

THE MEDIATION PROCESS

Trainee's Manual Community Mediation Programme

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Ministry of Justice

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Foreword

Ministry of Justice

This landmark event of the launch of the Manual for Mediators is a watershed in the entire Mediation Process of Sri Lanka. With the introduction of this Manual, a long felt need to have a proper guide for the mediators is fulfilled. Its content can be used, from now onwards, for the skills development and the enhancement of the knowledge base. At these transitional times, where we are probing in to the availability of alternative dispute resolution mechanisms in settling social disputes, the Manual can provide both a conceptual basis as well as a pragmatic approach, which can be deftly utilized by Mediators.

The industry and the commitment of our long standing friend and guide Dr. Chris Moore need to be commented. Without his dedication to the development our Mediation System and the Manual, the compilation of the Manual wouldn't have seen the light of day in such a short time. With his guidance, presently we are also in possession of a system to determine the level of competence of our mediators and such determination is indeed a very important basic necessity in infusing improvements to the system.

We recall with a deep sense of gratitude the unstinted support rendered by Asia Foundation and Mr. Nilan Fernando in particular, in nurturing, fostering and promoting mediation in Sri Lanka. Without this support, for the past so many years, Sri Lankan Mediation System wouldn't have achieved the high level of efficacy that we experience today.

Let me also take this opportunity to thank Mrs. Ramani Jayasundere and Mr. M. Thirunavukarasu for the role they played in developing the manual.

Finally, it is our fervent hope that with the knowledge springing from the manual, the Mediators will derive benefits and serve the community more fully.

Suhada Gamalath,
Secretary,
Ministry of Justice

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INTRODUCTION

Mediation provided by Mediation Boards is a means of providing rapid, inexpensive and efficient access to justice to the people of Sri Lanka. Mediation as practiced by the Community Mediation Boards is a process that is highly compatible with the traditions and values of all cultural groups in Sri Lanka.

Members of Mediation Boards are respected community members who voluntarily provide conflict resolution assistance to people unable to resolve their differences on their own. Serving as a mediator on a Mediation Board is a tangible way that individuals demonstrate their commitment and provide a valuable service to their neighbors, broader community and country. It is an honor and privilege to be appointed and serve as a member of a Mediation Board.

Members of Mediation Boards are selected and appointed because of their reputation as fair, wise and representative members of their community, who can provide needed assistance. They are not judges or authority figures who make decisions or tell people in dispute what to do. Rather, they are “process assistants” who help disputants improve their relationships and communication, and facilitate effective problem-solving procedures that assist people in conflict to develop their own solutions to issues in dispute.

The Mediation Boards Act stipulates that individuals nominated to serve as potential mediators on Mediation Boards participate in a five-day Mediation Process training programme. Participation in the full training programme is a pre-requisite for being considered for appointment to serve on a Board.

During the training programme, participants will learn about appropriate attitudes, procedures and skills required to be an effective mediator. They will also have multiple opportunities to practice and refine their skills.

At the end of the programme, the Ministry of Justice Mediator Trainers who conduct the programme will submit a report to the Ministry and Mediation Boards Commission. The report describes the attitudes, knowledge and skills of each trainee (Schedule 1-3 and Schedule 1-4) and includes a recommendation regarding whether the trainee should be appointed to serve on a Board. This information as well as the nominee’s other qualifications will be considered by the Mediation Boards Commission when making a final decision on appointments.

This manual presents key information on what is required to be an effective mediator on a Mediation Board. It details the Duties of Mediation Boards, Roles and Responsibilities of Mediators, Standards of Practice, Code of Conduct as well as appropriate and effective attitudes, procedures, strategies and skills.

Participants in the training programme are strongly encouraged to read this manual, learn its contents and be able to apply lessons learned during the discussions and exercises conducted in the programme. Remember that your *attitude* and *approach* to serving as an impartial mediator, will be just as important as application of relevant *communication* or *conflict resolution skills*. All of these will be assessed when considering your appointment.

We encourage you to participate fully in the programme, enjoy the experience and learn conflict resolution skills that will be important for serving on a Mediation Board, or in many other areas of your lives. In fact, participants in past training programmes said that one of the major benefits of participation was learning approaches and skills that were useful to them in improving relationships and resolving differences between members of their family, neighbors, and associates in social or religious organizations, co-workers or business colleagues. Using them will help you promote more peaceful relations in your family, community and country.

Enjoy your time together and the new attitudes, approaches and skills in conflict resolution that you will learn.

WAYS TO RESOLVE DISPUTES: A RANGE OF APPROACHES

If a dispute arises between you and your neighbor over the boundary between your properties, what do you do?

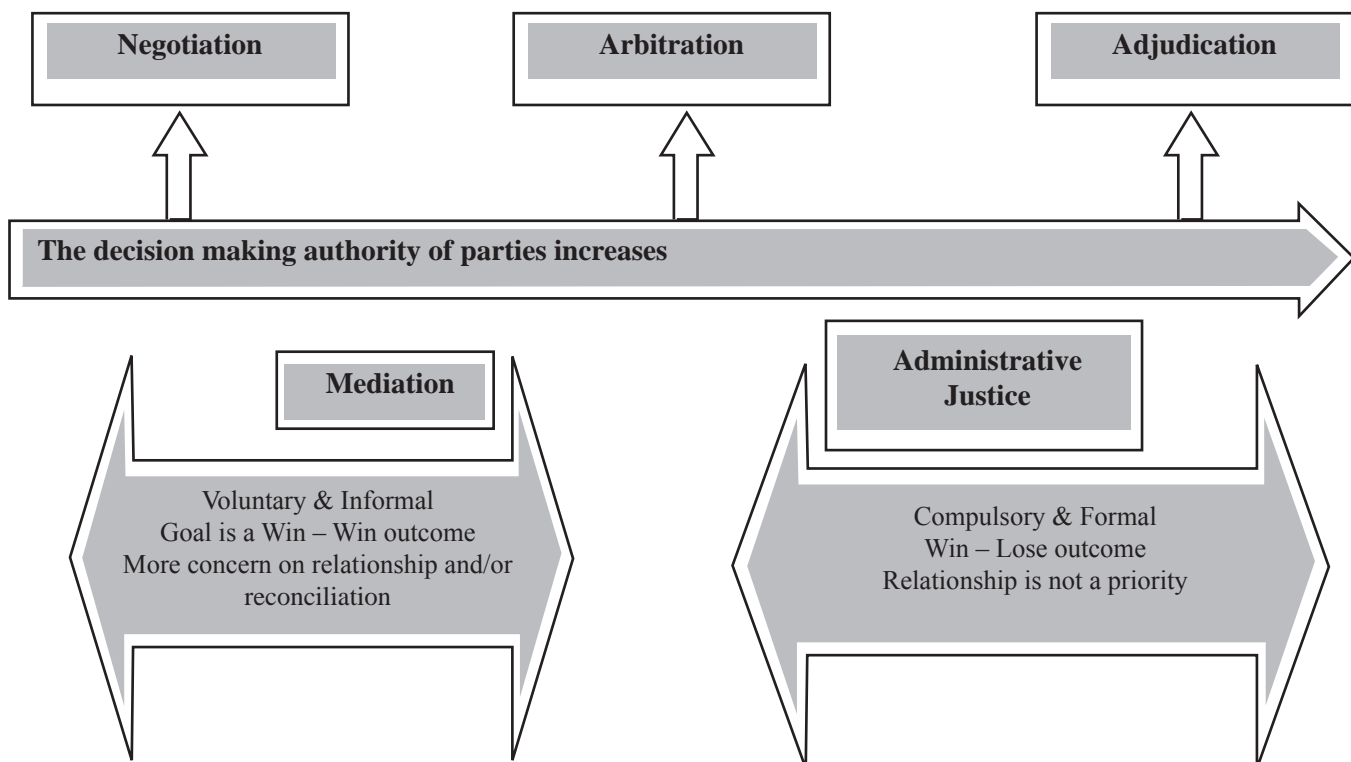
If a person breaches a promise he or she made with you in a business contract, what can you do?

If your basic rights are violated by a public officer, what can you do?

If a person was accused of committing a murder, and was arrested, what would the State do to determine his or her guilt?

Answers to these questions reveal a range of procedural options available to people for resolving civil or criminal disputes. There are voluntary processes that help people find or develop mutually acceptable solutions, either on their own and without assistance or with the help of an independent third party. There are also procedures in which a dispute or case is submitted to a third party for a decision on its resolution.

The diagram below outlines some procedural options. Those on the left side of the diagram – negotiation and mediation – involve cooperative problem-solving to develop mutually acceptable solutions. They involve collaboration between people in dispute, and are informal and voluntary. These procedures also have significant potential to preserve, restore or establish new positive relationships between those involved.



The procedures from the middle to the right side of the diagram are more formal and adversarial in nature, with each party presenting their “best case” argument to a third party decision maker who is empowered to make a decision. These generally result in win-lose or guilty or innocent outcomes, and rarely consider the importance or quality of the relationships between the parties or potential impacts the decision may have on them in the future.

Each of these dispute resolution procedures is defined in more detail below.

Negotiation is a problem-solving process in which two or more people with perceived or actual competing views or interests and/or are in dispute, voluntarily discuss their differences and work together to develop mutually satisfactory agreements or resolutions.

Mediation is a voluntary conflict resolution process in which an individual or groups help people in conflict to negotiate tangible and mutually acceptable agreements that resolve their differences. It can also help disputants (parties to the dispute/conflict) to restore, redefine or transform their attitudes and interactions toward one another, and move towards more peaceful relationships and reconciliation.

Arbitration is a voluntary dispute resolution process in which people in conflict bring contested issues to a mutually acceptable third party, and request that he or she make a decision (Award) for them regarding the resolution of the dispute. Arbitration can be either advisory and non-binding, or binding depending on the desire of the parties. However, compliance with either outcome is voluntary and not enforceable by the arbitrator. Implementation requires the commitment and ongoing cooperation of the parties to comply with the decision.

Administrative Justice involves people in dispute submitting their complaints, claims or disputes to an official, agency, institution or statutory authority formed by the legislature. The official or agency has delegated judicial powers to make binding decisions on issues within its authority or jurisdiction. The individual or agency may possess both legislative and judicial powers. The former gives the agency authority to issue regulations; the latter to hear and resolve cases. An example of this type of body is the Human Rights Commission of Sri Lanka.

Adjudication is a dispute resolution process in which a judge or jurist hears and reviews evidence, arguments and legal reasoning provided by lawyers of opposing parties (complainant/defendant or defense and prosecution), and makes a binding decision on the rights and obligations of involved parties. The process is formal, decision binding and outcome compulsory and enforceable.

The Judging/Mediation Exercise

In this exercise, you will explore differences in procedures and outcomes of judicial processes and mediation as means to resolve disputes.

It involves doing the same conflict simulation twice - first, with the third party acting as a judge (or arbitrator), and second, with the third party acting as a mediator.

The Judging Part of the Exercise

During the first part of the exercise, the third party will serve in the role of a judge. They will hear the views of each of the parties, ask any necessary clarifying questions, make a decision on the issues in dispute and announce it to the parties.

The process for the first part of the exercise is as follows:

- All parties (disputants and the judge) read the case – 5 minutes
- Party A presents his/her case – 3 minutes
- Party B presents a rebuttal – 2 minutes
- Party B presents his/her case – 3 minutes
- Party A presents a rebuttal – 2 minutes
- Judge asks any questions he/she has – 3 minutes
- Judge issues a decision – 1 minute

Please read the case. As soon as you are finished, begin presenting your cases to the third party decision maker, the judge. Once you have completed the process above, the judge should make and announce his or her decision.

For those of you playing the role of the judge, do not mediate and help parties to negotiate an agreement. Your role is to hear the “facts” of the case and make a decision.

Once you have finished presenting the case and heard the judge’s decision, stop and wait for further instructions. Please do not discuss the case or possible other settlements at this time.

The Mediation Part of the Exercise

Now that you have completed the “judging” part of the exercise, we turn to mediation. Those of you who were playing the role as judge in the last part of the exercise will rotate and work with another group and will take on a new role, that of a mediator

A *mediator* is an acceptable, independent and impartial individual or group who assists people in conflict to amicably resolve their differences. Mediators are neither a party to the conflict, nor do they have authority to make a binding decision for participants about its outcome. Mediators provide assistance to improve communications and relationships, and procedures for discussion of issues, problem solving and resolution of differences.

The instructor will tell you how long you have to complete this part of the exercise. The people in the role of the mediator should help people in dispute by:

- Welcoming them to the meeting, and setting a positive tone
- Describing that your role is - to help them make their own decisions about issues in question and not to make decisions for them

- Proposing a process for talking about their problem – Each person will get a chance to share their views and educate the other about what is important to them. Then we will conduct option generation and problem-solving to develop mutually acceptable solutions
- Giving each person an uninterrupted opportunity to share their views
- Helping, if necessary, to manage the expression of strong emotions that might get in the way of solving their problem(s)
- Helping them to describe the issues or problem(s) to be addressed
- Encouraging them to identify and explain their interests and needs to each other
- Helping them to look for multiple possible solutions or agreements that meet their individual and joint interests and needs, but without telling them what to do
- Recognizing, building and stating final agreements as they are reached or at the conclusion of the mediation session

Begin the mediation simulation. When you have finished, raise your hand to let the instructor know you have completed the exercise.

WHAT IS CONFLICT?

Components of a Conflict

Conflict involves:

- ***Awareness or beliefs*** held by one or more parties that they are in serious opposition to or in disagreement with another party, or are entangled in a situation or relationship that is unfair or unjust.
- ***Attitudes and perceptions*** of one or more parties, which may or may not be accurate, about the fairness of their situation; their character and that of others who are involved; and the merits and/or legitimacy of their own and other's goals, interests, motivations or actions.
- ***Motivations or drivers*** that impel one or more parties to try and change their situation. Examples include the desire to: end suffering; re-allocate perceived or actual scarce resources; meet personal or group internal or external needs; obtain justice, rights or a fair deal; adhere to or make changes in cultural norms, common practices or behaviors; express strong emotions, get revenge, etc.
- ***Emotions***, either negative or positive, felt by one or more parties about a situation and/or the people, issues, interests or actions involved. Feelings, whether experienced only internally or actively expressed externally, are often drivers and influence the dynamics of conflict.
- ***Behaviors and actions***, either direct or indirect and generally highly competitive and aggressive, initiated by one or more parties to achieve a change in their situation and meet their interests and needs.
- ***Goals, outcomes or changes*** consciously or unconsciously desired by parties, and which may be either incompatible or compatible with those of others, that they believe will change their situation and meet their interests.

One Definition of Conflict and Conflict Resolution

There are many definitions of conflict. For the purposes of this training programme, this is the one that we will use:

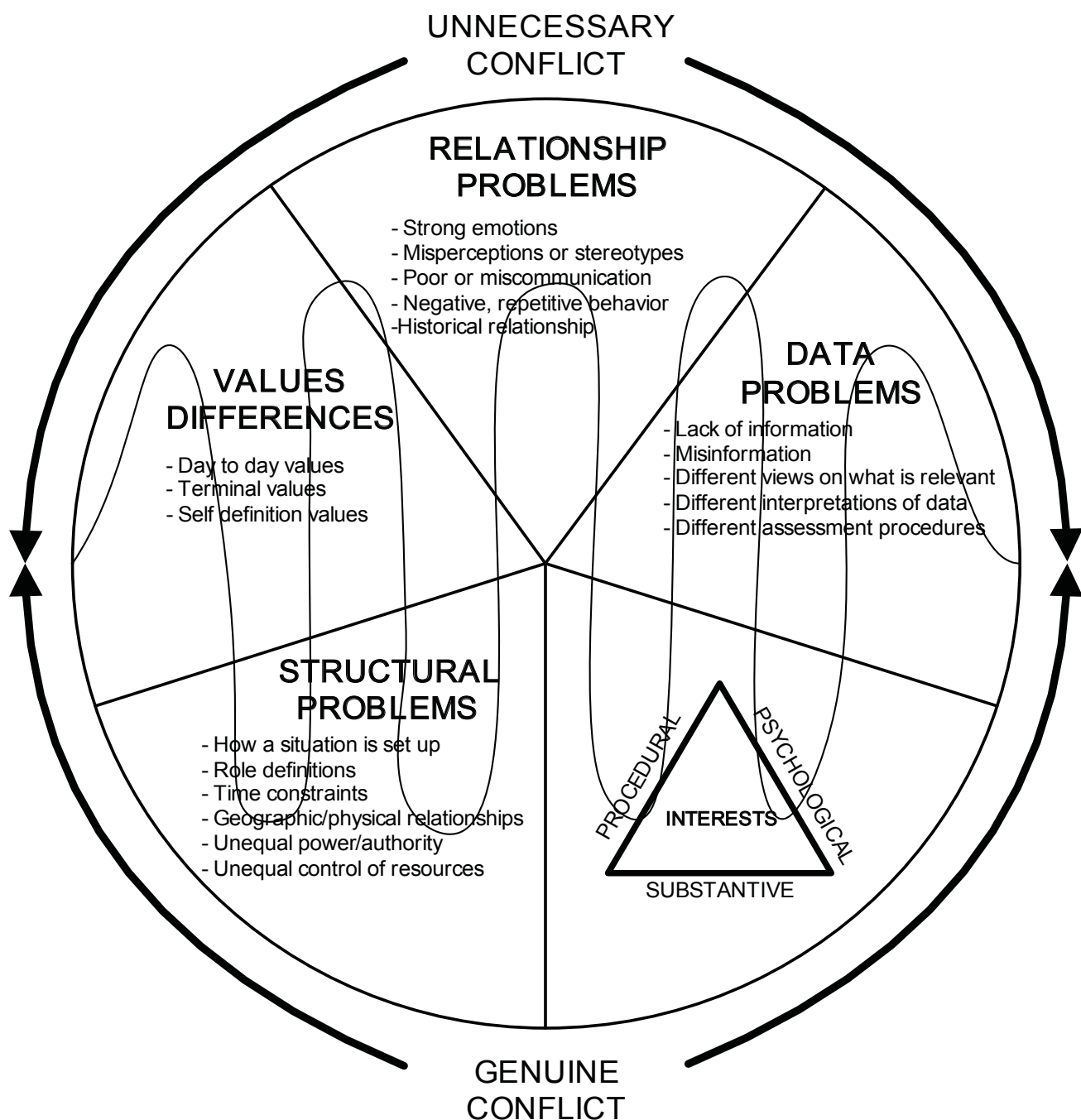
CONFLICT is a competition or struggle between two or more people initiated to settle perceived or actual significant differences or views, or allocate resources that are perceived to be limited. It involves the use of a variety of approaches, procedures and strategies by opposing parties to compel or encourage each other to meet and satisfy their interests and needs. Parties in conflict generally have strong feelings about the people, issues and desirable outcomes; and often engage in assertive, if not outright aggressive, behavior to achieve desired ends.

