

Concept & Techniques of Mediation

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“.....both were happy with the result, and both rose in public estimation.... I realized that the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing out private compromises of hundreds of cases. I lost nothing thereby - not even money; certainly not my soul.”

Mahatma Gandhi

Why Mediation?

The concept of mediation is ancient and deep rooted in our country. In olden days, disputes used to be resolved in a panchayat at the community level. Panches used to be called Panch Parmeshwar. Now we have grown into a country of 125 crore people. With liberalization, globalization and tremendous economic growth there is an explosion of litigation in our country. Though our judicial system is one of the best in the world and is highly respected, but there is still a lot of criticism on account of long delays in the resolution of disputes in the courts of law. A point has now been reached when even an honest litigant is wary of approaching the court for a decision of his dispute. Hence, we have turned to alternative forms of dispute resolution.

We tried the system of Lok Adalats and gave statutory recognition to it through the Legal Services Authority Act, 1987. But, it is only a miniscule amount of litigation that has gone to the Lok Adalats, and even those cases are mainly compensation cases, house tax matters or small recovery disputes of big companies where only arithmetic calculations are to be made and there is hardly any dispute about the question of liability. The Arbitration & Conciliation Act, 1996 replaced the Arbitration Act, 1940 but even that has been unable to contain litigation. This is because disputes can go to arbitration only if there is an arbitration agreement between the parties; and experience has shown that in a very large percentage of cases, the aggrieved party files objections to the award, and that sometimes takes several years for disposal.

The legislature, by the Code of Civil Procedure (Amendment) Act, 1999, amended Section 89 of the CPC with effect from 1.7.2002 whereby mediation and judicial settlement were envisaged as modes of settlement of disputes. The amendment in Section 89 was made on the recommendation of the Law Commission of India and the Malimath Committee. It was suggested by the Law Commission that the court may require a party to a suit or proceeding to appear in person with a view to arrive at an amicable settlement of the dispute between the parties and make an attempt to amicably settle the dispute between them. It is now obligatory for the court after framing the issues to refer the dispute for settlement either by way of

arbitration, conciliation, mediation or judicial settlement. It is only when the parties fail to get their dispute settled through any of the alternative dispute resolution methods that a suit could proceed further. Thus, Section 89 has been introduced to promote alternative methods of dispute resolution.

In fact mediation is widely used as an alternative to litigation for quick resolution of disputes in USA, European countries and in Australia, particularly in commercial and matrimonial disputes.

Mediation started in USA in the late 1970's. Labour relations mediation began much earlier, which was limited to collective bargaining. Mediation became very popular in USA and European countries in 1990's. In our neighbouring countries like Pakistan, Bangladesh and Sri Lanka, mediation started earlier than in India. In Ahmedabad, a trust called Amlead was formed and registered by lawyers who opened a Mediation Centre on 27.7.2002. A Mediation Centre was established in Madras High Court in April, 2005. In Delhi, we started mediation only in August, 2005. Hon'ble Mr. Justice Y.K. Sabharwal, then Judge of the Supreme Court (former Hon'ble Chief Justice of India) formally inaugurated the Mediation Centre at Tis Hazari Court, Delhi on 24.10.2005. Since then, our results have been so very encouraging that another Mediation Centre was formally inaugurated on 5.5.2006 in Karkardooma Courts complex. As on 05.12.2007 as many as 5009 cases have been referred to the Mediation Centre at Tis Hazari and 2602 cases have been referred to the Mediation Centre at Karkardooma. The number of settled cases (including connected cases) is about 5782.

What is Mediation?

In the adversarial system, a litigant becomes insignificant, almost a non-entity. He is a mute spectator to the legal battle fought on his or her behalf, sometimes on grounds that are too technical.

Mediation is a negotiation process in which a neutral third party assists the disputing parties in resolving their disputes. A Mediator uses special negotiation and communication techniques to help the parties to come to a settlement. The parties can appoint a Mediator with their mutual consent or the Court, in a pending litigation, can appoint a Mediator. Mediation always leaves the decision making power with the parties. The Mediator does not decide what is fair or right, does not apportion blame, nor renders any opinion on the merits or chances of success if the case is litigated. Rather the Mediator acts as a catalyst to bring the two disputing parties together by defining issues and limiting obstacles to communication and settlement.

Why Do We Need Mediation?

We need mediation because it is a good method of resolving certain kinds of disputes especially those involving relationships. Relationships can be personal, business, contractual or social. These disputes are not easily resolved with the litigation process.

What are the Problems with Litigation?

It is expensive, has huge delays, aggravates the tension and fighting between parties, workable solutions are not arrived at and the dispute does not end with the verdict.

Is Mediation Used? Is it Working?

- (a) Mediation is extensively used abroad especially in the United States of America, England, Europe, Australia, Singapore and Hong Kong amongst other countries.
- (b) It is applied in a range of disputes from small causes and community disputes to business and contractual matters, from family matters to complex high value commercial disputes.
- (c) The Success rate of mediation is high – the estimates of the percentage of cases in which it has worked ranges from 50% to 80%. Considering that a successful mediation is one where both parties are satisfied with the result that is surely a high figure.
- (d) It is now becoming standard procedure for a mediation clause to be inserted in the dispute resolution section of agreements as a first try method before arbitration or litigation.

What are the Risks of Mediation?

