Law Society of Saskatchewan

Notice of Regulatory Change
Changes to the Exemption for Mediation and Changes to the *Code of Professional Conduct*

Background

Important changes have occurred in the area of mediation and family law dispute resolution in Saskatchewan and this prompted a review of the relevant regulatory structure by the Law Society of Saskatchewan. Effective July 1, 2022, family law matters that come to family court are required to attempt a family dispute resolution process by the close of proceedings before they may continue with any further court proceedings.

The Law Society is committed to improving access to legal services in its regulatory structure, policies, and initiatives. This includes reducing regulatory barriers, while maintaining protection of the public, to help drive efficiencies in the provision of legal services.

To support a review, the Law Society developed a survey in consultation with the ADR (Alternative Dispute Resolution) Institute of Saskatchewan and Ministry of Justice and Attorney General (Dispute Resolution Office, Early Family Dispute Resolution Office, and Family Law Information Centre), requesting input from lawyers and family dispute resolution providers to understand perspectives and personal experiences prior to potential amendments to:

- *Law Society of Saskatchewan Rules* (rule 1002(1)(a)(i) - Exemptions); and
- *Law Society of Saskatchewan Code of Professional Conduct* (section 5.7 – Lawyers and Mediators).

This consultation and further dialogue have resulted in regulatory changes in the form of amendments to the *Rules* and *Code* which were approved by the Board of the Law Society in June and December 2024.

Consultation Survey

The survey was open from June 19 to July 21, 2023, and received 48 responses. Dissemination channels included:

- during a June 19, 2023 free Continuing Professional Development webinar (CPD 362) titled *What to Expect when Engaging the Family Dispute Resolution Process* which had 67 attendees;
- via notification in the Law Society ReSouce newsletter on June 22, 2023, and July 6, 2023;
- via notification in the Canadian Bar Association (CBA) SaskWatch newsletter on June 29, 2023, and July 13, 2023; and
- via e-mails on June 20, 2023 and July 13, 2023 to stakeholders recommended by the Dispute Resolution Office with a request to disseminate further as appropriate:
  - Dispute Resolution Office
  - Early Family Dispute Resolution Office
  - CBA Saskatchewan Branch (Family Law sections)
  - ADR Institute of Saskatchewan
  - Saskatoon Community Mediation Services
  - Regina Alternative Measures Program

- Restorative Action Program
- John Howard Society of Saskatchewan
- Conflict Resolution Saskatchewan

Survey findings are outlined below, beginning with an overview of survey respondents and then followed by the five areas in which substantive questions were asked in the survey:

A. Exemption for mediators and parenting coordinators
B. Practice issues (Family Dispute Resolution)
C. *Code* (Legal Advice)
D. *Code* (Additional Guidance)
E. Any general comments

This is then followed by the regulatory changes in force from January 1, 2025 and clarifications arising from the survey consultation.

Survey Respondents

From all responses received, 65% (31 responses) were from licensed members of the Law Society and 35% (17 responses) were from dispute resolution providers not licensed by the Law Society. These respondents identified their practice areas as:

- Mediation (39 responses – 81%)
- Collaborative Law (15 responses - 31%)
- Arbitration (11 responses – 23%)
- Other (10 responses – 21%)
- Parenting Coordination (4 responses – 8%)

Those responding in the 'Other' category identified the following as practice areas: four-way meetings, litigation, investigations, negotiation, and settlement advocacy.

To assist with an understanding of response rates, as of July 2023, the Law Society of Saskatchewan Find Legal Assistance Directory listed 196 licensed lawyers who indicated they offer mediation services, suggesting around a 16% response rate from mediation practitioners. Similarly, the Directory listed 224 licensed lawyers who indicated they offer family law services, suggesting around a 14% response rate from family law lawyer practitioners.

Similarly, as of July 2023, the ADR Institute of Saskatchewan Find a Practitioner database listed 52 mediators (6 family law mediators), 197 arbitrators, and 82 collaborative law practitioners in the province. Collaborative Professionals of Saskatchewan listed 41 individuals offering services while the Conflict Resolution Saskatchewan directory listed 22 practitioners. The Government of Saskatchewan Early Family Dispute Resolution Office listed 16 recognized family arbitrators and parenting coordinators and 66 recognized family mediators in addition to those recognized via the Dispute Resolution Office and Legal Aid.