CONFLICT RESOLUTION – involves the use of a range of procedures to settle or reconcile seemingly incompatible desires or wishes of opposing parties, and to satisfy their interests or needs. It may be collaborative in nature, such as occurs in negotiation or mediation; involve a third party decision maker, such as a judge; or utilize coercion such as psychological pressure or physical violence. Conflict resolution may focus exclusively on the resolution of substantive or procedural issues, and/or focus on restoring, reconciling or redefining existing relationships; or establishing new ones.

CIRCLE OF CONFLICT

The Circle of Conflict is a useful tool for analyzing potential causes of conflict - relationships, data, interests, structure and values. It can also be used to develop strategies to address and resolve each of these causes.

The tool helps mediators and parties distinguish between “unnecessary conflict” and “genuine conflict”. Unnecessary conflict occurs when people believe they disagree and engage in a dispute, but objective causes or conditions are not present or they are acting on misperceptions or misinformation. Genuine conflict occurs when parties have significant real differences that need to be resolved or reconciled. Unnecessary or genuine conflicts can occur in any of the five causes of conflict (thus the wavy line that crosses the circle and divides it in half)



CONFLICT ANALYSIS EXERCISE USING THE CIRCLE OF CONFLICT

- 1) Select a current or past conflict about which you are very familiar. It may be one of your own, or one involving other people.
- 2) Using the Circle of Conflict, identify and list below the causes of the conflict from the perspectives of the people or groups involved. Note that different people or groups may perceive different causes. (Be as specific as possible. For example, if there were relationship causes, specify what they were.)
- 3) Are (or were) any of the causes “unnecessary”, and do (or did) not have real or objective causes, or are (were) they all “genuine”? If some are or were unnecessary, what could be or was done to address them?
- 4) Are or were any of the genuine causes of the conflict significantly more important than others? If so, which ones?
- 5) What was or could be done to help parties address and resolve the critical causes of the conflict and move them toward resolution?

POTENTIAL STRATEGIES TO RESPOND TO CAUSES OF CONFLICT

RELATIONSHIPS

Typical “Non-negotiable” causes of Relationship Conflicts

- History/baggage from the past
- Strong emotions/feelings
- Misperceptions
- Stereotypes/prejudice
- Poor communication/miscommunication
- Distrust
- Irritating habits/repetitive behavior
- “Restimulation” of past hurts
- Blaming/accusations

Non-negotiation Strategies for responding to causes of Relationship Conflicts

- Change the setting for interactions
- Establish ground rules for interactions
- Take a “time out”
- Talk about perceptions, then agree to “wall off history” and move forward into the future

Negotiation Strategies for responding to causes of Relationship Conflicts

- Negotiate mutually acceptable ground rules for interactions
- Have each party share perceptions about what happened in the past to move toward a mutual understanding of history
- Conduct mutual education or sharing of views develop understanding of motivations and needs, and create empathy
- Request people to use “I messages” and talk about their views rather than criticizing or blaming others
- Ask people what they wanted in the past or expected or want in the future in terms of relationships or relationship behaviors
- Develop behavioral contracts
- Ask parties to recognize and acknowledge potential negative impacts of their past attitudes or actions
- Ask for give an apology
- Negotiate tangible reparations to make a harmed party physically whole

DATA

Non-Negotiable causes of Data Conflicts

- Manipulation of data
- Mistrust of data
- Math anxiety
- Feeling overwhelmed by technical information
- Lack of information/information withheld
- Misinformation

Non-Negotiation Strategies for responding to causes of Data Conflicts

- Clarify assumptions
- Examine sources and procedures for developing existing information
- Slow down, give time to absorb information
- Provide education/Questions & Answers about technical issues
- Provide both/all sides with their own technical experts
- Discuss uncertainties, ambiguities, data gaps
- Identify “real” information issues vs. political and values issues
- Distribute information and analyses so that everyone is informed

Negotiation Strategies for responding to causes of Data Conflicts

- Discuss and reach agreement on what information is relevant or important for deliberations and decision making
- Negotiate a process for how data will be collected
- Discuss and reach agreement on how data will be interpreted
- Identify and ask for information from a credible and unbiased third party (not a mediator)
- Discuss and agree upon how data will be collected for future decision making if answers are not currently known

INTERESTS

Typical “Non-negotiable” causes of Interest Conflicts

- Totally incompatible or mutually exclusive substantive interests
- Totally incompatible or mutually exclusive procedural interests
- Totally incompatible or mutually exclusive psychological or relationship interests
- Total unacceptability or perceived legitimacy of one or another party’s interests

Non-Negotiation Strategies for responding to causes of Data Conflicts

- Meet another party’s interests even if they you do not agree with them
- Recognize some but not all of another party’s interests
- Find alternative ways other than negotiation to satisfy interests

Negotiation Strategies for responding to causes of Interest Conflicts

- Decode and separate interests from positions, preferred solutions, advocated by each party
- Clearly present and articulate interests (substantive, procedural and psychological/relationship)
- Clarify the interests of each party and why they are important for them
- Frame the goal or to be achieved or problem to be solved in terms of meeting all parties’ interests to the greatest extent possible
- Strive to satisfy relationship interests first, then focus on finding fair and acceptable procedures for to meet substantive interests
- Meet substantive interests first and do not strive to meet relationship ones (these may be satisfied later by the satisfaction of some substantive)
- Develop fair procedures to address all interests

STRUCTURE

Typical “Non-negotiable” causes of Structural Conflicts

- Resource not divisible
- Inadequate or too little resources and no others are available
- Role responsibilities or authorities are not possible to divide
- Impossible to change physical constraints – too close or too far
- Time parameters or deadlines cannot be changed

Non-Negotiation Strategies for responding to causes of Structural Conflicts

- Acknowledge structural constraints and operate or reach agreements within them
- Acknowledge that structural causes of conflicts are not necessarily caused by the individuals involved, and that they may be trapped by them against their will
- Seek additional resources by means other than negotiation
- Create new roles and responsibilities
- Move one or more parties to create additional space between them or shift them closer together
- Stop the clock or extend a deadline to allow for more time to resolve an issue
- Create an artificial deadline to push parties to reach a conclusion

Negotiation Strategies for responding to causes of Structural Conflicts

- Negotiate allocation of resources in another manner
- Jointly work to expand amount of resources
- Trade resources that are valued differently by each of the parties
- Negotiate a change in role responsibilities
- Negotiate redistribution of power and authority
- Negotiate new laws, rules, regulations or procedures that lower structural conflict
- Agree on each party’s “sphere of influence” where each has primary decision making authority
- Negotiate new time parameters to solve a problem or implement a solution
- Make payments over time

VALUES

Typical “Non-negotiable” causes of Conflicts

- Identity/core values—self definition
- Extreme views of what is right/wrong
- Quotations from venerable sources
- Criticisms of another person’s or group’s beliefs
- Misunderstanding/distortion of other’s values

Non-negotiation Strategies for responding to causes of Value Conflicts

- Differentiate between day-to-day, operational and core values, and focus on interests that are often associated with day-to-day values
- Go separate ways
- Agree to disagree
- Listen/try to understand, but not necessarily seek agreement
- Engage in a values clarification exercise

Negotiation Strategies for responding to causes of Value Conflicts

- Look for common values that may supersede value differences
- Search for or develop super ordinate or overarching values that all share
- Agree on each party's "sphere of influence" where each one's values has primacy
- Trade items that each party values differently
- Build stronger relationships that may overcome value differences

NEGOTIATION

Negotiation is a process in which two or more people voluntarily discuss their differences, and endeavor to reach a mutually acceptable agreement that addresses them and satisfies their interests.

Why People Negotiate

☞ People enter into negotiations, because they have unmet needs or interests they want satisfied. These include substantive, procedural or psychological (or relationship) interests.

- **Substantive Interests** – Tangible items an individual or group wants, such as money, goods, performance, behavior, etc.
- **Procedural Interests** – The way an individual or group wants to have a problem solved and agreement implemented
- **Psychological Interests** – The way an individual or group wants to feel about themselves and others involved in a dispute, and the way they want to be treated.

☞ People also choose to negotiate because they believe the process is more likely to achieve their goals than others available to them such as doing nothing, remaining in a stalemate, going to court, escalating the conflict or resorting to violence.

☞ People choose to negotiate because they:

- Do not have the power or authority to get what they want by a unilateral decision or action
- Require the cooperation of another party who can provide or do what they want
- Want greater control over the dispute resolution process, and whatever outcome is reached
- Desire or see a need for customized solutions to issues in question
- Believe that the process is the most predictable, especially when contrasted to others that may have unintended or undesirable negative consequences

Factors that influence the Outcome of Negotiations

Outcomes of negotiations are influenced by four key factors:

- **Environment or structural parameters** in which negotiations occur (amount of time available, resources available to exchange, legal or customary parameters, etc.)
- **Negotiators' attitudes** toward each other, the process and possible outcomes (adversarial/win-lose, or cooperative/mutual gain orientations)
- **Negotiation process** used to address and resolve differences (Positional or Interest-Based negotiations)
- **Negotiators' means of power and influence** to get what they want (coercion, information, relationship, cooperation, rewards, etc.)

Approaches to Negotiation

There are two major approaches and related processes to negotiation:

- Positional Negotiation
- Interest-Based Negotiation

Positional Negotiation is commonly used in the day-to-day lives of people in Sri Lanka. They use this approach to reach agreements when buying things in the market, negotiating three-wheeler fares or making larger commercial transactions over goods or property. They also use it to resolve disputes.

Negotiations using a positional approach commonly start with one or more parties stating an initial position or making a specific demand to the other party or parties.

Position is a specific proposal or solution made by a party that meets their interests or needs. (Note, their needs and interests may or may not be presented or detailed in the position)

The initial position usually elicits a rejection from the other party and their presentation of a counter-position, one which better meets their needs and interests. The parties then proceed to alternate proposing positions and counter positions as a way to try and find a solution that is acceptable to both. This process is the basis for the term Positional Negotiation.

Positional Negotiation is a process for reaching agreements in which negotiators alternate taking, advocating for (and often ultimately giving up) preferred solutions that meet their individual goals and interests. However, the positions advocated do not necessarily satisfy those of their counterpart. Negotiations proceed as parties continue to present positions or proposals that are rejected or countered by alternatives that are demanded or suggested by the other party. Agreement is reached when negotiators either through trial-and-error discover a solution that is mutually acceptable, or reach a positive “bargaining range”, parameters with potential options, within which any agreement is preferable to alternatives that could be attained by means other than negotiation or breaking off talks. Positional negotiations often result in compromise solutions, which lie somewhere between the parties’ initial positions.

When is Positional Negotiation commonly used?

- When negotiators expect that a give and take process - in which parties make proposals/offers, counter proposals/offers and ultimately reach a compromise and share gains and losses - is the normal or traditional approach for reaching an agreement (such as bargaining in a market).
- When resources being negotiated are perceived to be limited - time, money, authority, status, respect - and a party wants to maximize the possibility of getting a greater share.
- When parties are negotiating over a single issue, item or resource that does not appear to be divisible or shared, and other things are not available to trade.
- When the interests of the parties do not appear to be interdependent, are contradictory or mutually exclusive.
- When compromise does not appear to be possible or desirable.
- When current or future relationships have a lower priority than immediate substantive gains.

Attitudes of Positional Negotiators

The attitudes negotiators have about the people, issues in question and potential solutions that may result from negotiations strongly impact the selection of the approach used to try and resolve differences. Some typical attitudes of Positional Negotiators are listed in the chart below

The Attitudes of the Positional Negotiators
The resources are limited; my goal is to get the biggest portion.
The Goal - A win for me = a loss for you
We are opponents
There is one right solution, it's mine
I must stay on the offensive
A concession is a sign of weakness

The Process of Positional Negotiations

In Positional Negotiation, people start with and propose an initial *position* or demand, a preferred solution, which if accepted by the other party, will provide the proposer with the greatest benefit or best outcome they want or expect. Generally, one opening position provokes another, or counter-position, from the other party, who also demands the greatest benefit for him or herself.

Often initial positions are extreme or “inflated” demands, which request or offer either more or less than the proposing party is ultimately willing to give or receive. Extreme demands are made to allow room for “bargaining”, lowering demands and making concessions that may lead to agreement. Ultimately, people go back and forth making offers and counter offers, until such time an agreement is reached. The agreement is often a compromise somewhere between the parties’ initial positions.

Common Means of Influence or Power used in Positional Negotiations

Depending on the context, Positional Negotiations is often more argumentative, adversarial and coercive than other approaches to negotiations. This is especially the case when the parties involved are in a conflict.

Common means Positional Negotiators use to influence their counterparts include:

- Argumentation and logic to gain concessions
- Threats or coercion (“If you do not agree, I’ll take you to court... or take other more drastic actions!”)
- Predictions of negative or dire consequences if agreement cannot be reached (“If you do not pay your debt me, you will live in poverty forever. I will take your cow, house and land.”)
- Fading opportunity (“If you do not do X within my time frame, you will receive less benefits”)
- Imposition of deadlines (“We must settle by X”)

However, in some cases, Positional Negotiators use more positive means of influence.

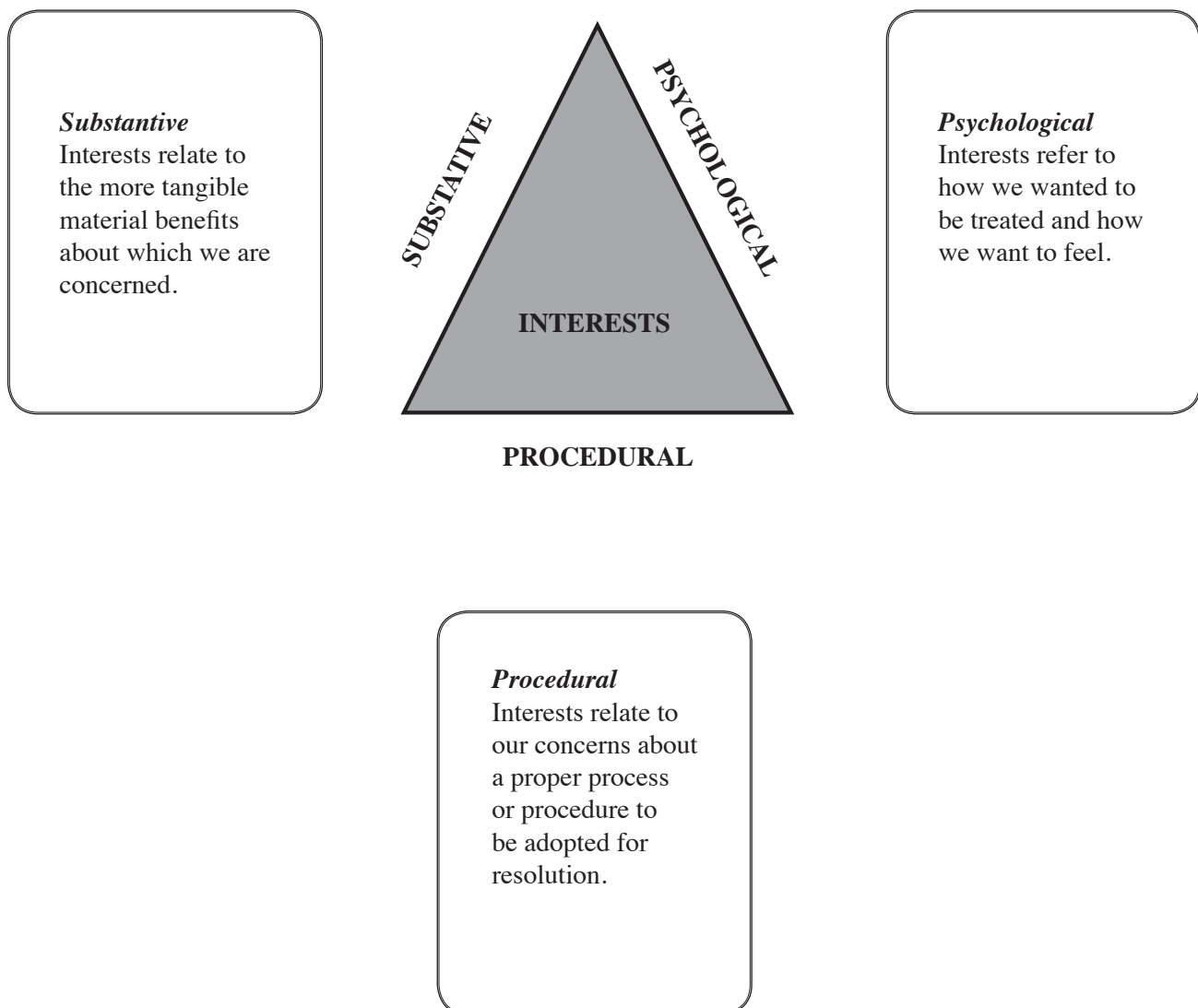
- Rewards (“Look at how this agreement will benefit you!”)
- Links and trades (“If you will do this for me, I will do this for you”)
- Relationship (“If we can just settle this money matter, our relationship can go back to the good one we had before this dispute.”)

