

“AWARENESS & TRAINING PROGRAMME”

ON

“MEDIATION AS A PROCES OF DISPUTE RESOLUTION”

for Advocates and Judicial Officers

AT

**IJTR U.P. LUCKNOW
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BY
JUSTICE SUNIL AMBWANI,
JUDGE, ALLAHABAD HIGH COURT

“(Mediation and Conciliation) is definitely a faster method of dispute resolution compared to the conventional court processes. Only thing is that, we have to have trained mediators and conciliators, who can see the problem objectively without bias and facilitate affected parties to come to an agreed solution.”

Dr. A.P.J. Abdul Kalam

“For the legal profession, mediation and allied processes brings the opportunity to use legal knowledge and skills to achieve quick resolution and fashion creative solutions. That is the language most clients to hear”.

Mr. Justice M. Katju,
Judge, Supreme Court of India

1. What is Mediation:

The mediation is a structured process of dispute resolution in which a mediator, a neutral person, works with the parties to a dispute, to bring them to an agreement that they can all accept. The mediator does not decide the dispute or give an award. He is only a facilitator and incharge of the process at the mediation table.

The mediation is a purely voluntary process. The parties continue the process out of their free will. They can opt out any time they decide that their interests are not served in the mediation. **Once an agreement is reached and signed, it is enforceable by a Court.**

There are various advantages of mediation. **It saves time** as mediation may be resolved in a few sessions. Some times it takes more sessions. On an average three or four meetings are sufficient for a good mediator to settle the dispute. **The costs of the proceedings are minimal.** Since the mediation is a non-adversial mode, bringing quick resolution to the issues, the legal costs are cut down substantially.

The mediation avoids adversial approach and instead adopts cooperative methods. The parties focus on mutual agreement with long term gains and improve their relationships. Even if mediation is not successful, the parties have a chance to talk to each other and explore acceptable solutions. Many a times parties come back after unsuccessful mediation, and have again made an effort and succeeded.

The litigation invariably offers win-lose situation, whereas in **mediation parties try to achieve a win-win situation**, which puts an end to the dispute.

The litigation looks back to the date, when the plaint was filed or a case was instituted in the Court, whereas **mediation looks forward and offers long term acceptable solutions to the parties.**

2. The law's recognition to mediation:

The mediation is not new to the Indian legal system. **Section 89 of the Code of Civil Procedure, 1908** provides for special proceedings for resolving disputes. The amendments by Act No.46 of 1999 w.e.f. 1.7.2002 have accepted 'mediation' as one of the process of alternate dispute resolution along with arbitration, conciliation and judicial settlement including settlement through Lok Adalats. The **Salem Bar Association's case¹** has laid down the fundamentals and provided model rules for mediation. The Court may refer the case for mediation under Order X Rules 1-A and 1-B after recording admissions and denials, and at any stage in Section 89 CPC. In case of mediation under Section 89 (2) (d) the Court shall effect a compromise between parties and shall follow such procedure as may be prescribed. In compoundable offences, and also in non-

“Nothing is more powerful than an idea, whose time has come.”

Victor Hugo

1. Salem Advocate Bar Association, Tamil Nadu Vs. Union of India, (2005) 6 SCC 344;

2. B.S. Joshi Vs. State of Haryana, AIR 2003 SC 1386

compoundable offences, where the parties settle the issue, specially in matrimonial matters, the Supreme Court has held in **B.S. Joshi's** case² that the Court may quash the complaint or the first information report on such settlement, after which there may be no evidence to proceed with the trial.

3. Conciliation:-

The Arbitration & Conciliation Act, 1996 has recognised conciliation as a method of settlement of disputes. The process of mediation and arbitration is almost similar except that in conciliation the conciliator may give advise to the parties and that under Section 74 of the Act of 1996 a settlement agreement has the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under Section 30. In case of mediation the settlement agreement needs acceptance of the Court as a compromise and is enforceable as a Civil Court decree. In both the cases the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872 is not applicable, and that both the processes help parties to arrive at a settlement to be accepted by the Court.

4. The nature of disputes, which can be mediated:

Mediation mostly succeeds in personal matters such as family disputes relating to **relations and properties; partition; divorce; commercial and business matters** relating to disputes between **companies and firms**, suppliers, contractors, consumers; **banking and insurance matters; employer employee matters, consumer disputes**, real estate, constructions, intellectual property, doctor and patient, landlord and tenant.

Mediation is also successful in petty criminal cases and matrimonial issues such as Section 125 CrPC and Section 498A IPC. In such cases the parties can agree to drop the proceedings and not to lead evidence against each other. In B.S. Joshi Vs. State of Haryana, AIR 2003 SC 1386 the Supreme Court held that in such case no evidence may be led and thus the High Court can quash the first information report or the proceedings.

Mediation is **not recommended** in all kinds of disputes, specially in those, **where interim orders are required from the Court or where an important question of law is to be settled.**

The mediation is **not recommended**, when there is **serious imbalance between position of the parties in which fair negotiation is not possible**.

