-Dr. Ajay Nathani

A managerial approach to
Administration of justice USING
ALTERNATIVE DISPUTE RESOLUTION

Pendency of dockets in different courts in India is huge. Since three decades Indian judiciary is trying to innovate the modes to reduce pendency. Piling up of documents can be reduced in two ways. One mode is to dispose of the pending cases expeditiously and other mode is to reduce the input of dockets. ADR mechanisms are helpful in both the modes. Indian Judiciary is trying to expeditiously implement ADR mechanism in all Indian courts. ADR centers are set up in all most all the courts and many advocates and judges are working as mediators, negotiators and conciliators. Unfortunately there is no recourse for them to understand science of ADR, Philosophies of ADR and methodology of ADR. In order to effectively implement ADR we have to learn all these aspects by knowing meaning of ADR, its origin, Previous Systems of ADR and reasons for its failure, review of Arbitration Act, the legislation recognizing some modes of ADR, ADR within courts, Methodological approach of western nations, Ethics of mediator, use of Emotional intelligence in mediation, dynamics of ADR, Collaborative family law (CFL), Importance of apology, tactics to improve outcome, art of Preparing for mediation, preparing Mediation checklist, Ethics and role of mediator, art of Identifying the hidden issues, pitfalls and obstacles in the process of Mediation and Philosophies of mediation.

Meaning

ADR, which stands for alternative dispute resolution, is not an abstract word to be described by a synonym. Justice S.Radhakrushnan while explaining what includes alternative disputes resolution system mentioned that it not only includes holding Lok-Adalat but it also includes negations, mediation dispute prevention and conflict avoidance and collaborative problem solving. Dr., S.N.Tripathi describes ADR as settlement of dispute outside the scope of formal legal system may be called as an alternative means of settlement of dispute. These descriptions are not sufficient to define ADR. Alternative dispute resolution can be defined as a system, which compasses in itself a bundle of dispute resolution, which can provide alternative mode of settlement of disputes to the existing and established judicial system. This loosely worded definition may suggest that every other mode of dispute resolution, which is not an established judicial system, is alternative mode of dispute resolution.

To remove this and other similar ambiguity we have to improvise the definition as "alternative dispute resolution is a system which encompasses a bundle of recognized, authorised and tested modes of settlement of disputes which will assist and support the existing judicial system to resolve disputes. The recognition or authorisation mentioned in the definition may be by the statute or it may be non-conventional, social, cultural or customary authorisation.

Imminent lawyer F.S.Nariman in one of his article mentioned that ADR and arbitration are complementary, hence the system may be preferably recognised by the words 'appropriate' or 'additional' in place of 'alternative'. The suggestion appears inappropriate because if we recognise the system as appropriate dispute resolution, then we have to admit that the established judicial system is not appropriate and hence it is necessary to give a message to the society to make use of appropriate dispute resolution system to resolve the disputes. Certainly one cannot say or indicate such opinion. The adversarial system is one of the best systems of justice dispensation, which recognise all the principles of natural justice. The ADR system also cannot be additional, because you cannot have more than one established judicial system. Considering these reasons the appropriate and recognised long form of ADR is and will be alternative dispute resolution. In order to effectively implement ADR in India, it is necessary to adopt methodological approach as adopted by Western nations. Lot of research-oriented work is necessary to standardize the procedure and method of various modes of dispute resolution. First let us consider what are the alternative dispute resolution modes and how they can be defined;

1.negotiation - a non-binding procedure in which they special between the parties is initiated with the object of arriving at a negotiated settlement of the dispute.

2.conciliation- promoter of settlement in which impersonal third party guides the parties to the dispute in reaching a satisfactory and agreed settlement.
3.mediation- it is method of alternative dispute resolution in which a mediator assessed the parties to dispute to take a discussion for settlement of dispute in a right direction to reach a mutually agreed settlement.
4.made arb - a process of dispute resolution where the parties agree in between them that if they fail to reach a negotiated settlement, and neutral person, who may be due regional mediator or arbitrator will select one of the final negotiated offer as a settlement to the dispute between the parties and such selection will be binding on the parties.
6. Mini trial - a process of settlement of dispute in which the dispiriting parties are provided with summary of their case to enable them to assess the strengths, it less and prospects of their cases and an opportunity to negotiated a settlement is provided with the assistance of a neutral adviser.
7.arbitration - a process in which the dispute is submitted to arbitration tribunal, which passes an award of binding nature point
8.fast track arbitration - a process in which dispute is settled by arbitration but the procedure to be followed by the arbitrator is rendered in a particular short time and at reduced costs.
For implementation of this process, a neutral person in the role of negotiator or conciliator or mediator or arbitrator is required. Such person is required to possess specific qualities. The different modes of dispute resolution may required to person with distinguished qualities to assessed the parties to reach to the settlement and effectively implement the ADR system. This is because there is a distinction between different modes of ADR.

Origin

Several forms of dispute resolution have an ancient recognition. Even before establishment of a judicial system, disputes were resolved by mediation or by the local Punchas having imminence and prestige in the society. Dr.Priyanath Sen. in his book *"the general principles of Hindu jurisprudence"* has given an exposition of the dispute resolution institutions prevalent during the period of Dharmashatras. One of the main characteristics of the traditional institutions is their use as recognised system of administration of justice in ancient India. This mode of justice dispensation continued to operate along with the recognise system of administration of justice. The procedure followed by traditional institutions was similar to arbitration and conciliation, depending on the dispute to be resolved.

Initially presidencies of Bengal, Madras and Bombay opted for arbitration as one of the mode of dispute resolution. Regulations were made recognise arbitration as one of the mode of dispute resolution. Act 7 of 1870 replaced these resolutions. Act 10 of 1861 replaced earlier Act. Certain provisions in the code of Civil Procedure 1859 also provide for arbitration in certain areas. Section 28 of Indian contract Act recognised arbitration agreement as an exception to the agreement in restrain of legal proceedings. Section 21 of the Specific Relief Act made arbitration agreements not especially enforceable but the right to plead in defence such agreement as a bar to the suit was retained. The code of Civil Procedure 1908 provided for arbitration outside the scope of Arbitration Act. These provisions laid the foundation of the Arbitration Act. The Act of 1940, which was a complete code on the law of domestic arbitration, saw the light of the day. It applied to arbitrations including statutory arbitrations except provided otherwise either by the Arbitration Act or Any Other Act. The Arbitration and Conciliation Act was legislated in the year 1996 on the basis of provisions of United Nations Convention on International Trade Law. The provisions of this Act authenticate and bring into mainstream use of conciliation for settlement of disputes. Before this the conciliation received recognition by the provisions of the code of civil procedure 1908. Order XXXII A rule 3 of the Code provides for adopting conciliation. Section 23 of the Hindu Marriage Act recognised American concept of Court annexed mediation way back in the year 1955. Section 12 of the Industrial Disputes Act recognised mediation way back in the year 1947. Unfortunately these substantial provisions were not backed by the well-structured procedure and conciliation and mediation could not achieve a degree of popularity as expected by the legislators.

In 1984 Himachal Pradesh High Court taken up project for disposal of pending cases by conciliation. The project was a success. The Law Commission of India in its 77th and 31st and report emphasized on following Himachal Project in subordinate courts.

The movement of Lok-Adalat started in March 1982. Soon the local program of Himachal was adopted by other states. In the year 1986 state of Maharashtra framed rules to hold Lok Adalat. Before the act of 1987 settlement before Lok adalat have no sanctity. The Legal Services Authority is Act, 1987 provided statutory recognition to the Lok Adalat. Silent features of the Act are as under;

1. Powers of civil court were vested in Lok Adalat,
2. Proceedings before a Lok Adalat shall be deemed to be judicial proceedings within the meaning of section 193, 219 & 228 of the Indian Penal Code;
3. Every Lok Adalat shall be deemed to be civil court for the purpose of section 195 and order XXVI of the Code of Criminal Procedure 1973;
4. The members of the Lok Adalat in terms of the provisions of section 23 of the Act, shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code; and
5. Every award made by a Lok Adalat shall be final, binding and non-appellable.

Because of these advantages of settlement of dispute in Lok Adalat the system of dispensation of justice by Lok Adalat is now deep-rooted in India.

Analysis of previously existing alternatives of dispute resolution

In ancient India, especially in the villages the disputes were resolved by panchayats. Father of the nation also noticed some good aspects of such settlements of dispute. *Father of the nation* believed in decentralized justice with people's participation in developing crime free society. He said; *"The government of the village will be conducted by the panchayats of five persons annually elected by the villagers, male and female, possessing minimum prescribed qualifications. The panchayats will have all the authority and jurisdiction required. So there were no system of punishments in the accepted sense, these panchayats will be the legislature, judiciary and executive, elected to operate for its year of the office."*

Because of his recognition initially when the State of Maharashtra legislated the Village Panchayat Act the aspect of Nyaya panchayat was introduced In the Said Act.

We are often obsessed by our past. There are several writers who praise our ancient dispute resolution system. It is certainly right that non-conventional mode of dispute resolution is not new for India. *P.C.Rao Secretary-General of the international Center for Alternative Dispute Resolution* in one of his article's writes *"ADR is ADR by no means a resident phenomena, though it has been organized on more scientific lines expressed in more clear terms and employed more widely in dispute resolution is in more clear terms and employed widely in dispute resolution in recent years than before. The concept of parties setting their disputes by Ref to a person or persons of their choice or private tribunals was well known in ancient India. Long before the King aim to adjudicate on disputes between persons such disputes were quite peacefully decided by the intervention of the family or clan assemblies, guilds of main following the same occupation, assemblies of learned men who knew Law and such other autonomous body. There were panchayats at grassroots level before the advent of the British system of justice."* The believers however conveniently ignore the fact that the mode of settlement of dispute by the panchayats was a total failure. I myself have interviewed several tribal residing in the remote villages in Amravati district in Maharashtra and studied method of dispute resolution by these panchayats. The so-called wise men of the society sitting as Punchas for deciding the disputes are illiterate and unaware of the civil rights or natural human rights. As they are not conscious of the civil rights it is not possible to expect from them a decision acceptable to the Justice conscious society or the decision, which recognises principles of natural justice. It was noticed by me that the panchayats used to impose pecuniary punishment on the party who as per them committed a wrong. The fine recovered from the wrongdoer do not use to pass to the victim. The fine use to go to the panchas. The amount was not put to any social or cultural activity, the Punchas, on the contrary, use to utilize said amount for getting liquor and food for them. It was also noticed by me that whenever the Punchas are in a mode to get free catering, they deliberately use to impose heavy fine on some party. Said party used to pay the amount because of the fear of being ousted from the community for not respecting the verdict of the panchayats. Tribal panchayats in

other parts of the State are functioning in similar manner. Certainly such panchayats cannot be said to be the groups imparting justice by resorting to alternative mode of dispute resolution. In ancient India as there were no other mode to resolve dispute people continued to fearfully respect panchayat as a seat of justice. Because of the above-discussed autocratic and inhuman behaviour of the Punchas of the panchayat, the system of delivering justice by panchayats is slowly discarded by society.