A. Survey Findings – Exemption for mediators and parenting coordinators

Respondents were asked whether they see any issues(s) with a proposed amendment to the current exemption for mediation to bring alignment with the Early Family Dispute Resolution legislative changes and provide assurance for oversight and quality standards for exempted

practitioners. The majority of respondents (67% or 32 respondents) indicated no issues were identified and supported the amendment. 33% (16 respondents) provided comments that raised several points which are reproduced, while noting that not all points accurately reflect the proposed amendment and existing legislation, indicating this may not be a well-understood area or that there are different practices and perspectives within the mediation field and among practitioners. Prior to reviewing the comments, it is important to understand:

- An exemption for mediators exists as the activities of mediators (and parenting coordinators) can fall within the definition of the practice of law outlined in *The Legal Profession Act, 1990.*
- The proposed amendment does not create distinctions between different types of mediators but rather requires that all mediators and parenting coordinators, who are not also lawyers, belong to a recognized professional dispute resolution association or regulatory association other than the Law Society of Saskatchewan. Distinctions with respect to practice types in family law arise from the Early Family Dispute Resolution program and related regulations that apply only as specific to this program.
- The exemption for mediators does not only apply to family mediators nor authorize the practice of law generally. Rather, the exemption applies to all mediators and parenting coordinators insofar as they are carrying out the functions of a mediator or parenting coordinator. Specific requirements are in place for practitioners participating in the Early Family Dispute Resolution program.

Comments provided by respondents included:

- *Over-regulation or 'it's not broken'*: two respondents identified the proposed amendment as an unnecessary increase in regulation that defines mediation as legal practice, noting mediators should not be practicing law as they are not providing legal advice and so should not require an exemption.
- *Mediator distinctions*: one respondent identified that there are many mediators who mediate matters that are not family-related and the proposed amendment would create a distinction so that non-family mediators are no longer exempt. It was also noted that there are family mediators who practice without the intention of providing certificates of participation to family litigants under the Early Family Dispute Resolution program. These family mediators should therefore not be required to meet the statutory requirements set out in the regulations as this would preclude persons not meeting the Ministry's criteria from acting as a family mediator.
- *Limit – access to justice*: a respondent raised that a limit on the role of mediators is not in line with access to justice and that the proposed amendment would limit mediators practicing in matters other than family separation and divorce.

One respondent suggested a definition of mediation/mediator might be beneficial and another respondent queried the use of the word "accredited" and noted that membership was likely sufficient, also suggesting minor editing of the proposed amendment directly.

Respondents also reflected on areas more broadly for early family dispute resolution professionals that are not licensed by the Law Society:

- *Legal information versus advice:* the importance of being able to provide "fairly obvious predictions of how the law may apply to a given set of facts – almost like being permitted to take judicial notice of some facts without needing to prove them."
- *Training*: an increase in legal knowledge and continuing education requirements on matters most relevant to the work / services offered.

- *Importance but challenges of independent legal advice (ILA):* respondents noted that clients are often perplexed when informed that the next step is to take an agreement reached in mediation to separate lawyers for ILA as some clients seek to avoid meeting with lawyers. This can be due to a variety of reasons that can include fear of red tape, additional challenges, unnecessary conflict, cost, and time. However, as noted by one respondent, family law is:

  > *"a complex area of law involving contract law, tax law, and multiple pieces of legislation, Rules, and case law. Under no circumstances is it in the interest of the public to receive legal advice from persons other than licensed counsel. There are often imbalances of power between parties and legal interests, rights and obligations differ. Each party ought to have separate legal advice as part of the negotiation/resolution process."*

Finally, a respondent highlighted that mediators who are in training may work with another recognized mediator while they are completing requirements for recognition and one respondent queried who will monitor and provide oversight for the list of approved family mediators and parenting coordinators. In relation to this last point, by way of clarification, oversight is provided by the Early Family Dispute Resolution Office.

B. Survey Findings – Practice Issues (Family Dispute Resolution)

Respondents were also asked if they experienced any issues in their family dispute resolution practice that they would like to share. Responses were mixed, with 48% of respondents (23 responses) indicating they did not identify issues while 52% of respondents (25 responses) indicated specific issues that included:

