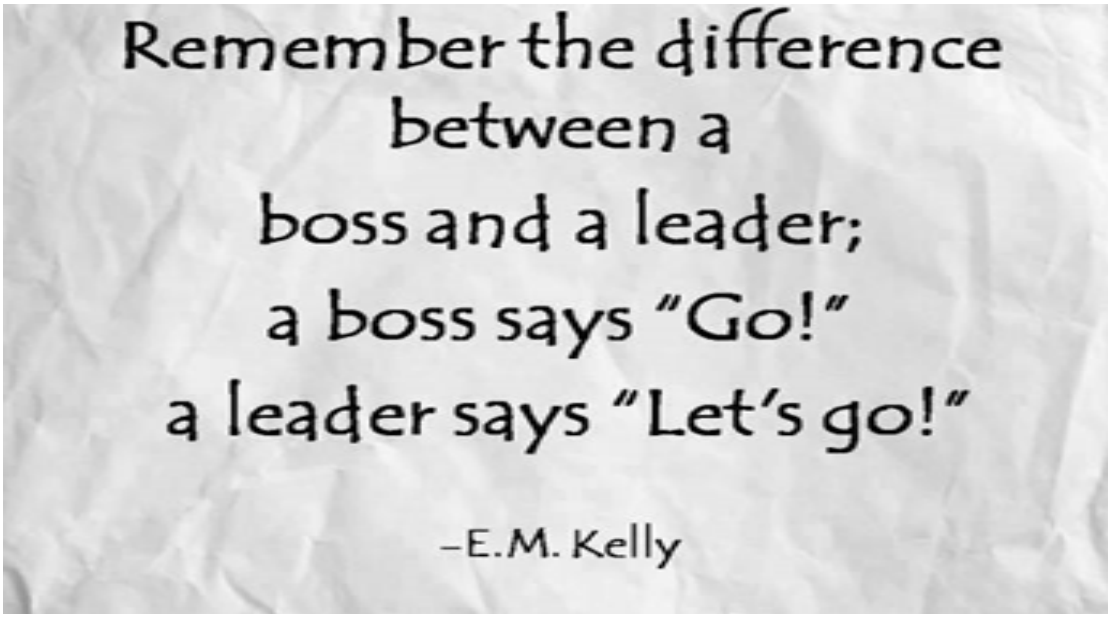
The difference between a boss and a leader has nothing to do with their job position, and at a glance, the same. They're both individuals who lead another group of people. The terms boss and the leader are often used interchangeably but both boss and leader have different connotations.

Who is a Boss?

A boss is an individual who is in-charge of the organization. He is someone who takes control over employees, orders, assigns tasks and duties to them.

Who is a Leader?

A leader is an individual who has the ability to influence and leads others by example. He is someone who holds a dominant position with a vision and stays committed to his goal. Any good leader can be a boss, but every boss can't be a leader! This role is something you embrace mentally and emotionally that inspires your company and employees to greater heights.



Quotes on Leaders and Bosses

- "A leader is best when people barely know he exists, when his work is done, his aim fulfilled, they will say: we did it ourselves." – **Lao Tzu**
- "A boss demands blind obedience; a leader earns his authority through understanding and trust." – **Klaus Balkenhol**
- "The key to successful leadership is influence, not authority." – **Kenneth H. Blanchard**
- "My job is not to be easy on people. My job is to take these great people we have and to push them and make them even better." – **Steve Jobs**
- "Successful leaders see the opportunities in every difficulty rather than the difficulty in every opportunity." – **Reed Markham**
- "Leadership is the art of giving people a platform for spreading ideas that work." – **Seth Godin**

Group Activity: Leadership

- Think of a leader you admire and respect. How would you characterize this leader's style or qualities? (5-10 minutes)

Teamwork

Teamwork is a compound word, combining team and work. Teamwork is the ability to work cooperatively with others to achieve group objectives. This competency is fundamental because leadership is not an individual sport. The essence of leadership is accomplishing worthy goals through the combined efforts of others, and teamwork capabilities are crucial.

Why teamwork matters?

- Teamwork allows individuals to share their talents and energy to accomplish goals.
- Teamwork motivates unity.
- Teamwork provides improved efficiency and productivity.
- Teamwork provides great learning opportunities.
- Teamwork promotes synergy.

Mediator as a Leader

Leadership and teamwork are two sides of the same coin. They complement and supplement each other. As Helen Keller said, *"Alone we can do so little; together we can do so much"*, leadership plus teamwork results into success. Similarly, a mediator has to provide the leadership role in leading the parties to resolve the dispute through mediation process to arrive at the amicable solution. He is not a boss. He is a leader who inspires, motivates, guides and paves the way through his mediative management skills. The mediator, parties and the counsels have to work together as a team to achieve a common goal. Because collaboration is the key to successful mediation.

"Teamwork is the ability to work *together* toward a common vision. The ability to direct *individual* accomplishments toward organizational objectives. It is the *fuel* that allows common people to attain uncommon results." – **Andrew Carnegie**

Group Activity: Teamwork

1. Do you prefer working in a group or team, or working individually? What are the advantages and disadvantages of each? (5-10 minutes)
2. Balloon Game/Video clips

CHAPTER 12
TRAINING METHODOLOGY

The training methodology deals with the methods aimed to design and implement training. Training is essentially the instructing of others in information new to them and its application. It may, and often does, involve the teaching of new skills, methods and procedures. The method can be defined as a means or a way of proceeding, regularly or systematically to achieve something. This training is designed to teach mediators the fundamentals of mediation in a community and court-annexed setting.