- (a) One of the risks is that it can be used to find out confidential information from the other side. For this reason the requirements of confidentiality must be strongly stressed and protected. Parties must be cautioned against revealing confidential information in joint sessions. As regards communication with the mediator, wherever the confidential nature of information needs to be maintained, the mediator must be clearly told so.
- (b) When there is severe imbalance in the negotiating strength between the parties that may be reflected in the agreement. For this reason, there is a caution against mediating cases where such imbalance is present.
- (c) An unethical mediator could abuse the position of trust and collude with one party to deprive the other. Just like any other office of trust, this too can be abused. However, in the case of mediation, a party can withdraw from it any time without adverse consequences. That is not possible in the case of a Judge or arbitrator. Secondly, parties are advised to attend the mediation with their lawyers who can protect their interests.

In some jurisdictions (notably in US), Codes of conduct and ethics have been drawn up for mediators, as also a certification procedure. This will provide for disciplinary action like withdrawal of certification. Fourthly, a mediator who is suspect on integrity will not get much business. The most important aspect here is that mediators should be drawn from those who possess integrity and credibility.

How Mediation is Different from Litigation and Arbitration

- a) In litigation, the Judge decides the issue and parties are bound by the decision subject to the right of appeal/revision etc. In mediation, the parties themselves take the decision to find a solution to end the dispute.
- b) In litigation the focus is usually on the past and on determining liability. In mediation the focus is on the future and improving the situation to the extent possible.
- c) Litigative proceedings tend to be contentious and procedural and do not yield quick results. Mediation stresses co-operation and is solution oriented.
- d) Arbitration proceedings are also adversarial in nature, like litigation. The difference is that parties can choose their arbitrators and the setting can be less formal. Arbitrators also give awards in favour of one party and against the other.
- e) Mediation avoids the win-lose equation and instead tries to achieve a win-win solution,

which puts an end to the dispute.

Comparison of Mediation and Lok Adalat

1. Forum [where it takes place]

Mediation takes place in a private conference room. Only the parties, their advocates or other persons helping them or accompanying them or involved in the mediation process are present. Lok Adalat usually takes place in court premises when numerous cases referred to Lok Adalat are listed before different conciliators. Often more than 25 cases are placed before each group of conciliators. Lok Adalat proceedings are held in public, in the presence of all persons assembled to attempt to settle their cases.

2. Morphology [Structure] of the process.

Mediation is a structured process featuring introductory comments by the mediator, [a] detailed exchange of information in a joint session, a series of separate and private meetings with the parties and an agreement stage.

In Lok Adalat, it is customary for the conciliators to talk with the parties, with their advocates present, to help persuade the parties to settle their case. The exchange of information is limited. The discussion of possible terms, likewise, is limited. If conciliators talk with any party privately, it is generally only once, due to time constraints.

3. Who controls the Process?

In mediation the mediator controls the process by following the stages of mediation process and deciding the order or presentation, the length of presentation, setting the agenda, etc. In Lok Adalat, the conciliators determine how the process will be handled, which party speaks and when.

4. Who selects the neutral third party?

In mediation, generally the parties decide who will serve as the mediator.

In Lok Adalat, the parties do not have any role in deciding who the conciliators will be. The parties appear before those conciliators to whom their case is assigned. The parties do not have the freedom to select conciliators of their own choice.

5. Time spent in the process.

In mediation, parties are afforded reasonable time to negotiate the agreement. This may involve a number of hours or days. Mediation may take place over a course of time to accommodate the parties and the complexities of a dispute.

In Lok Adalat, there are usually strict time constraints. The agreement has to be reached in fixed amount of time as the tenure of the conciliators is only for the given day. If there is no settlement on that day, the case proceeds to trial. There is no continuity and follow up by the conciliators.

6. Who controls the outcome?

In mediation, the parties control the outcome and work together in arriving at a settlement with the assistance of the mediator.

In Lok Adalat, the parties may usually agree to disagree with a settlement proposed by

conciliators. However, experience reveals that, in practice, conciliators and advocates of the parties try to persuade the parties to settle.

7. How is a dispute referred to mediation? Who pays for the expenses?

In mediation, reference to mediation is made by court order, by consent of the parties, or pursuant to a contract clause, etc. The parties pay for mediation or the court pays for mediation, if the programme provides funds.

In Lok Adalat, reference is made mostly by consent of the parties or their advocates. Sometimes, a case placed before Lok Adalat by a court order. Parties may opt to appear or not to appear. Parties do not pay for Lok Adalat expenses. Conciliators are free volunteers. Arrangements or organisational expenses are mostly made and funded by Legal Service Authorities.

8. Confidentiality

Mediation is a private process. Without consent of the parties, neither the parties nor the mediator can disclose the statements made during mediation, or documents prepared for mediation, such as mediation work.

In Lok Adalat, the process is generally not private. It takes place openly and in presence of all others who have assembled for their respective cases.

9. Depth of Analysis.

In mediation, the factual and legal analysis is detailed and in depth.

Due to time constraints, conciliators in Lok Adalat are rarely able to engage in an extensive discussion of a claim [e.g., the precise nature of the claim, the factual background and damages and possible settlement terms]

10. Types of disputes resolved.

In Mediation, all types of disputes, including commercial disputes, contract disputes personal injury claims, real estate, probate etc., can be negotiated and resolved.

In Lok Adalat, mainly motor accident claims and insurance claims are tackled. Commercial and other disputes which require creative solutions are rarely referred to Lok Adalat.

11. Role of a neutral.

In mediation, the neutral persons works in partnership with the parties to assist them in finding a solution that meets with their needs, interests, priorities, future relationship, etc.

In Lok Adalat, conciliators attempt to persuade the parties to settle their case. There is no attempt to work together with the parties solutions that meet with the parties' individual needs, interests, priorities, future relationship etc.