- *Another source of conflict*: one respondent identified that the mandatory requirements which require choosing an alternative dispute resolution process and service provider have become another source of conflict between some parties, to the extent of expending time and cost on court applications to determine their out-of-court process. A respondent also indicated a challenge with determining when the attempted out-of-court resolution is complete and another respondent raised time limits for proceeding where there is no agreement between the parties. Exemptions were also raised noting that it should be easier to obtain an exemption when matters such as child support require resolution.
- *Cost*: multiple respondents identified cost as a significant barrier, particularly where conflict is high and the chance of success through an alternative dispute resolution process is viewed as low, resulting in delay and additional cost. This was also raised where parties have attempted to negotiate matters through counsel without success. A practitioner in a rural location noted a lack of service providers requiring additional cost for clients and one respondent identified people being charged "exorbitant amounts" for mediation.
- *Quality of service*: several issues related to quality were noted with respect to all types of practitioners with recommendations for further education. Several respondents referenced mediators or parenting coordinators giving "very poor, and inaccurate advice" noting that this creates challenges when clients receive independent legal advice and are alerted to potential issues which is then perceived as 'being difficult'. Comments highlighted the benefit of having a legal background when working in this area and one respondent raised alarm that "misinformation is being disseminated to the detriment of children and financially dependent spouses." In turn, other respondents identified that

> some lawyers hamper dispute resolution efforts and treat them as a hindrance to litigation pathways offside the spirit of the legislation. This can include portraying an out-of-court process as an extra cost or lengthening the process and encouraging participation only to the extent of obtaining a certificate to return to litigation.

There were also comments that focused on productive ways in which practitioners can work together, helping to narrow the legal issues in dispute and minimize conflict for parties. However, further issues were also raised.

One area raised was with respect to confidentiality in mediation and "blurred lines" regarding the use of "without prejudice". It was noted that there are no clear guidelines to keep the confidentiality of participants while providing details of the mediation in summary. While a label indicating "privileged information not to be used in court" may be added, in practice the summary may be shared with non-participants with limited recourse or sanctions if breached. One respondent described the issue in this manner:

> *"Mediator summary notes are typically without prejudice, but may also confirm the existence of an agreement reached during mediation. Without prejudice discussions leading to an agreement are not disclosable, but once agreement is reached then evidence substantiating that agreement is typically admissible. Treatment of mediator summaries in this context is unclear. Prescribed guidelines on the contents or form of these summaries, and in what circumstances (if any) they are admissible, would likely be of assistance."*

Relatedly, a second area where multiple respondents reported an issue or raised questions and sought clarification is in relation to agreements stemming from mediation. One respondent noted that mediators are "drafting separation agreements rather than simply documenting the parties steps" and queried the adequacy of training for non-lawyer mediators and the issues that can arise. This was reinforced by other respondents who noted that clients frequently request a mediator to write an agreement and that clients are confused by the word "agreement" and "agree" which is often understood to be a real and binding agreement. Suggestions included to use other terms such as "mutually proposed resolution" rather than "agreement" at mediation which is better understood as a proposed agreement or the parties' agreed intentions prior to obtaining a document that is legally binding.

However, one respondent noted that there should not be a distinction between different types of practitioners conducting mediation and if a draft agreement is drawn, parties should be advised to consult independent legal advice before signing.

While multiple respondents referenced advising or recommending parties to seek independent legal advice prior to finalizing an agreement, it was noted this is not well understood. One respondent detailed their approach:

> *"I think that out of court professionals including mediators and parenting coordinators should be able to draft their own agreements (therefore needing to have that training continue as part of their qualifications) and to take it one step further, I think that those professionals should be closing the loop of connecting their clients who have reached agreements/parts of agreements to the identified lawyers for ILA (whether it is for drafting of the agreement and ILA or just ILA on a drafted agreement) such that the messaging about the agreements/the tone and nature of the services leading to the agreements can be transitioned from professional to professional and not left to the client. So many clients are very confused about how to approach the execution and*

> *finalization of their agreements when it comes to the transition to ILA. I include the drafting of agreements and the transition of such drafted agreements, once a draft of such is reviewed and approved for transition by the clients, within my services and I directly connect the mediation clients to their lawyers of choice (and help them identify lawyers in the community who offer such services) by way of joint email attaching the draft agreement and any supporting documentation as may be needed along with a summary of the experience of our process as best as possible. I also direct the lawyer providing ILA to ask me questions as best as possible about the draft and the context/intention of any of its contents instead of solely asking the client or engaging in direct communications with the other lawyer to honour the clients' intention to minimize direct lawyer to lawyer communications/negotiations and to respect the tone and nature of out of court work right to the completion of a file."*

Other respondents noted that it can be advised to seek independent legal advice but clients may make their own choices and perceive this as unnecessary if they have a written document from mediation. One respondent suggested:

> *"that the legal community should be less paternalistic when it comes to families crafting agreements that work for them. I think wise caution that signing an agreement is legally binding is important, but if they agree to terms that work for them, and have worked hard in dispute resolution to get there, it should not be dismantled by overly cautious lawyers who may stand to benefit from further conflict. I support the case law that gives the power to families to decide and agree. Good legal counsel could find better ways to support this trend."*

C. Survey Findings – Code (Legal Advice)

Respondents were also asked to comment on potential amendments to the *Law Society of Saskatchewan Code of Professional Conduct* for lawyers which currently provides guidance when lawyers are acting as mediators. The amendments identified have been adopted in British Colombia following consultation[1] and elaborate guidance for lawyers with respect to family law mediation, arbitration, and parenting coordination.