The other mode of delivery of justice prevalent in the ancient India was dispensation of justice by the King. This mode of delivery of justice has its own disadvantages. This mode has done little good and lot of harm to the ancient Indian society.

The most ancient period of the ancient history of India is the period of lord Rama. History of Rama's rule consolidated by Maharshi Walmiki provides the instances as to how justice was done and how the king himself uses to follow justice. Tulsidas put before the world Ramayana making some changes as per contemporary needs of society under the name Ramacharitmanasa. During the said period kings use to decide punishments with the advise of learned man. It is not certain whether the wise man-advising kings use to refer any written Code. It however appears that the wise man use to give references of Code of conduct, which are said to be followed as precedents. It is necessary to quote here some instances.

First instance is about advice of Bhibhisana to Ravana to decide punishment for Hanuman for trespassing in the boundaries of Lanka, Kingdom of Ravana. This instance shows that wise man Bhibhishana advised on the basis of a code of conduct, which was then followed as rule of law. This part also shows that Bhibhishana was respected to be a just man and hence his advice was found appropriate by the ministers of the kings and followed by the King.

The second instance is again about advice by Bhibhisana to Rama when he was about to use weapon to punish the the Ocean God when it did not respond to his prayers. Bhibhishana advised on the basis of a code of conduct, saying,

"although your arrow itself can dry up innumerable oceans, yet propriety demands that you should approach the ocean and request the deity presiding over it (to allow you a passage through ocean). "My lord the deity presiding over the ocean is an ancestor of yours, hence he will think over the question and suggests some means of crossing the ocean). The whole host of bears and monkeys will thus be able to cross the ocean without much ado."

This instance also shows that the King use to take advise of a wise man and generally act upon it.

Dispensing justice by a King is an aboriginal system. In ancient period it was the aspiration of every king that his Kingdom would resemble Rama's kingdom however it was not possible for any king to be as just as Rama was. Even some of the decisions taken by Rama are also subject of criticism. The act of Rama to kill Shambuka and his act of abandoning his pregnant wife Sita only to protect his clean image are pointed out to be the most unjust decisions taken and implemented by him. Tulsidas, while rewriting Ramayana dropped these instances in his Ramacharitamanasa, which find place in Walmiki's Ramayana and thus glorified the just image of Rama. So the history shows that amalgamation of the power to rule and dispense justice lead to unjust decisions.

Manusmriti provides some ancient rules to be followed while dispensing justice. In ancient India Manusmriti was supposed to be the best source of law. The Hindu kings dispensed justice by following the text of Manusmriti. The inherent defect with the system provided in Manusmriti is vesting the powers to dispense justice in the king. The system also appears to be based on Caste bias. There is no clear indication as to how the jury and witnesses could assist the king to unearth the truth. The system thus does not have relevance in the democracy.

The scrutiny of ancient system for justice dispensing in India reveal that like in ancient India the work of dispensing justice cannot be left to State. The Vedic Dogma to follow Manusmriti was followed in later part of ancient period of Indian history for centuries. When there was no substantial

justice system in proper shape in the ancient India, it is redundant to expect that the so-called alternative modes of dispute resolution exercised in ancient India were able to deliver justice to the masses.

Analysis of previous legislation recognizing one of the modes of ADR

Even the earlier attempts of the legislation to recognise other modes of dispute resolution in the earlier part of the independents failed. The Arbitration Act 1940 is the best example for the above statement. The provisions of the Act provided for so much judicial interference that it was difficult to get arbitration award and if arbitration award is passed it was difficult to get it enforced. The arbitration can only work when there is very less room for judicial review of the process of arbitration on points of law. This will make arbitration faster and cheaper. Unfortunately the Act of 1940 has so many options of judicial review that the arbitration uses to linger for years together. In the case of *trustees of the port of Madras v. Engineering Constructions Corporation Limited 1995 (4) SCALE 742* honourable Apex Court referring to the judgment in the case of *M/s Gurunanak foundation v. M/s Ratan Singh AIR 1981SC 2076* observed *"indeterminable, time-consuming, complex and expensive court procedures imperiled jurists to search for an alternative forum, less formal, more effective and speedy, for resolution of disputes avoiding procedure claptrap and this led them to the arbitration act, 1940. However, the way in which the proceedings under the act are conducted and without exception challenged in courts has made lawyers law of and legal philosophers weep. Experience shows and law reports BLM for testimony that the proceedings under the Act have become highly technical, accompanied by unending prolixity, at every stage providing a legal trap to the unwary. In former forum chosen by the parties for expeditious disposal of their disputes has by the decisions of the courts, been clothed with 'legalize" of unforeseeable complexity. This case amply demonstrates the same."*

After Implementing the Act of 1940 for almost 50 years government of India repealed the said act entirely.

Analysis of earlier provisions of law recognizing alternative modes

Order, XXXII-A introduced in the Code of Civil Procedure in the year 1976 imposed a duty on the court to make efforts to assist the parties in arriving at the settlement in respect of the subject matter of the suit. The court is authorised to adjourn the matter to due time to the parties to settle the dispute. The provisions are applicable only in respect of disputes concerning the family. Such proceedings are further identified as matrimonial disputes, legitimacy of a child, suit relating to guardianship, custody of a minor or person under disability, suit or proceeding for maintenance, the suit or proceeding as to the validity of effect of and adoption and the suit or proceeding relating to any other matter concerning the family in respect of which the parties are subject to their personal law. So the provision has limited scope in relation to the applicability of the disputes. The role of the court is not well marked. The nature and mode for settlement is neither pointed out not recognised. The provision appear to have been made more in order to keep away the families from legal battles and not with an intention to give recognition to the alternative mode of dispute resolution.

So the ancient Indian system of justice delivery in India has nothing to be proud of. Ancient modes of ADR and even earlier legislations recognizing some of the unconventional modes of dispute resolution failed revolutionize adversarial system in India.

Advantages of ADR

The ADR helps in reducing the workload of the courts and, thereby, help them to focus attention on other cases. The ADR procedure permits parties to choose neutrals who are specialists in the subject mater of the dispute. The main objective of the ADR procedure is to bring the parties to come together with a view to achieving a settlement and maintain the relationships even thereafter. The ADR procedure creates a formal sitting to bring adviser and client together for serious attempt for resolving problem. The ADR consists of several techniques, such as court attached the ADR system, conciliation-arbitration, court ordered and court annexed mediation,

judicial settlement, conferences, settlement weeks, neutral expert fact finding, Judge conciliator, mediation etc. The ADRS work in stages, right from the stage of decision of the party to get their disputes resolved through mediation/conciliation till dispute between the parties attaining finality.

Negotiation

It is a communication process. It is voluntary, nonbonding, involving less procedural embargos, have wide range of solutions, and it maximizes joint gains. It is quick, inexpensive and less complicated mode of dispute resolution. Negotiation is possible where parties must cooperate to meet goals, parties can influence each other to act in ways that provide mutual benefit or avoidance of harm, parties are affected by time constraints and parties can identify and agree on issues/interests not entirely incompatible.

The Negotiation works when,

a) The parties are willing to cooperate and communicate to meet their goals,
b) The parties can mutually benefit or avoid harm by influencing each other,
c) The parties know that they have time constraints,
d) The parties realize that any other procedure will not produce desired outcome,
e) The parties can identify on what issues require to be sorted out
f) The parties also agree that their interests are not incompatible to each other
g) The parties knew that it is preferable to participate in process of negotiation rather than go through severe external constraints like loss of reputation, excessive cost, and possibility of adversarial decision

The qualities of Good Negotiator

A good negotiator should know his subject intimately, should become expert, manifest a sense of personal integrity, should know how to exploit power. The negotiation is combination of all skills, and continuous practice of those skills.

Methods of negotiations

A. The five methods of negotiation are:
1. Attack or fight. This type of negotiator is often called an aggressive negotiator.
2. Appease or attempt to convert. This type of negotiator is often called a cooperative negotiator.
3. Flee or attempt to evade the problem. This kind of negotiator is often called a distracter.
4. Displace or analyze the problem. When a man is told not to come in to the office today because it has burned down and responds by analyzing the changes in traffic patterns the fire trucks will have made, he is engaging in displacement. This kind of negotiator is often called an analyst.
5. Truth seeking. This kind of negotiator is often called an idealist.

Conciliation

Apart from settlement by Lok-Adalat conciliation is also one of the better mode to reduce pendency. Statutory recognition is given to conciliation by the Arbitration Act 1996. Section 30 of the Act speaks of powers and duties to encourage settlement of disputes by conciliation, mediation by agreement of parties in dispute. Conciliation proceedings may be resorted to even in absence of arbitration agreement between the parties. With this recognition the parties to the dispute may now go to the neutral person for conciliation. The neutral conciliator may propose solution for disputes resolution considering the views of both the parties and the law existing in respect of the problems. While giving his opinion conciliator will take into consideration flexibility of both the parties to accommodate each other by give and take formula.

Provisions of the Arbitration & Conciliation Act regarding conciliation

Now, the proceedings relating to conciliation are dealt under sections 61 to 81 of Arbitration and Conciliation Act, 1996. This Act is aimed at permitting Mediation conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes. This Act also provides that a settlement agreement reached by the parties as a result of conciliation proceedings

will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal.

To which disputes:

Section 61 says that conciliation shall apply to disputes arising out of legal relationship, whether contractual or not and to all proceedings relating thereto. Unless any law excludes, these proceeding will apply to every such dispute while being conciliated. The parties may agree to follow any procedure for conciliation other than what is prescribed under the 1996 Act. If any law certain disputes are excluded from submission to conciliation, the third part will not apply.

