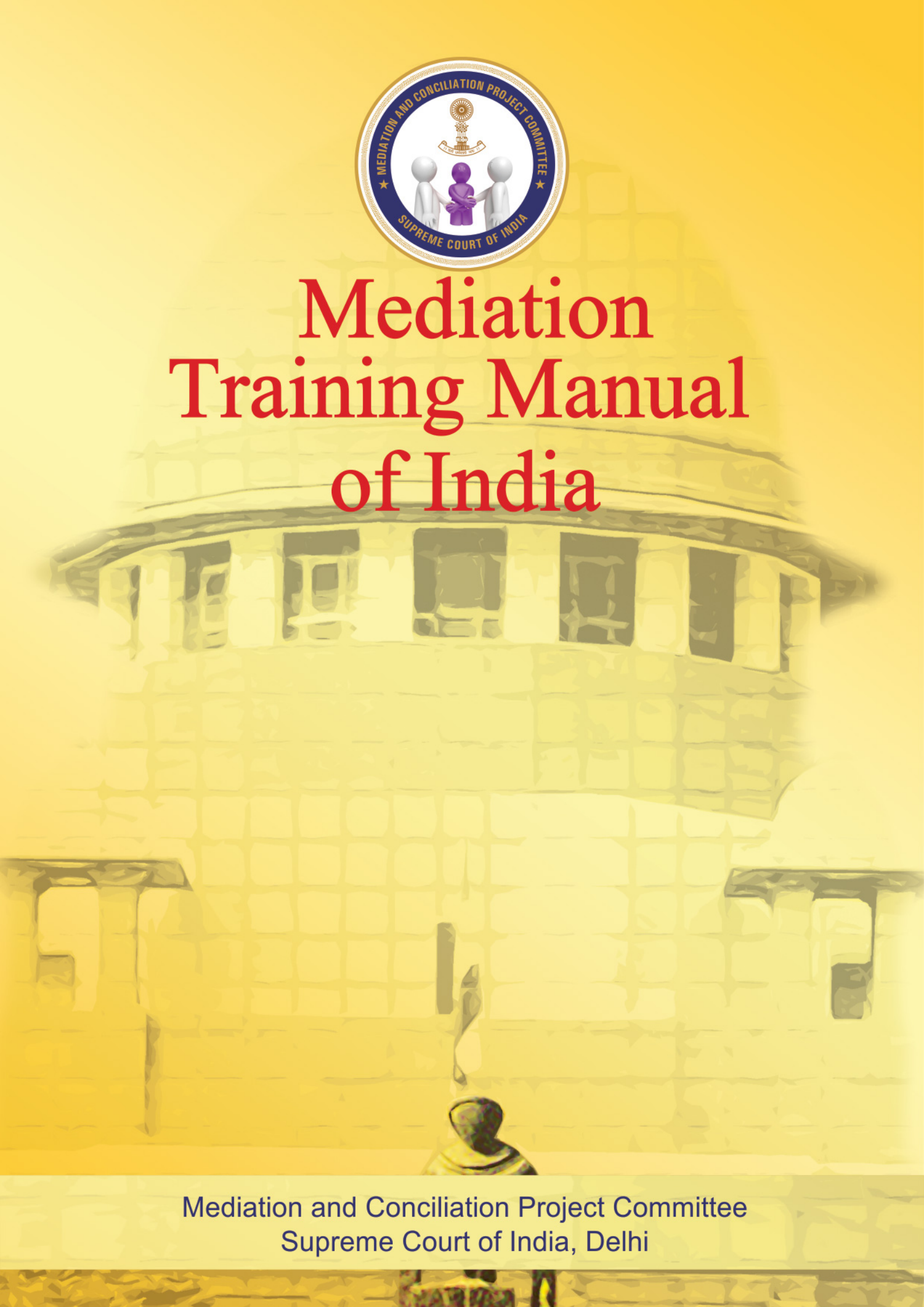

Mediation Training Manual of India

Mediation and Conciliation Project Committee
Supreme Court of India, Delhi

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CONTENTS

SWATANTER KUMAR
Judge, Supreme Court of India

PREFACE

Settlement of disputes in an amicable way is the hall-mark of civilization. In ancient India, mediation system has been prevalent in one form or the other. It has continued in our villages and has also been preserved in its customary form in our tribal areas. So far as formal litigation system is concerned, mediation, along with other methods of Alternative Disputes Resolution, has been statutorily recognized by the Civil Procedure Code (Amendment) Act, 1999 which introduced section 89 thereto.

An idea of the immense value that mediation imbibes in itself can be had by separately treating the wide array of unique features clustered under the mediation rubric. These features include severability, flexibility, party-participation, consensus, self-reflection, preservation of ongoing relationships and/or peaceful termination of relationships, etc. It fosters peaceable and healthier inter-personal interactions in the long term, thereby pre-empting the causes of conflict in the society. The benefits of such processes as mediation are further fortified from the fact that imminent legal personalities, such as Mahatma Gandhi, Abraham Lincoln and Nani Palkhiwala, have taken pleasure and pride in continually settling cases out of court, in uniting the parties driven asunder by conflict and discouraging litigation. In the words of Guatam Budhha, "Better than a thousand hollow words is one word that gives peace", which even is reflected in the famous Sanskrit quote *"santosham paramam sukham"*. Mediation is one of the modes for attainment of 'Peace'.

An evaluation of the usefulness of anything presupposes an awareness of what it is and the particular value that it has to offer. Though mediation as a process of dispute resolution is not new to our nation, in the changed social scenario an effective adaptation of the traditional methodology to the new conditions requires untiring efforts and devotion to be dutifully put into this reform process right from its inception to its culmination into an effective practice.

The Mediation and Conciliation Project Committee, Supreme Court of India has sought to tie together the various strands that have been the subject-matter of debate from time to time as regards

the benefits and/or suitability of ADR methods of dispute resolution, by way of various Regional Conferences organized across the length and breadth of the country. Conferences have been successfully held at Guwahati, Lucknow, Jammu, Bangalore, and Mumbai. These Conferences have witnessed brainstorming discussions of the strategies for integration of mediation within the conventional Court System. It is these exploring and inspirational discussions held at the Regional Conferences that have fructified into this National Conference on Mediation.

The first and foremost task before the Committee was to train the mediators. The Committee decided 40-Hours Mediation Training and 10 actual mediations as the essential qualification required for a mediator to be able to be entrusted the task of mediating disputes. Further, it was felt by the Committee that various schools of thought were prevalent in the country regarding the topics, curriculum and methodology for training of the mediators. The Committee thought it appropriate that a uniform training manual adaptable to local situations, but at the same time assimilating the cream of various mediation centres, was essential to be uniformly followed throughout the country in order to streamline the functioning of mediation in India. Based on that, a Sub-Committee was constituted under the able guidance of Hon'ble Mr. Justice Cyriac Joseph (former Judge, Supreme Court of India and Member, MCPC) to lay down a uniform Mediation Training Manual of India. It consisted of experts drawn from different mediation centres in the country. The Sub-Committee divided the topics among its various members, who prepared individual chapters. It was a tough job to marshal all the inputs received from the experts, taking the best of various institutions and the views of various experts on the subject. The Chairman of the Sub-Committee, with his rich and valuable experience and clarity of vision, could lead the team in assimilating the concepts of mediation.

The deliberation on the various topics to form a crystallized manual was an onerous task. The Sub-Committee met on several days, sat from morning till evening, discussed threadbare each topic, and after a long process of chiseling and polishing, has finally come out with a detailed, thorough and final version of the Manual.

This Manual is the product of a team work and intellectual exercise of the experts. The Sub-Committee has accomplished a major project of the Committee, initiated by the visionary Judge, Hon'ble Mr. Justice S.B. Sinha, carried forward by Hon'ble Mr. Justice R.V. Raveendran, who conceptualized and popularized mediation, and Hon'ble Mr. Justice Dalveer Bhandari, under whose able guidance mediation has become a vast movement in the country.

The Mediation and Conciliation Committee hopes that this Training Manual will facilitate and help guide mediation in growing not as an alternative dispute resolution mechanism, but as another effective mode of disputes resolution. We place this Manual with great sense of satisfaction for the benefit of the trainers, mediators, referral judges, litigants and common man and all those who strive to achieve peace through mediation. We expect that through this endeavour of the Committee, we are able to bring to life the words of Joseph Grynbaum, "an ounce of mediation is worth a pound of arbitration and a ton of litigation!"

[Swatanter Kumar]

ACKNOWLEDGEMENT

Mediation has emerged as a fast growing disputes redressal mechanism. The Supreme Court of India has constituted Mediation and Conciliation Project Committee (MCPC) to oversee the effective implementation of Mediation and Conciliation in the country. Referral Judges and Mediators play an important role in mediation. A need was felt to prepare a uniform Training Manual applicable throughout India, which can be used by the Trainers, Mediators, Referral judges, Litigants etc.

A Sub Committee under the chairmanship of Hon'ble Mr. Justice Cyriac Joseph, Judge, Supreme Court of India and Former Member, MCPC was constituted to prepare "Mediation Training Manual of India". The other members of the Committee were:

1. Hon'ble Mrs. Justice Chitra Venkataraman, Judge, High Court of Madras.
2. Hon'ble Mr. Justice M.L. Mehta, Judge, High Court of Delhi
3. Mrs. Uma Ramanathan, Trainer, Tamil Nadu Mediation & Conciliation Centre
4. Mrs. Laila Ollapally, Trainer, Bangalore Mediation Centre
5. Mr. Niranjan Bhatt, Senior Advocate and Trainer, Ahmedabad, Gujarat
6. Mrs. Sadhna Ramachandran, Advocate and Organizing Secretary, Delhi High Court Mediation & Conciliation Centre
7. Mrs. Anu Malhotra, Trainer, Delhi Mediation Centre
8. Dr. Sudhir Kumar Jain, Trainer, Delhi Mediation Centre
9. Mr. Sunil Thomas, Registrar & Member Secretary, MCPC

The Mediation Training Manual of India is the result of a laborious exercise undertaken by the committed and dedicated Chairman and members of the Sub-Committee. MCPC expresses deep gratitude to Hon'ble Mr. Justice Cyriac Joseph, former Member of MCPC and Chairman of the Sub-Committee, but for whose dedication, commitment and guidance, the Training Manual could not have been prepared. MCPC also expresses its gratitude to the members of Sub-Committee who prepared the draft topics and participated in the deliberations on topics which were proposed to be included in the Training Manual.