The first amendment related to removing an existing Commentary in the *Code* which guides a lawyer acting as a mediator not to give legal advice, as opposed to legal information to the parties during a mediation process. When asked if there is support for rescinding this Commentary, 54% of respondents (26 responses) indicated support while 46% of respondents (22 responses) did not support this change.

Those indicating support for this potential amendment did not provide comments, other than to note that the distinction between legal information and advice can be challenging for clients to understand as they may interpret legal information as advice applying to their particular situation.

Those objecting to the change noted the importance of a separate role for independent legal advice and that a mediator should not provide legal advice. One respondent noted that adopting the change would amount to a two-tier system within the mediation field as between different

[1] For background information, refer to: Law Society of British Colombia, 'Discussion Paper: Lawyers as Dispute Resolution Professionals,' May 2007, available: https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/reports/ADRreport.pdf.

types of practitioners or create grey areas for clients. Respondents also clearly identified a distinction between acting as a mediator and acting as a lawyer in other contexts and that when advice is dispensed, they are no longer a neutral third party.

It was also raised that the current *Code* provision should be kept but amended to remove the phrase “generally” so it is clear that a lawyer acting as a mediator is not providing legal advice and remains neutral from start to finish.

D. Survey Findings – Code (Additional Guidance)

The second amendment involved adding additional commentary to the *Code* for lawyers when acting as mediators, arbitrators, or parenting coordinators. When asked if there is support for adding this commentary, 60% of respondents (29 responses) indicated support while 40% of respondents (19 responses) did not support this change.

Respondents supporting the addition of additional commentary for lawyers tended to focus on the provision related to a lawyer who has acted as a mediator in a family law matter being able to act for both spouses in a divorce action provided that all relief is sought by consent and both parties have received independent legal advice in relation to the matter.

Several respondents identified this as a helpful initiative that could reduce costs and streamline the process while also indicating it would be important that the clients understand that this is not required and they could proceed on their own. One respondent identified that it is rare to be able to act for two individuals without “things going sideways”.

Several respondents also queried the potential additional commentary that would place obligations on a lawyer acting as a mediator or arbitrator or parenting coordinator when participants are unrepresented, noting that “parenting agreements do not require” independent legal advice and mediation that does not address property should not be required to urge parties to obtain independent legal advice. One respondent noted that adults choosing a family dispute resolution process may also choose for themselves to obtain independent legal advice and might simply be informed of the consequences of failing to do so.

E. Survey Findings – General Comments

Lastly, respondents were asked if they had any further comments to share in relation to family dispute resolution in Saskatchewan. Over half of the respondents chose not to answer and those providing responses raised several points, including that ongoing dialogue with practitioners would be beneficial.

With respect to mediation, this was identified as the primary way parties are engaging in early family dispute resolution and support was expressed for this being a less costly way to resolve conflict and reduce adversarial court processes.

Reference to the Early Family Dispute Resolution Office offering oversight was viewed positively by one respondent as were the statutory requirements pertaining to family mediators. However, concern was expressed regarding the vagueness of the legislation with respect to timelines and costs for early family dispute resolution which can be used to delay and obstruct justice. Other

respondents highlighted costs being borne by clients and delay tactics stemming from mandatory early family dispute resolution and Judicial Case Conferences.

A suggestion to make one mediation session freely available as in civil litigation was proposed as was consideration for expanded exemptions. One respondent identified difficulty receiving an exemption for a client experiencing domestic violence while another suggested that if pursuing child support, a party should be exempt as it can be difficult to pursue after incurring the expense of an early family dispute resolution process, a Judicial Case Conference, and an application. One respondent raised increased funding for dispute resolution so long wait lists for mediation can be alleviated. Another respondent suggested four-way meetings with counsel should be added as an early family dispute resolution process.

