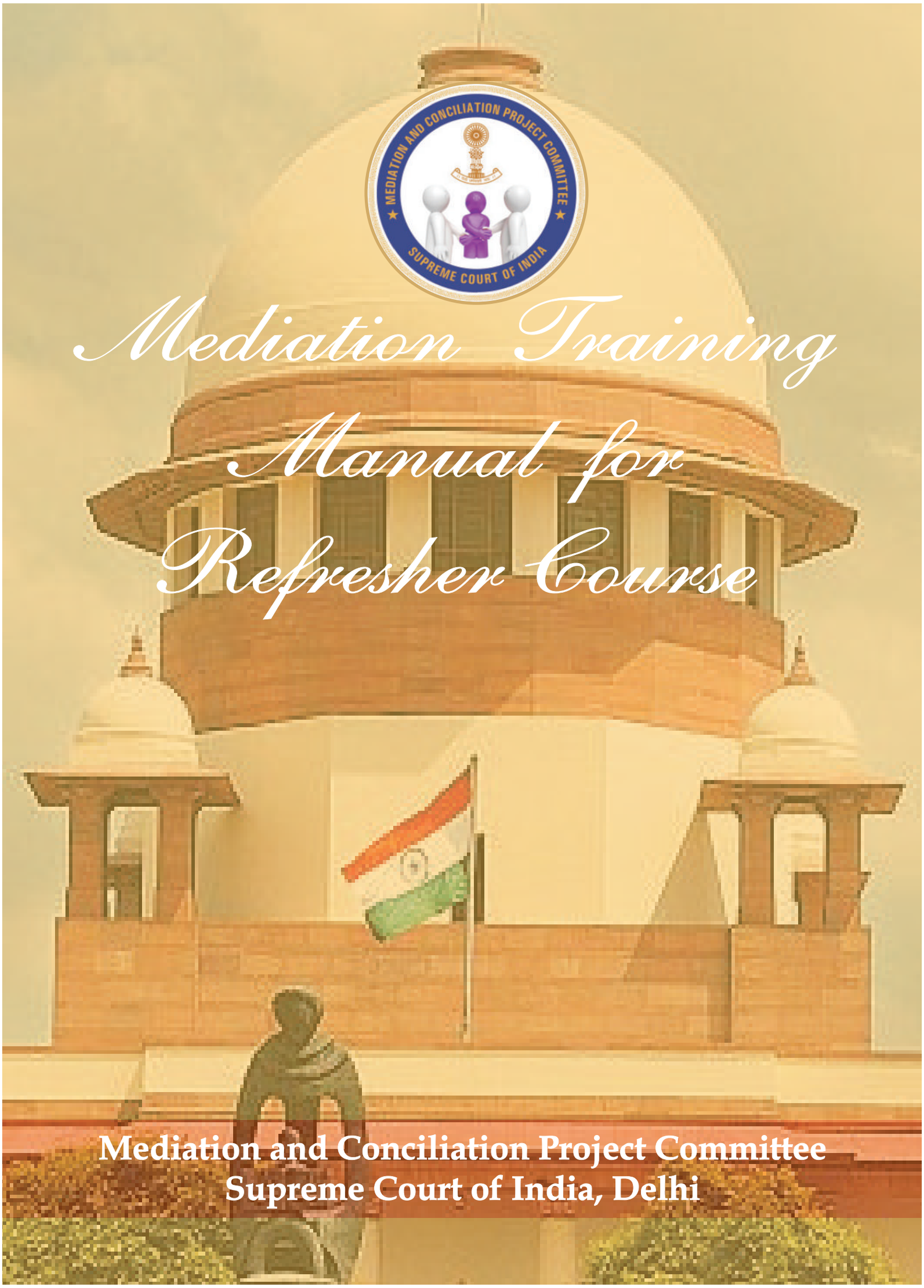


# Mediation Training Manual for Refresher Course

**Mediation and Conciliation Project Committee**
**Supreme Court of India, Delhi**


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# CONTENTS

# CHAPTER - I
# INTRODUCTION

**------Steps to Peace------**

The Worlds problems will never cease without mediators & adversaries for peace

Our mission will not be complete until it's achieved

please Take a step with me

In the direction of where we want to be

In the world of Peace.

**Ronney**

INDIA has rich inheritance of Justice Delivery System. The role of our Judiciary, as protector of our fundamental rights and guardian of constitution of India is immense. To supplement the judicial system over the years, various alternate dispute resolution mechanisms like arbitration, conciliation, Lok adalats, etc have been promoted to address the ever growing quantum of disputes/conflicts of parties. And, the recent in this line of approach has been the introduction of 'Mediation', a mechanism which focuses on resolving disputes/conflicts by addressing the deficit of mutual understanding and trust between parties.

Though introduced over a decade back, Mediation as an effective dispute/conflict resolution mechanism has gained credible traction lately. With multitude of disputes having been settled, Mediation as a dispute resolution platform is already on the ascent!

Mediation centres with trained mediators across the nation have been set up. And to support an effective roll out, the MEDIATION AND CONCILIATION PROJECT COMMITTEE (MCPC), SUPREME COURT OF INDIA has structured and conducted several 40 Hours training programmes to train mediators, Awareness

programmes, Capsule training programmes, Training of Trainers programmes and Training for Referral Judges have been conducted to stabilize mediation in India.

In pursuit to revisit and refresh mediators of their knowledge, learning and experiences on mediation concept and process, MCPC has structured 20 hours REFRESHER COURSE PROGRAMME to be imparted to all mediators across nation.

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**CONFLICT IS INEVITABLE BUT**
**COMBAT IS OPTIONAL**

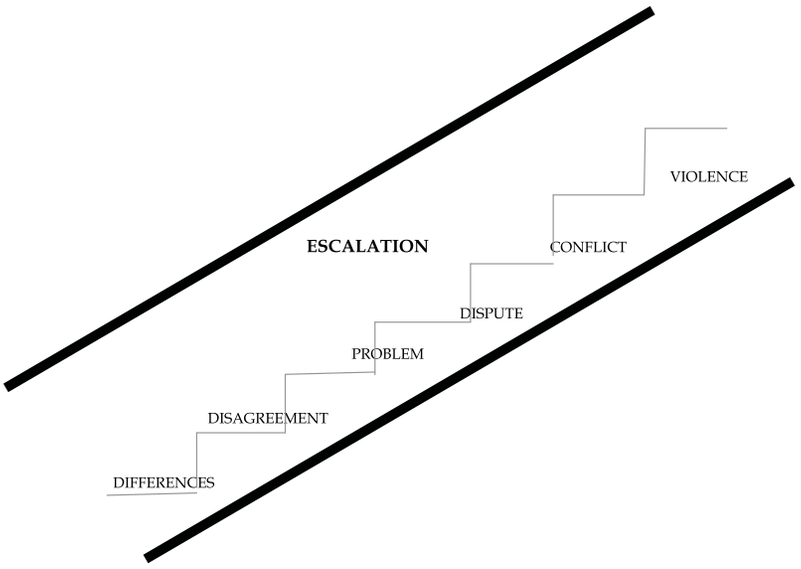
- Max Lucado

# CHAPTER - II
# CONFLICT: CAUSES, MANAGEMENT AND RESOLUTION

**THE NATURE OF CONFLICT**

Examination of the nature of conflict and the principles of conflict resolution which underlie the mediation process becomes necessary because how we understand conflict determines the way we will mediate.

The phenomenon of conflict is so much a part of human life. The understanding one has of a conflict is strongly influenced by the way one thinks about the Nature of Conflict. Life comprises of several different – persons, groups and nations. There are cultural differences, personality differences, differences of opinion, situational differences. Unresolved differences lead to disagreements. Disagreements cause problem. Disagreement unresolved becomes dispute. Unresolved disputes become conflicts. Unresolved conflicts




can lead to violence and even war. This is called the continuum of tension and is often. Illustrated by the following chart:

**CONTINUUM OF TENSION**

We will study the nature of Conflict in three broad dimensions. (1) The sense of threat which drives it (the Conflict Core). (2) What happens when it escalates (the Conflict Spiral). (3) The three primary aspects of conflict that mediation needs to address (the Conflict Triangle). Understanding these dimensions will help us understand our own approaches to conflict as well as those of the parties we deal with.

# THE DIMENSIONS OF CONFLICT

## 1) THE CONFLICT CORE

The Conflict Core diagram shows how at the very core of any conflict, there lies a sense of threat concerning individuals, groups, communities or nations. This sense of threat emerges when any disagreement, annoyance, competition or inequity threatens any aspect of human
dignity, personal reputation, physical safety, psychological needs, professional worth, social status, financial security, community concerns, religious membership or national pride. This list is not exhaustive and only indicates broad areas of threat. By the time parties get to the negotiating or mediation table, they are threatened both by the opposite side and within themselves! There is fear, suspicion, helplessness, frustration, embarrassment, anger, hurt, humiliation, distrust, desperation, vengeance and a host of mixed emotions that need to be addressed. Failure to address these emotions will prevent the parties from resolving their dispute.

## 2) THE CONFLICT SPIRAL

When a given conflict intensifies, the initial tensions start spiralling outwards, affecting individuals, relationships, tasks, decisions, organizations and communities. This outward manifestation of the conflict is called the Conflict Spiral.

**Personal responses**. The stress of conflict provokes strong feelings of anxiety, anger, hostility, depression, and even vengeance in relationships. Every action or in–action of the other side becomes suspect. People become increasingly rigid in how they see the problem and in the solutions they demand. It can be difficult for them to think clearly. Hence what the parties really need is a forum which will understand and address their emotions and not just their dispute. Without emotions being addressed it is difficult to find real solutions.

