

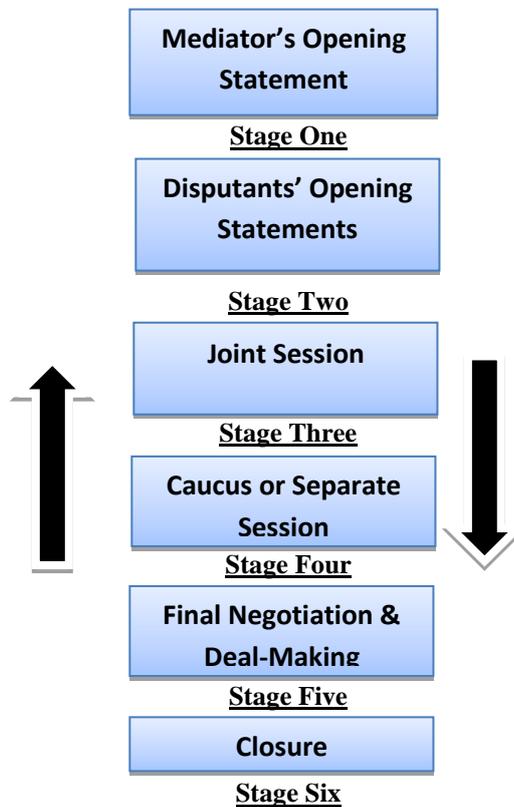
Stages in Mediation Process and Role of the Mediator

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Mediation is a process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), identify the disputed issues, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

Mediation can either be private or mandated by court. In both types, the initial stage or pre-mediation phase, may involve mediator informing parties about the mediation process. This may also involve mediator dealing with queries of disputants, making them understand about the particular models and approaches, checking the suitability of mediation, and helping parties reach the stage of readiness to commit themselves to signing up to the process.

A full scale mediation typically involves at least six stages, which are diagrammatically presented as follows:



Various Stages of Mediation¹

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1. Mediator's Opening Statement: Stage One

Mediator enters a dispute by court referral or by direct choice of the participants. The commencement of the mediation is typically marked by an 'opening statement' of the mediator. This introductory stage is vital to the establishment of a relationship that will facilitate the rest of the mediation process. The mediator must provide initial structuring, gain the participant's trust and cooperation in the process by highlighting the advantages of mediation. Even if the parties have participated in mediations before, it is not advisable to skip the opening statement. There are several reasons for beginning the mediation in this fashion:

- to educate the parties about mediation,
- to establish the procedures and the mediator's role,
- to put people at ease,
- to convey a sense of mediator competence and skill, thereby inviting trust and comfort with the process and the mediator,
- to reconcile any conflicting expectations regarding what will happen in mediation,
- to satisfy ethical requirements (if applicable).
- Typically, there are six basic components to an opening statement:
- introductions of the mediator, disputants and others present,
- establishing credibility and impartiality,
- explaining the process of mediation (that it is voluntary, confidential, self-determinative, informal, flexible and time bound) and the role of the mediator,
- explaining the procedures which will govern the process (including, if applicable the possibility of meeting separately with the parties),
- explaining the style or approach of mediation²,
- explaining the extent to which the process is confidential or inviting parties to set terms of confidentiality,
- asking the parties if they have any questions.

During the mediator's introduction, all participants are introduced. The mediator then describes his/her role, explains the mediation process, and sets out any ground rules³ that guide the process. The mediator may also identify and briefly discuss benefits of the process. Legal parameters, such as confidentiality and enforceability of settlement, are outlined. Goals and objectives from the mediator's standpoint are also set out.

Ashish, *Role of Mediation in the Justice Delivery System of India: A Critical Study*, Chapter IV, pp 170-185, submitted to the University of Delhi in March, 2015 and awarded in January, 2016).

¹(Diagram is adapted from) Rau, Sherman & Peppet, *Process of Dispute Resolution: The Role of Lawyers* (Foundation Press, 3rd edn., 2002) p.340 (stating that typical mediation has six stages.)

² Whether the mediation style adopted by the mediator will be only facilitative, or evaluative or will be mixed of both-this must be made clear at the outset. Mediator should inform parties about his possible role as merely facilitator or evaluator at some stage of the mediation.