12. Role of the parties.

In Mediation, parties play an active role in presenting factual background, discussing positions, developing offers and counter offers, making decisions , etc.

Parties play no active role in Lok Adalat. They play no active role in presenting information, identifying interests, making offers of settlement, responding to offers of settlement and

shaping the terms of settlement.

13. Role of Advocates.

In mediation, advocates play an active role, presenting the case, discussing positions, developing offers and counter offers, and advising clients regarding terms of settlement.

In Lok Adalat, advocates play a part in advising their clients to settle if they consider it advisable to settle.

14. Range of Possible Outcomes.

In mediation, parties are not bound by traditional legal remedies. Highly creative, innovative and nontraditional solutions are possible. In addition, it is possible to build future relationship by re-writing contracts, re-structuring relationship, etc.

Usually, in Lok Adalat the case is reduce to monetary damages. Imaginative solutions involving non-monetary or non-traditional remedies are not usually considered.

Stages of Mediation

1. INTRODUCTION

A Mediator introduces himself and the parties and explains the process of mediation. For instance where an Advocate is assisting a party and he/she has also brought some of his/her relations for the negotiation, the Mediator has to explain the role, which can be played by the Advocate and the relation/friend who has been brought in by the party. The Mediator must dispel the doubts in the mind of any of the party that a lawyer or a relation cannot participate in the mediation.

(i) **Establish Neutrality:** It is very important for the Mediator to exhibit his neutrality to the parties and the dispute. This can be done by very carefully using appropriate words, body language and making appropriate eye contact that shows equal treatment to the parties. A Mediator should sit squarely and by his conduct should not show any preference to one or the other side of the table undue eye contact to be avoided. A Mediator should avoid wishing the disputing parties or their Advocates in the waiting area before the first meeting, even if either of the parties is known to him or her because this may give a wrong signal to the opposite party. Of course, the Mediator must disclose any previous contact with any particular party but that can be done while explaining the process of mediation. A Mediator must always avoid calling a party by the first name because the opposite party may misconstrue it.

A Mediator should prefer to use neutral terms. For example, in a suit for breach of contract for supply of certain goods, the Mediator can describe it as a dispute with regard to a contract for supply of said goods instead of a case of breach of contract. Similarly, a suit for damages can be better described as a suit for compensation.

A Mediator should also show neutrality with regard to the date, venue and timing of mediation. If a Mediator asks for the convenient date from one of the parties, the other party may misconstrue it. Therefore, a Mediator can fix a date either as per his own diary, subject to the convenience of the parties, or can ask both the parties simultaneously to suggest a date and time which may be convenient to both of them.

(ii) **Describe the Role of a Mediator:** A Mediator must tell the parties that his role is simply

to assist them to come to a settlement which may be acceptable to all of them. Thus, his role is only facilitative and is not to decide the dispute between the parties. He should avoid early evaluation of the dispute even if requested by either of the parties by telling them that he is yet to get the complete information.

(iii) **Address Confidentiality:** A Mediator must explain to the parties/participants that the mediation proceedings are confidential so that they may feel more comfortable in giving their options towards resolution of dispute. A Mediator can draw the attention of the parties to the statute or the rules or the agreement whereby the proceedings are confidential. A Mediator should also tell the parties that they can disclose any confidential information during a caucus (private meeting) to be kept secret by the Mediator from the opposite party for coming to a settlement which may be acceptable to all the parties.

(iv) **Establish a Conducive Environment and Control over the Process:** A Mediator should be calm and relaxed during the mediation. He should be in complete control of the proceedings and should diplomatically handle any interruption without giving an indication to any party that he/she is not being given adequate attention.

While a Mediator is delivering the introduction or if one of the parties is presenting his or her point of view and the other party interrupts, a Mediator can request the said party to make a note of the point and that he (the Mediator) would be getting back to him in just a short while.

(v) **Generate a Momentum Towards an Agreement:** A Mediator should develop a positive frame of mind in the parties by expressing hope that if we work on the dispute, we may be able to come to a settlement which we would normally come to through hard work.

(vi) **Ground Rules:** Take an assurance that each and every party has to respect each other during the proceedings. One party shall not interrupt the other in the proceedings.

(vii) **Determine whether the Mediation Process has been Understood:** Enquire from the parties if they have any question or any doubt about the mediation process.

2. JOINT SESSION

Mediator's Goals

- Gather information about factual background.
- Learn about parties' claims, defence, arguments and positions.
- Gather information about parties' underlying interests.
- Manage interaction between parties.
- Maintain environment that is conducive to constructive negotiations.
- Elicit information by k each party if he / she has got any other point.
- Allow parties to give full information of facts
- Joint session to be done coolly and not to rush through - because both the parties will come to know of the stand of the respective parties in full view and this will enable the Mediator during negotiation in a separate session.
- Remain neutral - Do not give any idea to any party about the merits and demerits of a case.

Mediator's Dos & Donts

- Active listening - A good Mediator is a very active listener.
- Ask questions that bring out desired information (open-ended, clarifying closed questions that bring out underlying interests, fact-based questions, etc.)
- Manage outbursts and interruptions with acknowledgment. Acknowledge the point of feeling.
- Don't jump to conclusion.
- Don't rush to find a solution.
- Understand that, for most people, their perceptions equal their reality. To them, their perception is a fact.

- Understand that two people can perceive a situation differently and they can both be right.
- Let go of your desire to talk.
- Be careful in note taking.
- Be mindful of your body language and the speaker's body language.
- Minimize interruptions.