**Community responses**. Emotions have a vital community and cultural context, even though individual responses may not always be the same for all members of the same culture or community. Any dispute takes colour from its community and cultural context. When the dispute begins to affect those around it, people may take sides or leave. Communities and families get polarized when the dispute involves a family or community member. However, a solution for a family dispute in one part of the country may not necessarily be perceived to be the solution in another part of the country. Similarly, a solution in the context of a metropolitan urban city may not be the same as for a rural area. A solution for a voluntary organisation working with education may not be the solution for an information technology firm.

Legal advice. Legal advice often becomes important in a conflict. This may add to the increasing tensions and inability of parties to control the situation themselves. Through process of interaction between the parties, assisted by a neutral person, a possible solution acceptable to all can be evolved.

**Conflict becoming public**

Sometimes the conflict becomes public. Each side develops rigid positions and gathers allies for the cause. The conflict may spread beyond the original protagonists' control. It may also attract
public and media attention. The relationships of the old and new protagonists become more complicated. Resolving the original conflict therefore becomes more difficult.

3) **THE CONFLICT TRIANGLE**

The Conflict Triangle arranges the three primary aspects of Conflict namely: the People, the Process and the Problem into three sides of the triangle. This Conflict Triangle becomes the basic framework to understand and address conflict. Elements of each side of this Conflict Triangle differ from person to person, situation to situation and problem to problem requiring different solutions.

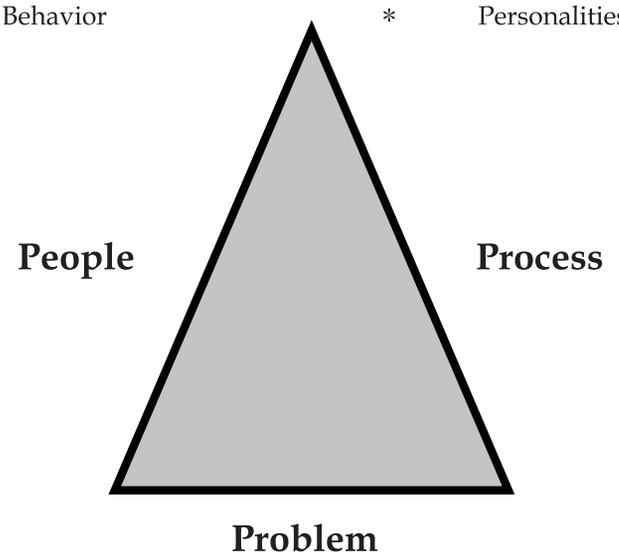
1. **People**. Dealing with any conflict involves dealing with people. People come from different personal, social, cultural and religious backgrounds. They have their own individual personalities, relationships, perceptions, approaches and emotional equipment to deal with varying situations.

2. **Process**. Every conflict has its own pattern of communication and interaction between and among all the parties. Conflicts differ in the way each one intensifies, spreads and gets defused or resolved.

3. **Problem**. Every conflict has its own content. This comprises of all the issues and interests of different parties involved, positions taken by them and their perceptions of the conflict.

**The_Conflict_Triangle**

| | |
|---|---|
| * Past history | * How people communicate issues and feelings |
| * Values, meanings | * Structures, systems, procedures |
| * Relationships | * Norms about how to behave in a conflict |
| * Relationships | * Decision –making |
| * Emotions | * Roles , jobs |
| * Behavior | * Personalities |




| | |
|---|---|
| * Abilities | * Facts |
| * Perceptions | * Interests, Needs |
| * Solutions | * Positions |
| * Issues | * Consequences |
| * Consequences of possible outcomes of events | |

**CAUSES OF CONFLICT AND ADDRESSING THEM**

The first step in resolving conflict is identifying its cause. Once the cause has been identified, the next step is to evolve a strategy to address it. The following are some examples of causes of conflict and strategies to address them.

| CAUSES | STRATEGY |
|---|---|
| **Information** | |
| Lack of information | Agree on what data are important |
| of information | Agree on process to collect data |
| | Agree on considering all interpretations |
| | Misinformation |
| Different interpretations of information | |
| **Interests and Expectations** | **Shift focus from positions to interests** |
| Goals, needs | Expand options |
| Perceptions | Find creative solutions |
| | Clarify perceptions |
| **Relationships** | |
| Poor communication | Establish ground rules |
| Repetitive negative behavior | Clarify misconceptions |
| Misconceptions, stereotypes | Improve communication |
| Distrust | Agree on processes and procedures |
| History of conflict | Keep your word |
| | Focus on improving the future, not dissecting the past |
| Structural Conflicts | |
| | Reallocate ownership and control |
| Resources | Establish fair, mutually acceptable |
| Power | decision-making process |
| Time constraints | Clearly define, change roles |
| **Values** | |
| Different criteria for evaluating ideas | Search for super-ordinate goals |
| Different ways of life, ideology and | Allow parties to agree and to disagree religion |
| | Build common loyalty |

Conflict Management is the process of limiting negative aspect of conflict while increasing the positive aspect of conflict.

**Exercise I -** Engage two or more participants to demonstrate how two disputants enter into a conflict.

Make other participants to watch them so as to understand Nature of Conflict, behavior of disputants in conflict, their inability to resolve it.

Role of Third Person : Whether he can understand their problem & behaviour & make attempt to resolve it.

******

**RAISE YOUR THOUGHTS**
**NOT YOUR FISTS**

- Matshona Dhilwayyo

# CHAPTER - III

# MEDIATION: SALIENT FEATURES AND CONCEPT

Mediation is a voluntary, party-centered and structured negotiation process where a neutral third party assists the parties n amicably resolving their dispute by using specialized communication ad negotiation techniques. In mediation, the parties retain the right to decide for themselves whether to settle a dispute and the terms of any settlement. Even though the mediator facilitates their communications and negotiations, the parties always retain control over the outcome of the dispute.

1. **Mediation is voluntary**. The parties retain the right to decide for themselves whether to settle a dispute and the terms of settlement of the dispute. Even if the court has referred the case for the mediation or if mediation is required under a contract or a statute, the decision to

settle and the terms of settlement always rest with the parties. This right of self-determination is an essential element of the mediation process. It results in a settlement created by the parties themselves and is therefore acceptable to them. The parties have ultimate control over the outcome of mediation. Any party may withdraw from the mediation proceedings at any stage before its termination and without assigning any reason.

2. **Mediation is a party-** centred negotiation process. The parties and not the neutral mediator are the focal point of the mediation process. Mediation encourages the active and direct participation of the parties in the resolution of their dispute. Though the mediator, advocates, and other participants also have active roles in mediation, the parties play the key role in the

mediation process. They are actively encouraged to explain the factual background of the dispute, identify issues and underlying interests, generate options for agreement and make a final decision regarding settlement.

3. Though the mediation process is informal, this means that it is not governed by the rules of evidence and formal rules of procedure it is not an extemporaneous or casual process . The mediation process itself is structured and formalized, with clearly identifiable stages. However, there is a degree of flexibility in following these stages.

4. Mediation in essence is an assisted negotiation process. Mediation addresses both the factual legal issues and the underlying causes of a dispute. Thus, mediation is broadly focused on the facts, law, and underlying interests of the parties, such as personal, business/commercial, family, social and community

interests. The goal of mediation is to find a mutually acceptable solution that adequately and legitimately satisfies the needs, desires and interests of the parties.

5. Mediation provides an efficient, effective, speedy, convenient and less expensive process to resolve a dispute with dignity, mutual respect and civility.

6. Mediation is conducted by a neutral third party- the mediator. The mediator remains impartial, independent, detached and objective throughout the mediation process. In mediation, the mediator assists the parties in resolving their dispute. The mediator is a guide who helps the

parties to find their own solution to the dispute. The mediator's personal preferences or perceptions do not have any bearing on the dispute resolution process.

7. In Mediation the mediator works together with parties to facilitate the dispute resolution

process and does not adjudicate a dispute by imposing a decision upon the parties. A mediator's role is both facilitative and evaluative. A mediator facilitates when he manages the interaction between the parties, encourages and promotes communication between them and manages interruptions and outbursts by them and motivates them to arrive at an amicable settlement. A mediator evaluates when he assists each party to analyze the merits of a claim/defence, and to assess the possible outcome at trial.

8. The mediator employs certain specialized communication skills and negotiation techniques to facilitate a productive interaction between the parties so that they are able to overcome negotiation impasses and find mutually acceptable solutions.

9. Mediation is a private process, which is not open to the public. Mediation is also confidential in nature, which means that statements made during mediation cannot be disclosed in civil proceedings or elsewhere without the written consent of all parties. Any statement made or information furnished by either of the parties, and any document produced or prepared for/during mediation is inadmissible and non-discoverable in any proceeding. Any concession or admission made during mediation cannot be used in any proceeding. Further, any information given by a party to the mediator during mediation process, is not disclosed to the other party, unless specifically permitted by the first party. No record of what transpired during mediation is prepared.

10. Any settlement reached in a case that is referred for mediation during the course of litigation is required to be reduced to writing, signed by the concerned parties and filed in Court for the passing of an appropriate order. A settlement reached at a pre-litigation stage is a contract, which is binding and enforceable between the parties.

11. In the event of failure to settle the dispute, the report of the mediator does not mention the reason for the failure. The report will only say "not settled".

12. The mediator cannot be called upon to testify in any proceeding or to disclose to the court as to what transpired during the mediation process.

13. Mediation in a particular case, need not be confined to the dispute referred, but can go beyond and proceed to resolve all other connected or related disputes also.

**TYPES OF MEDIATION**

1. **COURT- REFERRED MEDIATION-** It applies to cases pending in Court and which the Court would refer for mediation under Sec. 89 of the Code of Civil Procedure, 1908.

2. **PRIVATE MEDIATION -** In private mediation, qualified mediators offer their services on a private, fee-for-service basis to the Court, to members of the public, to members of the commercial sector and also to the governmental sector to resolve disputes through mediation. Private mediation can be used in connection with disputes pending in Court and pre-litigationdisputes.