Interest Based Negotiation

Interest-Based Negotiation is a second approach for reaching agreements and resolving conflicts. It gets its name from parties' focus on identifying and jointly striving to meet their individual or mutual interests and needs

Interests are needs that a party wants to have addressed or satisfied. They may be based on *substantive, procedural or psychological relationship* in nature.

TRIANGLE OF SATISFACTION



Interest-Based Negotiation has two major goals:

- 1) Avoiding damage to, re-building or establishment of new positive relationships between involved parties; and
- 2) Identification of parties' interests, and finding or developing solutions that meet and satisfy them.

Interest Based Negotiation starts with developing a positive **relationship** between the parties. Subsequently, negotiators educate each other about their individual and common needs and interests, and jointly seek or develop solutions that address and meet them to the greatest extent possible.

When is Interest-Based Negotiation Commonly Used?

- When avoiding damage to or preservation of an existing relationship is important
- When parties do or are likely to have continuing interactions in the future
- When a win-lose outcome may damage the current or future relationship
- When ongoing cooperation will be necessary to reach or implement an agreement
- When an positive or negative agreement made today may impact interactions, cooperation or agreements in the future (the “shadow of the future”)
- When parties want a customized or integrative solution to their problem or dispute, which meets and satisfies specific individual and mutual interests
- When parties want more control over the process
- When the process of resolving a dispute is similar in importance to the actual outcome
- When parties are willing to try collaboration to resolve their differences

Attitudes of Interest-Based Negotiators

Interest-Based negotiators generally have a positive and cooperative attitude toward other people with whom they differ, their current or potential relationships, issues and interests involved and a belief that mutually acceptable solutions can be found or developed. The Interest Based Negotiation process encourages positive attitudes. Rather than defining negotiators as opponents competing against each other, it defines them as partners working against the problem. It aims to attack the problem not the people who are involved.

Some typical attitudes of Interest-Based negotiators are listed in the chart below.

The Attitudes of Interest Based Negotiators
The resources are not limited.
The Goal – Win/Win
We are cooperative problem solvers
There are probably several satisfactory solutions. The needs of the all parties must be addressed to reach an agreement.
The relationship is important
Self esteemed preserved

The Interest-Based Negotiation Process

The Interest Based Negotiation process starts by creating a positive relationship between the parties. This may include setting a positive tone for talks, mutual acknowledgement that each party has played a role in creating the problematic situation, and statements that express beliefs that the problems at hand can be resolved to mutual satisfaction. Apologies can also occur at this time or later in negotiations.

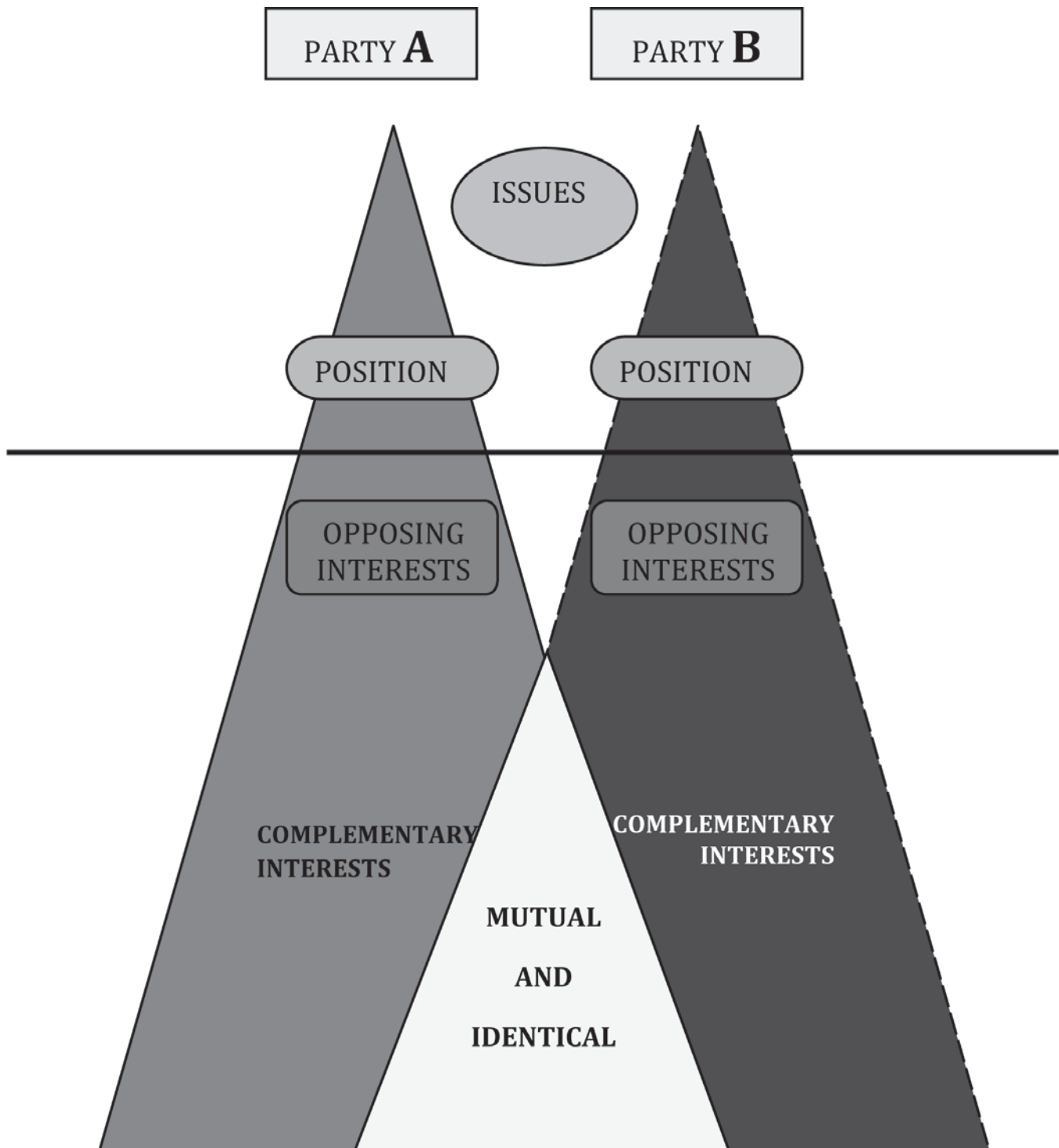
Next, parties begin the Interest-Based problem-solving process. Often parties may not be aware of what their interests and needs really are or equate them with a particular solution or position. An innovative process is needed to uncover and share them.

Some common steps for Interest-Based Negotiations are described below. In this process parties:

- Individually share their view about what has happened and motivated them to negotiate.
- Identify issues they want to discuss
- Identify and share substantive, procedural and psychological (relationship) interests they want to have addressed and met in a mutually satisfactory solution
- Describe the issue or problem to be addressed in terms of meeting individual and mutual interests
- Jointly search for or develop options that will meet their individual or mutual interests
- Evaluate options generated for their ability to satisfy needs
- Select, modify or refine options and reach an agreement

The process of convergence between parties' positions (if they have presented them at all), their issues and interests is detailed in the diagram below.

The Interest-Based Problem-Solving Process



Moving from Position to Interest

Common Means of Influence or Power used in Interest-Based Negotiations

Depending on the context, Interest-Based Negotiations are often more affirmative and collaborative than Positional Negotiations. This is the case when parties are negotiating an agreement and not in dispute, or when they are engaged in efforts to resolve a conflict.

Common means Interest-Based Negotiators use to influence their counterparts include:

- Appeals concerning the importance of a past and/or future positive relationship
- Logic and rationale, but not argumentation
- Commitments to try and address and meet each others information
- Transparent and open exchange of information
- Tangible demonstrations of willingness to meet each other's needs
- Stressing what will be gained by agreement
- A willingness to take risk and demonstrate trust
- Willingness to sacrifice a small loss for a greater gain
- Trading items that parties value differently
- Rewards ("Look at how this agreement will benefit you!")
- Links and trades that result in joint benefit
- Development of integrative package agreements in which many issues are addressed and interests met all at once

HISTORY OF MEDIATION IN SRI LANKA

Mediation is a process for helping people resolve conflicts. It involves the assistance of an independent third party, a person or group not directly involved in the dispute, which helps the people involved to negotiate and reach a mutually acceptable and voluntary resolution of their differences. The procedure is commonly used when parties are having difficulty talking with one another, are reluctant or unwilling to negotiate a settlement of their differences or have discussed contested issues and been unable to reach a satisfactory resolution.

Mediation is practiced in almost all cultures and societies all over the world. Sri Lanka has a long and rich history of third parties assisting others in dispute. As early as 425 BC, **Village Councils** known as *Gam Sabha* served as tribunals for the hearing of complaints and doing justice among neighbours. Over the course of history, recourse to justice followed different paths including the introduction of foreign adversarial legal and judicial systems, first by the Dutch then the British, for the resolution of conflicts. In 1856, the British attempted, without success, to revive the indigenous system of settling village disputes amicably through **Rural Courts**. By 1958, access to justice through litigation was severely restricted due to an ever-growing backlog in the courts, and costs that were often well beyond the means of a substantial proportion of the population. With the expressed purpose of alleviating court congestion, **Conciliation Boards**, composed appointed community leaders mandated to serve as mediators, were established by law to look into minor civil disputes or criminal offences. For a number of reasons – including perceived politicization of appointments and performance of Board members, lack of training and professional performance of intermediaries, the Conciliation Boards were abolished in 1978.

The drive to provide people with a cost-effective mechanism and alleviate court congestion saw the enactment in December 1988 of law No. 72 establishing the **Mediation Boards** of Sri Lanka. It was hoped that this alternative would be more effective in the resolution of minor disputes in communities and would relieve courts of some case overload. Mediation Boards are governed by an independent and impartial **Mediation Boards Commission**, whose members are retired judges and other respected national leaders. Boards are administered by the **Sri Lanka Ministry of Justice and Law Reform**. Mediators nominated by respected people in local communities and receive extensive training. Trainees' performance in the training program is evaluated by trainers who make recommendations on who should be appointed to be a mediator. These recommendations and the other qualifications of candidates are used by the Commission to make decisions on appointments. Mediators are volunteers who provide a very important and valuable service to their communities.

Today, **Sri Lanka's Mediation Boards Programme is the third largest mediation system in the world**. Our system has contributed to and been a model for many others world-wide. **Mediation stands in marked contrast to the adjudicatory/litigation process**, which is adversarial in nature and places decision making responsibility on external parties – lawyers and judges. Mediation provides an informal and voluntary alternative dispute resolution process, which leads to greater cooperation between the parties to develop an amicable settlement. **Interest-based negotiation** - a process in which parties identify their needs and develop mutually satisfactory solutions to satisfy them is the foundation of mediation. It promotes **self-determination** by parties regarding the settlement of their dispute, **collaboration**, **transparency** of process, and **outcomes that seek to restore or establish new positive relationships** between former disputants. This approach has been formally endorsed and adopted by the Mediation Boards Programme.

MEDIATION IS A POSITIVE SOCIAL WORK

Mediation is an important process to help people resolve disputes when they cannot do it on their own. It is also a valuable service provided by mediators to their communities and the country. **Mediation** helps people understand and accept differences as being normal; provides an effective forum and process for people to address and resolve their disputes and helps to re-establish harmony in families and between and among friends, co-workers, business associates and members of different religious or ethnic communities.

The professionals serving on Mediation Boards receive extensive training in dispute resolution, engage in ongoing professional development activities and volunteer a significant number of hours each week to serve on mediation panels. Their commitment makes a significant contribution to the well being of all people in Sri Lanka and contributes to building social peace.

Some guidelines to help Mediators in their work as mediators and in service to their communities:

1. INDIVIDUALIZATION

Individualization is the recognition and understanding of each disputant's unique quality. It is based upon the right of human beings to be individuals and to be treated not just as a human being, but as THIS human being with his/her personal differences.

2. PURPOSEFUL EXPRESSION OF FEELINGS

Purposeful expression of feelings is the recognition of the parties' need to express their feelings freely, especially strong feelings. The mediator listens purposefully neither discouraging nor condemning the expression of these feelings. To deny a client to express his/her feelings, fears, hopes and hostility is equivalent to a denial of the total person. At the same time, the mediator needs to ensure that this expression is respectful to the other party and thus may need to assist the parties to express their feelings constructively.

3. CONTROLLED EMOTIONAL INVOLVEMENT

The controlled emotional involvement is the third party's sensitivity to the individual's feelings, an understanding of their meaning, and a purposefully appropriate response to his/her feelings (a demonstration of empathy). The response of the third party is not necessarily verbal. Essentially, it is a response of attitude and feeling, guided by knowledge and purpose.

4. ACCEPTANCE

The purpose of acceptance is recognition. It helps the individual to deal with his/her problems and needs. Acceptance is a principle of action where the third party perceives and works with the parties recognizing strengths and weakness, positive and negative feelings, constructive and destructive attitudes and behavior, maintaining all the while a sense of the innate dignity and personal worth of each party.

At the same time, the mediator needs to maintain the integrity of the mediation process and to shut down any attempts by one party to intimidate or coerce the other party or the mediators. Closing the mediation needs to be done with respect and assertion – not through authoritarian tactics.

5. NON-JUDGMENTAL ATTITUDE

In helping individuals it is important to understand their failures and weaknesses, but it is not the function of the third party to judge. The mediator needs to understand the causes of an individual's problems without making judgments of guilt or innocence or assigning blame.

6 SELF DETERMINATION

It is important to accept and respect the freedom (and right) of individuals to make their own choices and decisions in the problem solving process. Third parties have a duty to recognize that need, stimulate and help to activate parties' potential for self-decision by helping them to see and use available resources.

7 CONFIDENTIALITY

Information received by a mediator in confidence, in a private session or joint session with the disputants is confidential and should not be revealed to parties outside the mediation.

PRINCIPLES OF MEDIATION

The successes or failures of a Concept are relied upon the application of the particular concept. The principles of mediation are underpinning the Mediation Concept, which are the livewires of that Concept. Application of these principles is paramount feature, especially in the Process Mediation.

PRINCIPLE	MEANING	SPECIFIC BEHAVIOURS/ATTITUDES: SOME EXAMPLES
SELF-DETERMINATION	<ul style="list-style-type: none"> ▪ Take responsibility for self ▪ Right to decide for self 	<ul style="list-style-type: none"> ▪ Parties make decision ▪ Parties speak for themselves ▪ Mediator respects & encourages parties' right to make decisions for themselves
COOPERATION	<ul style="list-style-type: none"> ▪ Working together for same end 	<ul style="list-style-type: none"> ▪ Parties listen to each other ▪ Parties help each other to solve problems ▪ Aim is to reach mutually acceptable solution ▪ Mediator helps parties to move from competitive style to cooperative style
RESPECT	<ul style="list-style-type: none"> ▪ Accept/value individuals for who they are ▪ Honour the integrity of other party 	<ul style="list-style-type: none"> ▪ Respect others & their ideas ▪ Accepting, is not dismissive ▪ Mediators are non-judgmental of parties are open to parties
JUSTICE	<ul style="list-style-type: none"> ▪ Fair to all parties – the process & the outcome ▪ Reparation and restoration 	<ul style="list-style-type: none"> ▪ Parties strive for a fair & just solution ▪ Mediator does not take sides or become involved in the content of the conflict ▪ Aim is one of repairing and if appropriate, restoring
EQUITY	<ul style="list-style-type: none"> ▪ Equal & equity are not the same; some people need to be treated differently in order to have equal opportunity ▪ Of equitable value 	<ul style="list-style-type: none"> ▪ Parties do not put down each other ▪ Parties have equitable voice at the table ▪ Mediators balance power at the table and are heard equitably. ▪ Advocate may need to be present at mediation
RECOGNITION	<ul style="list-style-type: none"> ▪ Acceptance/ empathy between parties 	<ul style="list-style-type: none"> ▪ Party demonstrates willingness to understand the perspective of the other party ▪ Mediator works with parties to create understanding of what happened and what is important to each of the parties
EMPOWERMENT	<ul style="list-style-type: none"> ▪ Each party feels capable of expressing her/himself and solving the conflict 	<ul style="list-style-type: none"> ▪ Direct, full involvement of each party ▪ Mediator explains roles of mediator & parties ▪ Mediator uses encourage and validate tools ▪ Mediator leads brainstorming of potential options
FLEXIBILITY	<ul style="list-style-type: none"> ▪ Informality within the process to change to meet parties' needs 	<ul style="list-style-type: none"> ▪ Parties consider different perspectives, different options ▪ Mediator adapts the process as necessary

MEDIATION AND MEDIATORS: Definitions and how they help

Mediation is a voluntary conflict resolution process in which an individual or group helps people in conflict to negotiate tangible and mutually acceptable agreements that resolve their differences. It can also help disputants to restore, redefine or transform their attitudes and interactions toward one another, and move toward more peaceful relationships and reconciliation.