³Mediators commonly help parties frame certain ground rules which the parties throughout the process must adhere to. See, Melamed, J., "Sample Mediation Ground Rules" (Aug. 1998) available at <http://www.mediate.com/articles/melamed7.cfm>

If the mediator plans to take written notes, the mediator should let the disputants and advocates know. It is generally a good idea to provide pen and paper for the disputants and encourage them to listen for new information and to take notes, if necessary, while the other is talking. This enables the parties to remember issues they want to discuss without having to interrupt each other.⁴

In order to gain the disputants' trust and confidence, a mediator should assure the disputants of the mediator's impartiality about the dispute and the individuals involved. The most concise, credible way to do this is to provide the participants with information regarding the mediator's previous experience and knowledge about the dispute, any previous acquaintance with either of the party or their lawyer; and then let the parties draw their own conclusion.⁵

The mediator's opening statement should be clear and concise. A mediator should try to avoid using 'jargon' or technical words that the disputants are unlikely to understand (e.g., plaintiff, defendant, claimant, respondent, per se, or other difficult legal terms).⁶ Even if the parties are represented by advocates the advocates are present, it is a good idea for the mediator to focus the opening statement on the parties, to talk directly to them, and to ensure their understanding of the process. Although delivering an opening statement should not consume a lot of time, a mediator should not rush through it. The mediator's opening statement is important- it must be long enough to cover all of the elements clearly and completely, and short enough not to lose the interest of the parties.⁷

In developing an opening statement, a mediator should recognize that an opening statement need not be structured in any particular order, but it should flow and sound like the individual mediator. It may also vary depending on the type of mediation and the context of the mediation.

2. Disputants' Opening Statements: Stage Two

Following the opening statement by the mediator, it is then the turn of the parties to begin. Each party is provided with an equal time to talk and the choice of who speaks first is left to the parties, although normally the person who initiates the dispute will speak first.⁸

The stage is also called 'ventilation' as the parties, locked in bitter dispute, is likely to furiously air his/her grievances. The mediator should calm things down and request parties not to lose their composure while making the opening statement. The parties and/or their representatives should be able to ventilate their views of the case or dispute. The opening

⁴See, Bullen, Barbara A., *Mediation: A Training and Resource Guide for the Mediator* (Trafford Publishing, 2012) pp. 310-311

⁵This can be accomplished with this simple sentence: "I have not met either of you before and have no previous knowledge of the events which brought you to mediation today."

⁶Choice of words on the part of a mediator is very vital for persuading parties to negotiate. A mediator having law background is more likely to convey his ideas using legal terms, which might create adversarial climate like that in court.

⁷Delivering the mediator's opening statement is a difficult and laborious exercise. At the same time, it highlights the importance of starting the mediation process in an articulate, informative and calming manner.

⁸See, Spencer, David & Brogan, Michael, *Mediation Law and Practice* (Cambridge University Press, 2006) p.58

statement stage provides a time for parties to fully express and explain to the mediator, and more importantly, to each other, how they view the dispute in their own words.

The mediator must listen carefully the statements of the parties, the manner in which the information is shared, and the order of presentation are all important pieces of information. The mediator should usually let each disputant take as much time as needed without interruption from the other party or the mediator.

When the first party is finished, the mediator should not ask the other to 'respond', but rather should invite a description or explanation of that party's issues and concerns. The second person to speak often feels defensive- the mediator's job is to put the parties at ease enough to share what is important to them.⁹

After each party has spoken, the parties often will look to the mediator to identify the next step in the process. The mediator could then identify and summarize the issues as the parties have put them forth. To perform that important task requires a mediator to organize the information accurately and constructively. For this purpose, mediator may take 'notes' after letting parties know about the purpose of such note-taking. Parties should re-assured that such notes will remain and cannot be used as evidence in formal proceeding.¹⁰ A mediator's notes serve three important purposes:

- i. identification of the issues which the disputants wish to address
- ii. clarification of statements/issues for the mediator
- iii. record of "movement" with regard to offers and solutions

After the conclusion of the opening statements by the parties, the mediator has to summarize the parties' opening statements. The mediator will summarize what each party has said. This will be what it implies- a summary- not a verbatim report even though the note-taking may have been quite detailed. The purpose of the summaries are:

- i. to assure the parties that the mediator has heard, noted and summarized their individual issues and concerns,
- ii. to give each party the opportunity to hear through the mediator the other side's version a second time.