3. CAUCUS or SEPARATE SESSION

Purpose: In caucus parties get the chance to vent out their charged up feelings and emotions. A Mediator should not talk negative about any party. It often happens that a novice mediator starts taking sides and has sympathy with the parties, which is not conducive to the mediation process and ultimately embarrasses the Mediator.

- A Mediator explains confidentiality to the extent requested. Parties may discuss confidential information and issues.
- Gather information by asking more questions – Number of separate sessions will depend from case to case.
- Parties are encouraged to invent settlement options.
- Possibility to settle the case to be enquired from the parties.
- Strong on facts, soft on parties. (For example in a compensation case, a Mediator can ask the question “Do you have the medical bills?” (Defendant has raised the question of an exaggerated bill)“Do you have any other document” (Never tell a party that he cannot be believed and that if he had received the treatment he must be in possession of the bills or documents)

Agreement:

- Orally confirm a settlement in a separate session with the parties.
- Write down the terms of the settlement.
- Confirm the settlement in a joint session with both the parties.
- Who can draft agreement, parties, their Advocates or the Mediators?
- To be signed by the parties.
- Terms of Agreement - Clear, complete, concise, specific (give date) preferably in active voice.

Closing Comments:

It has been noticed that whenever the parties take an adjournment to draft the agreement as

per the terms settled during mediation, there has been a rethinking on the part of one or the other party to gain some more advantage. Experience has also shown that in some cases the agreement has failed. Even if an adjournment has to be granted, it should be preferably scheduled on the next day or in a couple of days – try to draft the agreement yourself but at the same time make sure about the provisions of law.

Approaches to Negotiations

There are two types of approaches to negotiations, that is, competitive and cooperative. A competitive negotiator may be aggressive, hostile, uncompromising while a cooperative negotiator may be accommodating, straightforward and courteous. A good negotiator mixes these approaches according to the circumstances of the negotiations. If a negotiator is too docile, he may not get a good bargain.

Types of Bargaining Used in Mediation

(i) **Rights-based Bargaining:** It is a customary and traditional form of bargaining in which the parties' primary focus is on right and wrong (for example, who violated the statute, who breached the contract, who was negligent). It is blame-oriented analysis.

(ii) **Positional Bargaining:** It is also a customary and traditional form of bargaining, in which the parties focus on their legal positions and offer to settle. It is often combined with right based bargaining (for example my client's claim is worth Rs.1 lakh as your client was 100% at fault for injuries).

(iii) **Distributive Bargaining:** This type of bargaining focuses on the allocation of fixed or limited resources between the parties. It is often referred to as "dividing the pie", where the "pie" represents a fixed amount of money, property, assets, etc. (For example, the assets of an estate). Distributive bargaining is also referred to as "zero sum" bargaining, because for each amount of resources received by one party, the other party loses the same amount. (Suit for partition, petition for grant of probate of Will, suit for dissolution of partnership and rendition of accounts etc. would come under distributive bargaining).

(iv) **Integrative Bargaining:** In this type of bargaining, a Mediator expands the resources that are the subject of negotiations by introducing the possibility of traditional additional resources that are outside the framework of initial negotiations. (For example, 18th camel, that is 1/2, 1/3rd and 1/9th of the camels).

(v) **Interest-based Bargaining:** In interest based bargaining, the focus shifts from law to the facts and underlying interests of the parties to develop terms of settlement that produce mutual gains (for example division of orange). It is a three-step process in which a Mediator (a) identifies the underlying interests of the parties, (b) prioritizes their interests (using information generated from the parties), and (c) develops settlement terms that promote the most important interests of the parties.

Interest based versus Right based Bargaining

A commercial mediation or even compensation mediation normally starts on the basis of right-based mediation. Like the plaintiff may have filed a suit for recovery of damages amounting to Rs. 1 lakh but he may be ready to accept Rs. 50,000/- as a settlement. The right-based bargainer may sometimes bring the mediation to an impasse and the Mediator must cleverly move towards interest based bargaining in order to save mediation.

Communication Technique Used in Mediation

Restatement: Restatement is a communication tool used frequently by the mediators to ensure that the mediator has accurately heard their statements. As the name suggests, restatement consists of mediators repeating of a party's point(s), at times using same or similar words as the party. This technique gives the party confidence that the mediator has accurately heard the party and noted the party's point. Restatement usually focuses on statement made by a party about facts, law and position.

Example :

Party : "I am not at fault because I delivered the product on time on June 16, 2006"

Mediator : Your position is that you are not liable because you carried out the terms of agreement by delivering the product on June 16, 2006.

Reflection: Reflection is a communication technique that is similar to restatement, except that reflection involves a mediator repeating of a party's statement about thoughts, feeling and emotions.

Example

Party : "I am frustrated because the other party delayed payment of the money I gave to him."

Mediator: "If I am hearing you correctly, you are frustrated about the timing of payment."

Summarizing: "Summarizing" is a technique used by a Mediator to briefly, clearly, and accurately re-state the essence of statements by a party or advocate regarding issues, positions, or proposed terms of settlement.

- In summarizing, a Mediator must be careful to:
- Be accurate
- Be brief
- Re-state the issues, positions, or terms in words that are neutral
- Be complete

Neutral Re-Framing: Neutral re-framing is the restatement by a Mediator, in neutral words, of a comment or position expressed by a party or his or her advocate. Using neutral re-framing, a Mediator attempts to extract the essential content of a statement, leaving out inflammatory or highly charged words. The Mediator's restatement is usually made for the purpose of re-phrasing the comment in terms that are clear and inoffensive. Neutral re-framing also may be used to focus the parties' attention on a particular aspect of the statement or position offered by a party.