According to Section 62, a party can take initiative and send invitation to conciliate under this part after identifying the dispute. Proceedings shall commence when other party accepts the invitation. If rejects it stops there itself. If other party does not reply within 30 days it can be treated as rejection.

1 Conciliation under the Arbitration and Conciliation Act

Sections 61 to 81 of the Act of 1996 make express provisions as to conciliation by agreement of the parties - a matter on which there has so far been no statute in India.

2 Conciliation and Arbitration

Unlike an arbitrator, a conciliator does not give a decision but his main function is to induce the parties themselves to come to settlement. An arbitrator is expected to give a hearing to the parties, but a conciliator does not engage in any formal hearing, though he may informally consult the parties separately or together. The arbitrator is vested with the power of final decision and in that sense it is his contribution that becomes binding. In contrast, a conciliator has to induce the parties to come to a settlement by agreement.

3 The Emotional Aspect

An arbitrator generally decides after a contest between the parties while in the case of conciliation the final result depends on the will of the parties. Therefore, at the end of the proceedings, emotional harmony between the parties may not suffer much, in the case of conciliation.

4 Scope

Under Section 61(1) of the new law, conciliation can be resorted to in relation to "disputes arising out of a legal relationship, whether contractual or not".

5. Conciliators

i. There will be only one conciliator, unless the parties agree to two or three

ii. Where there are two or three conciliators, then as a rule, they ought to act jointly.

iii. Where there is only one conciliator, the parties may agree on his name

iv. Where there are two conciliators, each party may appoint one conciliator.

v. Where there are three conciliators, each party may appoint one, and the parties may agree on the name of the third conciliator, who shall act as presiding conciliator.

vi. But in each of the above cases, the parties may enlist the assistance of a suitable institution or person.

6. Institutional Assistance

Section 64(2) and proviso of the new law lay down as under: -

a. Parties may enlist the assistance of a suitable institution or person regarding appointment of conciliator. The institution may be requested to recommend or to directly appoint the conciliator or conciliators.

b. In recommending such appointment, the institutions etc. shall have regard to the considerations likely to secure an "independent and impartial conciliator.

c. In the case of a sole conciliator, the institution shall take into account the advisability of appointing a conciliator other than the one having the nationality of the parties.

Section 37 provides that an appeal shall lie from certain orders. No second appeal will lie from an order passed in an appeal. However, the right to appeal to the Supreme Court is not affected.

Incidentally, the new list of appeasable orders is slightly narrower than that contained in Section 39 of the Arbitration Act, 1940.

7.Procedure

1. The conciliator, when appointed, may request each party to submit a statement, setting out the general nature of the dispute and the points at issue. Copy is to be given to the other party. If necessary, the parties may be asked to submit further written statement and other evidence.

2. The conciliator shall assist the parties "in an independent and impartial manner", in their attempt to reach an amicable settlement. See Section 67(1) of the new law.

3. The conciliator is to be guided by the principles of "objectivity, fairness and justice". He is to give consideration to
the following matters:

i. Rights and obligations of the parties;

ii. Trade usages; and

iii. Circumstances surrounding the dispute, including previous business practices between the parties. [Section 67(2)

He may, at any stage, propose a settlement, even orally, and without stating the reasons for the proposal. [Section 67(4)].

He may invite the parties (for discussion) or communicate with them jointly or separately. [Section 68].

Parties themselves must, in good faith, co-operate with the conciliator and supply the needed written material, provide evidence and attend meetings, [Section 71].

If the conciliator finds that there exist "elements of a settlement, which may be acceptable to the parties", then he shall formulate the terms of a possible settlement and submit the same to the parties for their observation.

On receipt of the observations of the parties, the conciliator may re-formulate the terms of a possible settlement in the light of such observation. If ultimately a settlement is reached, then the parties may draw and sign a written settlement agreement. At their request, the conciliator can help them in drawing up the same. [See Sections 73(1) and 73(2)].

9 Legal Effect

a. The settlement agreement signed by the parties shall be final and binding on the parties. [See Section 73(1)].

b. The agreement is to be authenticated by the conciliator. [See Section 73(4)].

The net result is that the settlement can be enforced as a decree of court by virtue of section 36.

9. Role of the Parties

Under section 72, a party may submit to the conciliator his own suggestions for the settlement of a dispute. He on his own initiative or on the conciliator's request may submit such suggestions.

10 Conciliator's Procedure

The net result of section 66, Section 67 (2) and Section 67(3) can be stated as follows: -

The Code of Civil Procedure or the Evidence Act does not bind the conciliator. The conciliator is to be guided by the principles of objectivity, fairness and justice. Subject to the above, he may conduct the proceedings in such manner, as he considers appropriate, taking into account.

I. The circumstances of the case;

ii. Wishes expressed by the parties;

iii. Need for speedy settlement.

13 Admissions etc.

In any arbitral or judicial proceedings (whether relating to the conciliated dispute or otherwise), the party shall not rely on, or introduce as evidence

i. Views expressed or suggestions made by the other party for a possible settlement;

ii. Admissions made by the other party in the course of conciliation proceedings;

iii. Proposal made by the conciliator; and

iv. The fact that the other party had indicated his willingness to accept a settlement proposal (Section 81).

14 Costs and Deposit

The new law also contains provisions on certain other miscellaneous matters, such as costs and deposit (Section 78 and 79).

Advantages:

The following are the advantages of resolving disputes by conciliation:

1. The parties and the third neutral party (in place of judge) sit together to resolve.
2. Matter settles at threshold of the first count, and for all times to come instead of resorting to all possible appeals to High Court and the Supreme Court, as many times as the CPC provided.
3. The social advantage of parties going back home happily without broken relations is of high value. The bickering and enmity will not be enhanced as happens in other modes of rule-based resolutions.
4. Drastically cuts down the cost of litigation and the time. The early disposal of the case will reduce the hidden and unproductive costs like traveling to courts and keeping off from working for several productive days.
5. Execution is done simultaneously of the settlement.
6. It offers a more flexible alternative, for a wide variety of disputes, small as well as large.
7. It obviates the parties from seeking recourse to the system.
8. It reserves the freedom of the parties to withdraw from conciliation without prejudice to their legal position inter se at any stage of the proceedings.
9. It is committed to maintenance of confidentiality throughout the proceedings and thereafter of the dispute, information exchanged, the offers and counter offers of solutions made and the settlement arrived at;
10. It facilitates the maintenance of continued relationship between the parties even after the settlement or at least during the period the settlement is attempted at. This feature is of particular significance to the parties who are required to continue their relationship despite the dispute, as in the case of disputes arising out of construction contracts, family relationships, family properties or disputes between members of any business or other organisations.
11. There is no scope for corruption or bias.

Arbitration

Arbitration is a process of dispute resolution where dispute between the parties is referred to an impartial and neutral arbitrator selected by the parties mutually either beforehand or when the dispute arises. The Arbitrator has to resolve dispute as per the set of rules prescribed for arbitration. In case of commercial transactions, where the parties to the transaction are aware of possible conflicts beforehand, it is always preferable to implicate clause to refer the possible dispute to arbitration. New sets of rules are legislated to give new dimensions to the arbitration in India.

The Arbitration and Conciliation Act, 1996 was brought with following objectives,

I. To propagate, promote and popularize the settlement of domestic and international disputes by different modes of ADR;

ii. To provide facilities and administrative and other support services for holding conciliation, mediation, mini trials and arbitration proceedings;

iii. To promote reform in the system of settlement disputes and its healthy development suitable to the social, economic and other needs of the community;

iv. To provide choice to the parties to select conciliators, mediators or arbitrators of their choice;

v. To create awareness in the society and educational circle to create opportunities for education, research and training in the field of ADR;

Silent features of the Arbitration and Conciliation act 1996 are as under;

1.clear provisions are made to indicate commencement of the arbitral proceedings;

2.the requirement of giving reasons in the arbitral award to provide for transparency in the decision-making, unless parties have agreed that no reasons are to be given;

3.the provision for time limit for making an arbitral award and seeking extension of time, which led to considerable litigation, is done away. On due delay on the part of an arbitrator is made ground for termination of the mandate of the arbitrator;
4.the supervisory role of the Court is reduced to a minimum and intervention of the Code can be only after the award is made;
5. It is left to the arbitrator to decide the question of his jurisdiction and the existence and validity of the arbitration agreement;
6.the arbitrators empowered to order interim measures in respect of the subject matter of the dispute;
7.international commercial arbitrations are to be decided in accordance with the roles of law designated by the parties as applicable to the substance of the dispute. In absence of such designation, the arbitrator is at liberty to apply the roles of law, which he considers to be appropriate;
8.the award is to become final and can unforeseeable as if it is a decree of the court if it is not challenged within the prescribed limitation or the challenge has been rejected;
9. The Act pressed the controversy about domestic award and foreign awards by giving definition of both these terms;
10. The Act recognises conciliation as one of the more of resolution of disputes.

Pitfalls of arbitration

Arbitration often is faster than trial. However, arbitrators in many areas are rumored to be prone to "split the baby." If a party is entitled to harsh legal remedies and is willing to wait (and take some risk) in order to obtain them, then arbitration thought to probably be dissatisfying. Many intellectual property law plaintiffs have basically written arbitration off because of the natural level of compromise that is perceived as to accompanying it. Note that this is an issue of perception.
Situations where one side is completely in the wrong, but is pushing arbitration or trial to obtain the benefit of natural compromise often do not yield fruitful result. If one side is unwilling to give an inch, and has no legal reason to compromise, non-binding arbitration have only about a break-even chance of persuading the other side to throw in the towel purely to save legal costs.

Mediation

Mediation and negotiation are said to be some other modes of alternative dispute resolution. Negotiation means setting out differences. Mediation means making all parties to dispute seat together and resolve their differences. Of all the modes of alternative dispute resolution mediation have potential to provide a break through in the process of docket reduction. Dispute is manifestation of human egos. So the parties who create dispute can find out appropriate solution for the same. Considering the prominent role of dispute resolution I am trying to provide all the aspects of mediation in this paper.