3. Joint Session: Stage Three

After all participants and/or their representatives have presented their views through their opening statement, at this point, the mediator may try to lead the disputants to joint discussion and get them talking directly with each other in his presence. This phase may come before or after the separate meeting between a party and mediator. Generally, the mediator has a tough time during this phase as parties are likely to engage in bitter accusation and counter-accusations. He has to ensure that parties engage in constructive talks. To this purpose, he has

⁹See, Alfini, James J., *Mediation: Theory and Practice* (LexisNexis, 2006) p.119

¹⁰*Id.*

to try to get the parties away from their stated positions to the ones which are workable and future-oriented.

The primary objective of the joint session are as follows¹¹:

- i. to gather information,
- ii. to provide opportunity to the parties to hear the perspectives of the other parties,
- iii. to understand facts and issues,
- iv. to understand perspectives, relationship and feelings,
- v. to understand obstacles and possibilities, and
- vi. to ensure that each participant feels heard.

3.1. Identifying Issues and Interests

Arguably the most critical point in the third stage of mediation is the identification of issues and interests. While the parties may well be clear about the 'position', or stance, that the other side has taken in relation to the dispute, it is not always the case that the reasons for that position are apparent. Hence it is vital that mediator assists the parties to uncover the issues and interests, or the reasons, for the position held.

While mediator tries to discern the underlying issues or interests of the parties, he should educate the parties about usefulness of interest-based negotiation.¹² One of the major reasons why parties reach impasse in negotiation and mediation is their inability to identify their own interests and the interests of the parties. Parties' failure to identify interests often arises from their lack of awareness of them, intentional hiding of them, unconscious equating of them with their positions, and lack of awareness of procedures to explore their interests.¹³ In such situation, mediator can often be of great benefit to the parties in helping them identify their relevant interests. However, the identification of the issues and interests is, practically, not as easy as it might seem. Parties may be nervous about disclosing matters that might later be used against them in a court hearing, personal or business relationship, or later in the mediation.¹⁴

3.2. Agenda Development

Agenda development includes listing issues, interests and concerns of the parties. The issues¹⁵ in dispute are recognised and the dispute is broken into parts so that the issues are dealt with and agreement can be reached. This process is done by determining the underlying interests and ensuring that they are framed in neutral language. For example, framing the issue as

¹¹*Mediation Training Manual of Supreme Court of India*, The Mediation and Conciliation Project Committee, Supreme Court of India (2011) p. 28, available at <http://supremecourtindia.nic.in/MEDIATION%20TRAINING%20MANUAL%20OF%20INDIA.pdf>

¹²See, Fisher, Roger & Ury, William, *Getting to Yes* (Random House Publisher, 1st edn., 1981) p.7-10

¹³Cooley, John W., *The Mediator's Handbook: Advanced Practice Guide for Civil Litigation* (NITA, 2006) p. 241

¹⁴*Id.*

¹⁵As opposed to the traditional way lawyers and law students think about 'issues', in mediation an issue is described as a matter, practice, or action that enhances, frustrates, alters or in some way adversely affects some person's interests, goals or needs. See, Abramson, Harold I., *Mediation Representation: Advocating in a Problem-Solving Process* (NITA, 2004) pp.85-86

‘breach of contract’ (which may be an issue for one party but not both), may lead to blame-game and limit the discussion between the parties. However, framing the same as ‘obligations under agreement’ can present a more neutral agenda item.

Most mediators and facilitators use whiteboards to note down agenda items or issues. In adjudicative or determinative methods this is seldom done. Writing down the issues on a whiteboard has a number of advantages that include:

- i. objectifying the issues in a transparent manner before the parties,
- ii. ensuring that no issues are missed,
- iii. showing that all parties have been heard,
- iv. addressing issues rather than positions ensures that broadest possible options can be developed.