LEGAL DEFINITION OF MEDIATION

*Mediation is the process where, by all **lawful means**, mediators endeavor to bring disputants to **an amicable settlement by removing**, with **the consent** of the disputants, **wherever practicable**, the **real cause of grievance** between them so as **to prevent a recurrence** of the dispute or offence ... (section 10 Mediation Boards Act No. 72 of 1988)*

A *mediator* is an acceptable, independent and impartial individual or group who assists people in conflict to amicably resolve their differences. Mediators are neither a party to the conflict, nor do they have authority to make a binding decision for participants about its outcome. Mediators provide assistance to improve communications and relationships, and procedures for discussion of issues, problem solving and resolution of differences.

Mediators assist people in conflict by:

- Providing a safe place and safety for discussion of contested issues
- Opening and improving communications
- Suggesting behavioral guidelines that help promote productive talks
- Managing the expression of strong negative emotions and limiting further damage to relationships
- Proposing a process for discussion of issues, negotiation and problem solving
- Asking people involved to present their views on the issues in question
- Probing to help identify, understand and articulate interests or needs
- Framing the problem to be solved in terms of meeting both individual and joint interests
- Assisting in generation and exploration of options that meet interests
- Helping to evaluate options in terms of meeting interests, and comparing them to potential settlement procedures and outcomes available away from “the negotiating table”
- Identifying or building agreements
- Formalizing agreements and conducting closure processes that promote compliance and psychological satisfaction

OBSERVATION SHEET FOR THE MEDIATION DEMONSTRATION

- 1) Observe what the mediator does to help the people in dispute change their conflict relationship and move toward agreement. What did the mediator do?

- 2) Look for specific attitudes, behaviors or skills the mediator exhibited or used. What did you see? Were they effective? If so why? What impacts did they have on the parties in conflict?

- 3) Watch for problems or dilemmas that the mediator encounters? What were they, and how did the mediator help overcome them?

- 4) Look for the problem solving steps used by the mediator. Did you see them? What were they?

- 5) Watch whether the mediator does anything to help the people in conflict overcome psychological barriers to reaching an agreement. What did they do?

- 6) What questions do you have about the mediator's role, attitudes, strategies or behaviors?

The Heart, Mind and Hands of a Mediator

To be an effective mediator, individuals serving on mediation panels need to cultivate new ideas about what it means to provide help to people involved in a conflict. The role of an effective mediator is significantly different from that of many authority figures in Sri Lankan society, or ones which mediation panel members may have performed or played in other parts of their lives.

To be an effective mediator, individuals performing this role need to cultivate appropriate:

Heart – Attitudes about their role as helpers, the disputants and the dispute itself;

Mind – Concepts for thinking about conflict and the parties' issues, interests and potential solutions; and

Hands – Procedures and skills to provide assistance in dispute resolution

Let's look at each of these elements in more detail.

In the diagrams, attitudes, concepts and procedures held or used by people traditionally in authority are contrasted with those of professional mediators.

Heart - Attitudes

Common Attitudes of Traditional Authority Figures (Politicians, judges, priests, managers, school principals, teachers, police, etc.)	Common Attitudes of Mediators (An acceptable, independent and impartial individual or group who assists people in conflict to amicably resolve their differences)
<i>Attitudes toward Roles and the Process</i>	<i>Attitudes toward Roles and the Process</i>
<ul style="list-style-type: none"> ▪ I'm the boss; you are my subordinate (or inferior) ▪ I'm an important person and deserve respect because of my knowledge, experience and position of authority ▪ I am wiser than you are, and know what is best ▪ I have the authority to decide what is important to discuss, the process and the final outcome of your dispute ▪ You came to me for help, so let me help you ▪ My role is to give you advice or tell you what to do to solve your problem ▪ Your role is to accept what I recommend ▪ If you do not agree or comply, I will put pressure on you to do so, or create negative consequences until you give in 	<ul style="list-style-type: none"> ▪ I am a helper, not superior or boss ▪ We are all important in the process ▪ Each of us deserves respect as people, not because of our position ▪ Respect for me comes from my ability to provide useful assistance, not from my position (as mediator or other role played in the community) ▪ We are all equal participants in the process. Equitable treatment should guide our work together so that all can fully participate. ▪ Each person has a role to play in the process, and in finding mutually acceptable solutions ▪ Each person has valuable insights, information or ideas to contribute; mine as the mediator are not necessarily better or wiser ▪ Self determination by you, the parties (and not me the mediator) is what is important ▪ My role is to help you make your own decisions, not to decide for you ▪ All agreements will be voluntary ▪ The problem and its final outcome is in your hands, not in mine

<i>Attitudes toward the Problem or Dispute</i>	<i>Attitudes toward the Problem or Dispute</i>
<ul style="list-style-type: none"> ▪ Conflicts are bad, and should be suppressed and/or settled as rapidly as possible ▪ It was your problem to begin with; now it is now mine to resolve ▪ One of you is responsible for or to blame for the problem; one of you will be the winner and found right. The other will be the loser and wrong. ▪ I will play a role as a strong advisor, decision maker or “judge” in to arrive at an outcome ▪ There is a good and wise solution to your problem or dispute (mine, which may not necessarily be yours) ▪ I will tell you the solution I think is appropriate, best, wisest or fair (which may or may not meet your interests) ▪ My interests are important too (often implied or unstated – i.e. getting this settled and possibly gratifying my ego) 	<ul style="list-style-type: none"> ▪ Conflicts and their outcomes can be positive, negative or both ▪ My goal is to create positive change as a result of your conflict and its resolution ▪ Everyone has some responsibility for a dispute; rarely is one person totally responsible, at fault or to blame ▪ My interest is to help you develop an effective cooperative process for resolving your differences yourselves, and, if appropriate, help improve your relationship ▪ I do not have specific interests, bias or view on what should be the ultimate substantive settlement of issues in dispute

Mind - Concepts

<p>Common Concepts of People in Authority related to providing Help or Problem-Solving (Politicians, judges, priests, managers, school principals, teachers, police, etc.)</p>	<p>Common Concepts of Mediators related to providing Help or Problem-Solving</p>
<p><i>Concepts related to Outcomes</i></p>	<p><i>Concepts related to Outcomes</i></p>
<ul style="list-style-type: none"> ▪ An outcome is more important than promoting cooperation ▪ Determining the correct <i>position</i>, <i>substantive solution</i> or <i>legal answer</i> is the goal for our interaction ▪ In a dispute, there will generally always be a winner and a loser, or a person who gets what they want and is right, and another who does not and is wrong ▪ If there is a voluntary settlement of a dispute it will be the result of a compromise where some parties' interests and needs are met, and others are not 	<ul style="list-style-type: none"> ▪ Substantive outcomes, process and improved relationships are all important ▪ Understanding and respect for all parties' <i>interests</i> is critical to the outcome and success of mediation ▪ Empathy for and satisfaction of parties' relationship interests is often as important as meeting their procedural and substantive needs ▪ An acceptable and satisfactory process for the resolution of differences may be as important as the actual outcome ▪ Understanding and using an interest-based negotiation process is helpful in resolving disputes ▪ There does not necessarily have to be a winner or loser, or someone who is right or wrong ▪ Mutually satisfactory agreements are possible, and should be the goal of our efforts ▪ Finding ways to meet as many of the parties' interests as possible is the goal of mediation. Additionally, we should be concerned about finding solutions that you, the parties, believe are just and fair ▪ The goal is to find or develop customized "integrative solutions" that meet specific needs, not just to reach a compromise ▪ Repair or redefinition of relationships, to levels mutually acceptable to all parties, should also be a goal of mediation

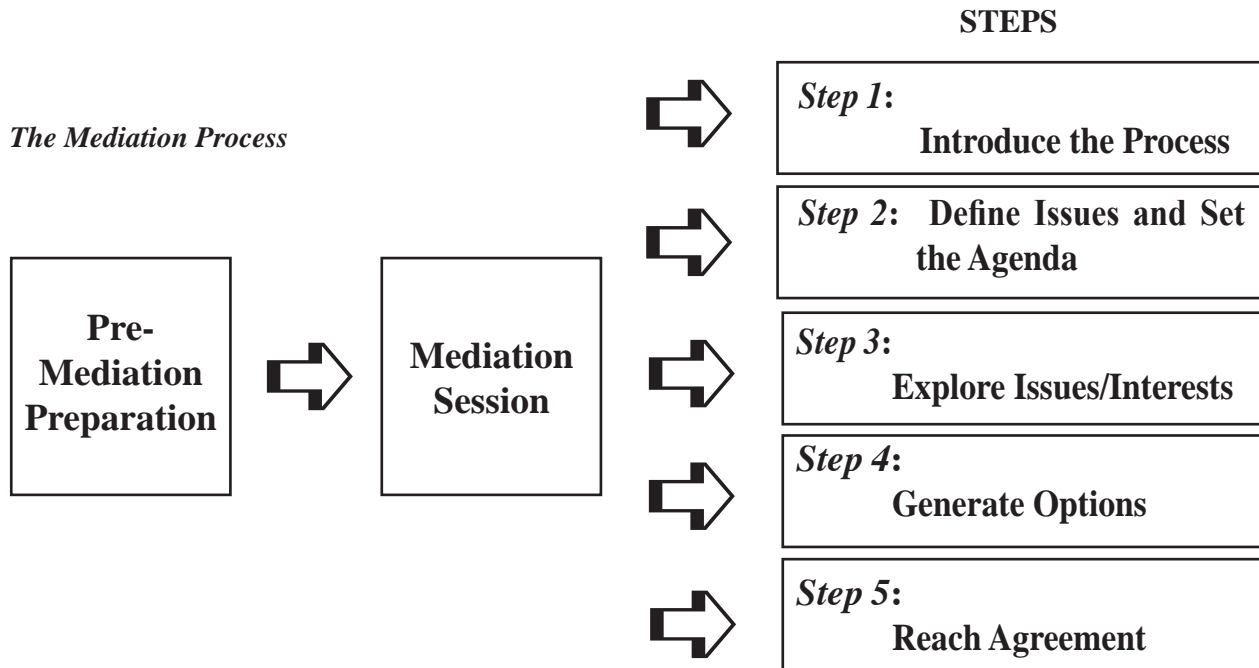
Hands – Procedures and Skills

Common Approaches Procedures and Skills used by People in Authority to Solve Problems or Resolve Conflicts (Politicians, judges, priests, managers, school principals, teachers, police, etc.)	Common Approaches, Procedures and Skills used by Mediators to Solve Problems or Resolve Conflicts
<ul style="list-style-type: none"> ▪ “Telling” ones view – either on the part of the parties or the decision maker – may be more important than listening ▪ Negotiation, if it is used or in the context of mediation, involves an exchange of positions and counter-positions until a compromise is reached ▪ Positional negotiations are the normal way of resolving disputes ▪ Advice from me as the a decision maker is more valid and valuable than most solutions that you, the parties, might work out ▪ Application of my, the decision maker’s, standards and criteria as the basis for decision making is more important than the parties’ criteria ▪ Solutions that I suggest or impose may or may not you’re your interests (However, they will meet mine) 	<ul style="list-style-type: none"> ▪ A safe place and process for talking is important ▪ Cooperation is valued and should be promoted ▪ Empowerment of one or more parties may be necessary to enable them to fully participate in the process and reach fair agreements ▪ A flexible process will be required to address and meet parties’ unique interests and concerns ▪ Understanding and analysis of the causes and dynamics of conflict is important ▪ Improving communications is a major goal and foundation of mediation ▪ Good active listening – both for emotions and content – is important for parties and mediators to better understand each other and the issues and interests involved ▪ Identification, articulation and mutual recognition of parties’ substantive, procedural and relationship interests is the foundation for productive problem solving ▪ Engagement in interest-based negotiation is an effective way to help people resolve differences ▪ Good problem solving involves setting a positive tone, articulating issues to be resolved, identifying parties’ interests, framing the problem in terms of meeting joint interests, generating possible options for agreement, evaluating options, reaching a final agreement and implementing it

The Mediation Process

The *Mediation Process* is a practical step-by-step procedure that helps people in conflict to understand, explore and develop solutions to disagreements or disputes. It is a map for resolution.

The Mediation Process involves preparation time before the parties meet and then five steps where people involved in the conflict work together with the mediator to identify or build a mutually acceptable agreement.



Pre-Mediation Preparation

Objectives	Key Actions
<ul style="list-style-type: none"> ▪ To conduct the intake 	<ul style="list-style-type: none"> ▪ <i>Meet with the party or parties bringing the dispute to mediation</i> ▪ <i>Gather information about the history of the conflict, parties, issues and interests</i> ▪ <i>Determine whether mediation is appropriate, and whether the Mediation Board has authority to hear the case</i> ▪ <i>Notify the initiating party if mediation is/is not appropriate</i> ▪ <i>If mediation is appropriate, contact the other party, inform them about the process and gain their commitment to participate</i> ▪ <i>Inform parties about the time and place for the mediation</i> ▪ <i>Inform the parties about how the mediation panel will be selected, and help make appropriate decisions about its members</i>
<ul style="list-style-type: none"> ▪ To prepare parties to mediate 	<ul style="list-style-type: none"> ▪ <i>Explain the goals of mediation: 1) to help them address and resolve their differences, and 2) to assist them, as appropriate, to make changes in the ways they relate to each other and their relationship</i> ▪ <i>Explain their role – make their best efforts to identify and advocate for their needs and interests, and to look for solutions that will meet their needs as well as the others</i> ▪ <i>Explain your role as mediators – to help parties communicate more effectively, identify and present their interests and assist them in finding mutually acceptable solutions.</i> ▪ <i>Explain your relationship to them and issues to be discussed – neutral and not biased toward or allied with either of them, and impartial toward specific issues, interests or solutions.</i> ▪ <i>Explain that mediation is an opportunity for them to make their own decisions on disputed issues with the help of the mediation panel</i> ▪ <i>Explain that the mediators will not make any final decisions for the parties</i>

▪ **To prepare the mediation panel for the mediation session**

- *Meet briefly before hearing the case to share and discuss what is known about the dispute, its history, the parties and their issues and interests*
- *Clarify roles of the panel - who will lead in each stage, or on specific tasks or issues*
- *Clarify how you will work together as a team, and what each of you need to be at your best*
- *Clarify how you will shift speaking or lead between members of the panel*
- *Clarify how panel members will indicate what they want to change during the mediation session*
- *Clarify times and timeframes for the mediation session*
- *Cultivate a positive and optimistic attitude toward the dispute, disputants, the mediation process and other panel members. Take a moment of silence to become focused and in the present.*

Step 1: Introduce the Process

Objectives	Key Actions
<ul style="list-style-type: none"> ▪ To open the meeting and set a positive tone 	<ul style="list-style-type: none"> ▪ <i>Greet participants at the door of the mediation venue. Welcome them warmly to the meeting, and thank them for coming.</i> ▪ <i>Introduce parties and/or members of the mediation panel, if they do not already know each other</i> ▪ <i>Specify where participants are to sit, and ask them to be seated. Allow enough space between them so that they are not crowded, as this can create tension.</i> ▪ <i>Seat yourselves at an equal distance from the parties.</i>
<ul style="list-style-type: none"> ▪ To build confidence and trust in the mediator, mediation process, and clarify roles ▪ To build confidence and trust in the mediator, mediation process, and clarify roles (continued) 	<ul style="list-style-type: none"> ▪ <i>Explain the goals of mediation: 1) to help address and resolve their differences, and 2) to assist, as appropriate, to make changes in the ways they relate to each other</i> ▪ <i>Explain their role – make their best efforts to identify and advocate for their needs and interests, and to look for solutions that will meet their needs as well as the others who are involved</i> ▪ <i>Explain your role as mediators – to help parties communicate more effectively, identify and present their interests and assist them in finding mutually acceptable solutions.</i> ▪ <i>Explain your relationship to the parties issues to be discussed – neutral and not biased toward or allied with either of them, and impartial toward specific issues, interests or solutions.</i>
<ul style="list-style-type: none"> ▪ To set the parameters for the meeting/ mediation 	<ul style="list-style-type: none"> ▪ <i>1) Determine if the parties have the authority to reach an agreement. 2) If they do, explain that only they will make final decision, and that the mediators will not make decisions on solutions or agreements for them. 4) Explain the timeframes for the meeting and what will be done if more than one meeting is needed). 5) Explain the conditions for confidentiality, note taking by the mediators and what will be done with notes. 6) Raise the possibility of private meetings (caucuses) with each party. 7) Explain that there will be a brief written summary of the outcome of the mediation session, either an Agreement or Non-Settlement Certificate, which is required by the Mediation Boards Commission, 8) Finally, explain what their options will be if an agreement cannot be reached.</i>

<ul style="list-style-type: none">▪ To gain and confirm commitment	<ul style="list-style-type: none">▪ <i>Ask for and answer questions about the process and roles – theirs and the mediators’</i>▪ <i>Ask for and gain participants’ commitment to try their best to find mutually acceptable solutions to their issues or problems</i>▪ <i>Express your belief that mutually acceptable solutions are possible, and provide hope and motivation for productive talks.</i>
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CHECKLIST FOR Beginning The Mediation session