Philosophies of Mediation

Utilitarian Theory

From this view, the goal of mediation is economic self-interest (usually defined in obtaining the best dollar value for a case) in a free market without constraints. The limits to this philosophy are fairly obvious beginning with the fact that often mediation is over issues other than money.

On the other hand, if the definition shifts just a little, to social utility, where value is defined as whatever the parties want (for one to make money, another pride, a third to resolve this quickly so that a good nap is in order), mediation is a process that improves society by facilitating a free market exchange between parties.

This philosophy implies that the mediator wants what is the greatest good for the free market and society, is basically neutral to the parties, and places a strong focus on allowing the parties to seek their own good (with some help in understanding or realizing what the outcome of their own unencumbered desires would be, and some social balance on other's good).

Theory of Essential Needs

Utilitarian theory blends into essential needs theory as a natural development of social utility. In essential needs theory mediation helps parties seek and accommodate their essential needs, whether the need be for freedom, shelter, peace, dignity or fair compensation. Essential needs theory focuses on the emotional and non-financial elements that drive many conflicts and is especially well suited for community mediation efforts. This is where the emphasis is first on meeting each parties essential needs and then recognizing the benefits that can be made above the essentials. His initial and his ascending needs provide a base line for comparing where each party is and where each wishes to end.

Resolution Theory

Resolution theory is a special branch of Essential Needs. In resolution theory, the focus of all mediation is on dispute resolution with the premise that violence and conflict need to be avoided or resolved. While rather ill suited to the mediation of a personal injury claim, it works extremely well in mediating partnership disputes. This kind of resolution is ideal for internal problems where the goal is smooth operation, not justice. Resolution based mediation is essentially what military law and cooperative internal policy runs on. Not what is just, but what can be done to resolve this problem and keep the operation moving forward toward its basic goal, be it deterrence, global domination or meeting a product deadline.

Natural Law Theory

Natural Law mediation treats mediation as an expression of natural law (more so than courts or formal processes). In one branch it is extremely naturalistic, but in all applications it treats mediation as part of the essential nature of man at his best. Natural Law mediation is an attempt to incorporate the structure of the philosophy of natural law into the definition of mediation. This is an effort to get both parties to harmonize with how it "should be" and requires a basic harmony between parties on that basis in order to resolve conflict toward that goal.

Intervention Theory

Interventionists see mediation as an equity device (a process that seeks to create social justice or find fairness) and that philosophy casts mediation as a tool for intervention into conflicts. An interventionist seeks conflicts and situations to which mediation may be applied in pursuit of greater fairness. This process inserts the mediator into a situation the mediator views as requiring change and the mediator is an active value holder in the process.

Justice Theory

A law oriented mediator sees mediation as an expression of the rule of law and a tool for justice under the rule of law (albeit at a cost savings). Generally this approach sees mediation as giving parties greater participation and control and focuses on reducing the cost of justice. It values mediation for its utility in reducing transaction costs and increasing the level of satisfaction and knowledge.

Restorative Justice

This philosophy of mediation sees the process (often used in post conviction proceedings with criminals) as a tool for providing restorative justice and for healing the harm caused by criminal breaches of the civil contract. Once again the mediator is an active value holder (representing the injured party/society) in a relationship with the offender in the offender's efforts to rejoin society.

Other Views

There are other philosophies of mediation, but to my understanding, the above philosophies shape the various types of mediation that we see in society today. From the victim-offender movements to school yard and diversity mediation, to attorney-mediators in court-annexed proceedings, to families and partnerships in the process, each facet of mediation seems to reflect a philosophy that created mediators that address the needs and situations of the various types of conflicts approached by mediation.

Elements of mediation

Mediation has the following five elements:

1. An impartial third party facilitator.

The third party neutral, the mediator, is the person who makes the entire process work. As long as there is a neutral facilitator, the parties can trust that they have some safety and are not being abused by an interested party. All of these programs work because the mediator in them is known to either be neutral or supportive of the parties and not an involved party.

2. A third party who protects the integrity of the proceedings.

Usually this means that the facilitator or mediator protect the confidentiality of the proceedings. Thus, not only does the mediator not take sides against any party to the mediation, the mediator does not usurp the parties' rights to disclose, or not disclose information. The mediator preserves the integrity of the proceedings in all ways. Confidentiality also means that the facilitator cannot be made a witness.

3. Good faith from the participants.

Good faith includes not only entering into the ADR method with the intent to work towards a resolution, it also includes not using the process for outside purposes. What makes all of the proceedings mediation is that the parties are in the process to seek solutions rather than for an ulterior purpose. Both the behavior and integrity of the neutral are important in creating, and preserving good faith.

4. The presence of the parties

Those with full authority to act for the parties must attend so that the parties can work towards resolution. If the decision makers do not attend the process becomes something other than mediation.

5. An appropriate site or venue.

Generally this means a neutral site that is conducive to the process. It must mean a place where neutrality, confidentiality and inclusiveness may be obtained. The place is some times as important as the persons and is a part of the process often overlooked.

Ten Commandments of Mediation

Rule One: Remove all proxy warriors. In the present circumstances in India it is advisable to have mediation between parties alone.

Rule Two: Mediator should not have a state in the existence of disputes.

1. Look at the structure of your disputes.
2. How are you measuring success?

Rule Three: You can't buy a better relationship. It is much better to resolve disputes "on the merits" than to give in to improve the relationship.

Buying off problems only generates more of them.

Rule Four: Role-play your opposition in order to understand them, but do not become them. You need to understand the other side, but you must seek your own best interests.

Walk a mile in their shoes -- not a marathon.

Error! Bookmark not defined.Rule Five: Understand your best alternative to a negotiated settlement including:

1. Tangible costs (immediate amount)
2. Intangible costs (relationship costs)
3. Transaction costs (what is the cost of litigating pride?)

Batten down your BATNA.

Rule Six: Dispute resolution may mean being willing to say you are sorry. Many, many complaints are really issues of respect -- or feeling issues of respect -- and no more or less.

Apologize for the conflict.

Rule Seven: Share information. Withholding information leads to mistrust and prevents a correct evaluation of BATNAs by the parties.

Prevent the blind from leading the blind.

Rule Eight: Prevent conflict through education. Teach people the law, and teach them their rights as a part of on-going training and understanding. Respect and learn from what you teach.

An ounce of prevention is worth a pound of litigation.

Rule Nine: Establish proper boundaries. People will argue what they have (If they have the law, they argue the law, if they have the facts, they argue the facts, if they have neither, they pound the table). Remember that what you feed grows and you have to starve table pounders or violence will drive everything else out of the process.
Replace coercion with persuasion.
Rule Ten: When all else fails, introspect and try to learn from your mistakes.

Common errors in application of mediation

The parties are sometime aggressive, critical, unforgiving, hot head and self-righteous. The mediator instead of showing charity towards the attitude of clients also becomes aggressive and critical

2.some mediators arrogantly determine their view of the case and urged the parties to except said view without exploring alternatives, which may be available with the parties.

3.some cases are not fit for mediation. The mediator if finds such case on his table, he should straightway refuse mediation.

4. The parties must be taken in confidence. For good mediation clients must know and understand, the process of mediation, his true interests, variety of options for possible alternative arrangements, strengths and weaknesses of his case, importance of apology and empathy, importance of listening open-mindedly and if the importance of not making the source of water muddy from which he has to drink water.

5. Opportunities would be given to the party to understand his own as well as adversaries case.

6.allure of a party to listen to the other side.

7.the parties to be restrained from taking assistance of unfair means and like threatening the adversary or tampering the evidence

8.Once the settlement has arrived, settlement agreement should be finalised. Leaving these show for another day may result in change in the stand by one of the party.

9.confidentiality should be maintained facts confidentially informed by the parties to the mediators should never be reiterated.

10.the mediator should show patience and perseverance.

Distinction between arbitration and mediation
1. In mediation, mediator has to assist the parties to settle the dispute, whereas in arbitration, and arbitrator nominated by the parties has to take up the matter in summary inquiry way.
2.are better award is based on con provisions of arbitration proceeding and is binding on the parties. The settlement arrived at the mediation is in the form of an agreement between the parties but the effect of such agreement is not as effective as that of arbitral award.
3.in arbitration there may be more than 1 arbitrator and at the arbitrator is an equally divided while taking decisions, the umpire can be appointed. In mediation, the mediator is generally a single person and there is no umpire system in mediation. The Arbitration and Conciliation Act, 1996 have abolished open pattern umpire system)

4. Arbitration proceeds as for the procedure under arbitration law, whereas there is no qualified procedure for the purpose of mediation.

a. Arbitration award is enforceable. The settlement of negotiation is however not legally unforeseeable unless it has the past by invoking the provisions of the Legal Services Authorities Act.

Court Annexed Mediation

There are three different definitions of Court Annexed Mediation.

The narrowest definition is mediation that has been specifically ordered by a Court. The middle ground is mediation that occurs per general court orders (e.g. standing orders that all family law cases will be mediated before a trial date is set).

The most expansive definition is the mediation of any and all matters that will certainly be litigated. In India except the pre-litigation matters all the matters referred to ADR forums are Court Annexed litigations. This measure marginally assists to reduce pendency. In order to reap appropriate benefits from the mediation process it is necessary to bring the dispute before court before it reaches the Court.

How mediation is used in western countries

Mediation is schoolyard intervention. From kindergarten through twelfth grade, mediation is part of the education community and is supervised by schoolteachers and conducted by specially trained peer group mediators in the same classes as the parties in conflict.

Use of Mediation in schools - In a growing number of schools, a mediator is a student in a federally funded initiative to reduce conflict and violence in schools.

Use of Mediation in Juvenile justice - Mediation is a part of the juvenile criminal justice system. For non-violent offenders, victim-offender mediation is a process where community volunteers, under the supervision of the criminal justice system caseworkers, help both sides humanize and rehabilitate each other.

Use of Mediation to avoid Juvenile delinquency - In many communities, a mediator is an unpaid volunteer with three to six hours of training in a state funded program who helps kids get back on the right track.

Use of Mediation in matrimonial disputes - Mediation is a part of family counseling for people getting divorced. Mediation is a way for families who are splitting into parts to learn to deal with the changes in roles, duties and opportunities and to face those changes with emotional balance.

Use of Mediation in family matters - To many, mediation is a special form of family counseling handled by licensed family counselors and therapists.