Neutral re-framing may be used in a variety of situations:

- When a party or advocate makes a statement that is highly adversarial
- When a party or advocate uses words that are inflammatory
- When a party or advocate engages in a personal attack on another person

For instance, in a suit for recovery of Rs. 10 lakhs, the defendant may say in a caucus that he shall not pay a penny over and above Rs. 5 lakhs and he can see the plaintiff in Court. A Mediator can reframe the offer by removing the word "not a penny" and "over and above" and that "he can see the plaintiff in Court".

Re-Directing: “Re-directing is a communication technique used by a Mediator to shift the focus of a party from one subject to another. Re-directing may be used to:

- Focus on details.
- Re-focus on general issues, party expectations or goals.
- Respond to a hostile, inflammatory, or highly adversarial statement by a party or attorney.

Setting an Agenda: “Setting an agenda” is a communication technique used by a mediator to establish the order in which issues, positions, claims, defences, or proposed settlement terms will be addressed. Setting an agenda may be used to :

- Organize information.
- Determine the priority and relative importance of issues to a party.

Deferring: “Deferring” is a communication technique used by a Mediator to postpone a response to a question or statement by a party. It may be used in the following situations:

- Where a party or his or her advocate requests a premature evaluation. (It is too early, yet to get full facts).
- To follow an agenda established by the Mediator.
- To gather additional information.
- To de-fuse hostile, inflammatory, or highly adversarial statement.
- To break an impasse.

Acknowledgment: “Acknowledgment” is a communication technique used by a Mediator to reflect back a person’s statement or position, in a manner that recognizes the perspective of the party who expressed the statement or position. One purpose of acknowledgment is to convey that the Mediator has accurately heard and understood the statement/position. Another purpose of acknowledgment is to convey that the Mediator understands the importance of the statement/position of the party.

Empathy without Reinforcement: Often, it is a Mediator's responsibility to express understanding and empathy, without expressing agreement or disagreement with a party. Words and phrases that express empathy without reinforcement include;

- I understand your position.
- I see what you are saying.
- I hear your point.

Words and phrases that, if used improperly or over-used, may lead a party to believe a Mediator agrees with him / her include:

- Yes
- Okay
- Uh-huh
- Silence (for example, after a party says, “Anybody would do the same thing under the circumstances”)

In addition, certain gestures and body movements may convey agreement, including nodding the head up and down.

Finally, passive information gathering by a Mediator may convey the impression to the

speaker that the Mediator agrees with the party's comments (for example, allowing another person to have complete control of the agenda, scope, and degree of detail when relating factual background and positions).

Use of Apology in Mediation

Sometimes apology plays a very important role in resolution of a dispute between two warring parties. A plaintiff may be hurt on account of an unreasonable conduct of the defendant taking the matter to the Court. The Mediator, therefore, has to use his/her intuition to find out if it would be helpful if one or both sides make an apology. The timing and sincerity of apology is crucial.

For instance, in a suit for damages in a motor vehicle accident or in a criminal case under Section 279/338 IPC, the plaintiff may be having a grievance that the defendant had fled the spot after the accident and had not even cared to take him to the hospital. The apology in addition to some compensation may prove very vital in settlement of the dispute.

An insincere apology, however, is worse than none at all. As a practical matter a mediator should never suggest an apology to the plaintiff without having already confirmed with the defendant that one is available and would be made if the plaintiff is happy.

Disputes where Mediation is Appropriate

- Parties desire a negotiated outcome
- Parties have an on-going relationship (family, business, other)
- Merits of case make a favourable judgment unlikely
- Litigant does not want to appear as a witness
- Costs of trial exceeds projected value of the case
- Parties want prompt resolution
- Parties want control over the outcome
- Opportunity to develop creative non-traditional remedies.
- Confidentiality/Privacy is desired by the parties.

Disputes where Mediation is not Appropriate

- Parties refuse to negotiate
- Parties want a judicial determination
- Parties want public airing of the dispute
- Parties want to establish legal precedent
- Delay in resolution benefits party
- Parties do not have sufficient information.
- Where an order of Court is necessary to enforce a right.
- Serious criminal offences.
- Cases which are prohibited from being settled through ADR, such as tax disputes.

Types of Disputes which can be Referred for Mediation

- Family Disputes (divorce, custody, visitation)
- Commercial disputes
- Dispute between neighbors (boundary disputes, noise, animal control)

- MACT/Insurance claim
- Copyright, Trademark disputes
- Billing disputes with public sector companies

Why Should Business Community Consider Mediation?

Mediation is very effective when there is a question of reputation of a big company involved in any dispute. For instance, there may be presence of some foreign substance in a bottle of soft drink. The soft drink company in order to avoid any adverse publicity would never like the dispute to go to the court and would try to settle the dispute to control rumors about the product.

A dispute between the employees and a business house and between a contractor and the business house are also best settled in mediation in order to avoid disruption in the work/business and in order to maintain the continuing relationship.

Stage at which Mediation can be Tried

Mediation can be tried before trial, during trial or even during pendency of the appeal.

Mediation *viz-a-viz* Traditional Litigation

There is no conflict between mediation and court trial. Some cases need to be litigated whereas other needs to be mediated. Thus, mediation is complimentary to the court proceedings and is not opposite to the Court proceedings. That is why Section 89 gives mediation as one of the methods for the resolution of a dispute in cases instituted in the Court.