- Make Introductions
- Explain the goals of mediation
- Explain what mediation is
 - Voluntary problem solving process
 - Confidential
 - Way to address and improve relationship issues
- Mediator's role
 - Neutral – no relationship with any of the parties that would compromise the mediators' independence
 - Impartial – no biased views regarding issues to be discussed
 - Facilitator of communication and problem solving
- Parties' role
 - Articulate, educate and advocate for your interests
 - Listen to the interests of others
 - Make your best effort to find solutions that address and meet your joint interests
- Overview of process
 - Initial exploration of parties' perspectives
 - Summary of issues to be addressed
 - Joint problem solving by the parties to find mutually acceptable solutions
 - Development of a written agreement
- Ground rules
 - Speaking and listening
 - Refrain from personal judgments or attacks
 - Confidentiality
- "Caucus" (separate meetings with the parties)
- Agreement or Non-Settlement Certificate will be written at the end of the mediation session, which is required by the Mediation Boards Commission
- Answer questions and ask for a commitment to begin and work to find mutually acceptable solutions

Step 2: Define Issues and Set the Agenda

Objectives	Key Actions
<ul style="list-style-type: none"> ▪ To provide an opportunity for parties to tell their story 	<ul style="list-style-type: none"> ▪ <i>Explain that each person/party will have an opportunity to share their views on the issues or problems they want to address, and what is important for them in a solution (i.e. their interests, concerns and needs).</i> ▪ <i>Decide which person/party should begin, and ask them to start</i> ▪ <i>Ask an open-ended question to get started – “Can you tell us about what brought you here to mediation, and what you would like to talk about and resolve?”</i> ▪ <i>Listen, maintain appropriate eye contact and exhibit attentive body language. Encourage the other person/party to the dispute to do the same</i> ▪ <i>Observe and assess the impacts of what is said on the others involved in the mediation</i>
<ul style="list-style-type: none"> ▪ To promote parties being heard and mutual understanding 	<ul style="list-style-type: none"> ▪ <i>Periodically restate or summarize what has been said, for clarification, to verify accuracy of understanding, and help “translate” and make information more acceptable it to the other party</i> ▪ <i>Control interruptions or counter-arguments from other participants. Allow the person presenting to complete sharing their view on the situation.</i>
<ul style="list-style-type: none"> ▪ To help parties exchange relevant information 	<ul style="list-style-type: none"> ▪ <i>Ask additional open-ended questions to encourage sharing of more information and clarify views</i> ▪ <i>Ask clarifying questions to gain greater understanding.</i> ▪ <i>Ask if the other party has clarifying questions, and encourage them to ask them.</i> ▪ <i>Consider asking how what the speaker has affected the views or feelings of the other party or parties</i>
<ul style="list-style-type: none"> ▪ To frame issues/topics for discussion, and an agenda and sequence for talking about them 	<ul style="list-style-type: none"> ▪ <i>Re-state issues/topics for further discussion as they are stated, or summarize them at the end of the speakers statement</i> ▪ <i>State, frame or re-frame issues or topics in a neutral and impartial manner</i> ▪ <i>Call a short break, if necessary, to frame issues and organize the sequence for their future discussion</i> ▪ <i>Repeat steps above and repeat with other parties</i>

Conducting Private Meetings with Parties

Goals

- To promote positive communication
- To control expression of negative communications or emotions that will further damage relationships
- To explore, generate or evaluate options
- To create movement toward settlement
- To overcome psychological barriers to reaching agreement

Timing/Strategy

- During opening statements
 - To control interruptions and name calling that is destructive
 - Need to adjust power imbalance/communication pattern
 - Manage strong emotions
 - Encourage crucial non-disclosures
- During processing issues stages
 - When parties are not revealing their interests
 - Parties are stuck/rigid
 - Too many options are available
 - To explore needs of both parties in more detail and in a safe environment
 - To look at the big picture
 - To test bargaining range
 - To do reality check - Best Alternative to Negotiated Agreement (BATNA), Worst Alternative to a Negotiated Agreement (WATNA) or and Most Likely Alternative to a Negotiated Agreement (MLATNA)
 - Coach one or more parties
 - Turn heat (pressure) up or down
- During agreement stage:
 - Time out to think and evaluate
 - Avoid a deal struck too quickly
 - To avoid an agreement that is not optimal

Procedure/Technique

- Set up expectation in the mediator's opening statement
- Announce in matter of fact way
- Choose who will go first
- Escort party out/make sure they are comfortable
- Coach (how to share information)
- Give person "homework" to do while they wait
- Determine what specific information, if any, should be kept confidential
- Repeat with the second party
- Bring back together
- Transition/rejoin parties

Problems/Pitfalls

- Mediator over controlling
- Deal-making/shuttling/advocacy
- Creation of dependence on mediator
- Time: other person drops out/too much waiting
- Meeting with both parties essential, and maintaining impartiality
- Confidentiality—care/attention to keep it
- Premature timing or overuse of private meetings
- Ethical dilemmas – lack of full disclosure by parties in joint session, appearance or concerns about alliances, private information that is compromising, learning about illegal activities

Step 3: Explore Issues and Interests

Objectives	Key Actions
<ul style="list-style-type: none"> ▪ To generate “complete” information 	<ul style="list-style-type: none"> ▪ <i>Select the appropriate party to begin the discussion of the first issue</i> ▪ <i>Suggest an issue to start with – one that all parties are interested in, where there are some common interests and which will not take too long to settle</i> ▪ <i>State and frame the issue or topic in a neutral unbiased way, which does not imply favoritism or a specific outcome</i> ▪ <i>Ask open-ended questions to encourage sharing of additional information and clarify views</i> ▪ <i>Restate, reflect and/or summarize your understanding and what you have heard</i>
<ul style="list-style-type: none"> ▪ To promote individual and common understanding 	<ul style="list-style-type: none"> ▪ <i>Restate to clarify what individuals or groups have said and to verify intent and impact on the other party</i>
<ul style="list-style-type: none"> ▪ To assist parties to move from positions to interests 	<ul style="list-style-type: none"> ▪ <i>Ask clarifying questions to gain greater understanding about interests and needs</i> ▪ <i>Encourage parties to listen to each other</i> ▪ <i>Restate interests (substantive, procedural and relationship) and solicit affirmation of understanding. If appropriate, ask other party to restate what they have heard.</i> ▪ <i>Reframe positions in terms of interests</i> ▪ <i>Reframe negatives (what they don't want) to positives (what they do want)</i> ▪ <i>Ask the other party if they have clarifying questions and encourage them to ask them.</i> ▪ <i>Repeat the process described above with the second or other parties</i>
<ul style="list-style-type: none"> ▪ To assist parties to move toward problem-solving 	<ul style="list-style-type: none"> ▪ <i>Identify, summarize and affirm common interests</i> ▪ <i>Restate interests that are different – those where further discussion will be needed, and which may need to be reconciled</i>

ISSUES, POSITIONS AND INTERESTS

PARTY	POSITIONS	INTERESTS	OPTIONS

COMMUNICATION AND MEDIATION

Communication is an important and valuable part of life and all human interactions. If we were unable to communicate, we could never convey how we see the world, our feelings about a situation or toward each other or get our needs met.

Communication is especially important in mediation. Mediators need to be good communicators to work effectively with disputing parties. They also need to be able to help people in conflict communicate more effectively, even when they are not at their best possible selves.

Communication is a learned skill. From a small age, we learn to watch and understand non-verbal communication or body language. These “cues” are often one of the best ways to know what is happening in a situation, even when no one is talking. We also learn how to listen, and in some cases not listen, from an early age.

Listening is one of the best ways of getting information, both about peoples’ feelings and the matters they care about. Failure to listen inhibits our ability to understand what is really going on.

Finally, we learn to speak. But speaking is not just what we say something, but how and when we say it, the phrases or words we select and what we convey through our verbal inflections and tone.

This section focuses on enhancing communications concepts and skills you already have, and introducing new ones to you.

What is Communication?

Communication is the method by which people share their ideas, information, opinions and feelings.

Communication generally occurs in two ways:

- a. Communication by words (verbal communication)
- b. Communication through gesture or body language (non-verbal communication)

What gets Communicated, and How

There are three major parts of face-to-face communication: non-verbal communication, voice tonality, and words. According to research:

- 55% of all communication is by body language — postures, gestures, facial expressions and eye contact,
- 38% is conveyed by the tone of voice, and
- 7% by the content or the words used in the communication process.
-

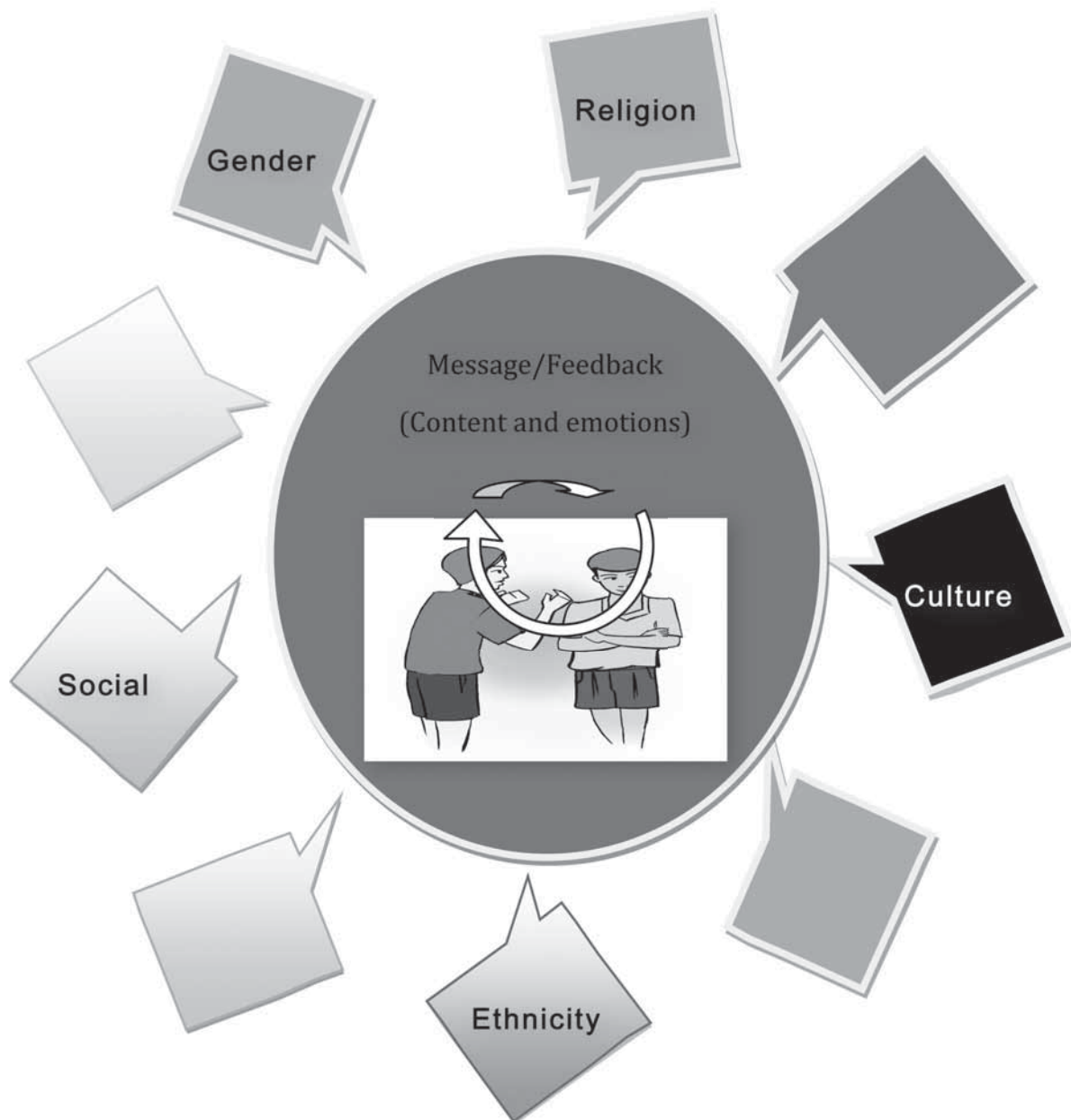
While the exact percentage of influence may differ due to variables like who the listener and speaker are (men generally speak more than women in mixed settings), their culture, the situation and issues under discussion, the general pattern of percentages of forms of communications is somewhat universal.

How communication works?

Communication occurs when people convey and receive messages through body language, speech and words, voice tone, and listening.

Messages have:

- A content component – substantive information
- An emotional component - feelings



But there are a number of other external factors that influence how a message is “sent” and “received”. Some of these are listed above. How do these and others that you might identify influence communications?

Barriers in Communication

In our lives, we have all experienced good and bad communications. What constitutes good communication? What does it look or feel like when we have expressed ourselves well or listened well? What does it look or feel like when others speak to us in an effective way or listen to what we have to say?

As mediators, we need to understand some of the barriers to good communication (both for ourselves and the people we work with) and strategies to overcome them. This is essential if we want to promote productive dialog, build a constructive process and help people overcome relationship problems. Mediation has a greater chance of being successful if the mediator understands what the party is really trying to convey, and can help other parties to understand this.

When a message is not clearly understood, it is often due to a barrier to communication. Barriers to effective communication often cause deadlocks in mediation, and loss of harmony and create havoc in our personal lives. Listed below are some common barriers to communications.

<i>Verbal Communication Barriers</i>	
Attacking	Interrogating, Criticizing, Blaming, Shaming
You Messages	Moralizing, Preaching, Advising, Diagnosing
Showing Power	Ordering, Threatening, Commanding, Directing
Other Verbal Barriers	Shouting, Name Calling, Refusing
<i>Non-verbal Communication Barriers</i>	
Flashing or rolling eyes	
Quick or slow movements	
Arms crossed, legs crossed	
Gestures made with exasperation	
Slouching, hunching over	
Poor personal care	
Doodling	
Staring at people or avoiding eye contact	
Excessive fidgeting with materials	

Why Communication Skills are important?

The mediator should develop skills that help him or her and parties to overcome communication barriers. A mediator should possess many skills necessary for success of the mediation process, but communication skills are among the most important. If you are good at communicating, there is a good chance that you will quickly help the parties in dispute to settle their differences. If on the other hand, you are a poor communicator, you may not help disputants, and may in fact make their dispute worse.

The essence of communication is to understand and be understood. However, it is not as simple as it sounds. There are many occasions in which people fail to understand each other even if they come from similar backgrounds. Different points of view and personalities can cause people to see things differently, and therefore misunderstand each other. There are countless problems that occur from misunderstandings in families, the workplace and communities. If people work to improve their communication skills, such misunderstandings can be minimized, and they can learn to interact in a mutually beneficial way.

For the reasons above, it is important for a mediator to work on his/her communication skills. A mediator must learn to express his/her thoughts in different forms. A mediator must learn to understand what other people are saying not only through their spoken words, but also through their body language. A mediator must learn to understand and be understood.

Just like any other investment, it takes time before one can reap the results of this effort. But it is an investment that will definitely be rewarding.

What are Communication Skills?

Active Listening

The mediator must be an active listener. Listening effectively means being able to focus on and distinguish, and clearly understand and separate as appropriate, the substantive content of a message, and the feelings it contains. Active listening also involves skills in feeding back to the listener what has been heard. This may mean feeding back substantive content or reflecting back in words the speaker's emotions. What is emphasized is influenced by the context and focus of the communication, and what the speaker believes or feels is important to convey.

Being a good active listener conveys to the speaker that:

- He or she has been listened to and heard
- The message, its content and intent has been conveyed and been accurately understood by someone
- The message is under consideration by the speaker
- Additionally, good active listening:
 - Encourages speakers to say more;
 - Promotes elaboration and clarification of ideas; and, if focused on emotions
 - Recognizes and legitimizes feelings and their expression of them, and help people “work through them“ (by non-repetitive talking or emotional release)

There are different “tools” or behaviors for active listening. Some are listed below.

ENCOURAGING

To encourage is to make the statement that conveys interest in what the person is saying.

Purpose:

- Prompt the parties to continue speaking.

Note: It's important that you use neutral language that does not agree or disagree with the speaker.

RESTATING

To restate is to say in your (mediator) own words the main contents of the message in mindful language.

Purpose:

- To let the other person know that you have heard what they have said.
- To ensure that you have interpreted the message correctly.
- To assist the speaker to clarify his/her own mind what he/she said.

REFLECTING

To reflect is to hear the feeling or emotion being expressed by the speaker and name it for the speaker. The speaker will feel and understood and acknowledged.

Purpose:

- To show that you understand how the person feels and what their concerns are.

Note: Reflecting is a key listening tool to use in order to deescalate anger and frustration etc.

CLARIFYING

To clarify is to ask a question or to make an inquiring statement about something that the speaker has said.

Purpose:

- It deals with information already heard as opposed to searching for new information and to understand what has been said.

Note: It helps the speaker to explain further.

Ex: I am not sure that I know what you mean by....

SUMMARIZING

To summarise is to restate main points that have been discussed in the process.

Purpose:

- To synthesize the important points and facts in order to review progress and thus establish a base for continuing the discussion
- To also check whether all the facts have been discussed and to provide space for adding facts if untold.

VALIDATING

To validate is to make a statement that demonstrates the importance of their ideas, values, efforts and feelings.

Purpose:

- To show that you have acknowledged the content and to rectify the same, if the message is confusing.

Each of the above behaviors involves listening, and restating in various ways what has been heard.

Questioning

Questioning is another critical communication skill. Through questions, mediators and parties can gain a greater depth of understanding of conflict causes and dynamics, the history of a dispute, the issues and interests that are important and possible options that might be possible for agreement.