With respect to regulation, a separation between lawyers as advocates and mediators was noted as important and that dispute resolution processes are distinct from litigation. One respondent identified that it may be beneficial to have a joint sub-committee for family dispute resolution professionals, whether lawyers or non-lawyers. One issue raised related to lawyers obtaining retainer fees from clients before they have engaged in an early family dispute resolution process and a suggestion that clients be provided with information about the early family dispute resolution process and a list of service providers. Finally, one respondent highlighted the recent *Anderson v Anderson* Supreme Court decision, noting that it "provides parameters for parties not wanting to use lawyers." As a clarification, this decision reviews the specific facts of the Anderson family situation, *The Family Property Act* in Saskatchewan and provides guidance on consideration for interspousal agreements.[2]

The Law Society is appreciative of the feedback and time taken to complete the survey by respondents and has benefited from many of the views expressed which have helped inform next steps regarding updates to the exemption for mediation and parenting coordination and the *Code* for lawyers.

Regulatory Change – Exemption for Mediation and Parenting Coordination

In consultation with the Dispute Resolution Office, Early Family Dispute Resolution Office, Family Law Information Centre, and ADR Institute of Saskatchewan, the exemption for mediation and parenting coordination has been modified as follows:

> (i) a person serving in a neutral capacity as a mediator or ~~conciliator~~ parenting coordinator provided:
> (A) the person is employed or contracted by the Government of Saskatchewan or is a member of a recognized professional dispute resolution association or regulatory association other than the Law Society of Saskatchewan; and
> (B) if a family mediator, the person meets statutory requirements set out in *The King's Bench Act, 2023* and *Regulations*; and
> (C) if a parenting coordinator, the person meets statutory requirements set out in The Children's Law Regulations, 2021;

Further, "recognized professional dispute resolution association or regulatory association" is defined in the *Law Society of Saskatchewan Rules* to mean, for the purposes of subrule 1002(1)(a)(i)(A), the following: ADR Institute of Canada or Saskatchewan; Family Mediation

[2] *Anderson v Anderson*, 2023 SCC 13, 481 DLR (4th) 1.

Canada; Mediate BC; Family Dispute Resolution Institute of Ontario; Ontario Association for Family Mediation; Saskatchewan College of Psychologists; Saskatchewan Association of Social Workers; and other organizations as may be recognized by the Executive Director (of the Law Society of Saskatchewan).

The comments received during consultation informed this revised amendment which brings alignment with the Early Family Dispute Resolution legislation and provides some level of assurance for oversight and quality standards for exempted mediators and parenting coordinators.

An exemption related to mediation and parenting coordination is necessitated as the activities of these professionals fall within the definition of the practice of law which appears in s.29.1 of *The Legal Profession Act, 1990* and references: "(a) giving advice or counsel to others with respect to their legal rights or responsibilities or the legal rights or responsibilities of others; as well as (b) drafting or completing legal documents or agreements that affect the legal rights of an entity or person … (d) negotiating legal rights or responsibilities on behalf of another entity or person."

Mediation and parenting coordination can encompass a wide spectrum of services and disputes. Individuals participating in these processes regularly enter into agreements to participate (e.g., ADR Institute of Canada Standard Form Agreement to Mediate) that can affect their legal rights. The exemption facilitates mediation and parenting coordination activities so that the public may access these services from a variety of service providers while also providing basic safeguards for the public by:

- requiring membership in a recognized professional dispute resolution or regulatory association that can provide a level of oversight; and
- reinforcing the statutory requirements related to family mediation and parenting coordination as areas of practice requiring specialized and ongoing education, training, and experience.

Mediators and parenting coordinators not meeting these requirements would be considered to be engaging in unauthorized practice and would raise public protection considerations where there is an inability or unwillingness by these practitioners to comply with these minimum conditions. The Early Family Dispute Resolution Office continues to recognize and provide oversight for family mediators and parenting coordinators.

Clarifications – Survey Responses (Confidentiality and Drafting of Agreements in Mediation)

Several issues raised in the survey are also clarified. For instance, there are a number of resources that can help families understand and support family dispute resolution:

- Family Dispute Resolution (Public Legal Education Association – Saskatchewan)
- Family Law Information Centre and Self-Help Kits (Government of Saskatchewan)
- Family Law Legal Information (Public Legal Education Association – Saskatchewan)

The Ministry of Justice provides a fact sheet regarding early family dispute resolution that notes participation is mandatory only if one or both parties in a family dispute want to proceed through court for a decision. The fact sheet also recommends asking a service provider if they are recognized by the Minister of Justice, what the process of dispute resolution will look like, expectations for participation, and the cost of the service.

The Law Society does not regulate family dispute resolution providers who are not licensed lawyers or Limited Licensing Pilot participants. This means the Law Society does not supervise their education, training, and qualifications, apply a code of conduct and ethical standards, provide a complaint and discipline process, nor mandate professional liability insurance.