Choice of Mediator

As per Mediation and Conciliation Rules framed by the Delhi High Court, retired Judges of the Supreme Court of India, retired Judges of Delhi Court, retired Judges of Delhi Higher Judicial Service, Serving officers of Delhi Higher Judicial Service, a Legal Practitioner with at least 10 years service at the bar, experts or professional with at least 15 years of standing are eligible to be empaneled as Mediators in a court annexed mediation. Otherwise, the parties can decide and choose any person to mediate any dispute between them which has not gone to the court.

Brainstorming: “Brainstorming” in mediation process involves the following:

- Inventing / Generating Options for an agreement.
- Evaluating Options for an agreement.
- Identifying the issues for resolution
- Focusing party on their long term interest.
- Getting parties to be realistic about their case especially its weakness
- Making them examine their alternatives to settlements.
- Giving them freedom to create options for settlement.
- Refining their suggestions and reaching agreement.

Lateral Thinking: “Lateral thinking” is a type of thinking that is creative, innovative, and

intuitive. Lateral thinking is non-linear and non-traditional. Mediators use lateral thinking during the brainstorming process to develop terms of agreement that further the interests of the parties. Lateral thinking is often contrasted with logical thinking, which also plays an important role in mediation. Logical thinking is linear, traditional, rational, and fact-based. Mediators use logical thinking to analyze facts, to assess liability, and to understand the positions of the parties.

Impasse or Dead Lock: This occurs due to following reasons:

- Ultimate acknowledgment of failure
 - Failure of participants to reach an Agreement.
- Steps which can be taken by Mediator
- Alert the participants
 - Inform parties/Lawyers in caucus meetings
 - Solicit any 'last ditch' efforts.
 - Talk with lawyers apart from their clients
 - Brainstorm on final settlement offers
 - Before declaring an impasse, bring parties and lawyers in general session and seek final offers.

Origins of Impasse

- Emotional
 - o Personal animosity / mistrust
 - o Vengeance
 - o Pride/ego/fear of loosing face.
 - o Fear of change.
- Substantive
 - o Lack of knowledge of facts and law.
 - o Limited resources.
 - o Lack of Bargaining Power.
 - o Incompetence.
 - o Third parties.
 - o Fear of being taken advantage of
 - o Standing on principles
- Procedural
 - o Lack of authority.
 - o Power imbalance
 - o Mistrust of Mediator

Ten Effective Ways to Settle a Dispute

- Split the difference
- Conditional offers (“what if” offers)
- Use reactive devaluation.

- Convert to arbitration.
- Integrative bargaining
- Shift focus to finality, control, risk management, and other intangibles.
- Reality testing.
- Compare alternatives (BATNA, WATNA, MLATNA)
- Generate momentum toward settlement with multiple claimants by settling easy claims first.
- Re-visit issues.

Effective Mediator

- 1) Listens and respondents courteously and with understanding.
- 2) Acknowledge points made and the significance to the parties of problems and issues.
- 3) Encourages Parties to make their own decisions.
- 4) Subtly analysis Parties' presentations.
- 5) Asks relevant and insightful questions.
- 6) Probes, for clarification.
- 7) Keeps track of new information and changing positions.
- 8) Appears relaxed, alert and engaged with the process.
- 9) Demonstrates skill and confidence throughout in verbal communication.
- 10) Presents information, analysis and explanations in ways that influence the Parties positively.

Ineffective Mediator

- 1) Allow Interruption
- 2) Give attention to the person who interrupts
- 3) Fail to handle interruption appropriately.
- 4) Allow parties to cross talk.
- 5) Fail to hold caucus at appropriate time.
- 6) Cut off parties attorney / friends.
- 7) Rushing process.
- 8) Fail to follow four stages of mediation.
- 9) Reconvene joint session at wrong time.
- 10) Mediator fixing problem for the party.

Qualities of a Good Mediator

- 1) **Trust:** This is the most important characteristic. If the parties do not respect the Mediator, the chances of success are small. Mediation often involves private discussions between a party and the Mediator. If the party does not trust the Mediator to keep confidences disclosed at such a session, there will exist little chance of success. Similarly, if the parties cannot trust the Mediator to evaluate their positions impartially, the mediation is doomed.
- 2) **Patience:** Parties frequently come to the mediation with set positions that take a long time to modify. A Mediator must have the patience to work with the parties to bring them to the point where agreement is possible.
- 3) **Knowledge:** The chances of success are greater if the Mediator has some knowledge or expertise in the area of dispute. Because mediation does not result in a decision by the neutral, knowledge of the subject matter is not as crucial in mediation as it is in arbitration. However,

the parties in a complicated dispute over software, for example, will have more confidence in a Mediator who knows something about software technology than they would in a Mediator who knew nothing about the subject. Furthermore, such expertise will enable the Mediator to better assist the parties in identifying nontraditional solutions to their dispute.

- 4) **Intelligence:** A Mediator must be resourceful and attentive to understand not only the nature of the dispute, but also the motivations of the parties. Through an understanding of what is important to each of the parties, the Mediator can bring them into agreement much more quickly. The requirements are thus not only an ability to understand the subject matter, but an ability to understand people and their motivations as well.
- 5) **Impartiality:** This characteristic is closely related to trust. A Mediator must be impartial. Some Mediators will express their opinions about the position of a party, or will use their powers of persuasion in order to bring the parties to agreement. Other Mediators will not analyze or evaluate the merits of a dispute, but will cause the parties to realize on their own where the settlement potential lies. In either case, the parties must be satisfied that the Mediator is neutral. In the former situation, if the Mediator is not viewed as neutral, any opinions will carry no weight; in the latter situation, the parties will refuse to follow a biased leader.
- 6) **Good Communication skills:** An arbitrator needs only to listen to the evidence and render a decision based upon knowledge of the law and good judgment. Although these talents are extremely valuable ones, an arbitrator need not have the ability to communicate with the parties. A Mediator needs good judgment and good communication skills; it is the Mediator's job to evaluate and understand the motivations of the parties, foresee potential solutions, and then bring the parties to an agreement. Without good communication skills, this task is impossible.