In general, there are two broad types of questions:

- Open-ended questions
- Closed questions

Open ended questions do not imply or limit the answer that is given. They open doors to new information on substance and emotions. Closed questions seek to narrow the range of answers that can be given, often to either a “yes” or “no”. Each maybe appropriate at different times in the mediation or dispute resolution process. Generally, open ended

questions are used earlier to solicit more general information. Close questions may be used to affirm an agreement, such as “So you agree to do X.”

Open-ended Questions

Open-ended questions often start with open ended inquiries about a situation such as, “Can you say something about what brought you to mediation?” Mediator often use words like “what”, “when”, “how”, “where”, “who” and on the rare occasion, “why” in a way that it encourages information exchange without implying or requiring a limited answer. (In some circumstances, asking the question with “why” can make people defensive if they believe they are being asked to justify or defend their view or its legitimacy is being questioned.) As a mediator, it is essential to guard against the use of open-ended questions as leading questions. Leading questions might sound like the following:

- “Doesn’t it make sense to ...?”
- “Don’t you want to?”
- “Wouldn’t it be the right thing to do if you.....?”

The purpose is to gather more information, to learn, not to take the speaker in a specific direction that you as the mediator judge to be appropriate.

Examples of Open-Ended Questions

- “What did you think about that?”
- How did you feel when that happened?”
- “What is important in a solution for you?”
- “How would that change the situation?”
- “In what way would that be helpful?”

Types of Open-Ended Questions

The following are categories and examples of different kinds of open-ended questions that are asked for the specific reason indicated:

BROADENING/EXPANDING QUESTIONS

Purpose/Timing:

- To open a discussion, begin a dialogue or get information at the beginning of a mediation session
- To allow the respondent free reign to talk and share whatever information or point of view is most relevant to him/her
- To encourage them to share more information in an encouraging and non-threatening way
- To open the door for further discussion

Examples:

- “What else happened when. . .?”
- “Can you say more about that..?”
- “What is your point of view on that?”
- “How did you react to that?”

CLARIFYING QUESTIONS

Purpose:

- To clarify vague or unspecified views, positions or interests
- To move from the general (e.g. - always, never, ever, all) to the specific

Examples:

- “What do you mean when you say that s/he is irresponsible?”
- “Can you give an example of a time when s/he is pushy and demanding?”
- “What does respectful behaviour look like for you?”
- “When you say “that Samantha is a bad daughter-in-law”, to what are you specifically referring?”
- “What did you think his/her intention was?”
- What did you think caused him/her to do that?

INTEREST IDENTIFICATION QUESTIONS

Purpose:

- To elicit information about a person’s interests - concerns and fears, hopes, expectations, assumptions and values
- To encourage understanding underlying interests or priorities behind a person’s position
- To help convey, and “translate” a person’s interests if restated by the mediator, to the other party
- To separate out and have articulated substantive, procedural and psychological (relationship) interests

Examples:

- “What concerns you about..?”
- “What are you worried will happen if ..?”
- “What were you expecting when..?”
- “What do you hope your relationship will be like in the future?”
- “What have to be included in an acceptable solution for you, and how would it meet your interests?”

OPTION GENERATION QUESTIONS

Purpose:

- To encourage development of or consider options or alternatives
- To develop a range of choices for parties to choose from

Examples:

- “In what other ways do you think this could be handled in the future?”
- “What are some ideas or options you can think of that would meet both of your interests?”
- “Given that X is very important to you, what are several ways you think this interest could be satisfied?”
- “What other possibilities can you think of?”
- “How do you think this could be dealt with differently?”

CONSEQUENTIAL QUESTIONS

Purpose:

- To explore the consequences of a decision and what could happen as a result of it
- To examine the outcome of a choice or behaviour
- To conduct reality testing on the feasibility or desirability of an option or solution
-

Examples:

- “What do you think will happen if..?”
- “How do you think s/he will feel and/or react?”
- “Who do you think will be affected? What will that be like for you?”
- “Will this get you what you really want? If so how, or if not, why? ”

‘I’ messages and ‘YOU’ messages

“I” messages are a direct expression of thoughts or feelings of a person about what they think, feel or believe or are concerned about, without blaming or judging the person to whom they are directed. The ‘I’ message is also known as an “assertive message”. Alternatively, “You” messages – “You always say that”, or “you are to blame” always directed or find fault with another, and often put them on the defensive.

Example:

A wife is waiting for the return of her spouse. When the spouse returns, they might be greeted by this: “You are always coming home late! Why can’t you come back earlier?” This “You” message leads the spouse to feel blamed and attacked, and the ensuing communication would likely not be an amicable one. In a conflicting situation, “You” message focuses on attacking the other person. As a result, the primary issues are pushed aside. In contrast, if in this same scenario, an “I” message was used, it might sound like this: “I feel rather lonely waiting for you to come home and I don’t know when you will arrive. I’m concerned that something could have happened to you, and I won’t be able to do anything about it.” In this statement therefore, the speaker shares his or her feelings and concerns. The clear communication of the concern is a good starting point for both parties to work out what can be done about it.

Some sample “I” statements:

-
- “I would like you to come to class on time, so that we will all be able to begin our lessons together and the class will not have to repeat what we have done.”
- “I would appreciate it, if everyone could wait for their turn to speak, so that I will be able to hear you better and each one is assured a chance to share their views.”
- “I was disappointed when the loan was not paid back because I really trusted that it would be, and I needed the money to buy medicines.”

Framing and Reframing

Parties in conflict sometimes speak without a purpose, use inflammatory language, or do not show respect for other parties. They may also be stuck in positions and not describe what they are really interested in, their interests or concerns.

To change this dynamic and:

- Remove or reword toxic language so that it is less destructive,
- Move from a focus on forcing the acceptance of a position to one focused on meeting interests
- Encourage a more general or specific focus or discussion, or
- Lesson and get people to back-off threats
- Mediators may need to help parties frame or reframe their statements.

Framing and reframing are advanced communications techniques. They involve identification of what parties want to say and working with them to word or reword them so that they more accurately convey underlying values, hopes, expectations, needs and interests; and will be more understandable or acceptable to all concerned.

Principles of Reframing

- Every strong statement contains some important perception or kernel of truth and usually has some underlying interest that prompted the strong statement.
- Every strong statement has some relevance for the person who “sees it that way.”
- People want a constructive response to their statements.
- People can switch to more productive communication when they believe that their needs are being listened to, recognized and considered.

Steps of Reframing

1. Listen to the statement
2. Work to understand the speaker’s interest or messages
3. Ignore/remove inflammatory statements
4. Restate the message to the speaker, including the real issue or interest, in impartial and positive terms.
5. Check it out. “Is that it? Do I understand?”

Framing Joint Problem Statements

Parties involved in disputes often frame both the problem they want addressed, their interests and the proposed solution in a one-sided manner:

Party A - “I demand that you pay me the “5000 Rupees you owe me by tomorrow, or I’m coming to your house and seizing a piece of your property!”

Party B - “I’ll never pay you anything if you continue to use that judgemental tone. I deserve to be respected. Besides I don’t have all of it now. I need what I have to support my family, who are living on the edge. How can I pay you this sum? I would if I could?”

When this occurs, the mediator may need to help parties develop a joint problem statement that includes both of their interests. In the above case, the joint problem statement might sound like this:

Party A - "I demand that you pay me the "5000 Rupees you owe me by tomorrow, or I'm coming to your house and seizing a piece of your property. Not paying your debt is not respecting our bargain!

(For A and Party B) - "We need to find a way that both of feel respected. For you, an acknowledgement of the debt that is owed to you; and for you how you are treated as you discuss this matter".

(For Party A) – "We need to find a way that you can be paid what is owed to you in a timely manner, and figure out a way that you (Party B) can make the payments and still support your family.

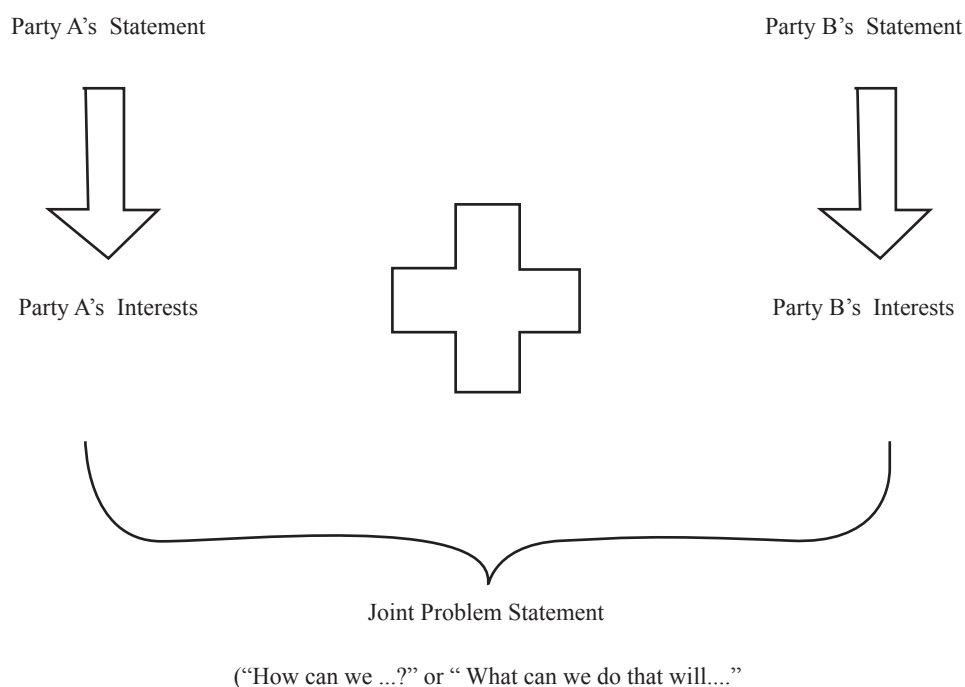
(For Party A and B) It sounds like you both agree on two things: a debt is owed and you want and will pay it back. We just need to figure out how it will be paid in a manner that will work for both of you."

The above reframing will promote both a better and more respectful relationship between the parties, and more productive problem-solving focused on meeting their joint interests.

Joint problem statements can be formulated using the thought process in the diagram on the next page. The mediator should:

1. Listen to Party A's statement, identify their interests, restate them and gain confirmation that they have been accurately heard.
2. Listen to Party B's statement, identify their interests, restate them and gain confirmation that they have been accurately heard.
3. Make and state a joint problem statement, which includes and frames the issue(s) to be addressed in terms of both parties' interests.

FORMULA FOR JOINT PROBLEM-SOLVING STATEMENTS



Step 4: Generate Options for Agreement

Objectives	Key Actions
<ul style="list-style-type: none"> ▪ To frame the problem to be addressed in terms of meeting joint interests 	<ul style="list-style-type: none"> ▪ <i>Describe or frame the problem to be solved in terms of meeting parties' individual and common interests</i> ▪ <i>Explain that for an agreement to be reached each party must have as many of their interests satisfied as possible</i> ▪ <i>Explain the importance of generating multiple solutions to choose from</i> ▪ <i>Explain the value of separating option generation from evaluation</i> ▪ <i>Suggest a process for parties to generate options and help them implement it</i> ▪ <i>Encourage generation of multiple options</i> ▪ <i>Write down potential options for settlement on a pad or flipchart</i> ▪ <i>Prevent premature selection of an option - grasping an easy but less than satisfactory solution. or a "leap to agreement"</i> ▪ <i>Affirm parties' good thinking</i> ▪ <i>Push parties to generate more ideas if they get stuck, or those suggested seem to be less than satisfactory</i> ▪ <i>Summarize potential options for agreement</i>

APPROACHES AND PROCEDURES FOR GENERATING OPTIONS

GENERAL CONSIDERATIONS

- Build awareness of need for multiple solutions to consider
- Separate generation from evaluation
- Focus option generation on meeting joint interests
- Search for mutually acceptable and fair standards and criteria to frame the agreement

GENERAL APPROACHES

- Ratify the status quo (recognize agreements that are currently in place and are working)
- Look for acceptable fair and objective criteria or standards to frame agreement
- Generate agreements-in-principle, then work out details (general to specific)
- Building block (specific to general)
- Expand Resources
- Re-allocate resources

SPECIFIC APPROACHES

- Discussion
- Brainstorming
- Elaboration
- Trial-and-error
- Vision building
- Model agreements
- Links/trades
- Offer/counter (of proposal)
- Packages (“yes”-able proposals)
- Procedural solutions to substantive problems
- Single-text negotiating document
- Expert advice

Step 5: Evaluate Options, Reach Agreements and Implement Them

Objectives	Key Actions
<ul style="list-style-type: none"> ▪ <i>To evaluate options and select the best one(s)</i> 	<ul style="list-style-type: none"> ▪ <i>Review each party's interests</i> ▪ <i>Compare how well each option meets each party's interests, either in joint session or in private meetings with each of the parties</i> ▪ <i>Ask parties to make options more concrete – who will do what, when, where and how</i> ▪ <i>Check for practicality or feasibility of implementation</i> ▪ <i>Assess options according to fair standards and criteria – Are they wise? Will they pass the “straight-face” or “laugh test”? How they might be viewed by members of the wider community or a court? Whether there are any potential negative unintended consequences?</i> ▪ <i>Determine if options to address specific issues and interests need to be linked or trade-offs made for an agreement to be reached - “If you will do this for me, I will do this for you.”</i> ▪ <i>If necessary, compare options developed in mediation to those available “away from the table” – Non-agreement and stalemate, conflict escalation, going to court, etc. If appropriate, conduct this assessment in private meetings.</i>
<ul style="list-style-type: none"> ▪ <i>To test for agreement</i> 	<ul style="list-style-type: none"> ▪ <i>Restate where you think there are agreements and ask for confirmation</i> ▪ <i>Try a hypothetical statement or “trial balloon” – “What would happen if (describe solution)? Could you agree to that?”</i>

<ul style="list-style-type: none"> ▪ <i>To confirm agreements</i> 	<ul style="list-style-type: none"> ▪ <i>Restate agreements on individual or linked issues as they are reached, and ask for confirmation that your understanding is accurate</i> ▪ <i>Verbally summarize all agreements made in the mediation session</i> ▪ <i>Conduct a reality check - to affirm that all parties agree, and are willing to comply with or implement them</i> ▪ <i>Take a short break to complete the settlement form</i> ▪ <i>Read the written settlement, revise wording or terms as necessary and get confirmation of its accuracy</i> ▪ <i>Have parties read the agreement</i> ▪ <i>Put in a contingency and/or dispute resolution clause, as appropriate, in case there are unforeseen circumstances or a future failure to comply with the terms of settlement</i>
<ul style="list-style-type: none"> ▪ <i>To implement the agreement</i> 	<ul style="list-style-type: none"> ▪ <i>If an exchange of promises or tangible items (money, land, livestock) can be made during the mediation, complete it</i> ▪ <i>If parties have to perform over time to comply with the terms of agreement, review who will do what, when, where and how</i> ▪ <i>Discuss if and how compliance will be monitored, criteria to be used and by whom</i>
<ul style="list-style-type: none"> ▪ <i>To encourage commitment to and compliance with the agreement</i> 	<ul style="list-style-type: none"> ▪ <i>Ask parties to sign the agreement</i> ▪ <i>Give each a copy of the agreement</i> ▪ <i>Affirm and complement the parties on their hard work, willingness to come to an agreement and good-faith commitments to implement it</i>
<ul style="list-style-type: none"> ▪ <i>To bring closure to the meeting</i> 	<ul style="list-style-type: none"> ▪ <i>Ask if the parties have anything else they want to say that affirms the agreement or their future relationship</i> ▪ <i>Have parties shake hands or make other affirmative gestures of agreement or closure, as appropriate</i> ▪ <i>Thank parties for their participation and trust in you, and express your hope for a positive future for them</i> ▪ <i>Walk them to the door of the mediation room, and say goodbye</i>

Writing Agreements and Non-Settlement Certificates

Writing and Issuance of either an agreement or a Non-Settlement Certificate at the end of mediation is required under the Mediation Boards Act. The Mediation Boards Commission has issued forms (see annex for the forms) for each of the potential outcomes of a mediation. Mediators need to be familiar with both forms, one of which must be completed at the end of the process - the 5th Step in mediation.

Prior to the Mediation Session

- Determine among the three mediators, who will be the note taker during the mediation. Decide on the level of detail that will be needed. Notes can be: 1) a running transcript of what has been discussed and said, 2) a summary of the discussion and decisions on each issue, or 3) or specific agreements as they are reached during talks. There is not one best way to take notes. It depends on the mediator's style, and what the intermediaries and parties' will need to remember what has been said and to prepare final documents. If the issues are complex, more detailed notes will be required.

At the Beginning (during the Opening Statement) of the Mediation Session

- Explain that during the mediation that one or more of the mediators will take notes on the discussions. The notes will be used exclusively for the purpose of recording what was discussed during the session, and to fill out required forms describing its outcome. At the end of the mediation, notes will be destroyed, and, cannot be used in any future dispute resolution proceedings.
- Explain in the opening statement that the outcome of the mediation will be written down, signed by the parties and witnessed by the mediators. (This will occur regardless of whether or not the parties reach an agreement.)
- Explain that if the agreement is conditional and requires approval of parties who are not directly involved in the mediation, disputants will need to identify who these parties are, and how and when the agreement will be approved.
- Explain that if an agreement is not reached, a Non-Settlement Certificate will be issued and signed by all of the parties and the Chief Mediator.