To avoid unauthorized practice, the Law Society does set a minimum condition that requires that a mediator or parenting coordinator not regulated by the Law Society as a licensed lawyer is a member of a recognized professional dispute resolution association or regulatory association and meet statutory requirements set by the Government of Saskatchewan if providing family mediation or parenting coordination services through the Early Family Dispute Resolution program. Consumers are encouraged to discuss and confirm directly with a service provider:

- their education, training, and experience;
- if they are recognized by the Minister of Justice and which recognized dispute resolution or regulatory association they belong to;
- if they maintain professional liability insurance; and
- their fees and rates for services.

Confidentiality - Mediation

Parties can agree on whether an early family dispute resolution process such as mediation is confidential. Recourse for any breaches of confidentiality would be through civil litigation proceedings.

The Law Society recommends as good practice to document in writing the early family dispute resolution process adopted and related issues which may include parameters such as confidentiality, fees and expenses, and enforceability. It is noted that the ADR Institute of Canada Code of Conduct for Mediators provides guidance with respect to confidentiality.

Drafting – Mediation

Parties participating in mediation may reach agreement on issues that are documented by the mediator in writing, often termed mediation minutes, memoranda of understanding, meeting summaries, etc., although there is variation in practice and the terms used.

In the context of family law matters, legislation provides guidance for what may constitute a legally binding interspousal contract or agreement that involves property. *The Family Property Act* details considerations for a section 38 interspousal contract that requires independent legal advice and a section 40 agreement that is just between the parties. Whether an agreement between the parties without independent legal advice is legally binding or could be enforced through a court process will depend on the circumstances in each case as guided by relevant case law. As the Supreme Court of Canada noted in the *Anderson v Anderson* decision interpreting *The Family Property Act* (FPA) in Saskatchewan:[3]

> *"[b]ecause no lawyers were involved, the agreement is not presumptively enforceable, but can be considered by the court in determining whether to depart from equal distribution under s. 21… Given the respect for spousal autonomy reflected in both the legislation and the jurisprudence, unless the court is satisfied that the agreement arose from an unfair bargaining process, an agreement is entitled to serious consideration*

[3] *Anderson v Anderson*, 2023 SCC 13, at paras. 5, 8, and 9, 481 DLR (4th) 1.

> *under s. 21 of the FPA. Once the court is satisfied that an agreement is entitled to consideration, it may assess the substantive fairness of the agreement, in order to determine how much weight to afford the agreement in fashioning an order for property division. The weight to ascribe to the substance of the agreement will ultimately be determined by what is fair and equitable according to the scheme set out by the FPA."*

With respect to the function of a mediator in relation to "drafting or completing legal documents or agreements that affect the legal rights of an entity or person" (reference to section 29.1 of *The Legal Profession Act, 1990*), it is important that a mediator:

- Understand the limits of their education, training, and experience and professional liability insurance in relation to mediation and drafting of documents or agreements; and
- Comply with relevant guidance from their recognized professional dispute resolution association or regulatory association. For example, the ADR Institute of Canada Code of Conduct for Mediators specifies:

> *3.3 The Mediator shall not provide legal or professional advice to the parties. The Mediator may express views or opinions on the matters at issue, and may identify evaluative approaches, and where the Mediator does so it shall not be construed as either advocacy on behalf of a party or as legal or professional advice to a party.*
> *3.4 The Mediator shall, where appropriate, advise unrepresented parties to obtain independent legal advice. The Mediator shall also, where appropriate, advise parties of the need to consult with other professionals to help parties make informed decisions.*

Notably, in the ADR Institute of Canada Code of Conduct for Mediators, there is a positive obligation to advise parties to obtain independent legal advice where appropriate. Recognized professional dispute resolution or regulatory associations may offer additional guidance to mediators regarding limits to drafting and providing an agreement for signing and variations on types of agreements with special consideration for family law as articulated in sections 38 and 40 of *The Family Property Act* and the overall principle regarding the best interests of children.