MCPC also expresses its deep sense of gratitude to Hon'ble Mr. Justice R.V. Raveendran, Hon'ble Mr. Justice Dalveer Bhandari, Former Chairman, MCPC, Hon'ble Mr. Justice Surinder Singh Nijjar , Chairman, MCPC, Hon'ble Mr. Justice Swatanter Kumar, Judge, Supreme Court of India and Member, MCPC and Hon'ble Mr. Justice Madan B. Lokur, Judge, Supreme Court of India and Member, MCPC, for their valuable suggestions and guidance in preparation of the Training Manual.

MCPC also acknowledges the assistance and guidance taken from the Training Manuals of the Delhi Mediation Centre, Bangalore Mediation Centre, Tamil Nadu Mediation and Conciliation Centre and other References and Books which were consulted in preparation of Training Manual.

MCPC also expresses its gratitude to Mr. P.K. Bajaj, Coordinator, MCPC, Mr. P.S.N. Murthy, Dy. Coordinator, MCPC, Ms. Anita Malhotra, Ms. Rama Chopra, Mr. Manoj Bhatt and other officials of the Supreme Court of India for their valuable assistance in preparation of the Training Manual.

MCPC is also thankful to Dr. Siva Kumar, Officiating Director, Indian Law Institute and the officials of ILI for their valuable assistance at institutional level in preparation of the Training Manual. MCPC expresses its gratitude to all those who have contributed in its preparation.

CHAPTER-I
INTRODUCTION

Though documentation is scant, it is believed that nearly every community, country, and culture has a lengthy history of using various methods of informal dispute resolution. Many of these ancient methods shared procedural features with the process that has coalesced in the form of contemporary mediation. In India, as in other countries, the origin of mediation is obscured by the lack of a clear historical record. In addition, there is a lack of official records of indigenous processes of dispute resolution due to colonization in India over the past 250 years. There is scattered information, set forth below, that can be gathered by tracing mediation in a very elementary form back to ancient times in the post-Vedic period in India. Tribal communities practiced diverse kinds of dispute resolution techniques for centuries in different parts of the world, including India. In China government-sponsored mediation has been used on a widespread basis to resolve disputes based on aged societal principles of peaceful co-existence. Native Americans are known to have adopted their own dispute resolution procedures long before the American settlement.

HISTORICAL PERSPECTIVE

As recorded in Mulla's Hindu Law, ancient India began its search for laws since Vedic times approximately 4000 to 1000 years B.C. and it is possible that some of the Vedic hymns were composed at a period earlier than 4000 B.C. The early Aryans were very vigorous and unsophisticated people full of joy for life and had behind them ages of civilized existence and thought. They primarily invoked the unwritten law of divine wisdom, reason and prudence, which according to them governed heaven and earth. This was one of the first originating philosophies of mediation - Wisdom, Reason and Prudence, which originating philosophy is even now practiced in western countries.

The scarcely available ancient Indian literature reflects the cultural co-existence of people for many centuries. This reality necessitated many of the collaborative dispute resolution methods adopted in the modern mediation process. Towards the end of the Vedic epoch, philosophical and legal debates were carried on for the purpose of eliciting truth, in assemblies and parishads, which are now described as conferences. India has one of the oldest cultural histories of over 5000 years and a recent history of about 1000 years during which it was invaded by the Iranian plateau, Central Asia, Arabia, Afghanistan and the West Indian culture has absorbed the changes and influences of these aggressions to produce remarkable racial and cultural synthesis. The 29 Indian States have different and varying social and culture traditions, customs and religions. The era of Dharma Shashtras [code

of conduct] followed the Vedic epoch, during which period scholastic jurists developed the philosophy of basic laws. Their learned discourses recognized existing usages and customs of different communities, which included resolution of disputes by non-adversarial indigenous methods. One example is the tribunal propounded and set up by a brilliant scholar Yagnavalkya, known as KULA, which dealt with the disputes between members of the family, community, tribes, castes or races. Another tribunal known as SHRENI, a corporation of artisans following the same business, dealt with their internal disputes. PUGA was a similar association of traders in any branch of commerce. During the days of Yagnavalkya there was an unprecedented growth and progress of trade, industry and commerce and the Indian merchants are said to have sailed the seven seas, sowing the seeds of International Commerce. Another scholar Parashar opined that certain questions should be determined by the decisions of a parishad or association or an assembly of the learned. These associations were invested with the power to decide cases based on principles of justice, equity and good conscience. These different mechanisms of dispute resolution were given considerable autonomy in matters of local and village administration and in matters solely affecting traders' guilds, bankers and artisans. The modern legislative theory of arbitrage by domestic forums for deciding cases of members of commercial bodies and associations of merchants finds its origin in ancient customary law in India. Cases were decided according to the usages and customs as were approved by the conscience of the virtuous and followed by the people in general. The parishad recognized the modern concept of participatory methods of dispute resolution with a strong element of voluntariness, which another founding principle of modern mediation. Buddhism propounded mediation as the wisest method of resolving problems. Buddha said, "Meditation brings wisdom; lack of mediation leaves ignorance. Know well what leads you forward and what holds you back; choose that which leads to wisdom". This Buddhist aphorism reflects acceptance of the principle that mediation focuses on the future instead of dwelling in the past. Ancient Indian Jurist Patanjali said, "Progress comes swiftly in mediation for those who try hardest, instead of deciding who was right and who was wrong". It is a recorded fact that complicated cases were resolved not in the King's courts but by King's mediator. Even during the Mughal rule, Emperor Akbar depended upon his mediator minister Birbal. The most famous case was when two women claimed motherhood of a child, the Mediator suggested cutting the child into two and dividing its body and giving one-half to each woman. The real mother gave up her claim to save the child's life whereas the fake mother agreed to the division. The child was then given to the real mother. Though this was not a fully-developed example of modern mediation, it is an example of interest-based negotiation where the neutral third party seeks to identify the underlying needs and concerns of the parties. It is widely accepted that a village panchayat, meaning five wise men, used to be recognized and accepted as a conciliatory and / or decision- making body. Like many of the ancient dispute resolution methods, the panchayat shared some of the characteristics of mediation and some of the characteristics of arbitration.

As societies grew in size and complexity, informal decision-making processes became more structured and they gradually took the shape of a formal justice delivery system. In fact, societies could not grow larger in size and complexity without first evolving a system of resolving disputes that could keep the peace and harmony in the society and keep trade and commerce growing efficiently.*

Mediation in the United States has developed in several distinct directions. Community mediation emerged in the 1960's in response to racial tensions and integration issues. Neighbourhood Justice Centers were established to address those issues. Later, community mediation expanded in application to neighbour-neighbour disputes, family disputes, and other disputes where the issues were predominantly interpersonal. This view held that mediation should be community-based and independent of the legal system, opining that mediation could deliver a high rate of satisfying settlement results if it were separate from the legal bureaucracy. In the 1980's, private mediation caught on when insurance companies realized the cost benefits of resolving insurance claims informally and expeditiously. Private mediation took hold in a variety of ways, including the emergence of private/independent mediators, non-profit mediation programs and agencies, and for-profit mediation providers. Private mediation was applied to pre-litigation disputes, litigated disputes, and, more recently, commercial and international disputes. Court-annexed mediation, which was the subject of experimental usage in the 1970's and 1980's, began to expand significantly in the 1990's. This school of thought concluded that mediation should be an extension of the legal system, even seeing mediation as an effective means of narrowing issues for litigation in courts. Currently, court-annexed mediation is offered by most courts at the trial and appellate levels. All three forms of mediation, community mediation, private mediation, and court-annexed mediation continue to co-exist, thrive, and to meet the needs of disputing parties in the United States.

A turning point in the use of alternative dispute resolution in the United States occurred in 1976, at a nationwide conference of lawyers, jurists, and educators called the Pound Conference. The conference was convened to address the urgent problems of over-crowding in the jails, lengthy delays in the courts, and the lack of access to justice due to the prohibitive costs of litigation. The need for alternatives to litigation generated in the new concept of a "Multi-door Court-house," and reinforced the importance of "Neighbourhood Justice Centers". The Multi-door Court-house concept, originated by Harvard professor Frank Sander, envisioned a scenario in which an aggrieved party could simply go to a kiosk at the entrance of a courthouse where a facilitative attendant would direct the disputant to one of the doors providing alternative or traditional dispute resolution processes. Prof. Sander described it as fitting the forum to the fuss. In this manner, the legal system could help the litigants achieve the most satisfactory result, in effect placing responsibility for providing alternative

* Michael Mcllwrath - the host of the CPR International Dispute Negotiation (IDN)

processes, including mediation, in the hands of the judicial system. The idea of a neutral assisting the disputants in arriving at their own solution instead of imposing his solution was introduced. Professors Ury, Brett and Goldberg opined that reconciling interests was less costly and probing for deep-seated concerns, devising creative solutions and making trade-offs was more satisfying to the disputants than the adjudicatory process.

Mediation in India

Mediation, Conciliation and Arbitration, in their earlier forms are historically more ancient than the present day Anglo-Saxon adversarial system of law. Various forms of mediation and arbitration gained a great popularity amongst businessmen during pre-British Rule in India. The Mahajans were respected, impartial and prudent businessmen who used to resolve the disputes between merchants through mediation. They were readily available at business centres to mediate the disputes between the members of a business association. The rule in the constitution of the Association made a provision to dismember a merchant if he resorted to court before referring the case to mediation. This was a unifying business sanction. This informal procedure in vogue in Gujarat, the western province of India, was a combination of Mediation and Arbitration, now known in the western world, as Med-Arb. This type of mediation had no legal sanction in spite of its wide common acceptance in the business world. The East India Company from England gained control over the divided Indian Rulers and developed its apparent commercial motives into political aggression. By 1753 India was converted into a British Colony and the British style courts were established in India by 1775. The British ignored local indigenous adjudication procedures and modeled the process in the courts on that of British law courts of the period. However, there was a conflict between British values, which required a clear-cut decision, and Indian values, which encouraged the parties to work out their differences through some form of compromise.