Use of Mediation within courts - Mediation is a part of the civil court system where parties to law suits are aided in settlement negotiations aimed at helping them find their own best interest.

Use of Mediation at pre trial stage - Mediation is a part of community action and conflict resolution, a place where volunteers, often with the Better Business Bureau or Community Alternative Dispute Resolution Centers, resolve conflicts and problems that otherwise would end up in small claims court.

Use of Mediation in Labour disputes- Mediation is a labour conflict resolution tool aimed at finding a better way. Drawing from a wide pool of talent and skills, labor mediation seeks to end conflict and improve feelings in the workplace.

Use of Mediation in industries and commercial establishments - Institutional mediation is conflict avoidance, a form of human resources management that aims to resolve conflict and improve communication between those served and the institution and between the different members of the institution.

Use of Mediation in hospitals and churches - in large hospitals, churches and other diverse organizations, mediation is a method of ensuring communication and that problems are resolved rather than ignored, cured rather than allowed to fester.

Use of Mediation in international relations - Mediation is what diplomats do to prevent countries from going to war or to help countries at war find peace. From the Middle East to Bosnia, mediation is the resolution, by political means, of armed conflict.

Application of mediation in specified cases and essential work out

A. Personal Injury

The advantages of mediation for a plaintiff in a personal injury claim include the fact that mediation of a claim leads to less risk and quicker resolution. ADR is often the best chance to work out a structured settlement. For a defendant's insurance company, mediation vastly reduces the overall expense of defending cases. With early mediation, 80% of the cases that would otherwise be litigated would be settled with only the preparation and costs equivalent to paying for a single deposition.

B. Commercial Litigation

Mediation is often the last and best remaining chance to find a business solution to the problem that led to litigation rather than place a dollar value on the injury. ADR is often the last chance to explore early resolution, correction of mistakes, and control of costs if litigation cannot be avoided. Mediation should be seen as a place to structure future relationships whether or not the litigation continues.

Further, early commercial mediation often results in additional business being worked out between the parties.

C. Family Law Issues

In Family Law or Domestic cases, mediation is often the only chance, other than trial, to have a client take time and look at reality and what the system can and cannot provide the client. Mediation can also can provide substantial catharsis; by providing opportunity to both parties to speak at length and be heard without interruption.

Mediation is also opportunity to the parties to sit down and focus on what they really. In cases where emotions are controlling settlement discords, a full day of mediation can often bring emotions under control and result in a signed and binding settlement of the issues before the Court.

D. Medical Malpractice

Medical litigation issues include both personality problems and medical malpractice issues. They are different from the preceding types of cases in important ways.

a. One of the most difficult portions is the mediating that goes on between the different defendants. Often the best method of handling this is to first have the defendants agree to a reasonable settlement range and then to have each put up an initial contribution to test whether the plaintiff can be moved towards that range.

Only after the plaintiff has moved into a reasonable range that the defendants can agree to, should the percentage contributions, the necessary amounts to "close the gap" (between the initial offer amounts and the amount that is "reasonable") be discussed. Often the reasonable range figure provides incentive, as does the possibility for partial settlements between the plaintiff and some defendants.

b. Cases seem to resolve more consistently if mediation occurs very early. Further claimants' negative feelings towards health care providers will harden over time.

In considering mediation of a medical malpractice claim, remember that medical malpractice cases are expensive.

E. Bankruptcy and Mediation

Available only by the agreement of the parties, there has been some mediation in bankruptcy proceedings. Since bankruptcy often involves non-zero sum solutions, mediation has been growing in that area solely as the result of the successes attorneys have had using the method.

Bankruptcy is one area where waiting to mediate -- until counsel can determine if there is going to be a contest -- may well be superior to immediately moving forward to mediation. As a result, instead of rushing to mediation, bankruptcy law calls for a "wait and see" attitude.

Accreted Mediation: Building Clarity and Connection

In using Nonviolent Communication in my work, it is often recommended that mediation begin in the initial phone call. This idea of mediations building or accreting with the addition of parties is not all that different from the practice of one of the better known institutional mediation providers, which uses case managers who receive the initial call from one party, often an advocate, requesting mediation. The case manager often mediates the agreement to mediate, and only when the parties agree to mediate is the "mediator" identified.

Mediation using NVC

When someone who is not an advocate calls mediator for help with a dispute, they often have never used a mediator and they don't exactly know what it is they want. In this context mediator's first step typically is to help them clarify what needs of theirs are not getting met in the conflict. People in the midst of conflict are often focused on everything but needs - the story, the history with a person, and strategies. One of the key distinctions mediator hold as he talks to someone in this situation is to differentiate their needs from the strategies they may already be thinking of. The focus on particular strategies is often a source of conflict in and of itself.

An important first step is for the person, either by him or herself or with the help of mediator, to name and to experience the effect of naming the needs that are going unmet in a particular situation. In the terminology that has evolved as part of NVC, helping a person clarify their needs is a way of helping them meet their need for empathy -- that is, to be heard as to what their needs are.

Strategies at this initial stage include whether and how they want mediators involvement; Mediator may coach them in communicating with the other party, they may request that the other party has a conversation with mediator, or request that he mediate a conversation between the two parties. What often happens in these situations is "accreted mediations" - mediator begins with this one person and other parties are added as the process unfolds.

Preparing For Mediation

Introduction - Using mediation in litigation requires several generic steps, and includes some steps that apply to litigation even where no mediation occurs.

Know your case - In the context of preparing for a mediation session, "know your case" means knowing and preparing the following elements.

a. Know which facts are disputed and which are undisputed.

b. Know which facts are critical, which are important and which make merely background.

c. Lay out the elements of your cause(s) of action and the facts you have. This will form the background of your preliminary statement.

d. Know your damages or other desired relief (if seeking relief). (Regardless of whether you are moving or defending the case, know what result you want). This will help you focus on what you hope to achieve in mediation.

e. Know your counter-claims and defenses (if you are actively resisting sought relief) and know your liability issues, disputed and undisputed. This is the first half of knowing the points you has to use in negotiation and the mediation.

f. Know comparable jury verdicts (if any). This can be very important and helps you in evaluating your goals.

Know your alternatives to settlement - a. Know your risk. Ask yourself: What is your range of results if you do not settle?

b. Know how long and how expensive it will be to go to trial and what outcome is possible at trial. Ask yourself: What will it cost you to go to trial?

c. Know what results are likely from a trial. Ask yourself not only what the range is, but: What is likely to happen if you go to trial?

d. Be aware of your client's other options (such as walking away) and other tools (such as binding arbitration or binding summary trials).

Once you have reviewed your case and answered the questions about the alternatives you are ready to talk with your client and spend the appropriate amount of time preparing them for mediation.

Educate your client (and prepare yourselves as a team). -Explain the mechanics of the system (especially how a mediation session goes). Goal: Have the client understand the procedures and keep them from being surprised by the process.

Explain the facts as the law sees them. Goal: Help the client to understand that what matters are not "the facts" but the admissible evidence. This helps clients avoid trouble later.

Explain the law as the State has created it. Goal: Help the client understand that the result they will get will not necessarily be what they think is fair but what the law allows.

Update the status of the case (where everything is, "how much longer."). Goal: Help the client understand how much, or how little, time settlement can save.

Explain the status of negotiations (if any). Goal: To make certain that the client approves of at least where the negotiations will start.

Determine and set the goals that the client is seeking from the dispute and the resolution process. Goal: To make certain that you are headed in the right direction in what you are seeking from the mediation session.

Define your client's objectives - Examine the alternatives to the client's objectives. Explain to your client the alternatives to settlement. (Including risks, delays and enforceability of judgments problems, if any.

Validate your opponent's file - Review and make certain that the other side has all of the materials necessary to fully negotiate. 21% of all failed mediations fail because one party did not prepare properly -- often simply because a necessary medical report, bill, or similar item was not provided to them (or not had by the party who should provide it).

Your goal is to make certain you have everything you need by making certain the other side has been sent everything they should have and that you have asked for and obtained the items you feel you should have from them. You should also read everything again at this point -- before you send it.

Qualities of mediator - mediator is the person who has to make personal efforts by means of his goodwill, knowledge and the skill to bring the parties to amicable settlement. The mediator is required to be independent, impartial and fair. He should have the capacity to keep the matter secret so that the parties can have faith in him to disclose all the aspects of the dispute. The mediator should be a person of good faith.

Some more steps are required to be taken by the party or his advocate participating in mediation;

a. Know what is the central issue of the dispute,

b. Know which facts are required to be settled and which are the facts in the background

c. Prepare a preliminary statement mentioning there in central issue of the dispute and the background facts identified by you

d. Ascertain what court outcome you want of the dispute

This will help you focus on what you hope to achieve in mediation.

e. If your defendant knows your counter-claims and defenses

f. Know comparable precedents. This can be very important and helps you in evaluating your goals.

2. Know your alternatives to settlement.

a. Know your risk. Ask yourself:

b. Know how long and how expensive it will be to go to trial and what outcome is possible at trial.

c. Know what results are likely from a trial.

d. Be aware of your or your client's other options

3. Educate your client

Explain the mechanics of the system. Let the client understand the procedures and keep them from being surprised by the process.

Explain the facts as the law sees them. This helps clients avoid trouble later.

Explain the law as the State has created it.

Explain the status of negotiations

Determine and set the goals that the client is seeking from the dispute and the resolution process.

Define your client's objectives.

Examine the alternatives to the client's objectives.

Explain to your client the alternatives to settlement. (Including risks, delays and enforceability/collectability of judgments problems, if any

Preparing Pre-Mediation Papers by a Mediator

The pre mediation paper referred above shall contain following particulars,

a. Concise statement of issues and positions the parties have taken and what are the reasons for those positions. It often helps to approach each point as follows:

Position

Issues that support the position

Legal elements for each issue/cause of action/defense/etc.

Uncontested facts for each element.

Contested fact for each element.

This will often disclose positions that have little factual basis, which will help in evaluating them for settlement purposes as well as helping you focus on important areas.

b. Identify strengths and weaknesses of parties to mediation.

This can be quite simple. Usually fully identifying the issues and positions will illustrate the strengths and weaknesses as well. This is also the time to consider legal trends, how strong and how certain your witnesses are on the facts and all of the related issues that come to mind in deciding if a case is strong or weak.

c. Decide timeline for case and for negotiations.