Lawyers acting as mediators and governed by the *Law Society of Saskatchewan Code of Professional Conduct* are provided the following guidance to positively recommend independent legal advice prior to parties signing any contract or agreement:

> *"5.7-1[4] If, in the mediation process, the lawyer-mediator prepares a draft contract for the consideration of the parties, the lawyer-mediator should expressly advise and encourage them to seek separate independent legal representation concerning the draft contract."*

The Law Society of British Colombia has detailed factors in favour of recommending independent legal advice, including:

- one or more of the parties is relatively unsophisticated;
- there is a power imbalance between the parties;
- the lawyer-mediator has concerns about the fairness or reasonableness of the agreement;
- the subject matter of the agreement is complex or difficult and independent legal advice would operate as a helpful check on the viability of the agreement; or
- the lawyer-mediator has concerns about the enforceability or finality of the agreement.[4]

[4] Law Society of British Colombia, 'Discussion Paper: Lawyers as Dispute Resolution Professionals,' May 2007, p.28, available: https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/reports/ADRreport.pdf.

Regulatory Change – *Code of Professional Conduct* for Lawyers

The Law Society is also implementing changes to the *Law Society of Saskatchewan Code of Professional Conduct* for lawyers who are acting as mediators, parenting coordinators, or arbitrators. These changes are designed to assist lawyers to act effectively when taking on these roles as dispute resolution professionals. *The Legal Profession Act, 1990* contemplates this role for the Law Society, detailing in s.10 (v) and (v.1) that the Law Society may make rules regulating the provision of mediation services by members and regulating the provision of alternative dispute resolution services by members.

The Law Society reminds lawyers choosing to act in these roles of their duty to be competent as outlined in section 3.1 of the *Code* which requires the relevant knowledge, skills, and attributes appropriate to each matter undertaken whether in the context of mediation, parenting coordination, or arbitration.

Additionally, similar to the approach adopted in British Colombia following consultation, the Law Society views it as beneficial to provide professional guidance for lawyers acting as family law arbitrators, mediators, and parenting coordinators where they are performing some dispute resolution functions along with more traditional legal services. Often, the public will not distinguish between these functions and will view them as services provided by a lawyer or legal professional. Therefore, the public is better protected if there is guidance to assist with issues that can arise (e.g., disqualifications, self-represented parties, obligations, dual roles). Therefore, the Saskatchewan *Code* is being amended as indicated below, while noting that a requirement not to give legal advice when acting as a mediator remains:

5.7 LAWYERS AND MEDIATORS AND FAMILY DISPUTE RESOLUTION

Role of Mediator

5.7-1 A lawyer who acts as a mediator must, at the outset of the mediation, ensure that the parties to it understand fully that:

(a) the lawyer is not acting as a lawyer for either party but, as mediator, is acting to assist the parties to resolve the matters in issue; and

(b) although communications pertaining to and arising out of the mediation process may be covered by some other common law privilege, they will not be covered by solicitor-client privilege.

Commentary
[1] In acting as a mediator, generally a lawyer should not give legal advice, as opposed to legal information, to the parties during the mediation process. This does not preclude the mediator from giving direction on the consequences if the mediation fails.
[2] Generally, neither the lawyer-mediator nor a partner or associate of the lawyer-mediator should render legal representation or give legal advice to either party to the mediation, bearing in mind the provisions of section 3.4 (Conflicts) and its commentaries and the common law authorities.

[3] If the parties have not already done so, a lawyer-mediator generally should suggest that they seek the advice of separate counsel before and during the mediation process, and encourage them to do so.

[4] If, in the mediation process, the lawyer-mediator prepares a draft contract for the consideration of the parties, the lawyer-mediator should expressly advise and encourage them to seek separate independent legal representation concerning the draft contract.

[5] A lawyer who has acted as a mediator in a family law matter may act for both spouses in a divorce action provided that all relief is sought by consent and both parties have received independent legal advice in relation to the matter.

Family Dispute Resolution
5.7-2 In this section:

"family dispute resolution process" means the process of family law mediation, family law arbitration or parenting coordination;

"family law arbitration" means a process by which participants submit issues relating to their marriage, cohabitation, separation or divorce to an impartial person (the family law arbitrator) for decision;

"family law mediation" (a) means a process by which participants attempt, with the assistance of an impartial person (the family law mediator), to reach a consensual settlement of issues relating to their marriage, cohabitation, separation, divorce, children, or finances, including division of assets;
"parenting coordination" means a process by which an impartial person (the parenting coordinator), by agreement of participants or by court order, mediates a dispute with respect to the implementation of an agreement or a court order respecting the allocation of parenting time or parenting responsibilities, or contact with a child or makes a determination respecting that dispute that is binding on the participants;

"participant" means a person with issues relating to marriage, cohabitation, separation, or divorce who has agreed to the intervention of an impartial person as family law mediator or arbitrator or parenting coordinator or is subject to a court order appointing such a person to assist in the resolution of such issues.