Barriers to Resolution of Dispute

1) Strategic Barriers:

Negotiation is compared to making a pie and dividing the pie. Conflict resolution affects the size of the pie. And who gets what size? Litigation can shrink the pie – that is costs, time, relationship, priorities, needs etc. Negotiation can create values and enlarge the pie. On the other side, distributive aspects can create deadlocks. For example, A has 10 apples and B has 10 oranges. [Assume that no other apples and oranges are available in the market]. A hates apples but loves oranges. B loves both equally. If A tells B about it and asks oranges for exchange, B will do strategic bargaining and would say he also likes oranges, though it is not true. B will offer one orange for say 5 apples. But if A tells his interest in oranges to a Mediator in a private caucus and asks him not to disclose it to B, favourable solution can be reached faster and beneficial to both. Thus a mediator helps in overcoming strategic barriers by inducing the parties to reveal information about their underlying interests, needs, priorities and expectations.

2) Principal and Agent Barriers:

Incentives for an agent negotiating for the principal may induce behaviour that fail to serve the interests of the principal. A Mediator involves the parties directly and tackles this barrier. A mediator helps in overcoming Principal-Agent barriers by bringing real decision maker

[Principal] to the table and help him understanding his own interests.

3) *Cognitive or Perceptive Barriers:*

Each party has its own perception or feelings over an issue. Parties fight [gamble a litigation] to avoid loss. They settle to receive a gain. For example, there are two gates in this hall, and the organizers declare that those who exit from North Gate will get Rs. 1,000/- each and out of these who exit from South Gate randomly selected few, say two, will get Rs. 5,000/- each. Which gate will most of the people select? Usually people do not gamble for a gain. This is called Risk Aversion.

Now let us change the game. Organizers announce that those who go out of the North Exit will each pay Rs. 1,000/- and out of those who exit out of the southern Gate, randomly selected few, say two, will pay Rs. 5,000/- each. Which gate most people will select for exiting?

- Usually people gamble to avoid loss.
- Sure loss [No]
- Possibility to avoid loss [Yes]

Mediator takes parties from loss aversion to risk aversion. Thus a mediator helps in overcoming cognitive barriers by emphasizing potential gains and de-emphasizing or dampening the losses.

4) *Psychological Barriers (Reactionary Devaluation):* “If only we could settle for Rs. 10 lakhs, I would put an end to it”. Next day the other side offers Rs. 10 lakh. “No, no! They must know something we do not know”. Or “If it is a good settlement for them, it cannot be good settlement for us.” Concessions offered are rated lower than concessions that are withheld. A mediator helps in overcoming psychological barriers or reactive devaluation by owning the source of the proposal. [Changing the messenger.

Place of Lawyer in Mediation

It has been found that wherever the lawyers are assisting their parties during the course of mediation, the settlements have been easy to come. (Barring a few case where the lawyers have stalled the settlement which was just going to be arrived.). Always give recognition to the presence of the lawyer and tell them their importance of being present with the parties and that it would be easier for the parties to settle the dispute if they are assisted by their lawyers. Give credits to the lawyers for reaching the settlement. The lawyers want their clients to feel that without them they would have paid more or get less.

Are there Benefits in Mediation for Lawyers?

- a) Mediation helps lawyers as for lawyers
- b) It is another avenue of professional practice and income.
- c) Appearing for a client is a professional service for which lawyers charge their fees. When cases come up faster for resolution instead of decades later, the income is earned now.
- d) Studies have shown that clients are far more willing to pay fees for mediations in which they participate and can understand than for litigation in which they feel excluded and do not see progress.

- e) Mediation invariably means a satisfied clients who participate and sees results, and satisfied clients come back to their lawyers with more business.
- f) There is satisfaction in helping to bring about beneficial solutions.

Lawyers as Mediators

Lawyers make good mediators and are sought after. Becoming a mediator is a new field which lawyers, especially senior ones, may like to try. It has elements of the resolver and peacemaker, and can also be professionally rewarding. So whether the lawyer refers clients' cases to mediation, or appears in mediations for clients, or becomes a mediator part or whole time, several opportunities have opened up for members of the legal profession. Abroad, it is now common to find leading lawyers and retired Judges of distinction focusing on mediation.

What is the Role of Lawyers in Mediation?

In Mediation the lawyer's role of arguing, demolishing or cutting down the other side's arguments does not help very much since there is no presiding officer to give a verdict for one or the other. Instead the lawyer's role is use his legal skills and practical knowledge to see if a solution is possible, and if so, to help evolve one. A primary role is to protect the client's legal interests. The lawyer must also ensure that the client is made aware of the implications of the decision he is taking. If the mediation is proceeding in a manner which is disturbing or not serving the interests of the party, the lawyer may advise terminating it.