The British system of justice gradually became the primary justice delivery system in India during the British regime of about 250 years. Even in England it was formed during a feudal era when an agrarian economy was dominant. While India remained a colony, the system thrived, prospered and deepened its roots as the prestigious and only justice symbol. Indigenous local customs and community-based mediation and conciliation procedures successfully adopted by business associations in western India were held to be discriminatory, depriving the litigants of their right to go to courts.

The British Courts gradually came to be recognized for its integrity and gained peoples' confidence. Even after India's independence in 1947, the Indian Judiciary has been proclaimed world over as the pride of the nation.

Until commerce, trade and industry started expanding dramatically in the 21st century, the British system delivered justice quicker, while maintaining respect and dignity. Independence brought with

it the Constitution, awareness for fundamental and individual rights, governmental participation in growth of the nation's business, commerce and industry, establishment of the Parliament and State legislatures, government corporations, financial institutions, fast growing international commerce and public sector participation in business. The Government became a major litigant. Tremendous employment opportunities were created. An explosion in litigation resulted from multiparty complex civil litigation, expansion of business opportunities beyond local limits, increase in population, numerous new enactments creating new rights and new remedies and increasing popular reliance on the only judicial forum of the courts. The inadequate infrastructure facilities to meet with the challenge exposed the inability of the system to handle the sheer volume of caseloads efficiently and effectively. Instead of waiting in queues for years and passing on litigation by inheritance, people are often inclined either to avoid litigation or to start resorting to extra-judicial remedies.

Almost all the democratic countries of the world have faced similar problems with court congestion and access to justice. The United States was the first to introduce drastic law reforms about 30 years back and Australia followed suit. The United Kingdom has also adopted alternative dispute resolution as part of its legal system. The European Union also endorses mediation for the resolution of commercial disputes between member states.

Legal Recognition of Mediation in India

The concept of mediation received legislative recognition in India for the first time in the Industrial Disputes Act, 1947. The conciliators appointed under Section 4 of the Act are " charged with the duty of mediating in and promoting the settlement of Industrial disputes." Detailed procedures were prescribed for conciliation proceedings under the Act.

Arbitration, as a dispute resolution process was recognized as early as 1879 and also found a place in the Civil Procedure Code of 1908. When the Arbitration Act was enacted in 1940 the provision for arbitration originally contained in Section 89 of the Civil Procedure Code was repealed. The Indian Legislature made headway by enacting The Legal Services Authorities Act, 1987 by constituting the National Legal Services Authority as a Central Authority with the Chief Justice of India as its Patron-in-Chief. The Central Authority has been vested with duties to perform, inter alia, the following functions: -

* To encourage the settlement of disputes by way of negotiations, arbitration and conciliation.
* To lay down policies and principles for making legal services available in the conduct of any case before the court, any authority or tribunal.
* To frame most effective and economical schemes for the purpose.

* To utilize funds at its disposal and allocate them to the State and District Authorities appointed under the Act.
* To undertake research in the field of legal services.
* To recommend to the Government grant-in-aid for specific schemes to voluntary institutions for implementation of legal services schemes.
* To develop legal training and educational programmes with the Bar Councils and establish legal services clinics in universities, Law Colleges and other institutions.
* To act in co-ordination with governmental and non-governmental agencies engaged in the work of promoting legal services.

The Indian parliament enacted the Arbitration and Conciliation Act in 1996, making elaborate provisions for conciliation of disputes arising out of legal relationship, whether contractual or not, and to all proceedings relating thereto. The Act provided for the commencement of conciliation proceedings, appointment of conciliators and assistance of suitable institution for the purpose of recommending the names of the conciliators or even appointment of the conciliators by such institution, submission of statements to the conciliator and the role of conciliator in assisting the parties in negotiating settlement of disputes between the parties.

In 1999, the Indian Parliament passed the CPC Amendment Act of 1999 inserting Sec.89 in the Code of Civil Procedure 1908, providing for reference of cases pending in the Courts to ADR which included mediation. The Amendment was brought into force with effect from 1st July, 2002.

Since the inception of the economic liberilisation policies in India and the acceptance of law reforms the world over, the legal opinion leaders have concluded that mediation should be a critical part of the solution to the profound problem of arrears of cases in the civil courts. In 1995-96 the Supreme Court of India under the leadership of the then Chief Justice, Mr. A. M. Ahmadi, undertook an Indo-U.S. joint study for finding solutions to the problem of delays in the Indian Civil Justice System and every High Court was asked to appoint a study team which worked with the delegates of The Institute for Study and Development of Legal Systems [ISDLS], a San Francisco based institution. After gathering information from every State, a central study team analyzed the information gathered and made some further concrete suggestions and presented a proposal for introducing amendments relating to case management to the Civil Procedure Code with special reference to the Indian scenario.

Evolution of Mediation in India

The first elaborate training for mediators was conducted in Ahmedabad in the year 2000 by American trainers sent by Institute for the Study and Development of Legal Systems (ISDLS). It was

followed by a few repeated advance training workshops conducted by Institute for Arbitration Mediation Legal Education and Development (AMLEAD) a Public Charitable Trust settled by two senior lawyers of Ahmedabad. On 27th July 2002, the Chief Justice of India, formally inaugurated the Ahmedabad Mediation Centre, reportedly the first lawyer-managed mediation centre in India. The Chief Justice of India called a meeting of the Chief Justices of all the High Courts of the Indian States in November, 2002 at New Delhi to impress upon them the importance of mediation and the need to implement Sec. 89 of Civil Procedure Code. Institute for Arbitration Mediation Legal Education and Development (AMLEAD) and the Gujarat Law Society introduced, in January 2003, a thirty-two hours Certificate Course for "Intensive training in Theory and Practice of Mediation". The U.S. Educational Foundation in India (USEFI) organized training workshops at Jodhpur, Hyderabad and Bombay in June 2003. The Chennai Mediation Centre was inaugurated on 9th April, 2005 and it started functioning in the premises of the Madras High Court. This became the first Court-Annexed Mediation centre in India. The Delhi Judicial Academy organized a series of mediation training workshops and opened a mediation centre in the Academy's campus appointing its Deputy Director as the mediator. Delhi High Court Mediation and Conciliation Centre has been regularly organizing mediation awareness workshops and Advanced Mediation Training workshops.

The Mediation and Conciliation Project Committee (MCPC) was constituted by the then Chief Justice of India Hon'ble Mr. Justice R.C. Lahoti by order dt. 9th April, 2005. Hon'ble Mr. Justice N. Santosh Hegde was its first Chairman. It consisted of other judges of the Supreme Court and High Court, Senior Advocates and Member Secretary of NALSA. The Committee in its meeting held on 11th July, 2005 decided to initiate a pilot project of judicial mediation in Tis Hazari Courts. The success of it led to the setting up of a mediation centre at Karkardooma in 2006, and another in Rohini in 2009. Four regional Conferences were held by the MCPC in 2008 at Banglore, Ranchi, Indore and Chandigarh.

MCPC has been taking the lead in evolving policy matters relating to the mediation. The committee has decided that 40 hours training and 10 actual mediation was essential for a mediator. The committee was sanctioned a grant-in-aid by the department of Legal Affairs for undertaking mediation training programme, referral judges training programme, awareness programme and training of trainers programme. With the above grant-in-aid, the committee has conducted till March, 2010, 52 awareness programmes/ referral judges training programmes and 52 Mediation training programmes in various parts of country. About 869 persons have undergone 40 hours training. The committee is in the process of finalizing a National Mediation Programme. Efforts are also made to institutionalize its functions and to convert it as the apex body of all the training programmes in the country.

The Supreme Court of India upheld the constitutional validity of the new law reforms in the case filed by Salem Bar Association and appointed a committee chaired by Justice Mr. Jagannadha

Rao, the chairman of the Law Commission of India, to suggest and frame rules for ironing out the creases, if any, in the new law and for implementation of mediation procedures in civil courts. The Law Commission prepared consultation papers on Mediation and Case Management and framed and circulated model Rules. The Supreme Court approved the model rules and directed every High Court to frame them. The Law Commission of India organized an International conference on Case Management, Conciliation and Mediation at New Delhi on 3rd and 4th May 2003, which was a great success. Delhi District Courts invited ISDLS to train their Judges as mediators and help in establishing court annexed mediation centre. Delhi High Court started its own lawyers managed mediation and conciliation centre. Karnataka High Court also started a court-annexed mediation and conciliation centre and trained their mediators with the help of ISDLS. Now court-annexed mediation centres have been started in trial courts at Allahabad, Lucknow, Chandigarh, Ahmedabad, Rajkot, Jamnagar, Surat and many more Districts in India.

Mandatory mediation through courts has now a legal sanction. Court-Annexed Mediation and Conciliation Centres are now established at several courts in India and the courts have started referring cases to such centres. In Court-Annexed Mediation the mediation services are provided by the court as a part and parcel of the same judicial system as against Court-Referred Mediation, wherein the court merely refers the matter to a mediator. One feature of court-annexed mediation is that the judges, lawyers and litigants become participants therein, thereby giving them a feeling that negotiated settlement is achieved by all the three actors in the justice delivery system. When a judge refers a case to the court-annexed mediation service, keeping overall supervision on the process, no one feels that the system abandons the case. The Judge refers the case to a mediator within the system. The same lawyers who appear in a case retain their briefs and continue to represent their clients before the mediators within the same set-up. The litigants are given an opportunity to play their own participatory role in the resolution of disputes. This also creates public acceptance for the process as the same time-tested court system, which has acquired public confidence because of integrity and impartiality, retains its control and provides an additional service. In court-annexed mediation, the court is the central institution for resolution of disputes. Where ADR procedures are overseen by the court, at least in those cases which are referred through courts, the effort of dispensing justice can become well-coordinated.