**ADVANTAGES OF MEDIATION**

1. The parties have CONTROL over the mediation in terms of 1) its scope (i.e., the terms of reference or issues can be limited or expanded during the course of the proceedings) and 2) its outcome ( i.e., the right to decide whether to settle or not and the terms of settlement.)

2. Mediation is PARTICIPATIVE. Parties get an opportunity to present their case in their own words and to directly participate in the negotiation.

3. The process is VOLUNTARY and any party can opt out of it at any stage if he feels that it is not helping him. The self-determining nature of mediation ensures compliance with the settlement reached.

4. The procedure is SPEEDY, EFFICIENT and ECONOMICAL.

5. The procedure is SIMPLE and FLEXIBLE. It can be modified to suit the demands of each case. Flexible scheduling allows parties to carry on with their day-to-day activities.

6. The process is conducted in an INFORMAL, CORDIAL and CONDUCIVE environment.

7. Mediation is a FAIR PROCESS. The mediator is impartial, neutral and independent. The mediator ensures that pre-existing unequal relationships, if any, between the parties, do not affect the negotiation.

8. The process is CONFIDENTIAL.

9. The process facilitates better and effective COMMUNICATION between the parties which is crucial for a creative and meaningful negotiation.

10. Mediation helps to maintain/ improve/ restore RELATIONSHIPS between the parties.

11. Mediation always takes into account the LONG TERM AND UNDERLYING INTERESTS OF THE PARTIES at each stage of the dispute resolution process - in examining alternatives, in generating and evaluating options and finally, in settling the dispute with focus on the present and the future and not on the

past. This provides an opportunity to the parties to comprehensively resolve all their differences.

1.11. In mediation the focus is on resolving the dispute in a MUTUALLY BENEFICIAL

**SETTLEMENT**.

1.12. A mediation settlement often leads to the SETTLING OF RELATED/CONNECTED CASES between the parties.

1.13. Mediation allows CREATIVITY in dispute resolution. Parties can accept creative and non conventional remedies which satisfy their underlying and long term interests, even ignoring their legal entitlements or liabilities.

1.14. When the parties themselves sign the terms of settlement, satisfying their underlying needs and interests, there will be compliance.

1.15. Mediation PROMOTES FINALITY. The disputes are put to rest fully and finally, as there is no scope for any appeal or revision and further litigation.

1.16. REFUND OF COURT FEES is permitted as per rules in the case of settlement in a court referred mediation.

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**PEACE CANNOT BE KEPT BY FORCE;**
**IT CAN ONLY BE ACHIEVED BY UNDERSTANDING.**

- Albert Einstein

# CHAPTER - IV
# CHARACTERISTICS OF VARIOUS ADR PROCESSES & COMPARISION

| JUDICIAL PROCESS | ARBITRATION | MEDIATION |
|---|---|---|
| Judicial process is an adjudicatory process where a third party (judge/ other authority) decides the outcome | Mediator/06/12/2016Arbitration is a quasi-judicial adjudicatory process where the arbitrator(s) appointed by the Court or by the parties decide the dispute between the parties. | Mediation is a negotiation process and not an adjudicatory process. The mediator facilitates the process. Parties participate directly in the resolution of their dispute and decide the terms of settlement. |
| Procedure and decision are governed, restricted, and controlled by the provisions of the relevant statutes. | Procedure and decision are governed, restricted and controlled by the provisions of the Arbitration & Conciliation Act, 1996. | Procedure and settlement are not controlled, governed or restricted by statutory provisions thereby allowing freedom and flexibility. |
| The decision is binding on the parties | The award in an arbitration is binding on the parties | A binding settlement is reached only if parties arrive at a mutually acceptable agreement. |
| Adversarial in nature, as focus is on past events and determination of rights and liabilities of parties. | Adversarial in nature as focus is on determination of rights and liabilities of parties | Collaborative in nature as focus is on the present and the future and resolution of disputes is by mutual agreement of parties irrespective of rights and liabilities. |
| Personal appearance or active participation of parties is not always required<br>A formal proceeding held in public and follows strict procedural stages | Personal appearance or active participation of parties is not always required<br>A formal proceeding held in private following strict procedural stages. | Personal appearance and active participation of the parties are required.<br>A non-judicial and informal proceeding held in private with flexible procedural stages. |
| Decision is appealable | Award is subject to challenge on specified grounds. | Decree/Order in terms of the settlement is final and is not appealable. |
| No opportunity for parties to community directly with each other | No opportunity for parties to communicate directly with each other. | Optimal opportunity for parties to communicate directly with each other in the presence of the mediator |

| | | |
|---|---|---|
| Involves payment of court fees | Does not involve payment of court fees. | In case of settlement, in a court annexed mediation the court fee already paid is refundable as per the Rules. |

| MEDIATION | CONCILIATION | LOK ADALAT |
|---|---|---|
| Mediation is a non adjudicatory process. | Conciliation is a non adjudicatory process | Lok Adalat is non – adjudicatory if it is established under Section 19 of the legal Services Authorities Act, 1987. Lok Adalat is conci liatory and adjudicatory if it is conciliatory and adjudicatory if it is established under section 22B of the Legal Service Authorities Act, 1987. |
| Voluntary process. | Voluntary process. | Voluntary process. |
| Mediator is a neutral third party. | Conciliator is a neutral third party. | Presiding officer is a neutral third party. |
| Service of lawyer is available | Service of lawyer is available | Service of lawyer is available |
| Mediator is party centred negotiation | Conciliation is party centred negotiation | In Lok Adalat, the scope of negotiation is limited. |
| The function of the Mediator is mainly facilitative | The function of the conciliator is more active than the facilitative function of the mediator. | The function of the Presiding Officer is Persuasive. |
| The consent of the parties is not mandatory for referring a case to mediation | The consent of the parties is mandatory for referring a case to conciliation | The consent of the parties is not mandatory for referring a case to Lok Adalat |
| The referral court applies the principles of Order XXIII Rule 3, CPC for passing decree/order in terms of the agreement. | In conciliation, the agreement is enforceable as it is a decree of the court as per Section 74 of the Arbitration and Conciliation Act 1996 | The award of Lok Adalat is deemed to be a decree of the Civil court and is executed as per Section 21 of the Legal Service Authorities Act, 1987 |
| Not appealable | Decree/order not appealable | Award not appealable |
| The focus in mediation is on the present and the future. | The focus in conciliation is on the present and the future | The focus in Lok Adalat is on the past and the present. |
| Mediation is a structured process having different stages. | Conciliation also is a structured process having different stages | The process of Lok Adalat involves only discussion and persuasion |
| In mediation, parties are actively and directly involved | In conciliation, parties are actively and directly involved | In Lok Adalat, parties are not actively and directly involved so much. |
| Confidentiality is the essence of mediation | Confidentiality is the essence of conciliation | Confidentiality is not observed in Lok Adalat. |

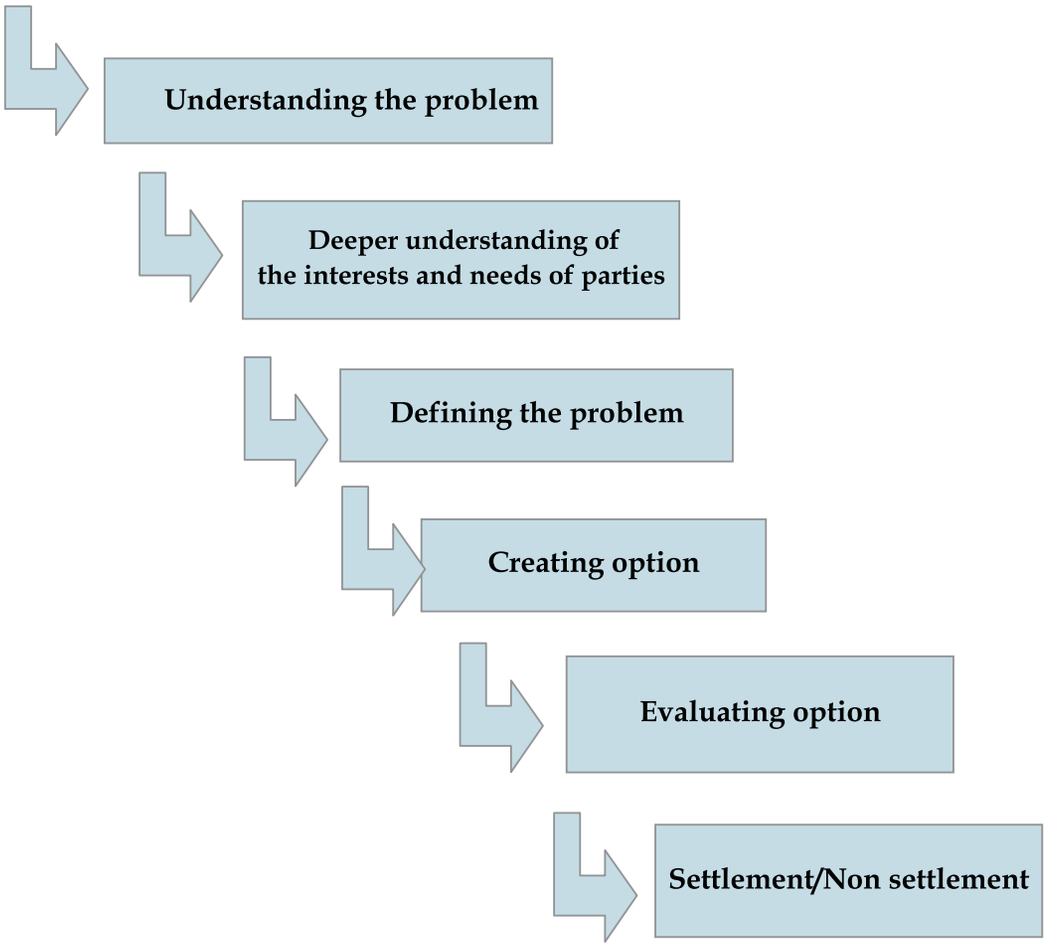
**THE WORLD IS AN ARENA WHERE THINGS REPRESENT THINGS. IT IS A STAGE WHERE THE SAME THING IS SEEN FROM DIFFERENT LENSES AS A DIFFERENT THING.**

**-** Ernest Agyemany Yeboah

# CHAPTER - V

# MEDIATION : THE PROCESS

Mediation is a dynamic process in which the mediator assists the parties to negotiate a settlement for resolving their dispute. In doing so, the mediator uses the four functional stages of mediation, namely, (i) Introduction and Opening Statement (ii) Joint Session (iii) Separate Session and (iv) Closing. These functional stages are used in an informal and flexible manner so that the mediation process gains momentum, following a specific and predictable course as illustrated below.