Benefits of Mediation

- A. ***It is Fast:*** As the amount of time necessary for the parties and the Mediator to prepare for the mediation is significantly less than that needed for trial or arbitration, a mediation can occur relatively early in the dispute. Moreover, once mediation begins, the Mediator can concentrate on those issues he or she perceives as important to bring the parties to agreement; time consuming evidence-taking can be avoided, thereby making the best use of the parties' time and resources. Even if the entire evidence gathering has already occurred, it almost invariably takes less time to mediate a dispute than to try it in a court.
- B. ***It is Flexible:*** There exists no set formula for mediation. Different Mediators employ different styles. Procedures can be modified to meet the needs of a particular case. Mediation can occur late in the process - even during trial- or before any formal legal proceedings begin. The mediation process can be limited to certain issues, or expanded as the Mediator or the parties begin to recognize during the course of the mediation problems they had not anticipated.
- C. ***It is Cost Efficient:*** Because mediation generally requires less preparation, is less formal than trial or arbitration, and can occur at an early stage of the dispute, it is always less expensive than other forms of dispute resolution. If the mediation does not appear to be headed in a successful direction, it can be terminated to avoid unnecessary costs; the parties maintain control over the proceedings.
- D. ***Brings Parties Together:*** Parties can save and sometimes rebuild their relationship like in a family dispute or commercial dispute.
- E. ***It is Convenient:*** The parties can control the time, location, and duration of the proceedings to a significant extent. Scheduling is not subject to the convenience of courts.
- F. ***It is Creative:*** Resolutions that are not possible through arbitration or judicial determination may be achieved. For example, two parties locked in a dispute that will be resolved by an

arbitrator or a judge may be limited to recovery of money or narrow injunctive relief. A good Mediator makes the parties recognize solutions that would not be apparent – and not available - during the traditional dispute resolution process. Two companies may find it more advantageous to work out a continuing business relationship rather than force one firm simply to pay another money damages. The limit on creative solutions is set only by the variety of disputes a Mediator may encounter.

- G. ***It is Confidential:*** What is said during a mediation can be kept confidential. Parties wishing to avoid the glare of publicity can use mediation to keep their disputes low-key and private. Statements can be made to the Mediator that cannot be used for any purpose other than to assist the Mediator in working out a resolution to the dispute. Confidentiality encourages candour, and candour is more likely to result in resolution.
- H. ***Control:*** The parties control the outcome of the mediation and either party has the advantage of terminating the mediation, if it is felt that it is not in the interest of the said party.
- I. ***Direct Communication:*** In a mediation, there is party to party direct communication. At least the parties have the feeling of being heard by the Mediators if the parties or either of them is being represented by an advocate.

BATNA, WATNA & MLATNA

BATNA: Best Alternative To Negotiated Agreement

WATNA: Worst Alternative To Negotiated Agreement

MLATNA: Most Likely Alternative To Negotiating Agreement also termed as **EATNA** (Estimated Alternative To Negotiated Agreement)

In assessing the value of a settlement offer, it is important to compare the pending offer to any alternatives to settlement that may exist. In the context of litigation, for example, negotiations often compare settlement offers to the predicted outcome at trial, factoring in the additional expenses of going to trial, the risk of losing, and the delay in reaching a judgment or verdict. In this manner, the negotiator can use the projected trial outcome as a point of reference in determining whether a pending offer is favorable.

One method of comparison used by negotiators is to compare a pending settlement offer to the best outcome at trial, also known as the BATNA (best alternative to a negotiated agreement). Using this point of reference, the negotiator will determine whether the settlement offer is close to, equals, or exceeds the best outcome at trial, after adjusting for the litigation expenses of trial, the risk of losing, and the delay in resolving a dispute.

Another valuable method of comparison is for the negotiator to compare the pending settlement offer to the worst projected outcome at trial, which is the WATNA (worst alternative to a negotiated agreement). This point of reference is valuable to a negotiator in determining whether a settlement offer exceeds a party's worst possible outcome at trial.

Using the BATNA and the WATNA will help a negotiator determine whether a settlement offer falls within the range of projected trial outcomes by establishing the high and low alternatives to settlement.

Perhaps one of the most important points of reference for a negotiator is the MLATNA (most

likely alternative to a negotiated agreement), which reflects the most probable outcome at trial. Litigators are familiar with the possibility of a judge or jury rendering an award that falls within a reasonably predictable range (the BATNA and WATNA). Litigators are also familiar with the fact that it is often possible to narrow the range of possible trial outcomes further by using their experience as trial advocates and their knowledge of the community norms for valuing a particular type of case. Thus, as part of the negotiation process, a negotiator generally will predict the high, low, and most probable trial outcomes in order to develop a strong point of reference when deciding the relative value of a settlement offer.

Mediators can use the BATNA, WATNA, and MLATNA as part of the reality testing process in private caucus, to assist the parties and their advocates in evaluating the strength of a pending settlement offer in relation to the possible outcomes at trial. Systematically exploring the BATNA, WATNA and MLATNA with parties and advocates will also provide the mediator with valuable insight into the factual, legal, and analytical basis for their positions.

Another use of the BATNA, WATNA, and MALTNA by mediators is to employ this type of analysis for the purpose of overcoming negotiating impasses. It is often useful for a mediator to remind parties of their BATNA, WATNA, and MLATNA when they lose sight of their strategic objectives, when they react strongly to an interim offer by another party, or when they believe they would like to terminate the negotiating process.

By focusing on the BATNA, WATNA, and MALTNA, a mediator can assist parties in making a balanced and systematic evaluation of their alternatives to settlement. This type of analysis will often bring clarity establishing alternatives and enabling the parties to develop a concrete measuring stick by which they can evaluate settlement offers.