5. The Court referred mediation:

In America and European countries almost 80% litigation does not go to the Court as there are provisions for pre-litigation mediations, which are mandatory and that the parties in order to avoid heavy costs involved in litigation, settle the matters with the help of their lawyers, who realise the advantages of mediation.

In India, so far, we have only court annexed and court referred mediations in the High Courts. The Courts have to identify the cases, and to persuade the parties to attempt a mediated settlement. The role by Hon'ble judges in referring the matters is very important for the success of court annexed Mediation Centre. The lawyer-mediators can, however, offer their services, if the parties to a dispute, which is not pending in Courts, need their services.

6. Process of Mediation:

A mediator after his appointment **receives a brief summary of the case from the parties**. Ordinarily he does not require the Court records but if he needs to peruse the papers, **he can call for the Court records through the Centre** incharge of the Mediation Centre with the approval of the Organising Secretary.

In the first session the lawyer-mediator makes an **opening statement to the parties** giving the entire structure of mediation. **He commits the parties to good behaviour**. The parties are required to sign a form that they would abide by the terms of the mediation process. **They are**, however, **at liberty to leave the mediation at any stage that they like**, and even upto the time than that they sign the settlement. In the first session the lawyer-mediator **actively listens without showing any sympathy towards any party**. He takes down notes and **identifies the issues of conflict**. He may then hold **private sessions** to understand the issues, which he thinks are confidential and should not be disclosed in front of the disputants such as bargaining terms or any private or confidential information, which they want to hold back from the other party.

The **mediator then identifies the issues and discusses the strengths and weaknesses of the cases with the parties and sets up the**

agenda. He then allows the parties to **communicate with each other in joint sessions.** Some times these sessions go up to hours, in which there is **brain storming for the options, which the parties generate amongst**

“Mediation is an art and a science”

Mr. Justice Y.K. Sabbarwal,
Chief Justice, Supreme Court of India

themselves. The mediator controls the process. He does not allow the party to deviate and **helps them in focusing on their long term interest** as distinct from their position that they have taken in the dispute. The mediator helps parties to focus on their disputes, as against the persons and brings out the underlying issues. The long term interest almost always helps in adopting harmonious methods of resolving disputes.

The mediator discusses with the parties the best alternative to negotiated agreement (BATNA) and worst alternative to negotiated settlement (WATNA).

Many a times parties resolve a few issues and are unable to reach to any solution on other issues. In such case the matter may be referred for conciliation by an expert or an advisor or one of the issue may be sent to an arbitrator. This process is called **med-conciliation or med-arbitration.** The parties with the consent of mediator may also take help of counselors or experts like Chartered Accountants, Doctors, Engineers, as the matter may require.

7. The settlement:

The parties, if they agree then sit down for writing settlement, which should resolve the dispute in full and should be effective. The **mediator helps the parties to draft a realistic**, legal, valid and effective settlement, which resolves all the issues between them and does not leave anything for any further dispute in future.

The **agreement then comes to the Court and may be accepted with or without modification, which the Court may suggest.** Almost invariably the Court accepts the settlement and resolves the disputes under Order 23 Rule 1 CPC. In criminal cases, which are compoundable and also those, which concern the relations between the parties and are non-

compoundable, the Court may quash the first information report or a complaint on such settlements.

The mediator is not required to appear in Court as a witness to the proceedings and the parties are not allowed by the Court to discuss the

“Discourage litigation, persuade your neighbours to compromise, whenever you can. Point out to them how the nominal winner is often a real loser- in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.”

Abraham Lincoln

procedure or the options generated by them in mediation sessions. The mediator has limited option to report to the Court. He may report that the parties did not turn up or withdrew from the mediation. He may also report whether the mediation was unsuccessful and if it was successful, he would report that an agreement has been reached, which has been drawn up and signed by the mediator and the parties.

8. Confidentiality and Ethics:

The **credibility of a lawyer-mediator, their reputation, confidentiality of the mediation process** and the information shared with the parties is most important for the Mediation Centre. The **ethics of mediation prohibit the lawyer-mediator to disclose the confidential information** gathered by them through mediation process. They are not permitted to disclose this information, even to their best friends. Only that much of information, which is relevant for a settlement, is to be disclosed. The Court referring the matter to the mediation is also not entitled to know the process and the position adopted by the parties in the process, as the Court in such case is likely to be prejudiced, by the reaction of the parties in the process of mediation.

The **lawyer-mediators' notes are destroyed after the mediation process is complete.** The inspections are not permitted to the parties unless such inspections are permitted by the mediator.

9. Training:

Mediation is a structural process. A mediator needs tact, skill of persuasion and understanding of human behaviour, psychology, knowledge of law and the process of negotiation. These skills are acquired by training.

Lawyers and retired judges make good mediators, since they have knowledge of law and have experience in dealing with people in conflict. A basic training and then advance training with mock mediations is required to begin as a mediator. The refresher courses and reading of books on mediation sharpens the skills.