3.3. Identifying Common Ground

Even where parties are unwilling to agree on contentious issues, there are some common issues or grounds, which need to be identified and addressed by the mediator. One of the common grounds in most mediations is that parties generally agree that they would like to see the dispute end. Further, parties may wish to end the dispute within a time period or as soon as possible. Mediator has to identify this common ground and motivate the parties to resolve the dispute.¹⁶

Another common ground could be parties’ willingness to keep the matter out of court. This may be for variety of reasons like, litigation costs, excessive delays, and uncertain result in court. A mediator has to identify this and push the parties towards negotiated deal in mediation.

Similarly, the parties may wish to keep the relationship that they had prior to the dispute in place rather than let it collapse because of the dispute. Therefore, another issue on which there could be some common ground is whether the parties wish to continue their relationship after resolution of the dispute.¹⁷

There are many ways to construct the agenda of discussion. It is the mediator’s key responsibility to set an agenda based on what the parties have said if they do not do so for themselves. One of the greatest assets a mediator brings to the mediation is an ability to create structure and develop a process to assist the parties’ communication. If the parties themselves or the mediator neglects to create an agenda, the possibility increases that the discussion will degenerate into impasse not because the parties necessarily disagree on all matters, but rather, because no one focused on separating those items on which the parties agree from those about which they remain in substantial disagreement.

3.4. Identifying Options for Early Agreement

¹⁶(Mediator’s question in this regard could be phrased as- ‘Do you both wish to see an end to this dispute?’ It will generally elicit an affirmative response which provides the mediator with the first piece of common ground between the parties.)

¹⁷(The psychological impact of reaching agreement on areas of common ground should not be understated. The mediator should put into writing (on white board) the agreement on common ground, so to remind the parties that they have already reached agreement on some issues, thereby providing further motivation to mediate.)

In identifying common ground, it may be clear that there are options for resolution being generated to which all parties agree. Option generation comes hand-in-hand with the exploration of identified issues as it is part of the way people solve problems. Mediator should encourage parties to generate options. Mediator may do 'brainstorming'¹⁸ and 'reality testing'¹⁹ of the options with a view to those options satisfying the identified interests of the parties. Options, if generated, should be examined closely, particularly if they might lead to agreements in principle.

3.5. Mediator's Tactics

Where the parties are stuck over issues, the mediator has to employ a range of tactics to break the deadlock, and to keep the mediation moving. Moving the parties away from their entrenched positions to interests, requires a lot of effort on the part of a mediator. Alfini²⁰ has enlisted a range of mediator's tactics to deal with any impasse in the mediation. These are set out below:

(i) *Focus on the future*- It is helpful to remind parties that they cannot change what happened in the past, but they can decide how they want things to be in the future. As a means of comparison, the traditional litigation process focuses on the past, determining what happened, and who was wrong or right. In mediations involving an ongoing relationship, what happened in the past need only be relevant in helping parties determine how they want to behave in the future.

(ii) *Use of humor*- People become more flexible when they are laughing because laughter often reveals some comfort with oneself and the situation. However, humor should never be used at the expense of anyone involved in the mediation.

(iii) *Integrative solutions*- If the mediator helps the parties and their advocates to identify their interests (not just their positions) and think creatively, they may be able to identify issues in which they both can achieve the 'win-win' solution that they want.

(iv) *Establish priorities and trade-offs*- Not everything that the parties or their advocates present at mediation will be of equal importance to them. Helping them identify which items are most important will help them see that other items are less important. This may yield greater flexibility and ideas regarding items to 'trade-off.'

(v) *Use of role reversal*- Helping parties and advocates see the situation from the other person's perspective is often very helpful. This technique is most useful when meeting separately with the parties and they are able to react with greater honesty.

¹⁸*Supra* n. 12, p. 259 (Brainstorming involves the mediator encouraging the parties to put forward as many ideas and options as possible as they come to mind without inhibiting their inflow by considering him individually or rejecting any at that stage, even if they may seem unworkable.)