Each of the above phases reflects an essential pre-requisite in the dynamics of the mediation process which must be accomplished before moving to the next phase.

******

**BEGIN CHALLENGING YOUR OWN ASSUMPTION, YOUR ASSUMPTIONS ARE YOUR WINDOWS ON THE WORLD. SCRUB THEM OFF EVERY ONCE IN A WHILE OR THE LIGHT WON'T COME IN.**

**-** Alan Alda

# CHAPTER - VI
# MEDIATION : THE STAGES

**The functional stages of the mediation process are**:

1) Introduction and Opening Statement

2) Joint Session

3) Separate Session(s)

4) Closing

**STAGE** 1: **INTRODUCTION AND OPENING STATEMENT**

**OBJECTIVES**

- Establish neutrality
- Create an awareness and understanding of the process
- Develop rapport with the parties
- Gain confidence and trust of the parties
- Establish an environment that is conducive to constructive negotiations
- Motivate the parties for an amicable settlement of the dispute
- Establish control over the process

**Seating Arrangement in the Mediation Room**

At the commencement of the mediation process, the mediator shall ensure that the parties and/or their counsel are present and proper/appropriate seating arrangement is made for them.

**Introduction and Opening Statement**:

The mediator commences with the opening statement which must be simple, and in the language the parties can understand.

i) To Welcome & great the parties and their representatives.

ii) Introduces himself, his standing, training and successful experience as a mediator

iii) Declares he has no connection with either of parties and has no interest in the dispute

iv) Asks the parties to introduce themselves and welcomes their lawyers

v) Asks parties which language they would prefer to be addressed in

vi) Enquire about their previous experience in any mediation process

vii) Discuss impartiality and neutrality by using appropriate words and body language

viii) Emphasizes the voluntary nature of the process

ix) Emphasizes on the non – adversarial aspect of the process like absence of recording of evidence or pronouncement of award or order

x) Informs he can go beyond pleadings and may cover other disputes

xi) States the mediation process and possibility of having private sessions

xii) Explain the procedures where there is settlement or no settlement

xiii) Informs that court fee is refunded on settlement

Finally, the mediator shall confirm that the parties have understood the mediation process and the ground rules and shall give them an opportunity to get their doubts if any, clarified.

**STAGE 2: JOINT SESSION**

**OBJECTIVES**

- Gather information
- Provide opportunity to the parties to hear the perspectives of the other parties
- Understand perspectives, relationships and feelings
- Understand facts and the issues
- Understand obstacles and possibilities
- Ensure that each participant feels heard

**PROCEDURE**

The mediator should invite parties to narrate their case, explain perspectives, vent emotions and express feelings without interruption or challenge. First, the plaintiff/petitioner should be permitted to explain or state his/her case/claim in his/her own words. Second, counsel would thereafter present the case and state the legal issues involved in the case. Third, defendant/ respondent would thereafter explain his/her case/claim in his/ her own words. Fourth, counselfor defendant/respondent would present the case and state the legal issues involved in the case.

The mediator should encourage and promote communication, and effectively manage interruptions and outbursts by parties.

The mediator may ask questions to elicit additional information when he finds that facts of the case and perspectives have not been clearly identified and understood by all present.

The mediator would then summarize the facts, as understood by him, to each of the parties to demonstrate that the mediator has understood the case of both parties by having actively listened to them.

Parties may respond to points/positions conveyed by other parties and may, with permission, ask brief questions to the other parties.

The mediator shall identify the areas of agreement and disagreement between the parties and the issues to be resolved.

The mediator should be in control of the proceedings and must ensure that parties do not 'take over' the session by aggressive behaviour, interruptions or any other similar conduct.

During or on completion of the joint session, the mediator may separately meet each party with his counsel, usually starting with the plaintiff/petitioner. The timing of holding the separate session may be decided by the mediator at his discretion having regard to the productivity of the on-going joint session, silence of the parties, loss of control, parties becoming repetitive or request by any of the parties. There can be several separate sessions. The mediator could revert back to a joint session at any stage of the process if he feels the need to do so.

**STAGE 3: SEPARATE SESSION**

**Objectives**

- Understand the dispute at a deeper level
- Provide a forum for parties to further vent their emotions
- Provide a forum for parties to disclose confidential information which they do not wish to share with other parties
- Understand the underlying interests of the parties
- Help parties to realistically understand the case
- Shift parties to a solution-finding mood
- Encourage parties to generate options and find terms that are mutually acceptabl Procedure

(i) **RE - AFFIRMING CONFIDENTIALITY**

During the separate session each of the parties and his counsel would talk to the mediator in confidence. The mediator should begin by re-affirming the confidential nature of the process.

(ii) **GATHERING FURTHER INFORMATION**

The separate session provides an opportunity for the mediator to gather more specific information and to follow-up the issues which were raised by the parties during the joint session. In this stage of the process:-

- Parties vent personal feelings of pain, hurt, anger etc.,
- The mediator identifies emotional factors and acknowledges them;
- The mediator explores sensitive and embarrassing issues;
- The mediator distinguishes between positions taken by parties and the interests they seek to protect;
- The mediator identifies why these positions are being taken (need, concern, what the parties hope to achieve);
- The mediator identifies areas of dispute between parties and what they have previously agreed upon;
- Common interests are identified;
- The mediator identifies each party's differential priorities on the different aspects of the dispute (priorities and goals) and the possibility of any trade off is ascertained.
- The mediator formulates issues for resolution.

(iii) **REALITY - TESTING**

After gathering information and allowing the parties to vent their emotions, the mediator makes a judgment whether it is necessary to challenge or test the conclusions and perceptions of the parties and to open their minds to different perspectives. The mediator can then, in order to move the process forward, engage in REALITY-TESTING. Reality-testing may involve any or all of the following:

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

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

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

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

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

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

(g) Consequences of failure to reach an agreement.

Techniques of Reality-Testing

Reality-Testing is often done in the separate session by:

1. Asking effective questions,

2. Discussing the strengths and weaknesses of the respective cases of the parties, without breach of confidentiality, and/or

3. Considering the consequences of any failure to reach an agreement (BATNA/WATNA / MLATNA nalysis).

(I) **ASKING EFFECTIVE QUESTIONS**

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

**Examples of Effective Questions**:

**OPEN-ENDED QUESTIONS** like 'Tell me more about the circumstances leading up to the signing of the contract'. 'Help me understand your relationship with the other party at the time you entered thebusiness'. 'What were your reasons for including that term in the contract?'

**CLOSED QUESTIONS**, which are specific, concrete and which bring out specific information.

For example, 'it is my understanding that the other driver was going at 60 kilometers per hour a the time of the accident, is that right?' 'On which date the contract was signed?' 'Who are the contractors who built this building?'

**QUESTIONS THAT BRING OUT FACTS**: 'Tell me about the background of this matter'. 'What happened next?'

**QUESTIONS THAT BRING OUT POSITIONS**: 'What are your legal claims?' 'What are the damages?' 'What are their defenses?'

**QUESTIONS THAT BRING OUT INTERESTS**: 'What are your concerns under the circumstances?' 'What really matters to you?' 'From a business / personal / family perspective, what is most important to you?' 'Why do you want divorce?' 'What is this case really about?' 'What do you hope to accomplish?' 'What is really driving this case?'

(II) **DISCUSSING THE STRENGTHS AND WEAKNESSES OF THE RESPECTIVE CASES OF THE PARTIES**

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

(III) **CONSIDERING THE CONSEQUENCES OF ANY FAILURE TO REACH AN AGREEMENT (BATNA/WATNA /MLATNA ANALYSIS)**

BATNA Best Alternative to Negotiated Agreement

WATNA Worst Alternative to Negotiated Agreement

MLATNA Most Likely Alternative to Negotiated Agreement

(iv) **BRAIN STORMING**

Brain Storming is a technique used to generate options for agreement. There are 2 stages to the brain storming process:

1. Creating options

2. Evaluating options

1. **Creating options**:- Parties are encouraged to freely create possible options for agreement. Options that appear to be unworkable and impractical are also included. The mediator reserves judgment on any option that is generated and this allows the parties to break free from a fixed mind set. It encourages creativity in the parties. Mediator refrains from evaluating each option and instead attempts to develop as many ideas for settlement as possible. All ideas are written down so that they can be systematically examined later.

2. **Evaluating options**:- After inventing options the next stage is to evaluate each of the options generated. The objective in this stage is not to criticize any idea but to understand what the parties find acceptable and not acceptable about each option. In this process of examining each option with the parties, more information about the underlying interests of the parties is obtained. This information further helps to find terms that are mutually acceptable to both parties. Brainstorming requires lateral thinking more than linear thinking. Lateral thinking: Lateral thinking is creative, innovative and intuitive. It is non-linear and non-traditional. Mediators use lateral thinking to generate options for agreement.

Linear thinking: Linear thinking is logical, traditional, rational and fact based. Mediators use linear thinking to analyse facts, to do reality testing and to understand the position of parties.