During the Session

The recorder should:

- Write down and capture important points to the greatest extent possible.
- Record the parties' issues, needs or interests
- Make lists of issues, interests and options for all parties to see, or provide only a list of options generated by the parties.
- Get and record details, clarifications and specifics.
- Keep the jointly developed information in front of the parties.
- If appropriate, ask parties to develop a contingent strategy clause - a "what-if" clause" - that describes what will happen if some aspect of the agreement breaks down and parties can't or don't comply with the terms of settlement. (This could include situations when an agreement can be re-opened for further discussion, specific consequences for non-compliance or conditions that require a return to mediation.)

Drafting the Agreement - Settlement

- Use the specified form provided by the Mediation Boards Commission.
- If necessary, take a break to do fine-tuning of the agreement, or meet with parties separately, to insure that all parties agree (Do not re-open the negotiations, ask only for comments on accuracy and for approval.)
- Write the agreement in a manner that respects the psychological and relationship interests of the parties – such as "After participating in mediation we both acknowledge the mutual frustration and harm our dispute has caused, and agree to comply with our agreement and work toward a more respectful relationship in the future".

- If agreements are not reached and implemented during or at the conclusion of the mediation session and have to be executed at some time in the future, obtain a verbal commitment by the parties about what they will do and describe in the written settlement document *who* will do *what*, *when*, *where* and *how* the settlement will be implemented.
- Explain and read the settlement to the parties, and ask them to read the written document carefully.
- Explain that, if appropriate or necessary, the parties have a right to obtain advice, explanation and clarification of the agreement from an independent advisor, expert or lawyer of their choice prior to signing it.
- Ask parties to sign the final document. All three mediators should also sign it as witnesses.
- Give each party a copy. The mediators should keep the original and file it with the Mediation Board.
- Send a copy of the settlement to the appropriate agency, if the dispute was referred by a Court or the Police.

Drafting - Non Settlement Certificate

- Use the specified form provided by the Mediation Boards Commission.
- Specify the reason/s for non -settlement.
- Explain the Non-Settlement Certificate to the parties, and ask them to read it carefully.
- Explain that, if appropriate or necessary, the parties have a right to obtain advice, explanation and clarification of the Non-Settlement Certificate and its terms from an independent advisor, expert or lawyer of their choice prior to signing it.
- Ask each of the parties to sign the document. The Chairman of the Panel/Chief Mediator should also sign it as a witness.
- Give a copy to the complainant. If the dispute is referred by Courts or Police, a copy of the settlement should be sent to the respective agency.

Points to Remember When Writing a Settlement

- Use simple language.
- Avoid jargon.
- Ensure consistency by:
 - accurately reflecting what the parties agreed to;
 - being internally consistent and avoiding ambiguous words; and
 - not using two or more words that mean the same thing.
- Avoid ambiguity by:
 - choosing descriptive adjectives carefully;
 - specifying who, where, what, when, how;
 - writing out exact amounts, such as with money use figures and words. [Two Thousand Rupees (Rs. 2,000)]; and
 - ensuring that words and definitions used in the document are fully understood by all parties, and that if clarification is needed, it is written into the agreement.
- Use appropriate words write down conditions if the agreement will not be implemented immediately at the conclusion of mediation.
- Determine that the agreement is implementable and, if necessary, enforceable.

Settlement Form

**THE MEDIATION BOARDS ACT, NO 72 OF 1988
SETTLEMENT BY MEDIATION
(Section 11)**

- 1. Mediation Board Area:.....
- 2. Dispute/Offence* (Mediators):.....
- 3. No of Mediation Board:.....
- 4. Court Case No (if any):.....
- 5. Nature of the Dispute/Offence* (Briefly):.....
- 6.
- 7. Parties to the Dispute/Offence*

Disputants:	(1)
	(2)
Witnesses	(1)
	(2)

Terms or Conditions to settle the Dispute/Offence*

.....

.....

.....

.....

.....
Signature of the Party	Signature of the Party
Name:.....	Name:.....

This to certify that the above mentioned dispute/offence* has been made to mediation board for settlement by mediation and the dispute/offence* is settled by mediation under the provisions of the Mediation Boards Act, No 72 of 1988.

.....
Signature of the Chief Mediator	Signature of the Mediator (1)	Signature of the Mediator (2)
Name:.....	Name:.....	Name:.....

Date:

Note:

- 1. Strike off whichever is inapplicable
- 2. Give each disputant/s a copy. The original shall be filed with respective documents.
- 3. If the dispute is referred by Courts or Police a copy of the settlement should be sent to the respective agency.
- 4. Please use extra papers, if the space is not sufficient provided above for writing the settlement.

Non Settlement Certificate

**THE MEDIATION BOARDS ACT, NO 72 OF 1988
SETTLEMENT BY MEDIATION
(Section 14A)**

I,Chairman of the Panel/Chief Mediator*, do hereby certify that an application has been made to me in respect of the dispute/offence* between the disputants specified below/*that the dispute/*offence between the disputants specified below has been referred to this Board for settlement and that no settlement by mediation in respect of such dispute/offence* has been possible under the provisions of the Mediation Boards Act, No 72 of 1988.

DISPUTANTS

- 7.
- 8.
- 9.
- 10.
- 11.

Dispute/Offence:

Date and No of Application:

Date of disposal of the Application:.....

Reasons for Non-settlement of Dispute/Offence:

.....

Chairman of the Panel/Chief Mediator,
Mediation Board area of

Date:

- Strike off whichever is inapplicable

SOME DO'S AND DON'TS FOR MEDIATORS

DO	DON'T
<ul style="list-style-type: none"> ✎ Enable parties to speak and to listen to each other ✎ Ensure that the responsibility for the conflict rests with the disputants ✎ Conscientiously work the five-step mediation process ✎ Recognize that you are in a secondary role and the parties are in the primary one ✎ Support the presence of support persons, and/or subject matter experts as needed ✎ Assume the role of host/hostess of the mediation ✎ Be aware that the credibility of the mediator, present and future, largely lies in your interaction with the parties ✎ Possess the majority of the following qualities, attributes and attitudes <ul style="list-style-type: none"> • Show patience • Have integrity • Demonstrate wisdom • Be willing to follow the parties' intuition • Be empathetic towards all • Apply analytical and critical thinking skills • Be willing to change • Be sensitive to social diversity and their implications for people • Recognize the need for equitable voice by all parties in deliberations • Be neutral and impartial toward the parties, issues and interests in question • Be able to work with parties' egos so that their egos do not adversely impact their interactions • Be able to enhance parties' self awareness, especially of their values and biases • Be open to learning • Capacity to communicate effectively • Ability to maintain confidentiality • Capable of inspiring confidence in parties • Be an accurate "check on reality" • Assist parties to resolve a dispute in reasonable amount of time or, • Record non settlement without delay • Let go of the idea that success in mediation has to be a signed agreement • Self-reflect and work on self-improvement 	<ul style="list-style-type: none"> ✎ Speak more than the parties ✎ Bring new information that is not important, valued or needed by the parties into the discussion ✎ Give your point of view ✎ Judge the parties based on your values and beliefs ✎ Believe that you are better placed than the parties to solve the conflict ✎ Allow your ego to enter into the dynamics ✎ Think you need to know "everything" ✎ Lead or push the parties to your solution ✎ Have all the answers ✎ Give very specific advice ✎ Take sides ✎ Use sloppy or indirect language ✎ Be uncomfortable with silence ✎ Feel the need to be successful by reaching an agreement ✎ Contain the discussion ✎ Take ownership of the problem ✎ Take control of the problem solving ✎ Be afraid of a display of emotion <div style="border: 1px solid black; padding: 10px; margin-top: 20px; text-align: center;"> <p>Remember - Non-settlement may be preferable to a mediator's settlement, which parties feel was imposed upon them, do not like or feel is not their own</p> </div>

WORKING AS A MEMBER OF A MEDIATION PANEL

Benefits of a Mediation Panel

- Several people thinking about how to resolve a problem are generally better than a solo mediator
- A team of mediators provides greater strategic and emotional support to its members and to people in dispute
- Multiple mediators can apply greater knowledge to the problem being addressed (*Local Knowledge* - about the people, issues, community and local practices and customs; and *Knowledge from Away* – ways similar conflicts are being resolved in other places, rights of women, information about youth, information about finances and financial arrangements, etc.)
- Panels help promote “demographic” balance – gender, age, caste, class, etc. – that increases greater insight into parties’ experiences and interests, facilitates development of empathy and helps increase comfort of disputants with their mediators
- Panels provide opportunities for teaching or mentoring new panel members

Drawbacks of a Mediation Panel

- Additional relationship and dynamic need to be paid attention to
- Differences of style, approach or behaviors may create problems within the team or with parties
- Different views on strategies, procedures or tactics may result in coordination problems within the team or with parties
- Problems in coordinating a unified mediation team strategy
- Team members undermining each other
- Possible conflict between mediators (often due to ego problems)!
- Uneven participation between panel members

Mediation Panel Strategies:

Before the parties arrive:

Be aware of and discuss:

- Team members’ different styles and approaches to mediation
- Each member’s strengths/weaknesses they bring to the case they will be helping with
- Any mediation skill they want to develop or practice during the session
- The role of the Chair of the Panel - Leading the process for the panel or facilitating involvement of all Panel members
- Division of labor – Who will lead on what stage or part of the mediation process or on specific issues
- Knowledge Panel members have of the case or the people involved

- Appropriate strategies to help parties to resolve their differences
- How to signal other team members that a break, private meeting with each of the parties or a in-team “mediator caucus” is needed
- Who will take and ultimately write up notes on the mediation and its outcome
-

During the mediation session

- Follow your pre-meeting process agreements, but be flexible to respond to changing circumstances and dynamics during talks
- Be willing to give up control to your other Panel members
- Strive for balance of participation, but don’t worry if there is *some* unevenness
- Take short breaks as needed to discuss roles and strategy
- Model cooperation

After the mediation session

- Plan and conduct a debrief – To express feelings about the case or your performance as a team; discuss what went well or did not; ask for or give constructive feedback; identify learnings to be applied in similar cases in the future; and agree on future changes to team roles process or dynamics.

STRATEGIES FOR BREAKING DEADLOCKS

At the beginning of the training programme, the Circle of Conflict and Triangle of Satisfaction were used to identify some of the major causes of conflicts and possible strategies to address them.

Now, at the end of the programme, we will return to these two tools and apply them to avoiding impasse and breaking deadlocks.

Impasse and/or deadlocks are specific situations, attitudes or behaviors of parties, interests, motivations etc. that inhibit parties from making progress toward settlement or reaching an agreement. They can be prevented or addressed by:

Preventions – Things mediators say or do before deadlocks occur that help prevent them from happening, and

Interventions – Things mediators say or do once a deadlock has occurred that help parties overcome it and move toward agreement.

- Form small groups and have group members identify some specific deadlocks they have seen or anticipate seeing in their mediation work. Have each describe the deadlock in some detail.
- Using the Circle and Triangle, identify potential causes of the deadlock. (There may be several.)
- Once causes have been identified, develop as a group, either prevention or intervention strategies that might be used to address them, and move the parties toward agreement.
- Be prepared to present some of your insights to the whole training group.

The legislative framework for the Community Mediation Boards program

Mediation Boards Act

It is important to understand the legislative provisions in Sri Lanka that govern community mediation boards.

The legal framework

Mediation was initiated in Sri Lanka in its present form by the enactment of the Mediation Boards Act No. 72 of 1988 as amended by Act No 15 of 1997. The Act provides the legal framework for institutionalizing Mediation Boards, which are empowered to resolve by the process of mediation, all disputes referred to it including referrals from the courts, Police and by disputing parties themselves. A large number of the disputes handled by the Boards relate to community disputes, civil and criminal in nature.

In addition to this Act is the Mediation (Special Categories of Disputes) Act No 21 of 2003 which facilitates the setting up of Special Mediation Boards for settling special categories of disputes such as Social and Economic issues. (Example: The disputes arising out of the Tsunami 2004).

The law defines Mediation in Section 10 of the Mediation Boards Act as;

“The duty of the Mediation Board shall be, by all lawful means, to endeavor to bring the disputants to an amicable settlement and to remove, with their consent and wherever practicable, the real cause of grievance between them so as to prevent a recurrence of the dispute or offence ...”

The definition in Section 10 of the Act includes 6 main parts that are important when mediating community disputes.

Meaning of the words in Section 10

LAWFUL: That which is done by lawful means; not by threat - mental or physical, inducement, force, intimidation nor any other unlawful measures.

AMICABLE SETTLEMENT: A consensus decision by the parties themselves to bring about a settlement to the dispute. A settlement made in agreement with each other, without influence from the panel of mediators. For this, parties must cooperate and try to understand each other’s problems, needs, concerns, fears, desires and related issues. For this, the mediators’ role is to help the parties to reach understanding about the issues and interests at hand.

REMOVE THE REAL CAUSE OF GRIEVANCE: Removal of the presenting issue through a process of helping the parties to move beyond the surface issues and obstacles to the underlying causes of the dispute and to develop an understanding of each other’s perspective. Interests, concerns and fears of parties need to be articulated and acknowledged.

WITH THE CONSENT OF THE PARTIES: Both parties to the mediation must willingly agree to a settlement (if any) by listening and understanding the grievance of the other party and without being forced or induced. They must also want to deal with more than the surface issue.

WHEREVER PRACTICABLE: Parties must be supported to reach a settlement when practicable and must be guided to seek alternatives to settle grievances if they so require. In an instance of non settlement, non settlement must be recorded without delay.

TO PREVENT A RECURRENCE: A decision reached must be for the well being of both parties and mutual trust must be established to remove all root causes of grievances.

Disputes that can be referred to mediation

Disputes that must be MANDATORILY referred to mediation

- These disputes must be referred to mediation before action can be filed in a court of law
- These disputes can be entertained by Court only if a settlement can not be reached in the Mediation Board and a certificate on non-settlement is produced by the Mediation Board
- Disputes are civil disputes and certain criminal offences
- The *civil disputes* are those relating to movable or immovable property or a debt, damage or demand which does not exceed Rs. 25,000/= unless it gives rise to a cause of action which is exempted

These disputes are:

- Civil Disputes : Those relating to movable or immovable property or a debt, damage or demand which does not exceed Rs. 25,000/=
- Criminal Offences : Those set out in the Second Schedule to the Act with reference to the Penal Code
- Offences and the relevant section of the Penal Code

Affray (157), Voluntarily causing hurt, grievous hurt or grievous hurt on provocation (314, 315, 325, 316, 326), Causing hurt by an act which endangers life (323), Causing grievous hurt by an act which endangers life or the personal safety of others (329), Wrongfully restraining or confining person (332,333), Assault or use of criminal force (343,346,348, 349), Dishonest misappropriation of property where the loss is to a private person (386), Mischief when the loss is caused to a private person (409, 410), Mischief by killing, maiming any animal of the value of rupees 10 where the loss is to a private person (411), Mischief by killing or maiming cattle where the loss is to a private person (412), Criminal trespass (433), House trespass (434), Painting, engraving defamatory matter or sale of such matter (481, 482), Insult intended to provoke breach of peace (484), Criminal intimidation (486).

Disputes that are VOLUNTARILY referred to mediation

- These are disputes that may be referred to mediation by the parties
- Any dispute except those exempted in the Third Schedule

These disputes are:

- Civil Disputes and Criminal Offences
- Any dispute that is not exempted by the Act

Disputes that CAN NOT be mediated

- These are disputes that can not be mediated, by law

These disputes are:

All disputes set out in the Third Schedule to the Act

- Matrimonial disputes
- Issues pertaining to persons and estates of persons of unsound mind, minors and wards; guardians, curators and receivers
- Trusts
- Applications for adoption of children
- Applications under the Registration of Births and Deaths Ordinance
- Partition
- Testamentary and Actions under the Insolvency Ordinance
- Admiralty Actions
- Election Petitions
- Fundamental Rights applications in the Supreme Court
- Mortgage Act
- Breaches of the privileges of Parliament
- Actions relating to applications which were pending before the Debt Conciliation Board on the date of commencement of this Act or which have finally been dealt with by the Debt Conciliation Board by settlement or dismissal of the application.
- Matters where one of the disputants is the State
- Where the dispute relates to the recovery of any property, money or other dues on behalf of the State
- Where the Attorney General has instituted proceedings for any offence

Some important issues set out in the Act

Time frame	In order to ensure speedy completion of the Mediation procedures, a Mediation Board must complete its proceedings, in the case of a civil dispute, within sixty (60) days and in the case of an offence, within thirty (30) days of the constitution of the Board.
Representation	Appearance of an Attorney-at-Law, agent or other person is NOT permitted on behalf of a disputant at a mediation conference. But representation of one spouse by another and of a minor or other disabled person by a parent, guardian or curator is permitted.
Privileges of a witness	Every person who makes a statement before a Mediation Board is entitled to all the privileges which a witness giving evidence before a court of law is entitled to in relation to such evidence. Statements made by any person, before a Mediation Board are not admissible in evidence in any civil or criminal proceedings.
On conclusion of proceedings at the Mediation Board	After a successful Mediation where the disputants agree to a settlement, copies of the written terms of the settlement are issued to the disputing parties. Where the dispute is one, which is referred by Court, the settlement is forwarded to the Court. If there is no settlement, a certificate of non settlement is issued stating that it has not been possible to settle such dispute or offence by mediation and stating the reason for non-settlement.
Failure to comply with or violation of settlements	Where a dispute or offence referred to a Mediation is settled and one of the disputants fails to comply with, or violates the terms of the settlement at any time, the other party must immediately report this to the Board Then the Board must notify the disputants and any other persons considered necessary to be present at a specified time and place and try to resolve any differences that may have arisen between the parties and help them to enter into a fresh settlement

Important facts about how a mediation board is expected to work

- A Mediation Board to which a dispute is sent will consist of three members of the Panel
- The three member board is constituted according to the preferences of the disputants.
- The Board may either be a pre-constituted one selected by the disputants or its members may be individually selected according to the choice of the parties from amongst Panel members.
- Upon the reference of a dispute to a Board, the Board is required to act according to section 10 of the Act to facilitate the settlement of the dispute
- The Mediation Board notifies disputants and any others considered necessary to be present at a mediation conference to be present either individually or together. Disputants attend such a conference of their own choice and there is no provision to compel attendance.
- The Mediation Boards function in an atmosphere which is entirely informal. There are no regulated procedures or technical requirements to be complied with at any of the mediation conferences and these may be convened on as many occasions as the Board may consider necessary subject to the statutory time limit

for the completion of proceedings.