¹⁹*See*, American Arbitration Association, *AAA Handbook on Mediation* (Juris Publishing, 2nd edn., 2010) p.328 (Reality testing means to question disputants about the strengths and weaknesses of their cases. In this role a mediator pushes the parties to become more realistic without completely revealing his or her opinion about the merits. However, as mediators become more and more familiar with the facts and arguments, it is almost inevitable that they will form views about how a court would rule on a case.)

²⁰*Supra* n. 9, p.128

(vi) *Point out possible inconsistencies-* A mediator should not evaluate the merit of parties' positions, but he should point out the inconsistencies within comments or proposals that have been made by the mediator.

(vii) *Identify constraints on others-* Everyone operates under some constraints- be they economical, psychological or political. Proposed solutions must account for these constraints or the solution will not be acceptable. Assisting the disputants to see each other's constraints may be useful in helping them understand the dynamics at work in reaching an agreement and lead to greater creativity.

(viii) *Be the agent of reality-* The mediator should never force the parties to settle their dispute or any portion of it in mediation. The mediator may, however, help the parties to think through the consequences of not resolving the dispute in mediation. The parties may want to consider monetary costs, time lost, relationship issues, and the uncertainty of a court outcome when evaluating the acceptability of the proposed settlement terms so that their decision to settle or not is as informed as possible.

(ix) *Appeal to past practices-* Sometimes the parties will have had a prior good relationship. In such cases, it may be useful for the mediator to explore with the parties how they have resolved similar issues in the past. If the parties have no prior relationship (or no positive prior relationship), this will probably not be a useful technique.

(x) *Appeal to commonly held standards and principles-* Sometimes both parties will express a common theme, for example, to be treated respectfully or that they are concerned about the 'best interest of their child' (in family mediation). While acknowledgment of this notion will not solve their issues, it is often helpful for the mediator to point out to that they do agree on some matters.²¹

These techniques can help trigger flexibility. The mediator may select a place for the parties to begin their discussions, but quickly discover that resolving it is more complex or difficult than originally envisioned. The mediator can deploy several different approaches for generating options for agreement as described above.

4. Caucus or Separate Session: Stage Four

The need for caucus²² or separate meeting between the mediator and a party (accompanied with or without advocate) may arise in certain situation. It involves private discussions about issues, interests, and options for resolution. The call for caucus has to come from the mediator in a scenario when parties have reached an impasse. Speaking privately to the parties will

²¹*Id.*

²²A caucus is a common step or procedure in mediation. It is a private meeting that each party holds with the mediator during the mediation. These private meetings give participants a chance to talk to the mediator freely, without the pressure of the other party being there. Anyone participating in a mediation may request a caucus, including the mediator. Other names for caucus include "individual meeting", "private meeting" or "time out". Typically, a caucus is a confidential process, however, a party may want the mediator to relay some or all of the caucus discussions to the other party(s). As such, it is important to confirm expectations at the beginning of a caucus. During the caucus, the mediator may seek clarification on issues of concern, and explore creative ways of resolving the conflict. The above definition is available at <http://www.violence-conflict-prevention.com/Glossary.html>

allow the mediator to discuss issues that the parties may be uncomfortable talking about in front of each other. The separate session can alleviate such concerns and, at the same time, give the mediator an understanding of what is really driving the dispute.²³

While a mediator must never disclose information discussed in caucus with the party, unless the disclosing party had authorised the mediator to do so, the mediator can use such information to assist both parties in settling on options that will satisfy interests. Separate sessions also allow the mediator to test information. Detailed questioning can take place which, if conducted in joint session, may embarrass one party.

Another, important use for separate sessions is the discovery of the best alternative to a negotiated settlement (BATNA) and/or the worse alternative to a negotiated settlement (WATNA). BATNAs are a vital piece of information for the mediator as they disclose when a settlement is better or worse than the parties' best alternative to a negotiated settlement. If the options being proposed as a settlement are worse than a party's BATNA, then the chances are that the party will not settle i.e. he or she would be better off walking away from mediation and living with his or her BATNA. The converse is also true, in that if the options being proposed as a settlement are better than a party's BATNA, then the chances are the party will agree to accept the settlement.²⁴

Another valuable use of the separate session is when there are the heightened emotions at play in the dispute. In such cases, it is better to separate the parties sooner rather than later. This will diffuse any tensions that threaten to destabilise the mediation. In some mediations, where parties are displaying high levels of animosity towards each other, it may be appropriate to have a very short first joint session, and then virtually break off into separate sessions as soon as the mediator has explained the process of mediation. This, of course, should only be done in extreme circumstances. The converse is also true. Where parties are happy to discuss the dispute in its entirety in joint session, then the mediator should not stop that process by breaking off into separate session. It should be borne in mind that mediation is really a process owned by the parties and they should be allowed to dictate the procedure for reaching an agreement.