(v) **SUB- SESSIONS**

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

A Mediator may also hold sub-session(s) only with the advocates of both sides, with the consent of parties. During such sub-session, the advocates can be more open and forthcoming regarding the positions and expectations of the parties.

b If there is a divergence of interest among the parties on the same side, it may be advantageous for the

mediator to hold sub- session(s) with parties having common interest, to facilitate negotiations. This type of sub-session may facilitate the identification of interests and also prevent the possibility of the parties with divergent interests, joining together to resist thesettlement.

(vi) **EXCHANGE OF OFFERS**

The mediator carries the options/offers generated by the parties from one side to the other. The parties negotiate through the mediator for a mutually acceptable settlement. However, if negotiations fail and settlement cannot be reached the case is sent back to the referral Court.

STAGE 4: **CLOSING**

(A) Where there is a settlement

Once the parties have agreed upon the terms of settlement, the parties and their advocates re-assemble and the mediator ensures that the following steps are taken:

1. Mediator orally confirms the terms of settlement

2. Such terms of settlement are reduced to writing;

3. The agreement is signed by all parties to the agreement and the counsel if any representing the parties;

4. Mediator also may affix his signature on the signed agreement, certifying that the agreement was signed in his/her presence;

5. A copy of the signed agreement is furnished to the parties;

6. The original signed agreement sent to the referral Court for passing appropriate order in accordance with the agreement;

7. As far as practicable the parties agree upon a date for appearance in court and such date is intimated to the court by the mediator;

8. The mediator thanks the parties for their participation in the mediation and, congratulates all parties for reaching a settlement.

THE WRITTEN AGREEMENT SHOULD:

1 clearly specify all material terms agreed to;

2 be drafted in plain, precise and unambiguous language;

3 be concise;

4 use active voice, as far as possible. Should state clearly WHO WILL DO, WHAT, WHEN, WHERE and HOW (passive voice does not clearly identify who has an obligation to perform a task pursuant to the agreement);

5 use language and expression which ensure that neither of the parties feels that he or she has 'lost';

6 ensure that the terms of the agreement are executable in accordance with law; be complete in its recitation of the terms;

7 avoid legal jargon, as far as possible use the words and expressions used by the parties;

8 as far as possible state in positive language what each parties agrees to do;

9 as far as possible, avoid ambiguous words like reasonable, soon, co-operative, frequent etc;

(B) **Where there is no settlement**

If a settlement between the parties could not be reached, the case would be returned to the referral Court merely reporting "not settled". The report will not assign any reason for non settlement or fix responsibility on any one for the non-settlement. The statements made during the mediation will remain confidential and should not be disclosed by any party or advocate or mediator to the Court or to anybody else.

The mediator should, in a closing statement, thank the parties and their counsel for their participation and efforts for settlement.

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**NOTHING IS MORE
INDISPENSABLE TO THE
RELIGIOSITY THAN A MEDIATOR
THAT LINKS US WITH DIVINITY**

# CHAPTER - VII
# ROLE OF MEDIATORS

Mediation is a process in which an impartial and neutral third person, the mediator, facilitates the resolution of a dispute without suggesting what should be the solution. A mediator cannot force or compel a party to make a particular decision or in any other way impair or interfere with the party's right of self-determination.

## (A) FUNCTIONS OF A MEDIATOR

The functions of a mediator are to -:

(i) facilitate the process of mediation; and

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

## (i) FACILITATIVE ROLE

A mediator facilitates the process of mediation by-

creating a conducive environment for the mediation process.

explaining the process and its ground rules.

facilitating communication between the parties using the various communication techniques.

identifying the obstacles to communication between the parties and removing them.

gathering information about the dispute.

identifying the underlying interests.

maintaining control over the process and guiding focused discussion.

managing the interaction between parties.

assisting the parties to generate options.

motivating the parties to agree on mutually acceptable settlement.

assisting parties to reduce the agreement into writing.

(ii) **EVALUATIVE ROLE**

**A mediator performs an evaluative role by-**

- helping and guiding the parties to evaluate their case through reality - testing.
- assisting the parties to evaluate the options for settlement.

******

**IF THERE IS NO COMMUNICATION THEN THERE IS NO RESPECT IF THERE IS NO RESPECT THEN THERE IS NO CARING IF THERE IS NO CARING THEN THRE IS NO UNDERSTANDING.... SO THERE IS CONFLICT BECAUSE THERE IS NO COMMUNICATION!**

**-** Shannon L. Aldes

# CHAPTER - VIII
# COMMUNICATION IN MEDIATION

1.1 Communication is the core of mediation. Hence, effective communication between all the participants in mediation is necessary for the success of mediation.

1.2 Communication is not just TALKING and LISTENING. Communication is a process of information transmission.

1.3 The intention of communication is to convey a message.

1.4 The purpose of communication could be any or all of the following :

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

1.5 Communication is conveying a message to another, in the manner in which you want to convey it. For example, a message of disapproval of something can be conveyed through spoken words or gestures or facial expressions or all of them.

1.6 Communication is also information sent by one to another to be understood by the receiver in thsame way as it was intended to be conveyed.

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

1.8 Consequently, a communication would involve :-

| | | |
|---|---|---|
| **A Sender** | - | person who sends a message. |
| **A Receiver** | - | person who receives the message. |
| **Channel** | - | the medium through which a message is transmitted which could be words or gestures or expressions. |
| **Message** | - | thoughts/feelings/ideas/emotions/knowledge/ information that is sought to be communicated. |
| **Encoding** | - | transforming message/information into a form that can be sent to the receiver to be decoded correctly. |
| **Decoding** | - | understanding the message or information. Response - answer/reply to a communicated message. |

A deficiency in any of these components would render a communication incomplete or defective.

1.9 Communication may be unintentional e.g., in an emotional state, the feelings could be conveyed involuntarily through body language, gestures, words etc. A Mediator should be alert to observe such expressions.

1.10 Communication may be verbal or non-verbal. Communication could be through words - spoken or written, gestures, body language, facial expressions etc. Studies reveal that in any communication, 55% of the meaning is transmitted through body language, 38% is transmitted through the attitude/demeanor of the communication, and 7% is transmitted through words.

**VERBAL AND NON-VERBAL COMMUNICATION**

Verbal Communication is transmission of information or message through spoken words. Non-verbal communication refers to the transmission of information or message from sender to receiver without the use of spoken words. It includes written communication, body language, tone, demeanour, attitude and other modes of non-verbal expression. It is often more spontaneous than verbal communication and takes place under less conscious control. Therefore, it can provide more accurate information. It is important for a mediator to pay adequate attention to non verbal communications that take place throughout the mediation. It is also important for a mediator to analyze the message sent by the parties through such non verbal communication.

**1.11 REQUIREMENTS FOR EFFECTIVE COMMUNICATION :**

i) Use simple and clear language.

ii) Avoid difficult words and phrases.

iii) Avoid unnecessary repetition.

iv) Be precise and logical.

v) Have clarity of thought and expression.

vi) Respond with empathy, warmth and interest.

vii) Ensure proper eye contact.

viii) Be patient, attentive and courteous.

ix) Avoid unnecessary interruptions.

x) Have good listening abilities and skills.

xi) Avoid making statements and comments or responses that could cause a negative effect.

**1.12 CAUSES OF INEFFECTIVE COMMUNICATION:**

i) Differences in perception i.e. where the Sender's message is not understood correctly by the Receiver.

ii) Misinterpretation and distortion of the message by the Receiver.

iii) Differences in language and expression.

iv) Poor listening abilities and skills.

v) Lack of patience.

vi) Withholding or distortion of valuable information by a third party/intermediary, where a message is transmitted by the sender to the receiver through such third party/intermediary.

**1.13 BARRIERS TO COMMUNICATION:**

**PHYSICAL BARRIERS:**

i) lack of congenial atmosphere.

ii) lack of proper seating arrangements.

iii) presence of third parties.

iv) lack of sufficient time.

**EMOTIONAL BARRIERS :**

i) temperaments of the parties and their emotional quotient.

ii) feelings of inferiority, superiority, guilt or arrogance.

iii) fear, suspicion, ego, mistrust or bias.

iv) hidden agenda.

v) conflict of personalities.

**COMMUNICATION SKILLS IN MEDIATION**

Communication skills in mediation include :-

(A) Active Listening.

(B) Empathy with Neutrality.

(C) Body Language.

(D) Asking the Right Questions.

**(A) ACTIVE LISTENING :**

Parties participate in mediation with varying degree of optimism, apprehension, distress, anger, confusion, fear etc. If the parties understand that they will be listened to and understood, it will help in trust building and they can share the responsibility to resolve the dispute. In active listening the listener pays attention to the speaker's words, body language, and the context of the communication.

An active listener listens for both what is said and what is not said.

An active listener tries to understand the speaker's intended message, notwithstanding any mistake, mis-statement or other limitations of the speaker's communication.

An active listener controls his inner voices and judgments which may interfere with his understanding the speaker's message.

Active listening requires listening without unnecessarily interrupting the speaker. Parties must be given uninterrupted time to convey their message. There is a difference between hearing and listening. While hearing, one becomes aware of what has been said. While listening, one also understands the meaning of what has been said. Listening is an active process.

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

1. **Summarising:** This is a communication technique where the mediator outlines the main points made by a speaker. The summary must be accurate, complete and worded neutrally. It must capture the essential points made by the speaker. Parties feel understood and repetition by them is minimized.

2. **Reflecting:** Reflecting is a communication technique used by a mediator to confirm they have heard and understood the feelings and emotions expressed by a speaker. Reflecting is arestatement of feelings and emotions in terms of the speaker's experience, e.g. "So, you arefeeling frustrated". Reflecting usually demonstrates empathy.