Sometimes a timeline is quite complicated. If the timeline is complicated this is a red flag that the mediator will probably need a road map to keep track of where and when the parties are discussing and may prompt you to prepare one for the mediator even if a road map has not been requested.

d. Details as to who will be present at the time of negotiations and their relationship to the case.

This is important to make certain that the appropriate parties attend, including everyone necessary to make a binding settlement. Many mediations fail because of absence of settlement authority.

e. Supplement as to appropriate "live" pleadings and case law. – It will make easy to guide the parties on the right track.

Secrets and lies a mediator, negotiator or conciliator may come across.

One may come across a situation in which you suspect either party or the advocates are lying in the name of "mediation advocacy" to gain advantage in the negotiation? It is the tough moment where the duty of advocate-client confidentiality collides with the ethical considerations of truthfulness in negotiation.

How do you respond?

Like a "Lie" in mediation, once a false word is laid down on the Scrabble Board, it can often confound and impede the progress, which creates the flow of the game or negotiation, creating frustration or even impasse. While a secret (like a plan to set up a triple word score in Scrabble on your next turn) is an excellent tool for advocates, a LIE (like cheating by using a non-word) just impedes the negotiation.

Using "Secrets" is Acceptable as a Tool for Negotiation

Most of the mediations begin with a promise by the mediator to maintain confidential communications. These typically consist of one or two types of communication: yet undiscovered facts, and/or negotiating posture, case valuation and limits on client authority.

For example, a defendant's desire to end litigation charging him with sexual harassment "as early as possible" in order to alleviate ugly claims which might be brought to the attention of his wife in a soon to be pending marital dissolution, is surely something the mediator would not voluntarily reveal to the claimant, yet a critical tidbit of information to aid in her understanding of the parties' "interests" in the outcome of the litigation. This is a prime example of an undiscovered "fact" that affects the outcome of the mediation, but should not be revealed by the mediator. It's a secret, but not a lie.

Secrets are not only expected, but also respected in a very different way than lies. A mediator is expected to maintain secrets, but if questioned should not lie to protect their secrecy. Instead, for

example, if asked if there are any prior accidents, should simply refuse to reveal any information. If, instead, the mediator states: "not that I know of", the mediator is participating in a lie. This can backfire, and destroy the mediator's credibility at the same time. Nonetheless, this type of secret is invited and usually useful to the mediator. Make sure, however, that you trust your mediator not to reveal this type of "secret" to your opposing side.

Lawyer's Role in mediation

An advocate has four very important roles in mediation.

a. To persuade and negotiate.

b. to communicate and persuade.

c. To protect the client.

d. To appear reasonable, calm, in command and confident.

Ethical And Practical Considerations In Choosing Whether And How To Mediate

A. Is There a Duty to Attempt ADR Processes?

The public consideration of the "ethical duty" began with an unsettling trend that attempted to portray the failure to use, or to attempt to use, ADR processes as a breach of the professional standard of care had by an attorney. If a bad result follows at trial (even just the cost, expense and risk of trial), it is more likely than not that the result could have been avoided by engaging in mediation.

The failure to attempt to avoid the bad result by engaging in mediation thus had the foreseeable expense or bad result occurring at trial

The choice of which negotiation enhancement tools to use (including which ADR method, if any) -- and when to use them -- depends dramatically on the case at hand. However, the overall use of negotiation techniques and the appropriate time and place for the use of them is an appropriate ethical consideration as is the possibility of resolving an issue by mediation. The savings to the client consist not only of financial, but also of emotional and social resources.

Advocates owe their clients a duty to consider such things in the conduct of their cases.

B. Improving Client Satisfaction

In addition to the ethical considerations, there are several very practical elements in mediation that improve client satisfaction and client relations. These elements are worth considering.

First, speed.

A client goes to a lawyer to find someone who knows how to get something done. Implied in "getting something done" is getting something done now. Clients are generally happiest when disputes are resolved sooner than later.

When successful, mediation resolves disputes much more quickly than the process of litigation the client gets satisfaction of getting something done.

Second, understanding.

The mediation process spends considerable time bringing the client along in the process of the negotiation and in evaluation and understanding of the positions and the case. As a result, following mediation there is a higher level of client understanding and agreement with the negotiated results or the failure to negotiate results. This leads to an increase in client satisfaction, cooperation and agreement to settlement.

Third, preparation.

ADR methods, including mediation, are useful even when settlement is not anticipated. The party going for mediation understands weaknesses of his case. The party is thus prepared for the outcome of the trial.

Fourth, Control.

A study reflected that clients who were sent to the ADR track actually felt that they had more control than those who remained in the conventional litigation track.

The Functional Use of Intuition in Mediating the Litigated Case

Intuition is defined as "quick and ready insight" or "the power or faculty of knowing things without conscious reasoning." In reality, it is nothing more or less than an exercise of judgment rooted in subtle observation and grounded in our own internal, sometimes lightning-quick, risk versus reward analysis.

B. Steps to Enhance Intuition

1. Maintain a Relaxed State of Mind

Most people have a greater ability to access their intuition when they have a relaxed state of mind. This means keeping your mind clear and devoid of rushing thoughts or judgments. With a clear mind, you can fully observe, listen to and interact with the participants.

It takes practice and discipline to maintain a relaxed state of mind, especially during highly charged mediations.

2. Observe

It is extremely important to constantly observe the parties' actions and reactions. A different and important dynamic exists between each of the parties and their lawyers. Who are these people, jointly and individually? How did they get here? How can these relationships be furthered in a way that will facilitate settlement? What will it take for each of these people to feel satisfied, appreciated, understood or redeemed? Study them carefully. How do they react to you and to each other? Who is "calling the shots here" and who is only pretending to do so. Do you sense fear, anxiety, uncertainty or false bravado? Is there true commitment and resolve? Are they willing to re-examine their core beliefs if necessary or can you make it all turn on something in which they might not be as heavily invested?

Body Language: Are they relaxed or holding tension (arms crossed, face strained etc)? Does their body language change when different people are around them? What level of formality or informality seems to best hold their attention when others are talking? What do you see beneath the surface that will help you later to reach out to them on an individual level? Is someone in the room reacting more emotionally than the others? By acknowledging someone's pain or anger, particularly when others have not, you can create a strong bond between you and that individual.

Verbal Communication: Are the parties speaking calmly or does their voice reflect anger or hurt? Do they seem to be speaking from their hearts or just following a pre-designed script? Are the lawyers speaking with sincerity and conviction or merely posturing? You should be looking for clues that will help you get them to refocus on the real needs and interests of their clients. Your intuition is what will tell you how to turn them subtly away from their saber rattling and towards an honest evaluation of their case.

Changes in the Weather: Each time you re-visit one of the rooms, there will be something new to observe that wasn't there before. While you have been away speaking with the other side, movement or realignment may have occurred among certain parties or between an individual party and their counsel. You will want to look closely for those changes, rather than assuming that the room has been in suspended animation awaiting your return.

3. Ask Questions

Ask questions to ascertain the participants' needs and interests. Broader questions are useful, but you must also avoid allowing them to ramble; guide them in a positive direction with your questions and use this as a way to learn about who they are, what they value, and how they think. Later you will need this information in order to make informed judgments about what it will take for them to disengage with dignity and relative satisfaction. Showing a genuine interest in people's personal lives is never a waste of time. And the way they answer, what they say and how they say it is critically important.

4. Listen

Listen intently to the parties so you can truly hear what they are saying, and perhaps, more importantly, what they are not saying. What remains unspoken or implied? Are they trying to send you a message or can you discern one that is not spoken but is of vital importance? Listening is more than just being polite. It's an opportunity to observe and evaluate. We must resist at all costs the ego-driven urge to have them hang on our every word and, somewhat selflessly, hang on theirs instead. To maximize the value of this process, suggesting a direction, interrupting with a question,

or making an acknowledging remark will often be necessary, but the focus should be upon listening to what the other person has to say. For some of us, that is not always easy. The remedy might be to remember that in mediation, authentic progress often occurs when the mediator says nothing but is fully present with the participants, allowing them to speak their own words.

5. Give Yourself a "Time-Out"

You will gain cues from the process of observing and listening and often your intuition will easily guide you in determining what is needed. If you don't know what move to make next, you may need to give yourself a "time out." You may have lost your relaxed state of mind. This can occur when you're dealing with difficult lawyers or parties; you might absorb their tension and lose your inner compass that helps you decide what to do next. Sometimes, it's difficult to regain a calm and clear mind. But the more quickly you are able to do so, the greater opportunity your intuition has to help you make decisions. One way to see whether you have lost your relaxed state of mind is by observing how quickly and how deeply you are breathing. If your breathing is quick and shallow, you have likely lost your relaxed state of mind. In order to regain that state, allow your breathing to be slow and deep.

Before you enter the next room, take a moment (or several if you need it) to get re-focused. Think about where you are in the mediation process and where you want to go. Regain that relaxed state of mind. While you must always show empathy and work "within the conflict," you must also stay sufficiently detached from it if you are to be of any real assistance to the parties.

C. Use Your Intuition to Manage Process and Content: The Importance of Timing

A mediator can use his or her intuition to manage both process and content when mediating a litigated case. Process includes the logistics, such as the manner in which the mediation is conducted. Content is the substance or subject matter discussed. Generally, the mediator is making quick decisions to determine what to say or do and what not to say or do, how to say or do it and when to say or do it. As Eric Galton states in his book, Ripples from Peace Lake, "when you do something is often as important as what you do."

The following subsections discuss when a mediator can use his or her intuition to make decisions by applying the tools discussed above.

Do Attorneys & Mediators need Emotional Intelligence?

Yes, Legal Professionals today are dealing with many different nationalities and cultures in many different situations and problems that were not considered problems years ago.

The need to deal with people's emotional needs as well as their legal needs are becoming more evident as to avoid risk of further conflict, so that the parties at hand can come to a more agreeable and lasting resolution that both parties are happy and will more willingly abide to the contract made, and without the parties feeling slighted or cheated by the legal system.

As Professionals in general and as people the need to look at the whole picture is becoming a reality that cannot be overlooked anymore. As Professional weather it be Legal, Medical or General Business there is a need to have emotional intelligence as well as business intelligence. Emotional intelligence is a good thing to have when dealing with our own families, also to keep an all around balance in our own lives so that we as Professionals can have a better understanding of the world and ourselves.