ADR services, under the control, guidance and supervision of the court would have more authenticity and smooth acceptance. It would ensure the feeling that mediation is complementary and not competitive with the court system. The system will get a positive and willing support from the judges who will accept mediators as an integral part of the system. If reference to mediation is made by the judge to the court annexed mediation services, the mediation process will become more expeditious and harmonized. It will also facilitate the movement of the case between the court and the mediator faster and purposeful. Again, it will facilitate reference of some issues to mediation

leaving others for trial in appropriate cases. Court annexed mediation will give a feeling that court's own interest in reducing its caseload to manageable level is furthered by mediation and therefore reference to mediation will be a willing reference. Court annexed mediation will thus provide an additional tool by the same system providing continuity to the process, and above all, the court will remain a central institution for the system. This will also establish a public-private partnership between the court and the community. A popular feeling that the court works hand-in-hand with mediation facility will produce satisfactory and faster settlements.

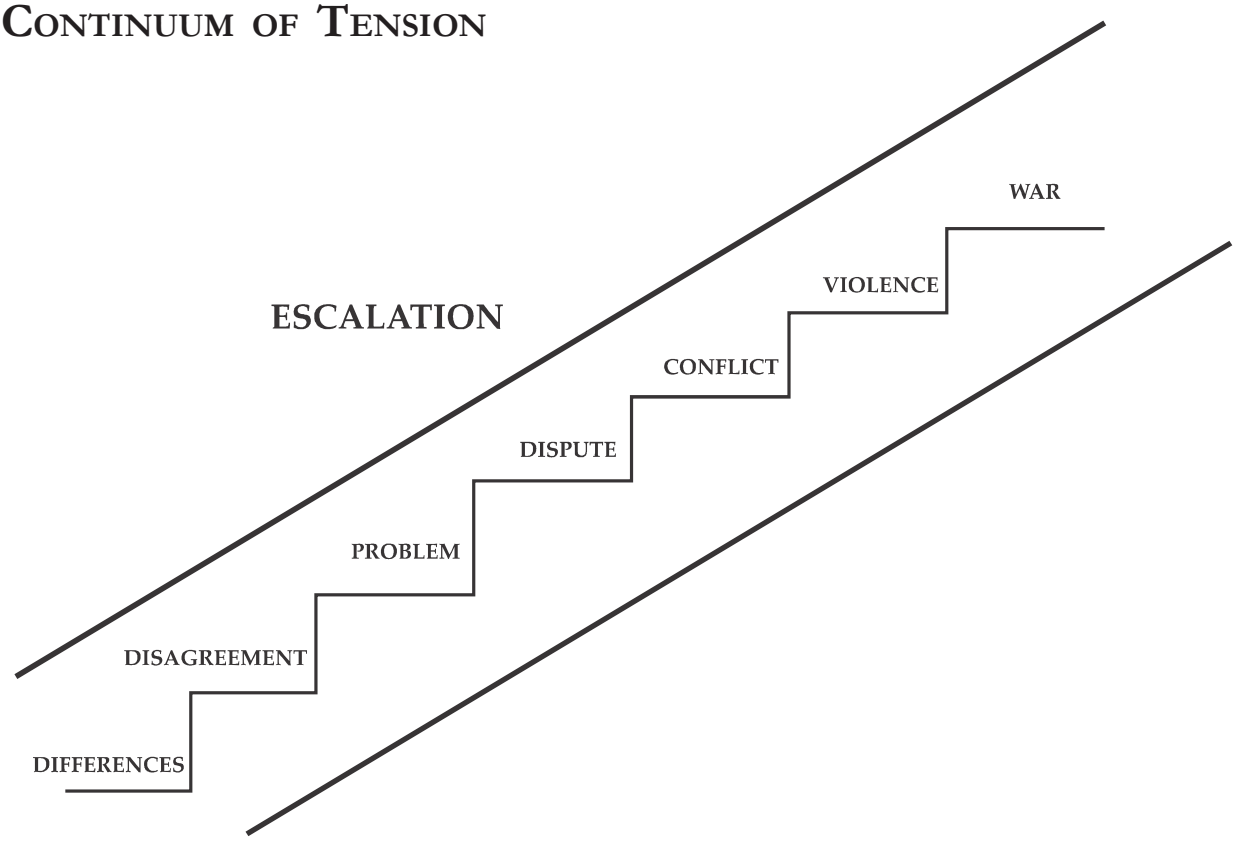
CHAPTER-II
UNDERSTANDING CONFLICT

THE NATURE OF CONFLICT

It is appropriate to begin the study of mediation with an examination of the nature of conflict and the principles of conflict resolution which underlie the mediation process. We will first attempt to understand conflict, then examine the need to manage conflict through negotiation and finally study mediation as assisted negotiation to resolve conflict effectively. This becomes necessary because how we understand conflict determines the way we will mediate.

Life comprises of several differences between and among people, groups and nations. There are cultural differences, personality differences, differences of opinion, situational differences. Unresolved differences lead to disagreements. Disagreements cause problem. Disagreement unresolved become 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



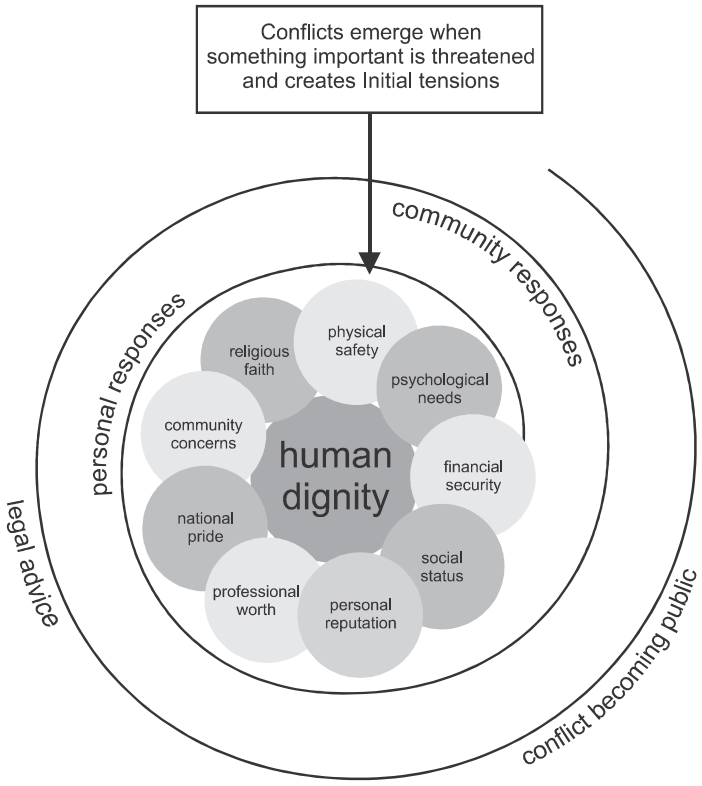
We will study the nature of Conflict in three broad dimensions. (1) The sense of threat which drives it (the Conflict Core). (2) What happens when it escalates (the Conflict Spiral). (3) The three primary aspects of conflict that mediation needs to address (the Conflict Triangle). Understanding these 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.

THE CONFLICT CORE AND CONFLICT SPIRAL



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

* Acknowledgement of concepts and ideas of the Conflict Core, Spiral and Triangle: 'The Mediator's Handbook' by Jennifer E. Beer with Eileen Stief developed by Friends Conflict resolution programs, revised and expanded 3rd.Edition, New Society publishers

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.

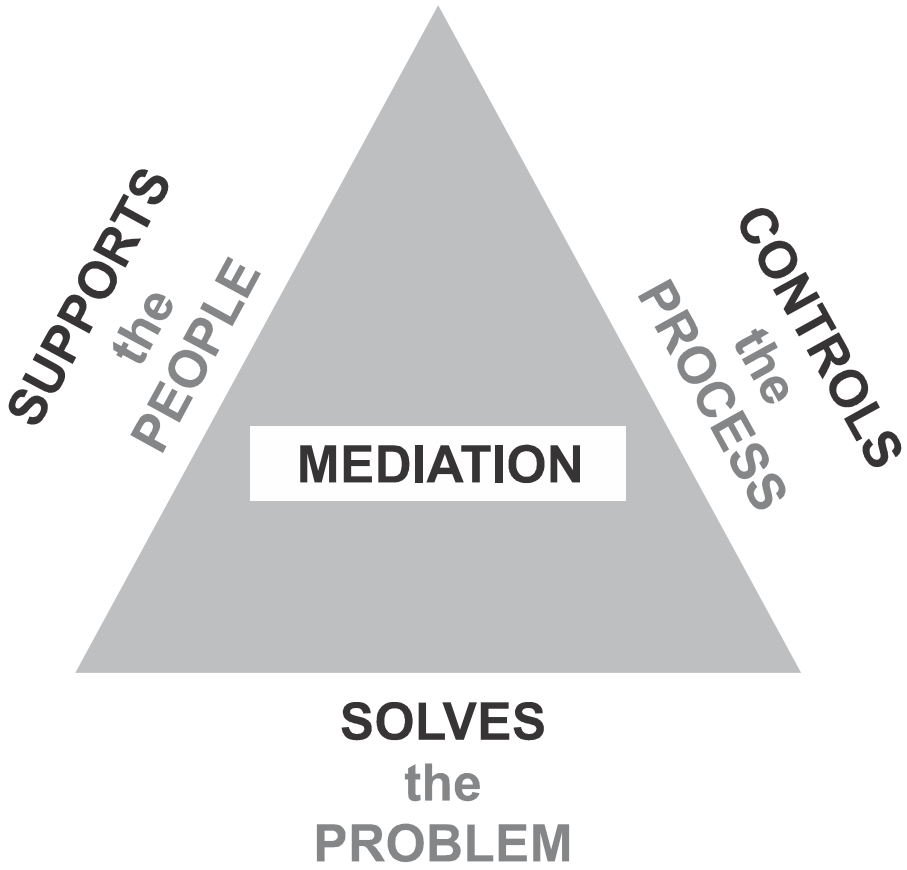
1. **People.** Dealing with any conflict involves dealing with people. People come from different personal, social, cultural and religious backgrounds. They have their own individual personalities, relationships, perceptions, approaches and emotional equipment to deal with varying situations.

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 -1

THE CONFLICT TRIANGLE -2



Going Beyond Mere Problem-solving

If the parties are able to address each side of the conflict triangle, easing their emotional state, changing their ways of interacting and addressing the problems which threatened their core interests, then the conflict is not merely resolved, but mindsets and hearts change. It is in this sense that mediation at its best goes beyond mere problem-solving or managing a conflict.