Commentary

Disqualifications

[1] A lawyer is disqualified from acting for any participant in the following circumstances:

(a) If a lawyer or a partner, associate or employee of that lawyer has previously acted or is currently acting for any of the participants to a family dispute resolution process in a solicitor-client relationship with respect to any matter that may reasonably be expected to become an issue during the family dispute resolution process, that lawyer may not act as a family law mediator or arbitrator or parenting coordinator for any of the participants;

(b) If a lawyer has acted in a family dispute resolution process for the participants, neither that lawyer nor any partner, associate or employee of that lawyer may

act in a solicitor-client relationship for either participant against the other participant;

(c) If a lawyer or a partner, associate or employee of that lawyer has acted in a family dispute resolution process for the participants, neither that lawyer nor a partner, associate or employee of that lawyer may act for or against any person if to do so might require the lawyer to disclose or make use of confidential information given in the course of the family dispute resolution process.

Obligations of family law mediator or arbitrator or parenting coordinator when participants unrepresented

[2] A lawyer who acts as a family law mediator or arbitrator or parenting coordinator for participants who are unrepresented must:

(a) urge as may be appropriate each unrepresented adult participant to obtain independent legal advice or representation, both before the commencement of the family dispute resolution process and at any stage before an agreement between the participants is executed;

(b) take care to see that the unrepresented participant is not proceeding under the impression that the lawyer will protect their interests;

(c) make it clear to the unrepresented participant that the lawyer is acting exclusively in a neutral capacity, and not as counsel for either participant; and

(d) explain the lawyer's role in the family dispute resolution process, including the scope and duration of the lawyer's powers.

Obligations of family law mediator or parenting coordinator

[3] Unless otherwise ordered by the court or through legislation, a lawyer who acts as a family law mediator or parenting coordinator must enter into a written agreement with the participants that includes at least the following provisions:

(a) an agreement that the lawyer, throughout the family law mediation or parenting coordination, is not acting as legal counsel for any participant;

(b) an agreement that the lawyer may disclose fully to each participant all information provided by the other participant that is relevant to the issues;

(c) with respect to family law mediation, an agreement that, subject to rule 3.3-3A, the family law mediation is part of an attempt to settle the differences between the participants and that all communications between participants or between any participant and the family law mediator will be "without prejudice" so that no participant will attempt:

(i) to introduce evidence of the communications in any legal proceedings, or

(ii) to call the family law mediator as a witness in any legal proceedings;

(d) with respect to parenting coordination, an agreement that no communications between the parenting coordinator and a participant, the child of a participant or a third party are confidential, except that subject to rule 3.3-3A the parenting coordinator may withhold any such information if, in the opinion of the parenting coordinator, the disclosure of the information may be harmful to a child's

relationship with a participant, or compromise the child's relationship with a third party;

(e) an acknowledgment that the lawyer must report to a Ministry of Social Services office or First Nations Child and Family Services agency any instance arising from the family law mediation or parenting coordination in which the lawyer has reasonable grounds to believe that a child is in need of protection;

(f) an agreement as to the lawyer's rate of remuneration and terms of payment;

(g) an agreement as to the circumstances in which family law mediation or parenting coordination will terminate.

Obligations of family law arbitrator

[4] A lawyer who acts as a family law arbitrator and the participants must, before the lawyer begins their duties as family law arbitrator, enter into a written agreement that includes at least the following provisions:

(a) an agreement that the lawyer, throughout the family law arbitration, is not acting as legal counsel for any participant;

(b) an acknowledgment that the lawyer must report to a Ministry of Social Services office or First Nations Child and Family Services agency any instance arising from the family law arbitration in which the lawyer has reasonable grounds to believe that a child is in need of protection;

(c) an agreement as to the lawyer's rate of remuneration and terms of payment.

Lawyer with dual role – mediator and arbitrator

[5] A lawyer who is empowered to act as both family law mediator and family law arbitrator in a family dispute resolution process must explain the dual role to the participants in writing and must advise the participants in writing when the lawyer's role changes from one to the other.

Lawyer with dual role – parenting coordinator and mediator

[6] A parenting coordinator who may act as a family law mediator as well as determine issues in a family dispute resolution process must explain the dual role to the participants in writing and must advise the participants in writing when the lawyer's role changes from one to the other.

The changes outlined in relation to the exemption for mediators and parenting coordinators and lawyers acting a mediators, parenting coordinators, and arbitrators will be made effective **January 1, 2025**, having been approved by the Board of the Law Society as well as in consultation with the ADR Institute of Saskatchewan, Dispute Resolution Office, Early Family Dispute Resolution Office, and Family Law Information Centre.