Steps in Family Mediation

Generally, family mediation is conducted as follows:

Americans follow two steps, which are not recommended in India, at least for the present. These steps are, 1. Instructing the parties to have independent advocates and 2. meeting with advocates of the parties in absence of clients. The reasons are the advocates in India are apprehensive of ADR and parties are not enough mature.

3. Individual meeting with each party separately, followed by joint meetings with the parties.

4. In some cases interview of the children separately from their parents.

8. When the parties reach an agreement, prepare a Memorandum of Understanding. Review the draft with the parties, and then send it to their lawyers to review with the clients.

Lawyer's Role in Family Mediation

Unlike other types of mediation, lawyers do not usually attend mediation sessions with their clients in Family Mediation. Mediation changes the role of lawyers from adversarial negotiators to legal consultants. The parties become the primary negotiators in mediation.

The role of the lawyers is to advise their clients throughout the mediation process on their legal rights and obligations. (Even if the mediator is a lawyer, the mediator does not provide legal advice to the parties.) The parties cannot make competent and informed decisions without sufficient legal advice. The lawyers will also review the Memorandum of Understanding and see their clients sign the Separation Agreement.

Mediator's Role in Family Mediation

A mediator is a neutral person who is trained to help people talk so that the parties can better understand their problems and reach an agreement. A mediator does not take the side of either party, and does not pass judgment on the parties or their problems.

The function of the mediator is to manage the process for the parties, to get them talking, to help them better understand the problems and to help them reach a solution that meets their needs. The mediator keeps the conversations going and focused. Where there is a **will** to address conflicts constructively and creatively, mediators provide the necessary **skill**.

The mediator sets the tone for the negotiations. Right from the beginning, the mediator tries to create an atmosphere conducive to discussion. In Settlement Meetings, the mediator will discourage intimidation, threats or bottom-lining. The mediator can remind the parties to take a more co-operative and less competitive approach. Because the parties have usually experienced a significant breach of trust, responding to trust issues is one of the most challenging tasks for a mediator.

The emotional consequences of the breakdown of relationships in family disputes cannot be overstated. Family mediators consider the emotions and the feelings that the parties are experiencing which can be a significant obstacle to settlement.

Mediation does not mean, "giving in" or "giving up". Mediation clients are no "nicer" than the ones who go to court. The difference is the process: in a positive environment, the parties find practical solutions that work for both of them.

Mediation can be effective even when conflict and anger is high, and communication has broken down. Some people are concerned that they will not be able to negotiate effectively with the other party and then they will lose. But with a trained mediator, the parties can trust that they are not going to be abused or taken advantage of by the other party.

Communication:

Settlement Meetings do not usually involve communication directly between the parties. In mediation, on the other hand, the parties talk to each other, with the mediator present. Direct negotiation between the parties generally expedites the resolution of issues.

One of the most common complaints from parties entering mediation is that they cannot communicate with each other. Therefore, the trained family mediator will focus on communications and improved understanding. The more people understand each other, the more likely they can begin the process of talking constructively about the issues in dispute.

Exchanging Positions:

It is important for each party to understand the position of the other, even if he/she does not agree with it. Therefore, in mediation, each party relates the issue as she/he sees it. The mediator probes into the underlying and often unspoken issues. The underlying issues may be the deep-rooted reason for the party's stand. The mediator encourages the parties to talk about their feelings. This is not done in Settlement Meetings. When the feelings have been expressed and heard, the parties may be more willing to talk about a way to resolve the issues.

Exploring Interests and Needs:

A position is what a party wants or demands. An interest is why a party has taken a particular position. Much of the mediation process is devoted to exploring the parties' respective

interests, rather than a positional approach to negotiation. The focus on interests in mediation changes the way in which the dispute is characterized, analyzed and processed. An agreement is unlikely to result from a consensual process unless the discussion can be moved beyond positions stated in rights-based terms, and explore how the conflict arose, the expectations of either side, and uncover what is critical to each side in seeking a resolution.

Generating Options:

Lawyers often excel in developing facts that support their positions, but bog down when it comes to developing settlement options.

Mediation recognizes that both parties have legitimate needs and helps develop options that will successfully reconcile those needs to the satisfaction of both parties. A mediator can explore suggestions as to available options that have not been previously considered.

Once the parties have identified their options, they can assess their merit and begin to negotiate their acceptance. Here the mediator often serves to facilitate communication, test realities and offers encouragement to the parties.

Children:

Family mediation focuses on plans for the future of the children, rather than on the parents' conflicts and grievances. The mediator can emphasize a co-operative parenting approach.

In Settlement Meetings involving custody and access, for example, agreements generally focus on legal rights. Negotiations between lawyers do very little to clarify ongoing parental responsibilities. On the other hand, mediation provides a forum for parents to structure their own unique parenting plan.

While Settlement Meetings do not usually include the children, often the mediator will meet privately with the children (but only with the approval of both parents). Children may have their own questions and concerns, and have needs that are quite different from their parents' needs.

Mediation can also help the parties explain the situation of their separation to their children in a constructive fashion. This is not done in a Settlement Meeting.

New Partners:

New partners are not usually included in Settlement Meetings. This can be a highly explosive subject (for the parties and for their children) if it is not dealt with. Often this topic is discussed in mediation.

Results:

The legal system concerns itself with the facts, and the results will often be black and white. In mediation, on the other hand, the parties are sometimes able to reach a solution that is more creative than that which a court would impose.

You need to consider the future relationship of the parties. This is where mediation can be a big help. In situations where the parties wish to preserve or improve their relationships, mediation is more likely to create a forum for frank exchange leading to a better working association, rather than either ignoring issues or using more formal approaches.

Benefits of Family Mediation not found in Settlement Meetings

- negotiations take place with the assistance of a third party mediator
- both parties are made to feel safe and comfortable in each other's presence
- allows the parties to take charge of their lives and design a plan for their future that would be good for themselves and for their children
- facilitates, promotes and improves communication between the parties
- hard bargaining tactics are avoided
- helps the parties to exchange views and information
- helps to reduce conflict and hostility between the parties
- encourages co-operation and trust
- allows the parties the opportunity to express their feelings associated with ending the marriage
- the position of the other party is not filtered through lawyers
- the parties have more control over the outcome

increases potential for solutions that may go beyond remedies, which can be ordered, by the court
mediated settlements generally work better because of the fact that the parties worked co-operatively to arrive at the agreement, rather than having it negotiated back and forth between their lawyers
preserves family relationships; a Settlement Meeting will not tell the parties how to do that
can make termination of a relationship more amicable and less traumatic
empowers the parties to solve their own dispute and find a compromise that works for both of them
a mutually acceptable solution lets both parties be winners and respect each other
the parties can deal with the issue of new partners
can and should make post-divorce relations easier among the parties and extended family
provides a way for families who are splitting into parts to learn to deal with the changes in roles, duties and opportunities and to face those changes with emotional balance

Added Benefits of Mediation Where There are Children

focuses attention on the children and in doing what is best for the children
minimizes the harmful effects of divorce and separation on children
courts deal with custody and access; mediators deal with parenting plans; parenting is a lifelong commitment that transcends court orders; children need both parents
agreements reached through mediation can take into account the personal needs of children in much more detail than other kinds of agreements
may involve children when their input is appropriate and helpful
children of parents who mediate adjust better to their parent's divorce than do children of parents who simply go through the Settlement Meeting or litigation process; the children are happier, more secure, more reassured, and less distressed
presents a co-operative model for addressing future changes in the lives of the children
establishes a sound foundation for post-separation parenting arrangements

Joint physical custody of child on divorce some aspects

Background

In USA in recent years, shared or joint physical custody has gained tremendous popularity as a means of caring for children after a divorce. Physical custody refers to the parent's right to have the children actually reside in that parent's home. Shared physical custody can take many forms, from summers at father's and the school year with mother, to switching homes every other day. Children have two primary residences, even if time in each is not equal.

Why has joint physical custody gained in popularity*?*

One positive reason is that women and men are realizing more the importance of fathers to children, and more men want to have a primary role in their lives. Many fathers are no longer content to be the biweekly visitor while Mom retains sole custody. As traditional marital roles shift, our concepts of the best way to parent children after divorce change also.

Another reason for the increase in popularity relates to the increase in mothers who must work full-time. Solo parenting becomes quite difficult for a mother with a demanding full-time job, especially one with overtime or a commute. Many couples, whose pre-separation lives were already stretched thin, find they must cooperate and juggle time to manage the childcare needs of their children.

In some cases, the choice of shared physical custody is a means for avoiding a prolonged, bitter custody battle unlikely to yield any real winners

What are the advantages of joint custody?

1. Living in both households allows children to maintain a strong relationship with both parents
2. Children benefit when parental relations are cooperative and there is no extended legal wrangling.
3. Children in shared custody have "normal time" with both parents. 4. Joint custody mitigates the traumatic sense of loss and rejection children often feel when a parent moves out

Children in joint custody may benefit materially, as child support is paid fully 75% of the time, compared to 46% in solo custody arrangements

What are the disadvantages of shared custody?

1. Children's lives may resemble that of a traveling salesman, never settled in any one place.

2. The psychological impact may be a sense of lack of control and chaos in a child's life.
3.Expenses are greater in maintaining two full residences.
4. Fathers are sometimes unprepared for the actual responsibilities of shared custody.
5. When parents have unresolved marital issues, joint custody can exacerbate family conflict.

Shared custody works best when:

- Parents can maintain a civil, business-like relationship.
- Arrangements are planned around the children's needs and developmental requirements.
- Schedules are predictable and stable but flexible enough to change when circumstances dictate it.
- Parents live in physical proximity.
- Parents are careful to support and not undermine each other, regardless of their own feelings.
- Financial resources are available to maintain two full residences.

The Power Of Apology In Mediation

WHAT IS AN APOLOGY?

Originally, the Oxford English Dictionary (OED) tells us "apology" meant a defense, a justification, and an excuse. Now it means, "to acknowledge and express regret for a fault without defense." This modern definition captures the core elements of apology: a) acknowledgment, b) affect, and c) vulnerability.