3. **Re-framing:** Re-framing is a communication technique used by the mediator to help the parties move from Positions to Interests and thereafter, to problem solving and possible solutions. It involves removal of charged and offensive words of the speaker. It accomplishes five essential tasks:

1. Converts the statement from negative to positive.

2. Converts the statement from the past to the future.

3. Converts the statement from positions to interests.

4. Shifts the focus from the targeted person to the speaker.

5. Reduces intensity of emotions.

4. **Acknowledging:** In acknowledgment the mediator verbally recognizes what the speaker has

said without agreeing or disagreeing. Example "I see your point" or "I understand what you are saying. This way mediator assures the speaker that he has been heard and understood.

5. **Encouraging** : The mediator can encourage parties when they need reassurance, support or help in communicating. Example : " what you said makes things clear" or "this is useful information"

6. **Bridging** : A technique used by a mediator to help a party to continue communication. Example: "And----------", "And then-----", The word "And" encourages communication whereas the word "But " could discourage communication.

7. **Restating** : In this the mediator restates the statement of the speaker using key or similar words or phrases used by the speaker, to ensure that he has accurately heard and understood the speaker. Example: "My husband does not give me the attention I need." Mediator restates "Your husband does not give you the attention you need."

8. **Paraphrasing**: Is a communication technique where the mediator states in his own words the statements of the speaker conveying the same meaning.

9. **Silence:** A very important communication technique. The mediator should feel comfortable with the silence of the parties allowing them to process and understand their thoughts.

10. **Setting an agenda**: In order to facilitate better communication between the parties the mediator effectively structures the sequence or order of topics, issues, position, claims, defences, settlement terms etc. It may be done in consultation with the parties or unilaterally.

**BARRIERS TO ACTIVE LISTENING** :

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

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

(iii) **Pre-judging** :-- A mediator should not prejudge the parties and their attitude, motive or intention.

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

(v) **Absent Mindedness :**- The mediator should not be half-listening or inattentive.

(vi) **Role Confusion** :-- The mediator should not assume the role of advisor or counselor or adjudicator. He should only facilitate resolution of the dispute.

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

(viii) **Criticising**

(ix) **Counseling**

(x) **Moralising**

(xi) **Analysing**

**(B) EMPATHY WITH NEUTRALITY**

In the mediation process, empathy means the ability of the mediator to understand and appreciate the feelings and needs of the parties, and to convey to them such understanding and appreciation without expressing agreement or disagreement with them.

Empathy shown by the mediator helps the speaker to become less emotional and more practical and reasonable. Mediator should understand that Empathy is different from Sympathy. In empathy the focus of attention is on the speaker whereas in sympathy the focus of attention is on the listener.

Reflecting' is a good communication technique used to express empathy.

**(C) BODY LANGUAGE**

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

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

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

**(D) ASKING THE RIGHT QUESTIONS**

In mediation questions are asked by the mediator to gather information or to clarify facts, positions and interests or to alter perception of parties. Questions must be relevant and appropriate. However, questioning is a tool which should be used with discretion and sensitivity. Timing and context of the questioning are

important. Different types of questions will be appropriate at different times and in different context. Appropriate questioning will also demonstrate that the mediator is listening and is encouraging the parties to talk. However, the style of questioning should not be the style of cross examination. Questions should not indicate bias, partiality, judgment or criticism. The right questions help the parties and the mediators to understand what the issues are.

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**LET US MOVE FROM THE ERA OF CONFRONTATION TO THE ERA OF NEGOTIATION.**

**-** Richard M. Nixon

# CHAPTER - IX
# NEGOTIATION AND BARGAINING IN MEDIATION

Though the words Negotiation and Bargaining are often used synonymously, in mediation there is a distinction. Negotiation involves bargaining and bargaining is part of negotiation. Negotiation may involve different types of bargaining.

**What is Negotiation?**

Negotiation is an important form of decision making process in human life. Negotiation is communication for the purpose of persuasion. Mediation in essence is an assisted negotiation process. In mediation, negotiation is the process of back and forth communication aimed at reaching an agreement between the parties to the dispute. The purpose of negotiation in mediation is to help the parties to arrive at an agreement which is as satisfactory as possible to both parties. The mediator assists the parties in their negotiation by shifting them from an adversarial approach to a problem solving and interest based approach. The mediator carries the proposals from one party to the other until a mutually acceptable settlement is found. This is called 'Shuttle Diplomacy'.

**NEGOTIATION STYLES**

| | |
|---|---|
| 1) **Avoiding Style** | **Unassertive and Uncooperative**: The participant does not confront the problem or address the issues. |
| 2) **Accommodating Style** | **Unassertive and Cooperative:** He does not insist on his own interests and accommodates the interests of others. There could be an element of sacrifice. |
| 3) **Compromising Style** | **Moderate level of Assertiveness and Cooperation:** He recognizes that both sides have to give up something to arrive at a settlement. He is willing to reduce his demands.<br><br>**Emphasis will be on apparent equality.** |
| 4) **Competing Style** | **Assertive and Uncooperative**: The participant values only his own interests and is not concerned about the interests of others. He is aggressive and insists on his demands. |

5) **Collaborating Style** — **Assertive, Cooperative and Constructive**: He values not only his own interests but also the interests of others. He actively participates in the negotiation and works towards a deeper level of understanding of the issues and a mutually acceptable solution satisfying the interests of all to the extent possible.

**What is Bargaining?**

Bargaining is a part of the negotiation process. It is a technique to handle conflicts. It starts when the parties are ready to discuss settlement terms.

**TYPES OF BARGAINING USED IN NEGOTIATION**

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

(i) Distributive Bargaining

(ii) Interest based Bargaining.

(iii) Integrative Bargaining.

(i) **Distributive Bargaining**: is a customary, traditional method of bargaining where the parties are dividing or allocating a fixed resource (i.e., property, money, assets, company holdings, marital estate, probate estate, etc.). In distributive bargaining the parties may not necessarily understand their own or the other's interests and, therefore, often creative solutions for settlement are not explored. It could lead to a win-lose result or a compromise where neither party is particularly satisfied with the outcome.

**Positional Bargaining**: Positional Bargaining, is characterized by the primary focus of the parties on their positions (i.e., offers and counter-offers). In this form of bargaining, the parties simply trade positions, without discussing their underlying interests or exploring additional possibilities for trade-offs and terms. This is the most basic form of negotiation and is often the first method people adopt. Each side takes a position and argues for it and may make concessions to reach a compromise. This is a competitive negotiation strategy. In many cases, the parties will never agree and if they agree to compromise, neither of them will be satisfied with the terms of the compromise.

**Rights-Based Bargaining**: This form of bargaining focuses on the rights of parties as the basis for negotiation. The emphasis is on who is right and who is wrong. For example, "Your client was negligent. Therefore, s/he owes my client compensation." "Your client breached the contract. Therefore, my client is entitled to contract damages."

Rights-based bargaining plays an important role in many negotiations as it analyses and defines obligations of the parties. It is often used in combination with Positional Bargaining (e.g., "Your client was negligent, so she owes my client X amount in compensation. ) Rights-Based Bargaining can lead to an impasse when the parties differ in the interpretation of their respective rights and obligations.

**(ii) Interest-Based Bargaining:** A mutually beneficial agreement is developed based on the facts, law and interests of both parties. Interests include needs, desires, goals and priorities. This is a collaborative negotiation strategy that can lead to mutual gain for all parties, viz., "win-win". It has the potential to combine the interests of parties, creating joint value or enlarging the pie.

Relief expands in interest based bargaining. It preserves or enhances relationships. It has all the elements of principled negotiation and is advised in cases where the parties have on-going relationships and / or interests they want to preserve.

**(iii) Integrative Bargaining:** Integrative Bargaining is an extension of Interest Based Bargaining. In Integrative Bargaining the parties "expand the pie" by integrating the interests of both parties and exploring additional options and possible terms of settlement. The parties think creatively to figure out ways to "sweeten the pot", by adding to or changing the terms for settlement.

**BARRIERS TO NEGOTIATION**

1) Strategic Barriers.

2) Principal and Agent Barriers.

3) Cognitive Barriers (Perception Barriers).

**1) Strategic Barriers:**

A Strategic Barrier is caused by the strategy adopted by a party to achieve his goal. For example with a view to make the husband agree for divorce the wife files a false complaint against her husband and his family members alleging an offence under Section 498 A of the Indian Penal Code.

A mediator helps the parties to overcome strategic barriers by encouraging the parties to reveal information about their underlying interests and understanding the strategy of the party.

**2) Principal and Agent Barriers**:

The behaviour of an agent negotiating for the principal may fail to serve interests of the principal. There may be conflict of interests between the principal and his agent. An agent may not have full information required for negotiation or necessary authority to make commitments on behalf of the principal. In all such contingencies the mediator helps the parties to overcome the 'Principal and Agent Barrier' by bringing the real decision maker (Principal) to the negotiating table.

**3) Cognitive Barriers (Perception Barriers).**

Parties while negotiating make decisions based on the information they have. But sometimes there could be limitation to the way they process information. There could be perception limitations which could occur due to human nature, psychological factors and/or the limits of our senses. These perception limitations are called cognitive barriers and can impede negotiation. It is important a mediator to identify Cognitive Barriers and use communication techniques to overcome it.

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**LIFE IS CONSTANLY TEACHING US**
**THAT WE ARE MIRROR OF ONE ANOTHER**
**AND THAT NO ONE IS AN ISLAND.**
- Auliq Ice

# CHAPTER - X
# IMPASSE

During mediation sometimes parties reach an impasse. In mediation, impasse means and includes a stalemate, standoff, deadlock, bottleneck, hurdle, barrier or hindrance. Impasse may be due to various reasons. It may be due to an overt conflict between the parties. It may also be due to resistance to workable solutions, lack of creativity, exhaustion of creativity etc. Impasse may be used as a tactic to put pressure on the opposite party. There may also be valid or legitimate reasons for the impasse.