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

CHAPTER-III

CONCEPT OF MEDIATION

1. Mediation is a voluntary, party-centered and structured negotiation process where a neutral third party assists the parties in amicably resolving their dispute by using specialized communication and 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.

1.1 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.

1.2 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.

1.3 Though the mediation process is informal, which 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.

1.4 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.

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

1.6 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.

1.7 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.

1.8 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.

1.9 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.

1.10 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.

1.11 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".

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

1.13 Parties to the mediation proceedings are free to agree for an amicable settlement, even ignoring their legal entitlement or liabilities.

1.14 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-litigation disputes.

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.)

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

1.2. 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.

1.3. The procedure is **SPEEDY, EFFICIENT** and **ECONOMICAL.**

1.4. 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.

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

1.6. 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.

1.7. The process is **CONFIDENTIAL.**

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

1.9. Mediation helps to maintain/ improve/ restore relationships between the parties.

1.10. 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.

CHAPTER-IV

COMPARISON BETWEEN JUDICIAL PROCESS AND VARIOUS ADR PROCESSES

	JUDICIAL PROCESS	ARBITRATION	MEDIATION
1.	Judicial process is an adjudicatory process where a third party (judge/ other authority) decides the outcome.	Arbitration 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.
2.	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.
3.	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.
4.	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.
5.	Personal appearance or active participation of parties is not always required.	Personal appearance or active participation of parties is not always required.	Personal appearance and active participation of the parties are required.
6.	A formal proceeding held in public and follows strict procedural stages.	A formal proceeding held in private following strict procedural stages.	A non-judicial and informal proceeding held in private with flexible procedural stages.

7.	Decision is appealable.	Award is subject to challenge on specified grounds.	Decree/Order in terms of the settlement is final and is not appealable.
8.	No opportunity for parties to communicate 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.
9.	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**
1.	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 conciliatory and adjudicatory if it is established under Section 22B of the Legal Services Authorities Act, 1987.
2.	Voluntary process.	Voluntary process.	Voluntary process.
3.	Mediator is a neutral third party.	Conciliator is a neutral third party.	Presiding officer is a neutral third party.
4.	Service of lawyer is available.	Service of lawyer is available.	Service of lawyer is available.
5.	Mediation is party centred negotiation.	Conciliation is party centred negotiation.	In Lok Adalat, the scope of negotiation is limited.
6.	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.

7.	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.
8.	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 executable as per Section 21 of the Legal Services Authorities Act, 1987.
9.	Not appealable.	Decree/order not appealable.	Award not appealable.
10.	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.
11.	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.
12.	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.
13.	Confidentiality is the essence of mediation.	Confidentiality is the essence of conciliation.	Confidentiality is not observed in Lok Adalat.

A ROLE PLAY TO DEMONSTRATE THE DIFFERENCES BETWEEN ADJUDICATION AND MEDIATION

"THE FAMILY PORTRAIT"

FACTS: Their father died recently, leaving the family property to the two sons. Their mother died earlier, so both parties are the sole surviving heirs. Their father's will is clear regarding the family home and his other personal property - everything has been divided fifty-fifty. However, the will mentions that the family portrait, an original painting by a famous Indian Painter, of their parents and grandparents, and which is a cherished family possession is to go to the father's "favourite child". The will does not name his favourite child. The two brothers cannot agree on who the father's favourite child is.

EXERCISE : Resolve the dispute using **(i)** arbitration (adjudication) and **(ii)** mediation.

Exercise (i)

ARBITRATION (ADJUDICTION)

The arbitrator has to first decide upon what the **ISSUE** in dispute is : Which child fits the definition of the "favourite child"?

Each party (child) presents reasons to the arbitrator as to why they believe that they were the favourite child.

The arbitrator evaluates the evidence and DECIDES who fits in the definition of "favourite child" - the painting is awarded to that child.

No compromise is permitted. The arbitrator must make a decision as to who is right and who is wrong depending on (i) the meaning of "favourite child" and (ii) an appraisal and comparison of each party's evidence as to why they were the "favourite child".

Exercise (ii)

MEDIATION

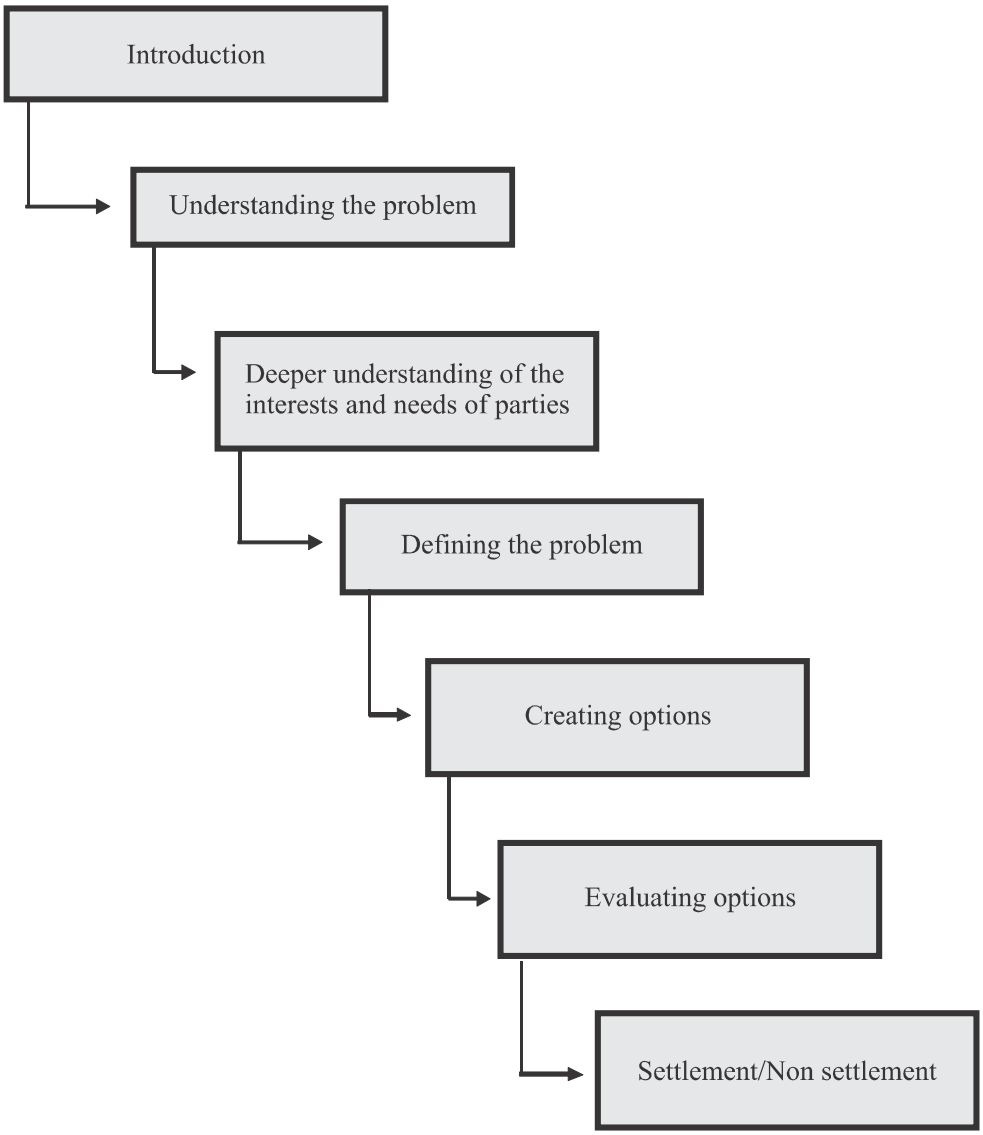
Here, the mediator facilitates the negotiation of the same issue. The parties will try and work out a solution between themselves, rather than relinquishing control over the resolution of the dispute to an arbitrator or any other neutral. The parties are free to choose creative compromises - there is no right and wrong, and consequently, there need not be only one winner.

Mediator is to demonstrate

- Identifying need
- Creating options
- Controlling process
- Restoring relationship

CHAPTER-V
THE PROCESS OF MEDIATION

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.

CHAPTER-VI
STAGES OF MEDIATION

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.

There is no specific or prescribed seating arrangement. However, it is important that the seating arrangement takes care of the following:

- The mediator can have eye-contact with all the parties and he can facilitate effective communication between the parties.
- Each of the parties and his counsel are seated together.
- All persons present feel at ease, safe and comfortable.

Introduction

- To begin with, the mediator introduces himself by giving information such as his name, areas of specialization if any, and number of years of professional experience.
- Then he furnishes information about his appointment as mediator, the assignment of the case to him for mediation and his experience if any in successfully mediating similar cases in the past.
- Then the mediator declares that he has no connection with either of the parties and he has no interest in the dispute.
- He also expresses hope that the dispute would be amicably resolved. This will create confidence in the parties about the mediator's competence and impartiality.
- Thereafter, the mediator requests each party to introduce himself. He may elicit more information about the parties' and may freely interact with them to put them at ease.
- The mediator will then request the counsel to introduce themselves.
- The mediator will then confirm that the necessary parties are present with authority to negotiate and make settlement decisions
- The mediator will discuss with the parties and their counsel any time constraints or scheduling issues
- If any junior counsel is present, the mediator will elicit information about the senior advocate he is working for and ensure that he is authorized to represent the client.

The Mediator's Opening Statement

The opening statement is an important phase of the mediation process. The mediator explains in a language and manner understood by the parties and their counsel, the following:

- Concept and process of mediation
- Stages of mediation
- Role of the mediator
- Role of advocates
- Role of parties
- Advantages of mediation
- Ground rules of mediation

The mediator shall highlight the following important aspects of mediation:

- Voluntary
- Self-determinative
- Non-adjudicatory
- Confidential
- Good-faith participation
- Time-bound
- Informal and flexible
- Direct and active participation of parties
- Party-centred
- Neutrality and impartiality of mediator
- Finality
- Possibility of settling related disputes
- Need and relevance of separate sessions

The mediator shall explain the following ground rules of mediation:

- Ordinarily, the parties/counsel may address only the mediator
- While one person is speaking, others may refrain from interrupting
- Language used may always be polite and respectful
- Mutual respect and respect for the process may be maintained
- Mobile phones may be switched off
- Adequate opportunity may be given to all parties to present their views

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, counsel for 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 acceptable

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 analysis).