Once the mediator has had one or more separate sessions with one party to settle the issues and interests and to generate the first set of options, he or she may conduct the next separate session with the other party and follow the same process of option generation with that party. This repeat exercise depends on the situation, and may see mediator going back and forth, shuffling between the parties,²⁵ seeking agreement on the various options being suggested by the parties.

As the mediator moves from option to fashioning a settlement on behalf of the parties, he or she should do reality testing of the options. Reality testing means testing the option for its

²³*Supra* n. 8, p. 66

²⁴*Supra* n. 8, p. 67

²⁵Also called shuttle mediation. It is a process in which parties are located in different rooms and the mediator 'shuttles' between them, conveying the parties' viewpoints, settlement ideas and financial offers. See, Brandon, M., "Use and Abuse of Private Session and Shuttle in Mediation and Conciliation", 8 (3) *ADR Bulletin* (2005) p.4, available at <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1332&context=adr>

potential. In other words, will the option practically work if parties agree on it? Further, how will the option work if the parties agree on it?

These questions on how the settlement is to be practically implemented are important ones which the mediator has to raise with the parties, as they are the sort of issues that, if left unaddressed, can cause a settlement not to be honoured by one or more of the parties.

5. Final Negotiation & Deal-Making: Stage Five

Final negotiation stage involves activities initiated by both the parties and the mediator to reduce the scope of substantive and procedural differences between parties, so to move toward a formal agreement leading to the termination of conflict. This is the final joint meeting between the parties in the presence of mediator before the closure of mediation. In this round, the results of the separate meeting are carefully considered. If there remains any miscommunication or misunderstanding, then those are discussed and removed, before parties reach the resolution of the disputes. If deadlock worsens, then they may, however, take a realistic decision to discontinue mediation and settle their dispute in other forum like court.

5.1. Possible Negotiated Outcomes to a Conflict

Christopher Moore suggests that even where mediation is failing, the parties to mediation, after having invested their valuable time and energy, are likely to come to partial settlement, than to see 'no-settlement' at all.²⁶ He has provided a spectrum of possible negotiated outcomes to a conflict²⁷:

- (i) *The 100 percent solution*- Parties have all substantive, procedural and psychological interests satisfied.
- (ii) *Compromise*- Parties share gains and losses in order to reach agreement. Compromise can occur on specific issues or in the negotiations as a whole.
- (iii) *Temporary settlement*- Parties are unable to reach a permanent agreement, but agree on a temporary settlement, that will be tested and evaluated at a later date.
- (iv) *Procedural solutions to substantive problems*- Parties devise a process by which they can obtain an answer to a substantive issue in dispute.
- (v) *Deferred decisions*- Parties decide, either unilaterally or jointly, to delay decision till a more favourable time is available.
- (vi) *Partial settlement*- Parties agree on some issue but continue to disagree on others.
- (vii) *Mutual dropping of issues*- Parties implicitly or explicitly agree to drop an issue in dispute.
- (viii) *Non-binding decision*- Parties agree on some sort of agreement but compliance part is not guaranteed.
- (ix) *Issue avoidance*- One or more parties decide to avoid a complicated and irritating issue.
- (x) *Decision referred to a third party decision maker*- Parties cannot decide but they defer the decision to a third party for a binding or non-binding decision.

²⁶Moore, Christopher W., *The Mediation Process: Practical Strategies for Resolving Conflict* (John Wiley & Sons, 4th edn., 2014) p. 321

²⁷*Id.*, pp. 321-322

(xi) *Impasse or stalemate*- Parties cannot decide and negotiations break down. Neither party has the power to force the issue in his or her favour or to develop a mutually acceptable solution.