**TYPES OF IMPASSE**

There are three types of impasse depending on the causes for impasse namely

(i) Emotional impasse

(ii) Substantive impasse

(iii) Procedural impasse

**Emotional impasse can be caused by factors like :**

Personal animosity

- Mistrust
- False pride
- Arrogance
- Ego
- Fear of losing face
- Vengeance

**Substantive impasse can be caused by factors like:**

- Lack of knowledge of facts and/or lawLimited resources, despite willingness to settle
- Incompetence (including legal disability) of the parties

- Interference by third parties who instigate the parties not to settle dispute or obstruct the
- settlement for extraneous reasons.
- Standing on principles, ignoring the realities
- adamant attitude of the parties

**Procedural impasse can be caused by factors like :**

Lack of authority to negotiate or to settle

Power imbalance between the parties

Mistrust of the mediator

**STAGES WHEN IMPASSE MAY ARISE**

- Impasse can arise at any stage of the mediation process namely introduction and opening
- statement, joint session, separate session and closing.

**TECHNIQUES TO BREAK IMPASSE**

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

(a) Reality Testing

(b) Brainstorming

(c) Changing the focus from the source of the offer to the terms of the offer.

(d) Taking a break or postponing the mediation to defuse a hostile situation, to gather further information, to give further time to the parties to think, to motivate the parties for settlement and for such others purposes.

(e) Alerting and cautioning the parties against their rigid or adamant stand by conveying that the mediator is left with the only option of closing the mediation.

(f) Taking assistance of other people like spouses, relatives, common friends, well wishers, experts etc. through their presence, participation or otherwise.

(g) Careful use of good humour.

(h) Acknowledging and complementing the parties for the efforts they have already made.

(i) Ascertaining from the parties the real reason behind the impasse and seeking their suggestions to break the impasse.

(j) Role-reversal, by asking the party to place himself/ herself in the position of the other party and try to understand the perception and feelings of the other party.

(k) Allowing the parties to vent their feelings and emotions.

(l) Shifting gears i.e. shifting from joint session to separate session or vice-versa.

(m) Focusing on the underlying interest of the parties.

(n) Starting all over again.

(o) Revisiting the options.

(p) Changing the topic to come back later.

(q) Observing silence.

(r) Holding hope

(s) Changing the sitting arrangement.

(t) Using hypothetical situations or questions to help parties to explore new idea and options.

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**IT IS VERY HUMBLING TO SEE MY OWN CHARACTER DEFECTS IN SOMEONE WHO ANNOY ME. AT THE END OF THE DAY, I REALIZE THEY HAVE ACTUALLY PROMPTED POSITIVE CHANGE IN ME.** - Auliq Ice

# CHAPTER - XI
# RELATED TOPICS

## A) ROLE OF ADVOCATES IN MEDIATION

The role of advocates in mediation can be divided into three phases:

(i) Pre-mediation;

(ii) During mediation; and

(iii) Post-mediation.

**(i) Pre-Mediation**

Where Mediation is considered the appropriate mode of ADR, Advocate prepares his client to opt for Mediation explaining and educating the party about the concept, process and advantages of mediation. The advocate is best placed to assist his client to understand the role of the mediator as a facilitator. He helps the client to understand that the purpose of mediation is not merely to settle the dispute and dispose of the litigation, but also to address the needs of the parties and to explore creative solutions to satisfy their underlying interests. The lawyer can help the parties to change their attitude from adversarial to collaborative. While helping the party to understand the legal position and to assess the strength and weakness of his case and possible outcome of litigation, the advocate makes him realize his real needs and underlying interest which can be better satisfied through mediation.

**(ii) During Mediation**

The role of advocates is very important during mediation also. The participation of advocates in mediation is often constructive but sometimes it may be non-cooperative and discouraging. The attitude and conduct of the advocate influence the attitude and conduct of his client. Hence, in order to ensure meaningful dialogue between the parties and the success of mediation, advocates must have a positive attitude and must demonstrate faith in the mediation process, trust in the mediator and respect for the mediator as well as the other party and his counsel. The advocate must himself observe the ground rules of mediation explained by the mediator and advise the party also to observe them. The lawyer must be prepared on the facts, the law and the precedents. At the same time, he must enable and encourage the party to present his case before the mediator. Considering that the party may not always be able to state the complete and correct facts or refer to

the relevant documents, the lawyer must be alert and vigilant to supplement them. With the help of reality-testing, using the BATNA/ WATNA/ MLATNA analysis, the advocate must constantly evaluate the case of the parties and the progress of mediation and must be prepared to advise the party to change position, approach, demands and the extent of concessions. When it is felt necessary to have a sub-session with the advocate(s) the mediator may hold such sub- session with the advocate(s) and the advocate(s) must cooperate with the mediator to carry forward the process and arrive at a settlement. Such sub-sessions with the advocate(s) can be held by the mediator also at the request of the party or the advocate. The advocate participates in finalizing and drafting the settlement between the parties. He must ensure that the settlement recorded is complete, clear and executable. He must also explain to his client and make him understand every term of the settlement.

**iii) Post-Mediation**

After conclusion of mediation also, the advocate plays a significant role. If no settlement has been arrived at, he has to assist and guide the party either to continue with the litigation or to consider opting for another ADR mechanism. If a settlement between the parties has been reached before the mediator, the advocate has the responsibility to reassure his client about the appropriateness of the client's decision and to advise against any second thoughts. To maintain and uphold the spirit of the settlement, the advocate must cooperate with the court in the execution of the order/decree passed in terms of the settlement.

**B) ROLE OF PARTIES IN MEDIATION**

Mediation is a process in which the parties have a direct, active and decisive role in arriving at an amicable settlement of their dispute. Though the parties get the assistance of their advocate and the neutral mediator, the final decision is of the parties. As far as the parties are concerned, the whole process of mediation is voluntary. Though consent of the parties is not mandatory for referring a case to mediation and though the parties are required to participate in the mediation, mediation is voluntary as the parties retain their authority to decide whether the dispute should be amicably settled or not and what should be the terms of the settlement. Neither the mediator nor the advocates can take the decision for the parties and they must recognize and respect the right of self-determination of the parties.

Mediation is about communicating, persuading and being persuaded for a settlement. Hence,

each party needs to communicate its view to the other party and should be open to receive such communication in return. Both speaking and listening are equally important. The attempt must not be to argue and defeat but to know and inform. Parties may have to change their position and align it with their best interest.

A settlement duly arrived at between the parties in mediation is binding on the parties and the parties are bound to cooperate in the execution of the order/decree passed in terms of the settlement.

## C) ETHICS AND CODE OF CONDUCT FOR MEDIATORS

1. **Avoid conflict of interest**

A mediator must avoid mediating in cases where they have direct personal, professional or financial interest in the outcome of the dispute. If the mediator has any indirect interest (e.g. he works in a firm with someone who has an interest in the outcome or he is related to someone who has such an interest) he is bound to disclose to the parties such indirect interest at the earliest opportunity and he shall not mediate in the case unless the parties specifically agree to accept him as mediator despite such indirect interest.

Where the mediator is an advocate, he shall not appear for any of the parties in respect of the dispute which he had mediated.

A mediator should not establish or seek to establish a professional relationship with any of the parties to the dispute until the expiry of a reasonable period after the conclusion of the mediation proceedings.

2. **Awareness about competence and professional role boundaries**

Mediators have a duty to know the limits of their competence and ability in order to avoid taking on assignments which they are not equipped to handle and to communicate candidly with the parties about their background and experience. Mediators must avoid providing other types of professional service to the parties to mediation, even if they are licensed to provide it. Even though, they may be competent to provide such services, they will be compromising their effectiveness as mediators when they wear two hats.

3. **Practice Neutrality**

Mediators have a duty to remain neutral throughout the mediation i.e. from beginning to end. Their words, manner, attitude, body language and process management must reflect an impartial and even handed approach.

4. **Ensure Voluntariness**

The mediators must respect the voluntary nature of mediation and must recognize the right of the parties to withdraw from the mediation at any stage.

5. **Maintain Confidentiality**

Mediation being confidential in nature, a mediator shall be faithful to the relationship of trust and confidentiality imposed on him as a mediator. The mediator should not disclose any matter which a party requires to be kept confidential unless ;

a. the mediator is specifically given permission to do so by the party concerned; or

b. the mediator is required by law to do so.

6. **Do no harm**

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

7. **Promote Self-determination**

Supporting and encouraging the parties in mediation to make their own decisions (both individually and collectively) about the resolution of the dispute rather than imposing the ideas of the mediator or others, is fundamental to the mediation process. Mediator should ensure that there is no domination by any party or person preventing a party from making his/her own decision.

8. **Facilitate Informed Consent**

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

9. **Discharge Duties to third parties**

Just as the mediator should do no harm to the parties, he should also consider whether a proposed settlement may harm others who are not participating in the mediation. This is more important when the third parties likely to be affected by a mediated settlement are children or other vulnerable people, such as the elderly or the infirm. Since third parties are not directly involved in the process, the mediator has a duty to ask the parties for information about the likely impact of the settlement on others and encourage the parties to consider the interest of such third parties also.

10. **Commitment to Honesty and Integrity**

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

a. his qualifications and prior experience;

b. direct or indirect interest if any, in the outcome of the dispute;

c. any fees that the parties will be charged for the mediation; and

d. any other aspect of the mediation which may affect the party's willingness to participate in the process.

Honesty also means telling the truth when meeting the parties separately, e.g. if party 'A' confidentially discloses his minimum expectation and party 'B' asks the mediator whether he knows the opponent's minimum expectation, saying 'No' would be dishonest. Instead, the mediator could say that he has discussed many things with party 'A' on a confidential basis and, therefore, he is at liberty to respond to the question, just as he would be precluded from disclosing to party

'A' certain things what was told by party 'B'. When mediating separately and confidentially with the parties in a series of private sessions, the mediator is in a unique and privileged position. He must not abuse the trust the parties placed in him, even if he believes that bending the truth will further the cause of settlement.