(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 the business'. '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 at 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 Õ Best Alternative to Negotiated Agreement
WATNA Õ Worst Alternative to Negotiated Agreement
MLATNA Õ Most Likely Alternative to Negotiated Agreement

One technique of reality-testing used in the process of negotiation is to consider the different alternatives to a negotiated settlement. In the context of mediation, the alternatives are 'the best', 'the worst' and 'the most' likely outcome if a dispute is not resolved through negotiation in mediation. As part of reality-testing, it may be helpful to the parties to examine their alternatives outside mediation (specifically litigation) so as to compare them with the options available in mediation. It is also helpful for the mediator to discuss the consequences of failing to reach an agreement e.g., the effect on the relationship of the parties, the effect on the business of the parties etc.

While the parties often wish to focus on best outcomes in litigation, it is important to consider and discuss the worst and the most likely outcomes also. The mediator solicits the viewpoints of the advocate/party about the possible outcome in litigation. It is productive for the mediator to work with the parties and their advocates to come to a proper understanding of the best, the worst and the most likely outcome of the dispute in litigation as that would help the parties to recognize reality and thereby formulate realistic and workable proposals.

If the parties are reaching an interest-based resolution with relative ease, a BATNA/WATNA/ MLATNA analysis need not be resorted to. However if parties are in difficulty at negotiation and the mediator anticipates hard bargaining or adamant stands, BATNA/ WATNA/ MLATNA analysis may be introduced.

By using the above techniques, the mediator assists the parties to understand the reality of their case, give up their rigid positions, identify their genuine interests and needs, and shift their focus to problem-solving. The parties are then encouraged to explore several creative options for settlement.

(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.

- 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.
- 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 the settlement.

(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:**

  - clearly specify all material terms agreed to;
  - be drafted in plain, precise and unambiguous language;
  - be concise;
  - 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);
  - use language and expression which ensure that neither of the parties feels that he or she has 'lost';
  - ensure that the terms of the agreement are executable in accordance with law;
  - be complete in its recitation of the terms;

- avoid legal jargon, as far as possible use the words and expressions used by the parties;
- as far as possible state in positive language what each parties agrees to do;
- 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.

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. It is an informal and non-adversarial process intended to help disputing parties to reach a mutually acceptable solution. The role of the mediator is to remove obstacles in communication, assist in the identification of issues and the exploration of options and facilitate mutually acceptable agreements to resolve the dispute. However, the ultimate decision rests solely with the parties. 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.

(B) MEDIATOR AS DISTINGUISHED FROM CONCILIATOR AND ADJUDICATOR

(i) Mediator and Conciliator

The facilitative and evaluative roles of the mediator have been already explained. The evaluative role of mediator is limited to the function of helping and guiding the parties to evaluate their case through reality testing and assisting the parties to evaluate the options for settlement. But in the process of a conciliation, the conciliator himself can evaluate the cases of the parties and the options for settlement for the purpose of suggesting the terms of settlement.

The role of a mediator is not to give judgment on the merits of the case or to give advice to the parties or to suggest solutions to the parties.

(ii) Mediator and Adjudicator

A mediator is not an adjudicator. Adjudicators like judges, arbitrators and presiding officers of tribunals make the decision on the basis of pleadings and evidence. The adjudicator follows the formal and strict rules of substantive and procedural laws. The decision of the adjudicator is binding on the parties subject to appeal or revision. In adjudication, the decision is taken by the adjudicator alone and the parties have no role in it.

In mediation the mediator is only a facilitator and he does not suggest or make any decision. The decision is taken by the parties themselves. The settlement agreement reached in mediation is binding on the parties. In court referred mediation there cannot be any appeal, or revision against the decree passed on the basis of such settlement agreement. In private mediation, the parties can agree to treat such settlement agreement as a conciliation agreement which then will be governed by the provisions of the Arbitration and Conciliation Act, 1996.

(C) QUALITIES OF A MEDIATOR

It is necessary that a mediator must possess certain basic qualities which include:

i. complete, genuine and unconditional faith in the process of mediation and its efficacy.

ii. ability and commitment to strive for excellence in the art of mediation by constantly updating skills and knowledge.

iii. sensitivity, alertness and ability to perceive, appreciate and respect the needs, interests, aspirations, emotions, sentiments, frame of mind and mindset of the parties to mediation.

iv. highest standards of honesty and integrity in conduct and behavior.

v. neutrality, objectivity and non-judgmental.

vi. ability to be an attentive, active and patient listener.

vii. a calm, pleasant and cheerful disposition.

viii. patience, persistence and perseverance.

ix. good communication skills.

x. open mindedness and flexibility.

xi. empathy.

xii. creativity.

(D) QUALIFICATIONS OF MEDIATORS

The Supreme Court of India in **Salem Advocate Bar Association** V **Union of India,** (2005) 6 SCC 344 approved the Model Civil Procedure Mediation Rules prepared by the Committee headed by Hon'ble Mr. Justice M.J.Rao, the then Chairman, Law Commission of India. These Rules have already been adopted by most of the High Courts with modifications according to the requirements of the State concerned. As per the Model Rules the following persons are qualified and eligible for being enlisted in the panel of mediators:--

(a) (i) Retired Judges of the Supreme Court of India;

(ii) Retired Judges of the High Court;

(iii) Retired District and Sessions Judges or retired Judges of the City Civil Court or Courts of equivalent status;

(b) Legal practitioners with at least fifteen years standing at the Bar at the level of the Supreme Court or the High Court or the District Courts of equivalent status;

(c) Experts or other professionals with at least fifteen years standing; or retired senior bureaucrats or retired senior executives;

(d) Institutions which are themselves experts in mediation and have been recognized as such by the High Court, provided the names of its members are approved by the High Court initially or whenever there is change in membership.

(E) 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.

CHAPTER-VIII
TRAINING OF MEDIATORS

A system, even if perfectly structured, may not yield desired result if the persons operating it do not have requisite operational skills. A person who is selected to perform a particular job may commit errors if he is not properly trained for it. Training is indispensable before a person starts performing. Training, seeks to identify the gaps in the expertise of a person and to fill such gaps to equip him to perform efficiently. Training should be focused, specialized, result oriented and structured according to the task. It should improve skills, knowledge and attitude of a trainee.

Mediation is a developing concept in India. Efforts are being made to make mediation a fully developed tool for resolution of disputes. Training is necessary for a mediator to learn the fundamentals of mediation. Training is required for a mediator irrespective of his background, whether he is a judicial officer or advocate or person belonging to any other category.

It is necessary to follow uniform mediation process and programme all over India. Uniformity is required also in the matter of duration, nature and curriculum of the training for mediators.

DURATION OF TRAINING

In the light of International standards and indigenous requirements, the duration of training should be a minimum of 40 hours.

NATURE OF TRAINING

Training consists of :-

(i) Theory

(ii) Exercises like role play and demonstration.

(iii) Practical training of mediating a few actual disputes under the guidance of a trainer or a trained mediator.

CURRICULUM

The curriculum for training shall include :-

1. Concept and process of Mediation.
2. Evolution and Legislative History of mediation in India.
3. Conflict management and resolution.
4. Concept of Mediation.
5. Types of Mediation.
6. Advantages of Mediation.
7. Difference between Mediation and other modes of Dispute Resolution.
8. Stages of Mediation.
9. Negotiation.
10. Communication.
11. Impasse management.
12. Role of Mediator.
13. Ethics and code of Conduct for Mediator.
14. Role of Referral Judges.
15. Role of Parties and their Advocates.
16. Enforceability of settlement agreement.
17. The Mediation Rules.

CHAPTER-IX

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 the same 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, demeanor, 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.

1.14 COMMUNICATION IN ADVERSARIAL SYSTEM AND MEDIATION

	ADVERSARIAL SYSTEM	MEDIATION
GOAL	To win.	To reach mutually acceptable solutions.
STYLE	Argumentative.	Collaborative.
SPEAK	To establish and convince.	To explain.
LISTEN	To find flaws and develop counter arguments.	To understand.

COMMUNICATION SKILLS IN MEDIATION

Communication skills in mediation include :-

(A) Active Listening.

(B) Listening with Empathy.

(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 a restatement of feelings and emotions in terms of the speaker's experience, e.g. "So, you are feeling 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.

Example:

Party: "My boss is cruel and indifferent. It is impossible to talk to him. I should be able to meet him at least once a day. He doesn't make any time for me and always ignores me."

Mediator Re-frames: "You want regular access and communication with your boss and you want him to be considerate, is that right?" This re-frame has converted the employee's complaint from negative to positive, past to future, position to interest and shifted the focus back to the employee's needs/interests.

NOTE :

Position: A position is a perception ("my boss is cruel and indifferent") or a claim or demand or desired outcome ("I should be able to meet him at least once a day").

Interest: An interest is what lies beneath and drives a person's demands or claims. It is a person's real need, concern, priority, goal etc. It can be tangible (e.g. property, money, shares etc.) and/or intangible (e.g. communication, consideration, recognition, respect, loyalty etc.).

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. **Deferring :** A specialized communication technique where the mediator postpones the discussion of a topic until later. While deferring a mediator should write down the topic he has deferred and re-initiate the discussion of the topic at the right time.

6. **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"

7. **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.

8. **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."

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

10. **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.

11. **Apology:** It is an acknowledgment 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 chooses to apologise.

    Example: "I am sorry that my words/act caused you hurt and pain. It was not my intention to hurt you"

12. **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.

    For example, when tensions are high it is preferable to select the easy issue to work on first. The mediator may determine what is to be addressed first so as to provide ground work for later decision making.

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) LISTENING WITH EMPATHY

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.

Example:

Wife: "I had such a hard day at work"

Husband :"I am so sorry you had a hard day at work"
(focus is on listener/ husband) - Sympathy

Husband :"You had a hard day at work, mine was worse" - Sympathy
(focus on listener/husband)

Husband: " You feel it was hard for you at work today.
Would you like to talk about it?"
(focus on speaker/wife) - Empathy

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.