“If the court annexed mediation program can be implemented with a determination, it will enable the country to carry out a major legislative intent and provide to the nation a stimulant for the growth of its commerce, industry and global interests.”

Niranjan J. Bhatt
Sr. Advocate, Gujarat High Court

10. Funds:

The Centre requires funds. These **funds come from the State Government or the State Legal Services Authority. The costs imposed by Hon'ble Judges on the parties and awarded to the Centre constitute the major part of the funds.** Just like the costs is paid to the Legal Services Authority, the costs can be paid to the Mediation Centre. The 'AHC MCC' had so far functioned only on the costs, which are coming in generous amount. In Delhi a substantial grant was received from the State Government. The National Legal Services Authority had allotted 40 lacs in the year 2007 to Mediation in U.P. out of about 6 crores for the country. It proposed to establish 11 mediation centres in district courts. There will be more funds this year. Gradually in about five years we will have a mediation and conciliation centre in each district. The Lucknow High Court Mediation and Conciliation Centre was established last year and is doing well. In Bahraich and Sultanpur Mediation Centres have been established.

11. Basic framework of a Mediation Centre in High Court:

The court annexed mediation centres are mostly situate in court campus with rooms or cubicals for joint sessions and small cubicals for private sessions. The Mediation Centre works **under a charter approved by Hon'ble the Chief Justice. An Advisory Committee of elders with Hon'ble the Chief Justice as the patron; and a Supervisory Committee to give a supportive role, is constituted by Hon'ble the Chief Justice.** The Organising Committee with an **Organising Secretary, preferably a senior**

trained lawyer-mediator, looks after day to day management of the Centre. The Organising Secretary allocates the cases and is incharge of the management and ethics. He maintains the records with the help of the Court staff, which includes a Centre Incharge, clerks, stenographers, accountants and peons. They maintain the records of the

“A mere knowledge of law does not make a good mediator or conciliator. Mediation and conciliation need tact, skill, art of persuasion and instructions in sociology, human behaviour and psychology”

Mr. Justice R.C. Lahoti,
Chief Justice of India.

cases registered and the files and accounts. They promptly report to the Court on the date fixed or even before the resolution of the mediation process. The rules, if approved by the Court are included in the High Court rules in the lines of the rules suggested by Salem Bar Association's case.

The Mediation Centre at Allahabad was brought under the aegis of the State Legal Service Authority for its statutory recognition with full functional autonomy. At Allahabad more than 3700 cases have been referred in last two and a half years and 600 have been settled out of about 1200 cases, where parties agreed for mediation.

Now the mediation movement has to be taken to the district courts. Initially 11 districts have been selected by the National Legal Service Authority in consultation with the State Legal Service Authority for establishing mediation centres. The High Court has framed and forwarded “U.P. Civil Procedure Alternative Dispute Resolution Rules, 2007” and “U.P. Civil Procedure Mediation Rules, 2007”. These rules have been framed under the statutory powers of the High Court under Para X of the Code of Civil Procedure, 2008 and Clause (d) of sub-section (2) of Section 89 of the Code. The success of the mediation centres in district courts, however, shall depend upon training both to the referral judges as well as coordinator and Advocates.

12. Lawyers' role in Mediation:

The lawyers are allowed to represent the parties in mediation sessions to protect their interest. The experience has shown that the lawyers give tremendous cooperation in mediation sessions. They are allowed to charge their fees and help in finding long term, effective and legal solutions for their clients. The lawyers gain both in relationship with their clients and reputation in such process.

“My joy was boundless. I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realized the true function of a lawyer was to unite parties driven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in brining about private compromises of hundreds of cases. I lost nothing thereby- not even money, certainly not my soul.”

Mohandas Karamchand Gandhi- from Gandhi's Autobiography: The Story of My Experiments with Truth.

“We must be the change we wish to see in this world.”

M.K. Gandhi

List of Books:

1. Settle for More. The Why, How and When of Mediation
By Sriram Panchoo. East West Books (Madras) Pvt. Lts.
2. Mediation in India. A Toolkit
By Hiram E. Chodosh, Niranjana J. Bhatt, Firdosh Kassaw
United State Eduation Foundation in India
3. The Mediators' Handbook
By Charlton and Dewdney. Thomson Law Book Co.
4. Settling Disputes
By Linda R. Singer
5. Getting to Yes
By Fisher & Frog
6. Getting Past No
By Ury-Williams
7. The Mediation Process
By Christopher Moore
8. Alternative Dispute Resolution
By Alexander Bevan
9. Alternative Dispute Resolution
By P.C. Rao & William Scheffield
10. The Dynamics of Conflict Resolution
By Bernard Mayer

Websites

1. www.mediationuk.org.uk - Mediation.UK
Homepage
2. www.mediate.com - Mediation
information and
resource centre
3. www.mediationnow.com - Mediator and Dispute
Resolution Resources

4. www.mediationinlaw.org - The Center for
Mediation in Law
5. www.mediationworks.com - Mediation Training
Institute International.