- Appearance of an Attorney-at-Law, agent or other person is NOT permitted on behalf of a disputant at a mediation conference. But, representation of one spouse by another and of a minor or other disabled person by a parent, guardian or curator is permitted.
- The Mediation Board is required to complete its proceedings, in the case of a civil dispute, within sixty (60) days and in the case of an offence, within thirty (30) days of the constitution of the Board.
- Where after a successful Mediation, the disputants agree to a settlement, copies of the written terms of the settlement are issued to the disputing parties. Where the dispute is one, which is referred by Court, the settlement is forwarded to the Court.
- The settlement arrived at by the disputants (unless it is one which is referred for Mediation by Court) is not enforceable in a court of law.
- A breach of the settlement entitles the aggrieved party to seek recourse from the Mediation Board once again or to obtain a certificate of non-settlement, which would enable him to file action in court.
- Where however, the settlement is in respect of a dispute referred for mediation by Court, on receipt by Court of the written settlement from the Mediation Board, a decree is required to be entered in accordance with the settlement. Such a decree would then be enforceable in Court as any other decree entered by a court of law.
- Where a settlement is not possible, the Board is required to issue a 'certificate of non-settlement' stating that it has not been possible to settle such dispute or offence by Mediation and stating therein the reason for non-settlement.
- Where settlement is not possible due to the failure of one of the disputants to be present at the mediation conference, the certificate of non-settlement is required to state that fact naming the non-participating disputant therein.
- The Act assures to persons who make statements before a Mediation Board the same privileges, in respect of such statements, as are accorded to witnesses who give evidence before a court of law.
- There is a statutory safeguard against the admissibility in a court of law of statements made by persons before a Mediation Board. The Act states that such statements shall not be admissible in evidence in any civil or criminal proceedings.

The Mediation Boards Commission

- The Mediation Boards Commission consists of five members.
- They are appointed by the President of Sri Lanka.
- They hold office for three years.
- Three of the members must be retired Justices of the Supreme Court or Court of Appeal. One of whom is appointed as Chairman of the Commission.
- The Commission is an independent and impartial body.

Powers and duties of the Commission:

- The Commission appoints Mediators.
- The Commission also has the power to dismiss mediators and ensure disciplinary control of Mediators
- The Commission supervises and controls the performance and discharge of the functions and duties of Mediators.

Mediators

- Mediators are appointed to constitute a Panel of Mediators for a defined territorial area.
- Its members are persons of the community.
- The Board enjoys territorial jurisdiction within its defined administrative area (which is the Divisional Secretariat Division).
- Each Panel appointed for a Mediation Board Area is required to consist of a minimum of twelve members.
- This may include up to five public officers nominated by the District Secretary for the area.
- A Chairman appointed by the Commission heads every Panel of Mediators.
- Mediators function on a purely voluntary capacity and are not paid any remuneration other than a nominal allowance to cover travel expenses.

Selecting Mediators

- The Mediation Boards Commission receives nominations of people to be appointed as mediators.
- These nominations are made by organizations or/and individuals of the area. These organizations must be of a non-political character to ensure that mediators are impartial and are free of any political bias
- Following this a training course is held for nominees selected from the nominations. This training course in mediation skills and techniques (conducted by Mediator Trainers) is where the aptitude of the nominees is assessed
- At the conclusion of the training course, the Commission (on recommendations made by Mediator Trainers) makes the appointment of Mediators to Panels.

WORKING WITH DIVERSE PARTIES: Gender and other differences

Women and Mediation in Sri Lanka

- Women form an intrinsic part of the diverse conflict resolution processes in Sri Lanka. An active and visible part of society (women make up approximately 50% of the population), women's needs to access the dispute resolution systems in the country are numerous.
- Most often women's legal needs are connected to their sex and gender, where their relationships and interactions with men form the crux of the legal problem.
- A majority of such legal problems affecting women center on instances of violence (domestic violence, rape, incest and sexual harassment), issues of separation and divorce, instances of maintenance and alimony, child custody and inheritance.
- In Sri Lanka, socio economic, political and cultural circumstances contribute to the fact that women face legal problems that are not necessarily faced by men.
- As such these gender specific issues arising from women's vulnerability are seen as demanding specific attention. The foundation of this specific attention lies in a gender sensitive conflict resolution process in Sri Lanka.

A brief gender review of the Mediation Process in Sri Lanka

- It is unquestioned that The Mediation Boards in Sri Lanka serve a crucial role in the amicable settlement of diverse conflicts within communities thereby reducing court congestion and providing relief to thousands of citizens who do not have financial resources to access the formal legal system.
- In terms of gender equality in the mediation process, several crucial issues show that Sri Lanka's mediation process is not in a position to treat men and women clients equally.

Constitution of Mediation Boards

- The majority of Mediators is male; few women are nominated to become mediators.
- There has been little interest shown in examining what prevents women from being nominated as mediators, which reduces the number of women who can be or are appointed

Jurisdiction of Mediation Boards

- The jurisdiction of the Mediation Boards includes issues that affect women differently. Some of these are family related issues including family disputes and property issues.
- The Mediation Boards also mediate in instances of physical injury that can amount to domestic violence (voluntarily causing hurt, voluntarily causing grievous hurt, causing hurt by an act which endangers life, causing hurt by an act which endangers life or the personal safety of others, wrongful restraint or confining, assault or use of criminal force).
- These issues affect women and men differently due to the unequal status or power relationship between the disputing parties. This requires that Mediators look at these specific issues in a gender sensitive manner.

Types of Clients

- Generally, parties and clients in the mediation process in Sri Lanka are diverse in sex and age. The majority of the clients are from socially and economically deprived sectors of society. The gender specific issues with regard to diverse age groups and particular sectors of society are many.
- It is commonly perceived that within any society, women tend to be, as a whole, less empowered than their male counterparts. While this is not a given in every situation, it is generally so.
- In a dispute before a Mediation Board, especially one where the disputing parties are male and female, and the dispute is of a gender specific nature (property within marriage or violence in the home), there can be a power discrepancy that places the woman in a disadvantaged position. In such a situation the Mediator ultimately holds a significant amount of power and influence to introduce and conduct a gender sensitive mediation process, that will help bring relief to weaker parties (normally women), and will result in a just and equitable resolution of issues for all concerned – both women and men.

Mediation process

- The Mediation process in Sri Lanka is an intrinsic part of Sri Lanka society. As such Sri Lankan culture, values and norms have major influence on the way mediation is conducted. Many mediators see their role as one of authority and that they are keepers of traditional norms, some of which are insensitive to the position of men and women in society.
- In order to “gender sensitise” the mediation process, culture, religious beliefs, values and norms need to be understood and their implications for the rights and status of men and women in society. This ensures that clients are treated equitably and ensures the dignity of all involved.

What Mediators can do to Address Problematic Issues and Dynamics in Mediation related to Gender

- Be aware that gender issues are likely to be present in many, if not most, disputes or mediations that involve men and women
- If you know that gender issues will be involved in the mediation of a dispute, have a women on the mediation panel.
- If a woman panel member is not available, consider making provisions for the presence of a female support.
- Recognize when gender issues and dynamics are involved. Watch for tell-tale body language, silence, escalation of emotions, put-downs or comments like “what would a woman know!”
- Be aware of gender “stereotypes” and the negative impacts they can have on parties or mediators’ perceptions, behavior or actions. They can also have significant impacts on potential options under consideration or outcomes.
- Recognize when differences in power and influence are related to gender.
- Take measures to prevent domination of women by men such as when men talk longer and louder, interrupt, tell women to be quiet, threaten or move toward physical action.
- Take care to allow women equal time to talk and share their views.
- Recognize that weaker parties may have more difficulty than stronger ones in recognizing, articulating and advocating for their interests. Help them to do so.
- Slow down the mediation process to allow more time for weaker parties to organize their thoughts and talk.

- Use private meetings, as needed, to help prepare women to present their views in joint session.
- Avoid allowing stronger parties to dominate and force an unfair or unacceptable solution on a weaker one, especially when gender differences are at the root of the settlement.
- Avoid solutions based on gender that are disempowering to women, force them into stereotypic roles or place them in a substantive, procedural or psychological disadvantage
- If appropriate, take a break in mediation and encourage a woman to get information about her legal rights. Do not be the facilitator of a settlement that denies them their rights.
- Listen for past disputes between the parties, or current threats, that could indicate incidents of domestic violence.
- Do not mediate “whether” or not violence against a woman is acceptable. Violence is non-negotiable and unacceptable under any circumstances.
- If past domestic violence is known, determine whether parties can or should mediate, can be in the same room without promoting future violence, the woman will not be coerced into a settlement and physical safety can be assured.
- If physical safety cannot be assured, consider not mediating, mediating only if the couple is separated and living in separate places, mediating in or near a police station, or mediating using shuttle diplomacy – never having the parties together, shuttling between them and having with sessions for each at different times so there is not an opportunity for them to meet and get into a violent conflict.
- Assure that all parties feel mentally and physically safe in mediation. If this cannot be guaranteed, stop the mediation process and assure that all parties can safely leave the venue and not encounter violent repercussions later on.
- Learn about assistance available to women to protect them from domestic violence, and possible treatment for perpetrators.
- Remember personal safety for all concerned is more important than any agreement.

Other Diverse Parties

Mediators will encounter other kinds of diversity in mediation. These include people from different ethnicities, religion, castes and class. They will also encounter people of different ages, status, educational backgrounds and life experiences.

Common issues that may be encountered include:

- Differences in values, customs, attitudes, behaviors, languages or words used to communicate by parties from different ethnic groups, religions or casts
-
- Differences in how people see issues, speak or listen due to social class, status or educational background
-
- Differences between members of diverse age groups, which may significantly impact member’s life experiences, values, attitudes about behavior or activities.

When mediators encounter some of these differences between parties, they will need to modify their approach and strategies to help disputants accommodate and adjust to them. This can be done by thinking about potential differences ahead of time, but often will have to be done in the moment to respond to specific circumstances as they arise.

CODE OF CONDUCT AND STANDARDS OF PRACTICE FOR MEDIATORS

A Code of Conduct for Mediators is essential to:

- Establish an understanding of how Mediators are expected to conduct themselves during mediations.
- Move the field of mediation towards professionalism.
- Insure the observance of the Code in order that the concept of Mediation is not prejudiced by the possible misconduct of Mediators.

Mediators shall:

- Follow the mediation process and conduct it in a manner consistent with the principle of self-determination
- Facilitate parties to arrive at a solution or decision taken by themselves
- Be neutral in regards to all parties (not demonstrate side-taking)
- Be impartial; be free from conflict of interest with regard to the issues of the dispute and the parties to the dispute.
- Maintain confidentiality as per the expectations of the parties
- Avoid concerns with the vested interests of parties
- Withdraw from mediations for which they are ill suited.
- Avoid mediating in disputes in which there is a personal interest or where there could be a perception of a personal interest.
- Be polite and courteous.
- Be patient and afford parties ample opportunity to discuss their concerns.
- Be assertive in focusing and refocusing the process when necessary.
- Avoid wasting of time by having the discussion stray from the agreed upon issues.

Mediators shall not:

- Provide legal advice
- Make decisions for parties
- Place personal interest on or benefit from the terms of settlement of the dispute
- Be dictatorial in approach.
- Coerce threaten, induce, force, intimidate or use any other unlawful measures to push parties into agreement
- Make judgments or discriminate based on social differences (sex, ethnicity, age, class, caste, religion, education, physical disability or any other characteristic of a party)
- Take payments or compensation in any form.

STANDARDS OF PRACTICE FOR MEDIATORS

Standards of practice are necessary for the Community Mediation Programme in order to:

- Inspire confidence among the parties that come to mediation
- Create confidence and trust in the process of mediation
- Ensure that mediations are conducted in an impartial and confidential manner
- Remove all conflicts of interest
- Ensure that the parties are satisfied with the handling of the process

The following standards of practice are adopted by the Community Mediation Programme:

- Mediators must have knowledge of and competence in the mediation process in addition to personal attributes and life experiences in dealing with disputes and conflicts.
- Mediators must assure confidentiality of proceedings and maintain confidentiality of the parties' discussions.
- Mediators must conduct the mediation in an impartial manner. If a Mediator is unable to do so, the Mediator must withdraw from the mediation.
- Mediators must encourage mutual respect among the parties and demonstrate respect for all parties and co mediators.
- Mediators must work with the parties to assist them in coming to a mutually acceptable settlement.
- Mediators must accept that the parties are attending the mediation voluntarily and have the right to terminate the mediation.
- Mediators must be of exemplary character.

ATTRIBUTES AND QUALITIES of MEDIATORS

Mediators should –

- Be neutral and impartial
- Be able to give parties an equitable voice
- Be able to understand the dispute
- Maintain confidentiality
- Communicate effectively
- Inspire confidence in parties
- Be sensitive to social diversity (gender, ethnicity, age, caste, religion, physical disabilities) and their implications for people
- Be able to understand subtle power imbalances in society (gender, class, race, caste etc.).
- Be able to identify, accept and detach themselves from personal and private values which may influence issues under consideration
- Show patience
- Have integrity
- Be mature
- Be empathetic
- Be analytical
- Self-reflect and work to improve
- Assist parties to negotiate including being a “check on reality”
- Assist parties to resolve a dispute in reasonable amount of time or,
- Record non settlement without delay

HANDLING ETHICAL PROBLEMS OR DILEMMAS

Mediators have ethical responsibilities to:

- The parties
- The process
- The profession
- The public and unrepresented or underrepresented parties

These responsibilities reflect broad commonly held values:

- Non-injury to parties
- Empowerment
- Confidentiality
- Reasonable transparency and disclosure
- Voluntariness/non-coercion
- Clarity of expectations (about process, mediator's role, costs)
- Neutrality/ impartiality
- Commitment to fairness
- "Good faith" use of the process

Ethical Dilemmas

Ethical Problems or dilemmas occur when there is tension or incongruity between obligations and responsibilities outlined code of conduct or standards of practice and tangible attitudes or actions by one or more parties or the mediator him or herself.

Steps for Resolving an Ethical Dilemma

- Describe the nature of the ethical dilemma
 - "My responsibility to X suggests that I do ..., while my responsibility to Y would indicate that I do..."
- Get advice from those you trust – other Mediation Panel members, Ministry of Justice Mediation Trainers, Ministry official, a lawyer or therapist or others who may have insight into the problem - without violating confidentiality
- Take action to resolve the dilemma

DISCUSSION PROCESS FOR DEBRIEFING MEDIATION SIMULATIONS

One of the members of the simulation group who is not the mediator or a trainer/coach if they are available, should the following questions of the mediator and group members, and lead a discussion of them.

1. Ask the mediator(s) to talk about what it was like for them serving in the role of a third party whose task was to help people resolve their dispute. Ask what was easy or difficult about the role and what they did? What they think worked or did not work?
2. Ask group members (parties who were disputants in the simulation) to identify to identify and tell the mediator(s) specific things (attitudes, strategies, or skills) that he or she did well that helped the parties move toward agreement
3. Ask the mediator to say what interventions or strategies he or she used that worked or did not work, why and what they could have done differently.
4. Ask the mediator and the group how they handled the specific stages or tasks of the mediation process that were the focus of the simulation, and any problems or dilemmas they encountered. What was done to overcome problems?
5. Ask the mediator about one or two things he or she might do differently in the future.
6. Ask group members make suggestions about what the mediator might do in the future to help parties reach agreements
7. Ask all group members to identify one or two things that they learned from participation in the simulation, which they will use in future mediations.

SETTLEMENT AND NON SETTLEMENT FORMS

NON SETTLEMENT FORM

**THE MEDIATION BOARDS ACT, NO 72 OF 1988
SETTLEMENT BY MEDIATION
(Section 14A)**

I,Chairman of the Panel/Chief Mediator*, do hereby certify that an application has been made to me in respect of the dispute/offence* between the disputants specified below/*that the dispute/*offence between the disputants specified below has been referred to this Board for settlement and that no settlement by mediation in respect of such dispute/offence* has been possible under the provisions of the Mediation Boards Act, No 72 of 1988.

DISPUTANTS

- 1.
- 2.
- 3.
- 4.
- 5.

Dispute/Offence:.....

Date and No of Application:.....

Date of disposal of the Application:.....

Reasons for Non-settlement of Dispute/Offence:.....

.....

Chairman of the Panel/Chief Mediator,
Mediation Board area of

Date:

- Strike off whichever is inapplicable

MEDIATION BOARD CHAIRMAN'S REPORT