(xii) *Continued negotiations*- Parties cannot agree, so they do agree to continue negotiating.

(xiii) *Shift to another approach of conflict resolution*- The parties are unable to reach an acceptable settlement, and move to another method of dispute resolution.

The final negotiation stage is very crucial and it requires a well-trained mediator to sail through the remaining impasse and bring parties to a negotiated deal. A novice mediator might fail in such situation. What is required on the part of the mediator is to remain determined in his pursuit of bringing a successful closure of the mediation. Even where negotiations have not yielded any result, the skilled mediator will shed light on the positive outcome, if any, generated out of the joint endeavours.

6. Closure: Stage Six

It is important that a process initiated, must end finally. Closure is the last process in mediation. Mediation may terminate in a number of circumstances. It terminates when the parties have resolved all their issues, or when they have resolved some issues and decided to take the others into a different forum such as arbitration or litigation. It may come to an end when one party simply walks out of it saying that he/she does not want to continue with mediation; or when the mediator decides that it is inappropriate to continue with mediation as there is no reasonable prospect of resolution, or otherwise, unethical to continue with mediation. Hence, closure envisages both, successful and unsuccessful outcome(s).

In case of successful outcome, settlement terms are reduced to writing leading to a formal agreement between the parties. In order that this mediated agreement becomes legally enforceable, it must be duly signed by the parties and mediator.²⁸ The settlement may also contain an implementing or monitoring mechanisms for the current as well as future differences or conflicts that may arise.

If the mediation was court mandated, the mediator will probably be required to file a report of 'impasse' with the court.²⁹ Most courts will accept a report from the mediator which states when the mediation occurred, who appeared at the mediation, and that no agreement was reached. While some judges may want to know why no agreement was reached, rules of confidentiality will often prevent mediators from providing this information. However, if the case was mediated voluntarily or pursuant to an agreement of the parties, there is normally no need for the mediator to write a report. If there is alleged non-compliance with what was settled in mediation, then one party must take the additional step of filing a court case to enforce the mediation agreement as a contract.

²⁸Mediation providers and mediators commonly require that settlement agreement be reduced to writing and signed by the parties or their advocates. See, Brooker, P., *Mediation Law: Journey through Institutionalism to Juridification* (Routledge, 2013) pp.86-87; On the need of signing settlement agreement, see also, Aina, K., "Must We Sign an Agreement Post Mediation?", Kluwer Mediation Blog, June 23, 2012, available at <http://kluwermediationblog.com/2012/06/23/must-we-sign-an-agreement-post-mediation/>

²⁹Form and content of mediator's report varies across jurisdictions and it depends on the kind of mediation programme undertaken by the mediator.

Where the mediation ends without settlement terms being agreed, there are no specific formalities. Some mediators conscientiously persevere in assisting the parties to reach agreement despite the imminence of ending the process. Mediators encourage the parties and advocates to consider returning to mediation (with the same or different mediator) if they think it would be helpful. The process finally ends on a positive note with the mediator's concluding address in which he thanks the party for their time and effort at the mediation.³⁰

Concluding Remarks

Mediation is a structured process, though it may vary and adapt itself suitably depending upon the nature and context of the dispute. The stages in mediation constitute a flexible, creative and non-legal process, unfettered by rigid procedures and rules. The role of mediator is extremely crucial during all the stages of mediation. A trained mediator through his variegated skills and expertise can facilitate parties to the negotiating table, leading perhaps to the constructive resolution of the dispute. The process is lauded for its essential attributes, such as flexibility, informality, creativity, confidentiality, parties' self-determinative role etc., which are absent in adjudicative processes. Parties' to mediation have full opportunity to participate in the decision making process. In that sense, mediation affords procedural fairness to the parties. However, the concerns remain high that in absence of the skilled mediator, the process might generate legal, as well as ethical challenges.

³⁰The mediator often accepts the scapegoat role by saying, "I regret that I was not able to assist you in resolving your dispute today," thereby encouraging the parties to have confidence that it is still within their capacity to end their controversy in a mutually satisfactory way. See, Stulberg & Love, *The Middle Voice* (Carolina Academic Press) 2008, p. 27