TYPES OF QUESTIONS :

(a) Open Questions: These are questions which will give a further opportunity to the party to provide more information or to clarify his own position, retaining control of the direction of discussion and maintaining his own perspective. They are broad and general in scope.

Examples: "Can you tell me more about the subject ?"
"What happened next?"
"What is your claim?"
" What do you really want to achieve?"

(b) Closed Questions: These questions are limited in scope, specific, direct and focused.

They are fact-based in content and tend to elicit factual information. The response to these questions may be 'Yes' or 'No' or a very short response and may close the discussion on the particular issue.

Examples: "What colour shirt was the man wearing?"
"On which date was the contract signed?"

"What is the total amount of your medical bills?"
"Were you present in the market when the event occurred?"

(c) Hypothetical Questions: Hypothetical questions are Questions which allow parties to explore new ideas and options.

Examples: "What if the disputed property is acquired by Government?"
"What if your husband offers to move out of the parental house and live separately?"

Other types of questions like Leading Questions and Complex Questions are not ordinarily asked in mediation, as they may not help the mediation process.

CHAPTER-X

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 refers to the process of communication that occurs when parties are trying to find a mutually acceptable solution to the dispute. 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'. Any negotiation that is based on merits and the interest of both parties is **Principled Negotiation** and can result in a fair agreement, preserving and enhancing the relationship between the parties. The mediator facilitates negotiation by resorting to reality-testing, brainstorming, exchanging of offers, breaking impasse etc.

Why does one negotiate?

a. To put across one's view points, claims and interests.

b. To prevent exploitation/harassment.

c. To seek cooperation of the other side.

d. To avoid litigation.

e. To arrive at mutually acceptable agreement.

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. 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. Distributive bargaining is often referred to as "zero sum game", where any gain by one party results in an equivalent loss by the other party. The two forms of distributive bargaining are:

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.

> *Example: Varun and Vivek are quarrelling in a room. Varun wants window open Vivek wants it shut. They continue to argue about how much to leave open - a crack, halfway, three quarter way.*

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.

Negative consequences of Distributive Bargaining are:

(a) By taking rigid stands the relationship is often lost.

(b) Creative solutions are not explored and the interests of both parties are not fully met.

(c) Time consuming.

(d) Both parties take extreme positions often resulting in impasse.

(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.

Example: The story of two sisters quarrelling over one orange. They decide to cut the orange in half and share it, although both are not happy as it would not adequately satisfy their interest. The mother comes in to enquire what is the real interest of each one. One says that she needs the juice of one orange and the other says that she needs the peel of one orange. The same orange could satisfy the interest of both parties. Both sisters go away happy.

Three steps in interest-based bargaining

There are three essential steps in interest-based bargaining.

(a) Identifying the interests of parties.

(b) Prioritizing the parties' interests.

(c) Helping the parties develop terms of agreement/settlement that meets their most important interests.

(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.

To continue the earlier example of Varun and Vivek quarrelling in the room. Ashok comes into the room and enquires about the quarrel. Vivek says that the cold air blowing on his face is making him uncomfortable. Varun says that the lack of air circulation is making the room stuffy and he is uncomfortable. Ashok opens the window of the adjoining room and keeps the connecting door open. Both parties are happy. The cold air is not directly blowing into Varun's face and Vivek is comfortable as there is adequate air circulation in the room.

As the interests and needs of both parties have been identified, it is easier to integrate the interests of both parties and find a mutually acceptable solution.

Another example of integrative bargaining. A car salesman may reach an impasse with a customer on the issue of the price of a new car. Instead of losing the deal, the car salesman will offer to throw in fancy leather seats as part of the deal while maintaining the price on the car. If necessary the salesman may also agree to help the customer to sell his old car at a good price.

The fancy leather seats and the offer to help in the sale of the old car are integrative terms because they result from an exploration of whether additional terms or trade-offs could be of interest to the customer. Similarly, the Mediator can help parties avoid or overcome an impasse by actively exploring the possibility and desirability of additional terms and trade-offs.

NOTE :

Position: A position is a perception ('my boss is cruel and indifferent') or a desired outcome ('My boss should meet with me once a day to talk'). The claim or demand, itself, is a position.

Interest: An interest is a person's true need, concern, priority, goal etc.. It can even be intangible (not easily perceivable) e.g. respect, loyalty, dependability, timing, etc. An interest is what lies beneath and drives a person's demands or claims.

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 perceptional limitations which could occur due to human nature, psychological factors and/or the limits of our senses. These perceptional 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.

Example of Cognitive Barriers

Risk Aversion: People tend to be averse to risk regarding gain and would rather have a certain gain than an uncertain larger gain. They are ready to bear risk with regard to loss. They would avoid a certain loss and take a risk of greater loss. For example, some parties would rather postpone a certain loss through settlement at mediation for an uncertain outcome of the trial in the future. A good mediator will assist the parties in addressing these realities.

Assimilation bias: The tendency of negotiators to ignore any unfavorable information. For example, a court decision which could prejudice the case. To counter this, repeat the important information, provide documentary and other tangible evidence and reduce information to writing.

Inattentional blindness: Negotiators sometimes fail to focus on the entire picture and instead focus only on specific details. To counter this, the mediator may frequently shift focus from the specific to the larger picture.

Reactive devaluation: People in conflict have a tendency to minimize the value of offers from the other side. To counter this, mediator can change the focus from the source of the offer to the terms of the offer. For example, instead of saying "the plaintiff offers 5 lakhs" the mediator may say " will you be satisfied with something like 5 lakhs".

Endowment effect: The tendency for people with property or interests in something to over value it. (their house, their land, a lawyer's evaluation of their case etc.) . To counter this, the mediator may enquire about the actual value, use objective criteria like the Sub-registrar's valuation, ask for the latest Court judgment supporting the submission etc.

Psychological impediments:

People make unwarranted assumptions about the motives and intentions of the other parties.

Anchor Price, Aspiration Price and Reservation Price

To facilitate meaningful and successful negotiation the mediator should be aware of the Anchor Price, the Aspiration Price and the Reservation Price.

Anchor Price is a base number or a set of terms or an opening offer that has to be assessed by the mediator from the information given by the parties. This will serve as a parameter in the negotiation. If the anchor price is defined appropriately, parties tend to treat it as a real and valid bench mark against which subsequent adjustments are made. It must be based on complete information and if not it can be misleading. Mistaken or misguided anchor prices can increase the chance of impasse and can have unintended consequences in a negotiation.

Aspiration Price is the price that a party aspires to obtain from the negotiation.

Reservation Price is the lowest a party may be open to receive.

ELEMENTS OF PRINCIPLED NEGOTIATION

(a) Separate the parties from the problem

A mediator should help the parties to separate themselves from the problem.

For example, if Aparna has been consistently late to work for the past 2 weeks, a perception may develop that "The problem is Aparna." Viewed in this manner the only way to get rid of the problem is to get rid of (dismiss, transfer etc.) Aparna. This is an example of merging the people with the problem and illustrates how it limits the range of options that are available for resolving the problem. To separate people from the problem, the key is to focus on the problem itself, independent of the person. In the above example, the employer might frame the problem as lack of punctuality. The employer can ask Aparna about her record of being on time for many years and the reasons for the recent two weeks of late arrival enquiring specifically whether there are circumstances that are resulting in Aparna's late arrivals. She may answer that she was involved in a motor vehicle accident recently and her vehicle repairs will be completed shortly. She might say that she had to change the route to work due to road repair, or she might say that she has to ride in a car pool to work and the driver has a temporary problem that caused the delay. By focusing on the problem itself, the employer has opened the door to understanding the root of the problem, which may lead to various options for handling it.

(b) Be hard on the issues and soft on the people

In being hard on the issues, the Mediator will request documentation on damages, verify the

accuracy of numbers and confirm the evidence provided by both parties. At the same time, the mediator will encourage the parties to be polite and cordial with each other and the mediator will demonstrate the same qualities during mediation.

(c) Focus on interests

In negotiation, focus must be on interests rather than on positions. Hence the mediator should help the parties to shift the focus from their positions to their interests.

(d) Create variety of options

The Mediator is required to facilitate generation of various options and selection of the option most acceptable to the parties.

(e) Rely on objective criteria

When perceptions of the parties differ, in appropriate cases objective criteria like expert's opinion, scientific data, valuation report, assessor's report etc. can be relied on by the parties to examine the options and arrive at a settlement.

AN EXERCISE TO IDENTIFYING UNDERLYING INTERESTS
Mohan Industries V/s All India Express

Facts for Mohan Industries

The owner of a small plastic supply company called Mohan Industries is a party at mediation. He is the defendant in a contract dispute with a large manufacturer called All India Express ("All India"). The dispute centers around his company's shipments of supplies to All India, which have been 7-10 days late for the past 3 months. All India's shipments to its customers consequently have been late and its customers have started to complain. Until 3 months ago, Mohan Industries had delivered timely shipments to All India.

All India's attorney demanded that Mohan Industries make its shipments on time and pay for the damages resulting from the 3 months of delayed shipments. If the case continues in Court, All India probably will win a suit for breach of contract.

Mohan Industries has had a profitable business relationship with All India having a supply contract for 10 years. It would be profitable for Mohan Industries to work with All India in the future.

The reason the shipments have been late for the past 3 months is that Mohan Industries is in the process of upgrading its computers for better service. This is a temporary problem that probably will be cleared up in 3 more months. A good deal of their operating expenses is going towards this

computer upgrade and they generally operate on a thin profit margin. Hence they do not want to spend a large amount of money on litigation.

Mohan Industries is also in the process of bidding on a supply contract with another large manufacturer. They would like to use All India as a good reference in submitting their bid.

The President of Mohan Industries is 84-years-old and he is not in good health. He has planned to turn over the company to his eldest son this year, but that is doubtful now that this legal dispute has come up. He does not want the final phase of his career in business to be tied up in litigation.

Facts for All India Express

The party at mediation is All India Express (All India). The counsel for All India has advised them that they have a right to sue Mohan Industries for breach of contract and that it will probably prevail in court.

All India has stated that it has had a good and profitable working relationship with Mohan Industries for the past 10 years. There are no other suppliers available that makes the plastic product as well as Mohan Industries. The price charged by Mohan Industries is reasonable.

All India is in the process of introducing its products on an international level. It is very important to All India that there be no interruption in plastic supplies for the next few years.