Apart from the fee/remuneration/honorarium, if any, prescribed under the rules, the mediator shall not seek or receive any amount or gift from the parties to the mediation either before or after the conclusion of the mediation process.

Where the mediator is a judicial officer he shall not mediate any dispute involved in or connected with a case pending in his Court.

**D) APOLOGY**

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

**AN APOLOGY IS THE SUPER GLUE OF LIFE. IT CAN REPAIR JUST ABOUT ANYTHING.**

**-** Lynn Johnstin

**Recommeded Readings :-**

1. Section 89 and Order X Rule 1-A, 1B and 1C of CIvil Procedure Code 1908 (CPC).
2. Saleem Advocate Bar Association Vs. Union of India MANU/SC/0912/2002
3. Saleem Advocate Bar Association Vs. Cherian Varkey Construction Co. (P) Ltd. and Ors. (2010) 8 SCCC 24

## CURRICULUM OF REFRESHER COURSE

**Day - 1**

**Suggested Reading : Mediation Training Manual for Refresher Course**

| TIME | SESSIONS | STUDY TOPIC |
|---|---|---|
| **10.00 AM to 11.30 AM** | **SESSION - I** | **Conflict**<br>1. Causes<br>Management & Resolution<br>**Exercise - I**<br>(Chapter - II) |
| **11.45 AM to 01.15 PM** | **SESSION - II** | **Mediation : Salient Feature**<br>♦ ADR Mechanism u/s 89, Civil Procedure Code<br>- Advantages<br>♦ Role of Mediators<br>(Chapter - III, IV & VII) |
| **02.15 PM to 03.45 PM** | **SESSION - III** | **Mediation : Process**<br>♦ Introduction<br>♦ Joint Session<br>♦ Private Session<br>(Chapter - V & VI) |
| **04.00 PM to 05.00 PM** | **SESSION - IV** | **Closing**<br>- Settlement<br>- No - Settlement<br>**Role Play - I**<br>(Robbert V. Arun) (Chapter - V & VI) |

**Note : Tea Breaks : 11.30 AM to 11.45 AM**
**: 03.45 PM to 04.00 PM**
**Lunch Break : 1.15 PM to 02.15 PM**

**Day - 2**

| TIME | SESSIONS | STUDY TOPIC |
|---|---|---|
| **10.00 AM to 11.30 AM** | **SESSION - I** | **COMMUNICATON MEDIATION** |
| | | Basic Element of Communication & its Process<br>♦ Effective and Ineffective Communication<br>♦ Verbal & Non - Verbal Communication<br>♦ Barriers in Communication<br>(Chapter - VIII) |
| **11.45 AM to 03.45 PM** | **SESSION - II** | **COMMUNICATION SKILLS**<br>♦ Active Listening<br>♦ Empathy with neutrality<br>♦ Body Language<br>♦ Questions<br>(Chapter - VIII) |
| **04.00 PM to 05.00 PM** | **SESSION - III** | **BARGAININGS**<br>♦ Distributive<br>♦ Integratvie<br>♦ Interests based<br>(Chapter - IX) |

**Note : Tea Breaks : 11.30 AM to 11.45 AM**
**: 03.45 PM to 04.00 PM**
**Lunch Break : 1.15 PM to 02.15 PM**

**Day - 3**

| TIME | SESSIONS | STUDY TOPIC |
|---|---|---|
| **10.00 AM to 11.30 AM** | **SESSION - I** | **NEGOTIATION** |
| | | **What is Negotiation ?**<br>**Negotiation Styles**<br>1. Accommodating<br>2. Avoiding<br>3. Collaborating<br>4. Competing<br>5. Compromising<br>**Barriers to Negotiations**<br>1. Strategic<br>2. Principal and Agent<br>3. Cognitive<br>**Role Play - II**<br>(Mohan V Soft Drinks) |
| **11.45 AM to 01.15 PM** | **SESSION - II** | **IMPASSE : Understanding and Mangaement**<br>♦ Definition<br>♦ Causes<br>- Emotional<br>- Substantive<br>- Procedural<br>- Techniques to Manage Impasse<br>(Chapter - X) |
| **02.15 PM to 03.45 PM** | **SESSION - III** | **RELATED TOPICS**<br>♦ Role of Advocates<br>♦ Role of Parties<br>♦ Ethical Principles & Code of Conduct for Mediatiors<br>♦ Apology<br>(Chapter - XI) |
| **04.00 PM to 05.00 PM** | **SESSION - IV** | **INTERACTIVE SESSION** |

**Note : Tea Breaks : 11.30 AM to 11.45 AM**
**: 03.45 PM to 04.00 PM**
**Lunch Break : 1.15 PM to 02.15 PM**

## Annexure - A

# Role Play I

### Robbert v. Arun

## General Information

Arun has advertised in a newspaper about his intention to sell a car owned by him. Robbert, a good friend of Arun, purchased the said car for a valuable consideration of Rs. 2 Lakhs. Robbert in a short period realized that Exhaust System is defective. Robbert became dissatisfied with the functioning of the car. He asked Arun to take back his car and refund the money of Rs.2 Lakhs. Initially, Arun promised to pay back Rs. 2 Lakhs to Robbert but later on refused to do so. Robbert has filed a suit for recovery of Rs. 2 Lakhs alongwith interest @15% p.a. against Arun. Case is referred for mediation.

## Confidential facts for Arun

1. Arun is a 25 years old man and is unemployed for the last one year. He is earning about Rs. 5,000/- per month from a petty job which is temporary in nature.

2. Arun decided to dispose of his car. For this purpose, he gave an advertisement in the newspaper. Robbert, one of the close friends agreed to purchase the said car despite the initial reluctance of Arun.

3. Arun did not disclose the faulty exhaust system of the car. Arun sold the car for a price of Rs. 2 Lakhs. It is very difficult for the Arun to pay back the entire money of Rs.2 Lakhs but he may consider to get the faulty exhaust system repaired from a mechanic and to pay repair charges.

4. Arun is also interested to maintain future relations with Robbert.

## Confidential facts for Robbert

1. Robbert is 25 years old. He recently got a job in a reputed company. Robbert's office is situated about 25 km away from his residence. He needs a car for transportation. Robbert cannot purchase a new car from the market. Robbert thought that the car owned by Arun should be in a good condition. Arun was not inclined to sell the car earlier but due to repeated requests, he sold the car to Robbert for a consideration of Rs.2 Lakhs. Arun also said to one of the common friend that "Well, now all my headaches are gone."

2. Robbert within the short span of time understand the Arun's comments. Robbert began to develop headache and nosia from the fumes which filled the car at the time of driving. Car was examined by a mechanic. After inspection, he suggested that entire exhaust system is required to be replaced which may cost around Rs.50, 000/-. Thereafter, the car will be in perfect working condition.

3. Arun did not disclose the said fact to Robbert and only talked about some minor problems in the engine of the car. This type of behaviour was not expected by Robbert from his close friend Arun.

4. Robbert contacted Arun and requested him to pay back his money. Initially, Arun agreed to pay back money but later on he refused. Robbert is only interested in the money. He does not want to have any future relation with Arun.

# ROLE PLAY II

## Mohan v. Soft Drink Limited

### General Information

Ram is running a restaurant in a posh colony of Delhi. He used to purchase Soft Drinks from a manufacturer Soft Drinks Ltd.

About 6 months back, Mohan visited the restaurant owned by Ram. He ordered for soft drink. Ram supplied the soft drinks prepared by Soft Drinks Ltd. It was supplied in a dark opaque glass bottle. It was opened by Mohan. Mohan found foreign article in the bottle which he could not notice before drinking. He suffered from severe gastric problems and could not attend his office for 10 days. He lost his job. Mohan initiated legal proceedings against Soft Drinks Ltd. and claimed damages of Rs. 5 lakhs due to mental pain, agony, loss of job and illness. Soft Drink Company appeared in the court and expressed willingness to settle disputes through Mediation. Referral Judge referred case for Mediation.

### Confidential Information for Mohan

1. Mohan remained ill due to the gastric problem for a period of 10 days. He was employed as an assistant in a General Merchant Shop. He lost his job due to absence of ten days.
2. Mohan does not want any action against Ram because he thinks that Ram was not at fault.
3. Mohan wants to initiate legal action only against the Soft Drinks Company. He thinks that Soft Drink Company should have proper system to prevent entry of foreign articles into the bottles.
4. When Mohan tried to contact concerned officials of the Soft Drinks Company about the incident, they misbehaved him. This really angered him.
5. Mohan obtained legal advice. As per the legal advice, the litigation in India is costly and time consuming. Mohan may not get the damages within the reasonable time.
6. Mohan needs money to invest in new business. If he gets suitable damages from Soft Drinks Company, he can invest money in new business.
7. Mohan is also interested in the job if offered by the Soft Drinks Company.

### Confidential instructions for Soft Drinks Ltd.

1. Soft Drinks Company is manufacturing soft drinks for the last 15 years. It is a multi-national company and is enjoying global reputation.
2. Soft Drinks is facing competition in Indian Markets from other manufacturers. If case is made public then the Soft Drinks Company Ltd. May lost business in Indian Markets.
3. It was a bonafide mistake. Soft Drinks company is having modern machines for filling the bottles.
4. Law of damages in India is now developing. The Courts are awarding damages in such cases.
5. Soft Drinks company is willing to pay Rs.1 Lakh to Mohan to settle the dispute.
6. Soft Drinks company also received legal advise and as per legal advise, damage shall be payable to Mohan.
7. The forensic report is also against the Soft Drinks Company. The foreign article was found to be decomposed snail.