Objectives of Training Manual

- It's intended to serve as the guide to the facilitators.
- To standardize the methodologies for mediation training.

Objectives of Training

- To promote and strengthen the traditional mediation system;
- To enhance access to justice;
- To provide basic mediation skills and techniques; and
- To implement a unified mediative process.

Intended Outcomes of Training

- To understand basic concepts of ADR, its types, its objectives and its benefits;
- To analyse a conflict situation and to select the appropriate dispute resolution mechanism;
- To acquire basic mediation skills and techniques; and
- To gain hands-on experience.

Training Methodologies

- Experiential learning – learning by doing it
- Gamifications and Simulations
- Case Scenario/Story-based learning

Modes of Delivery

- PPT Presentation/Lecture
- Concept Questions/Questions and answers
- Brainstorming
- Activities (Group, Pairs)
- Role-Plays
- Visual aids (video clippings, flip charts, white board, handouts)

Guidelines for Role-Plays

Be prepared: You should read the handout material and prepare yourself as well as possible and in good time. In the real world, the best results are achieved by being well-prepared – the same applies here during the course.

Too close for comfort: Should you receive a role-play scenario that is too close to a real life experience you have had, go to the facilitator to discuss whether you wish to continue with that role.

Not an acting course: You should behave as you would in the allocated role – be yourself and don't overplay the role.

Facts in the role-plays: Keep to the facts mentioned in the role-play scenarios. Some have more information than others but none of them has too much information. You are not to change any of the facts as set out in the material; however you are welcome to fill in the gaps, so long as it serves to make the scenario more cohesive.

Don't show each other your roles: In the real world, you don't have a piece of paper setting out your role in a particular scenario. The party on the other side should not know whether you're being 100% honest or whether you're bending the truth. You can disclose information to the other party orally or by writing it down on a separate piece of paper. The way the information is ultimately revealed is itself a part of the exercise.

Agreement versus outcome: You may or may not achieve an agreement in the role-play. In most cases, this is not the most important thing. What is important is how you utilise the time, and what you do manage to achieve in terms of acknowledgements and concessions. All role-plays will have an outcome, even if there is no agreement reached as such. An outcome could be the parties agreeing to meet again or even preparing an agenda for a future meeting.

Timing: You will have limited time for your role-play. Use the time well and when the time has run out, STOP the role-play and go back to the class. A lot of what you will learn comes not so much from the role-play itself, but rather from the subsequent review, analysis and feedback.

If you finish before the allocated time has run out: Try to improve the outcome. It's possible that, once the pressure to reach an agreement is gone, you can find more value-creating possibilities – in other words, opportunities for "enlarging the pie". If you're unable to improve the outcome, use the time to give each other feedback, but still without showing each other your role-play scenarios – because certain information is required to be kept secret until the role-play has been reviewed in the plenum. If you finish well before the time runs out, you can choose to repeat those steps of the role-play that presented the most difficulties.

"If we give people fish, they may eat for a day, but if we teach people how to fish, they will eat for life."

- Local Proverb

Duration of Training Program

- Following the international standards and indigenous requirements, training is scheduled for six days (a minimum of 40 hours).
- Sessions to begin from 9:00am till 5:00pm

Facilitator

- Facilitators comprise of legal professionals from the Judiciary, Bhutan National Legal Institute and relevant agencies.

Assessment of Participants

a) **Pre-Training Assessment (PTA)** – The PTA is a short assessment of mostly YES/NO questions. The PTA is administered at the very start of the training sessions. The goal is to assess the level of participants.

b) **Post-Training Evaluation (PTE)** – The PTE consists of questions to evaluate the results of the training and get feedback from the participants about the training and the trainers for future improvements. The goal is to determine if the learning objectives of a program were achieved and if the participants have understood the contents well.

Curriculum

1. Alternative Dispute Resolution Act of Bhutan 2013.
2. Basic concepts of ADR, its types, its objectives and advantages.
3. Evolution and Development of Mediation in Bhutan: Past and Current Practice.
4. Understanding conflicts, its types, causes and effects.
5. Conflict Management and Resolution.
6. Multiple Perception and Holistic View of Dispute.
7. Concept of Mediation.
8. Principles of Mediation.
9. Types of Mediation.
10. Advantages of Mediation.
11. Difference between Mediation and Litigation.
12. Stages of Mediation.
13. Conduct of Mediation Sessions.
14. Positions vs. Interests.
15. Negotiation and its techniques.
16. Communication skills.
17. Power Imbalance and Impasse in Mediation.
18. Role of Mediators.
19. Qualities of Mediators.
20. Ethics and Code of Conduct for Mediators.
21. Cases which can be mediated and Cases which cannot be mediated.
22. Drafting legally enforceable agreement.
23. Leadership and Teamwork in Mediation.
24. Court-Annexed Mediation System and its Rules.

25. Screening of Mediation Documentary Film.
26. Screening of Court-Annexed Mediation Audio-visual.
27. Screening of Zhidhey Tsawa Film (Entertainment)

Checklist for Facilitators

- ☑ Always stick to the timetable.
- ☑ Explain the learning objectives of each session.
- ☑ Do a recap at the end of each session.
- ☑ Be aware of cultural sensitivity and be respectful.
- ☑ All sessions shall have activities and energizers.
- ☑ Use of visual aids – ppts, handouts, flip charts, white board, video clips etc.

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Promoting Mediation Nationwide

A Path to a Better Future

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