All India is operated by a young man (37-years-old) who recently suffered a severe setback in his health (diabetes). He would like to focus his time and energy on the international expansion and getting better physically.

This is the right time for All India to expand internationally because its main competitor, another Indian company, is not yet ready for such as expansion (though it will be ready soon).

All India has explained that it values its customers and it is worried that it will lose them if plastic supply shipments continue to be late.

CHAPTER-XI

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 law
  - Limited 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

- ã settlement for extraneous reasons.
- ã Standing on principles, ignoring the realities
- ã adamant attitude of the parties

• Procedural impasse can be caused by factors like :

- ã Lack of authority to negotiate or to settle
- ã Power imbalance between the parties
- ã 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.

CHAPTER-XII
ROLE OF REFERRAL JUDGES

Judges who refer the cases for settlement through any of the ADR methods are known as referral judges. The role of a Referral Judge is of great significance in court-referred mediation. All cases are not suitable for mediation. Only appropriate cases which are suitable for mediation should be referred for mediation. Success of mediation will depend on the proper selection and reference of only suitable cases by referral judges.

Reference to ADR and statutory requirement

Section 89 and Order X Rule 1A of Code of Civil Procedure, 1908 require the court to direct the parties to opt for any of the five modes of alternative dispute resolution and to refer the case for Arbitration, Conciliation, Judicial Settlement, Lok Adalat or mediation. While making such reference the court shall take into account the option if any exercised by the parties and the suitability of the case for the particular ADR method. In the light of judicial pronouncements a referral judge is not required to formulate the terms of settlement or to make them available to the parties for their observations. The referral judge is required to acquaint himself with the facts of the case and the nature of the dispute between the parties and to make an objective assessment to the suitability of the case for reference to ADR.

Stage of Reference

The appropriate stage for considering reference to ADR processes in civil suits is after the completion of pleadings and before framing the issues. If for any reason, the court did not refer the case to ADR process before framing issues, nothing prevents the court from considering reference even at a later stage. However, considering the possibility of allegations and counter allegations vitiating the atmosphere and causing further strain on the relationship of the parties, in family disputes and matrimonial cases the ideal stage for mediation is immediately after service of notice on the respondent and before the filing of objections/written statements by the respondent. An order referring the dispute to ADR processes may be passed only in the presence of the parties and/or their authorized representatives.

Consent

Under section 89 CPC, consent of all the parties to the suit is necessary for referring the suit for arbitration where there is no pre-existing arbitration agreement between the parties. Similarly the court can refer the case for conciliation under section 89 CPC only with the consent of all the

parties. However, in terms of Section 89 CPC and the judicial pronouncements, consent of the parties is not mandatory for referring a case for Mediation, Lok Adalat or Judicial Settlement. The absence of consent for reference does not effect the voluntary nature of the mediation process as the parties still retain the freedom to agree or not to agree for settlement during mediation.

Avoiding delay of trial

In order to prevent any misuse of the provision for mediation by causing delay in the trial of the case, the referral judge, while referring the case for mediation, shall post the case for further proceedings on a specific date, granting time to complete the mediation process as provided under the Rules or such reasonable time as found necessary.

Choice of Cases for reference

As held by the Supreme Court of India in **Afcons Infrastructure Ltd. and Anr. V. Cherian Varkey Construction Co. Pvt. Ltd. and Ors.,** (2010) 8 Supreme Court Cases 24, having regard to their nature, the following categories of cases are normally considered unsuitable for ADR process.

i. (i) Representative suits under Order I Rule 8 CPC which involve public interest or interest of numerous persons who are not parties before the court.

ii. Disputes relating to election to public offices.

iii. Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.

iv. Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion, etc.

v. Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against the Government.

vi. Cases involving prosecution for criminal offences.

All other suits and cases of civil nature in particular the following categories of cases (whether pending in civil courts or other special tribunals/forums) are normally suitable for ADR processes:

i) All cases relating to trade, commerce and contracts, including

-disputes arising out of contracts(including all money suits);

-disputes relating to specific performance;

- disputes between suppliers and customers;

- disputes between bankers and customers;

-disputes between developers/builders and customers;

- disputes between landlords and tenants/licensor and licensees;

- disputes between insurer and insured

ii) All cases arising from strained or soured relationships, including

- disputes relating to matrimonial causes, maintenance, custody of children;

- disputes relating to partition/division among family members/coparceners/co-owners; and

- disputes relating to partnership among partners.

iii) All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including

- disputes between neighbours (relating to easementary rights, encroachments, nuisance, etc.);

- disputes between employers and employees;

- disputes among members of societies/associations/apartment owners' associations;

iv) All cases relating to tortious liability, including

- claims for compensation in motor accidents/other accidents; and

v) All consumer disputes, including

- disputes where a trader/supplier/manufacturer/service provider is keen to maintain his business/professional reputation and credibility or product popularity.

The above enumeration of "suitable" and "unsuitable" categorisation of cases is not exhaustive or rigid. They are illustrative which can be subjected to just exceptions or addition by the courts/ tribunals exercising its jurisdiction/discretion in referring a dispute/case to an ADR process.

In spite of the categorization mentioned above, a referral judge must independently consider the suitability of each case with reference to its facts and circumstances.

Motivating and preparing the parties for Mediation

The referral judge plays the most crucial role in motivating the parties to resolve their disputes through mediation. Even if the parties are not inclined to agree for mediation, the referral judge may try to ascertain the reason for such disinclination in order to persuade and motivate them for mediation. The referral judge should explain the concept and process of mediation and its advantages and how settlement to mediation can satisfy underlying interest of the parties. Even when the case in its entirety is not suitable for mediation a Referral Judge may consider whether any of the issues involved in the dispute can be referred for mediation.

Referral Order

The mediation process is initiated through a referral order. The referral judge should understand the importance of a referral order in the mediation process and should not have a casual approach in passing the order. The referral order is the foundation of a court-referred mediation. An ideal referral order should contain among other things details like name of the referral judge, case number, name of the parties, date and year of institution of the case, stage of trial, nature of the dispute, the statutory provision under which the reference is made, next date of hearing before the referral court, whether the parties have consented for mediation, name of the institution/mediator to whom the case is referred for mediation, the date and time for the parties to report before the institution/ mediator, the time limit for completing the mediation, quantum of fee/remuneration if payable and contact address and telephone numbers of the parties and their advocates.

Role after conclusion of mediation

The referral judge plays a crucial role even after the conclusion of mediation. Even though the dispute was referred for mediation the court retains its control and jurisdiction over the matter and the result of mediation will have to be placed before the court for passing consequential orders. Before considering the report of the mediator the referral judge shall ensure the presence of the parties or their authorized representative in the court.

If there is no settlement between the parties, the court proceedings shall continue in accordance with law. In order to ensure that the confidentiality of the mediation process is not breached, the referral judge should not ask for the reasons for failure of the parties to arrive at a settlement. Nor should the referral judge allow the parties or their counsel to disclose such reasons to the court. However, it is open to the referral judge to explore the possibility of a settlement between the parties. To protect confidentiality of the mediation process, there should not be any communication between the referral judge and the mediator regarding the mediation during or after the process of mediation.

If the dispute has been settled in mediation, the referral judge should examine whether the agreement between the parties is lawful and enforceable. If the agreement is found to be unlawful or unenforceable, it shall be brought to the notice of the parties and the referral judge should desist from acting upon such agreement. If the agreement is found to be lawful and enforceable, the referral judge should act upon the terms and conditions of the agreement and pass consequential orders. To overcome any technical or procedural difficulty in implementing the settlement between the parties, it is open to the referral judge to modify or amend the terms of settlement with the consent of the parties.

CHAPTER-XIII
ROLE OF LAWYERS IN MEDIATION

Mediation as a mode of ADR is the process where parties are encouraged to communicate, negotiate and settle their disputes with the assistance of a neutral facilitator i.e., mediator. Though the role of the lawyer in mediation is functionally different from his role in litigation, the service rendered by the lawyer to the party during the mediation process is a professional service. Since lawyers have a proactive role to play in the mediation process, they should know the concept and process of mediation and the positive role to be played by them while assisting the parties in mediation. The role of the lawyer commences even before the case comes to the court and it continues throughout the mediation process and even thereafter, whether the dispute has been settled or not. Awareness programmes are necessary to make the lawyers aware of the concept and process of mediation, the advantages and benefits of mediation and the role of lawyers in the mediation process.

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

(i) Pre-mediation;

(ii) During mediation; and

(iii) Post-mediation.

(i) Pre-Mediation

When faced with a dispute and the prospect of approaching an adjudicatory forum for relief, a party first contacts a lawyer. The lawyer must first consider whether there is scope for resorting to any of the ADR mechanisms. Where mediation is considered the appropriate mode of ADR, educating the party about the concept, process and advantages of mediation becomes an important phase in the preparation for mediation. The lawyer 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. The party must be informed that in a dispute involving the break down of relationship, whether personal, contractual or commercial, mediation helps to strengthen/restore the relationship. 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 lawyer makes him realize his real needs and underlying interest which can be better satisfied through mediation.

(ii) During Mediation

The role of lawyers is very important during mediation also. The participation of lawyers in mediation is often constructive but sometimes it may be non-cooperative and discouraging. The attitude and conduct of the lawyer influence the attitude and conduct of his client. Hence, in order to ensure meaningful dialogue between the parties and the success of mediation, lawyers 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 lawyer 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 lawyer 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 lawyer(s) the mediator may hold such sub-session with the lawyer(s) and the lawyer(s) must cooperate with the mediator to carry forward the process and arrive at a settlement. Such sub-sessions with the lawyer(s) can be held by the mediator also at the request of the party or the lawyer. The lawyer 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 lawyer 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 lawyer 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 lawyer must cooperate with the court in the execution of the order/decree passed in terms of the settlement.

CHAPTER-XIV
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 lawyers can take the decision for the parties and they must recognize and respect the right of self-determination of the parties.

During the process of mediation, parties should focus on their interests rather than their entitlement or legal technicalities.

The parties are free to avail of the services of lawyers in connection with mediation.

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.

In mediation, trust in the mediator is essential. Hence, the mediator must be a person who continues to enjoy the trust of the parties.

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.