What are the Elements of Apology?

a). Acknowledgment: There is a "ritual" of apology. As the OED says, there must be acknowledgment recognition - of an injury that has damaged the bonds between the offending and offended parties. The offense has to qualify as a genuine injury - one that has involved some transgression of a moral or relational norm that has both damaged the offender's social bonds and called into question his/her membership in some community. In turn the offending party must personally be accountable for it.

b). Affect: In order to truly accept responsibility, the offending party must also be visibly *affected* personally by what s/he has done.

c). Vulnerability: Finally, an apology is offered *without defense*. A key aspect of apology is the *vulnerability* involved. An effective apology may be accepted. The offending party is placed in a potentially vulnerable state in offering the apology knowing that the chance exists that it may be refused. More than anything else, it is vulnerability that colors apology. Indeed, many of us know well the moment in relationships when the other party has been offended by something and we weigh whether we will attempt to repair it. We know that attempting to restore the relation will take effort. It won't be easy. Is it worth it? We all have debated whether the relation was important enough to us to *bother*. It is not only effort, but also *exposure* we are weighing. If this doesn't work, things may be worse.

The Exchange of Shame and Power

Where a serious injury has been done, an offer of reparations may accompany the apology. It is crucial, though; that the person apologizing recognizes that there is truly nothing s/he can offer tangibly that will suffice for the damage done. Apology thus also involves a role-reversal: the person apologizing relinquishes power and puts himself at the mercy of the offended party who may or *may not* credit the apology.

The empowerment that occurs here is not some 'power-balancing' that the mediator manipulates. The ritual exchange involves a *moral* rebalancing offered by the offender. The apology reminds the wrongdoer of community norms because the apology admits to violating them. By retelling the wrong and seeking acceptance, apology assumes a position of vulnerability before not only the victims but also the larger community of literal and figurative witnesses.

Restitution/Reparations

For some observers other elements must also be present for a "true" apology. There must be a plea to repair the relation; the offending party must *mean* it. To demonstrate this some require only

that the offending party genuinely appears *sorry*. Others require a clear indication that the situation will not happen again. Still others require the offending party to make some attempt at *restitution*. A casual "sorry" to a storeowner after dropping and breaking a glass vase won't cut it. Damages are owed.

There are others who require some change in behavior.

Although restitution or changed behavior is often indispensable components of an acceptable apology, the author believes they are not essential elements of an apology per se. Many times in apology the offending party faces the fact that nothing can be done to right the wrong. The past cannot be erased: the damage is done and cannot be undone. Here, the offender can only pray that the offended may find the grace to forgive, but not because the offender has found some equivalence to make up for the injury.

Repair Work

Apology is *repair work*. And repair work is difficult. Need trousers cuffed? No problem. But repair a torn pair of pants? You need to be a tailor. And the work of apology is both more difficult and more delicate.

Apology is an Acknowledgment

Mediation has long been viewed as "an alternative form of dispute resolution." And "dispute resolution" does capture the nature of much mediation. So regarded, mediation is a form of problem solving. There is then a clear end-point to mediation and it is to achieve a settlement.

Apology, however, is clearly not about problem solving. Nor is it about negotiating. It is, rather, a form of *ritual* exchange where words are spoken that may enable closure. An apology represents more than an occasional event in mediation. It is embedded in the very nature of the process. Mediation, after all, is frequently about disputes in which at least one party feels *injured* by the other. Along with negotiations over the facts of the case, demands for compensation, and denunciations of the other side, there is often a felt need for some acknowledgment of harm done, a need for some acceptance of personal responsibility for the injury inflicted. In short, an apology.

Assisting Clients with Apology

Can people authentically apologize in mediation? Yes, but in the author's experience, many people need some assistance. People often need to get past the defensiveness and fear of blame that preclude apology.

How It Is Done

A critical step in the process was the caucus. Parties often need *preparation* before they are ready to offer an apology. Finally, the parties needed help with the *words*. There is a piece of back-leading here on the part of the mediator, but the parties won't go along with this if they are not ready. An apology involves such *vulnerability* that it is safer - often, the only way it is safe enough - if the mediator puts the apology in words and parties simply indicate their assent.

Apology as Power-Balancing

We speak much in mediation about *power balancing*. Often, however, our solutions tend toward heavy-handed techniques: controlling the powerful, limiting their dominance in the session, doing "reality" confrontations, threatening the disasters that the alternative of a trial would bring, etc. The example that follows, though, is an instance of power-balancing those parties themselves achieved. The powerful offer their *vulnerability*. Through recognition, the humiliated are empowered.

A Place for Apology

In American law, specific places do occur where apology may play a role. In criminal cases, for example, apology and remorse often results in a mitigation of punishment. Apology may also mitigate damages in a defamation suit and may function as a bar to libel actions there are also instances where an apology has been a critical element in settlements of lawsuits.

The Fear of Apology?

Nonetheless, in spite of such dramatic exceptions, the preoccupation of American jurisprudence with defending individual rights and fearing any admission of culpability effectively precludes apology in a great many cases This, in spite of the frequent reports that often major civil cases could have been avoided with a simple apology.

Apology - its invitation, its expression, and its reception - has been only minimally explored

outside mediation, and rarely in the literature and workshops of mediation professionals. At most, apology has a place as a sub-set of discussions of forgiveness. This reflects both an omission of an exchange vitally important in its own right, and a loss of a key reparative opportunity. Much work remains to be done if we are properly to understand apology: the relation of apology to reparations, of the symbolic to the material; the issue of the technology, art, and timing of apology; whether preparing people to recognize, accept and respond to opportunities for apology is necessary or properly the role of the mediator; the place of apology in different kinds of mediation - victim-offender, divorce, commercial, and international; and more. But we conclude here with the modest beginning of staking out the significance of apology.

An apology may be just a brief moment in mediation. Yet it is often the margin of difference, however slight, that allows parties to settle. At heart, many mediators are dealing with damaged relationships. When offered with integrity and timing, an apology can indeed be a critically important moment in mediation. Trust has been broken. An apology, when acknowledged, can restore trust. The past is not erased, but the present is changed.

Mediation pitfalls and obstacles

Introduction

1. Procedural Problems.

There are three extremely common procedural reasons that deadlock mediations.

a. Necessary parties not attending mediation. Those with authority must attend in order for the process to work.

b. Lack of preparation is the next reason. Often referred to as "an inadequate discovery," the problems quite commonly reflect a party or an advocate who does not know enough about their own case to be able to settle the case.

c. A substantial number of mediations fail because of hostile and incompatible advocates. A mediation session is not the place for an aggressive, hostile and emotional attack on the other party or their advocate. Such attacks cause a substantial number of failed mediations.

Special Problems.

a. Where one side is engaged in litigation with the primary intention of bleeding the other side with litigation expenses mediation is not fruitful. In this situation, a mediation session will generally be seen as one more opportunity to impose costs on the opposing party rather than a chance to cut costs and find a better resolution.

b. Where an uninsured defendant faces catastrophic liquidity problems mediation will often be fruitless. A mediation session after three years of infringement is unlikely to cause the Defendant to bite the bullet. When the result of mediation requires the dissolution, reorganization or bankruptcy of a party, mediation usually does not generate the imminent pressure necessary to resolve the problem.

c. Most frustrating, is the situation where one side is mentally unable to appreciate the legitimacy or the limits of property rights. Thieves will rarely change their stripes and become trustworthy or legitimate just because they have entered a mediation session.

Individuals will differ, but a substantial portion of all intellectual property law litigation is against persons whose infringement is intentional and willful and who refuse to acknowledge property rights. Mediation with many of them is as fruitful as mediating with a burglar on the issue of his or her profession.

Often, mediation also provides "one last chance" before major expenses are incurred. The general rule is that if negotiation can work, then mediation can make the negotiating process work better. If you are in a situation where negotiation won't work, mediation sometimes provides more of the "won't work" situation. However, mediation often finds creative alternatives that resolve the problems where negotiations have failed.

d. Final Word

ADR is an alternative. It remains an alternative because while it works most of the time, it cannot work all of the time.

APPENDIX

Model Standards of Conduct for mediators

The *Model Standards of Conduct for Mediators* was prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution[1]. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005.[2] both the original 1994 version and the 2005 revision have been approved by each participating organization.[3]

Preamble

Mediation is used to resolve a broad range of conflicts within a variety of settings. These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision-making by the parties to the dispute.

Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.

Note on Construction

These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear.

The use of the term "shall" in a Standard indicates that the mediator must follow the practice described. The use of the term "should" indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion.

The use of the term "mediator" is understood to be inclusive so that it applies to co-mediator models.

These Standards do not include specific temporal parameters when referencing mediation, and therefore, do not define the exact beginning or ending of mediation.

Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources.

These Standards, unless and until adopted by a court or other regulatory authority do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.

STANDARD I. SELF-DETERMINATION

A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.

2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

STANDARD II. IMPARTIALITY

A. A mediator shall decline mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.

B. A mediator shall conduct mediation in an impartial manner and avoid conduct that gives the appearance of partiality.

1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.

2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.

3. A mediator may accept or give de minims gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.

C. If at any time a mediator is unable to conduct mediation in an impartial manner, the mediator shall withdraw.

STANDARD III. CONFLICTS OF INTEREST

A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.

B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.

C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.

D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.

E. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.

F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

STANDARD IV. COMPETENCE

A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.

1. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.

2. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.

3. A mediator should have available for the parties' information relevant to the mediator's training, education, experience and approach to conducting mediation.
B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.
C. If a mediator's ability to conduct mediation is impaired by drugs, alcohol, and medication or otherwise, the mediator shall not conduct the mediation.

STANDARD V. CONFIDENTIALITY

A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.
1. If the parties to mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.
2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.
3. If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.
B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.
C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in mediation.
D. Depending on the circumstance of mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

STANDARD VI. QUALITY OF THE PROCESS

A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.
1. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.
2. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of mediation.
3. The presence or absence of persons at mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.
4. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of mediation.
5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.
6. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.
7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.

8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.

9. If mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, and withdrawing from or terminating the mediation.

10. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination.

B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, and withdrawing from or terminating the mediation.

C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

STANDARD VII. ADVERTISING AND SOLICITATION

A. A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees.

1. A mediator should not include any promises as to outcome in communications, including business cards, stationary, or computer-based communications.

2. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.

B. A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.

C. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.

STANDARD VIII. FEES AND OTHER CHARGES

A. A mediator shall provide each party or each party's representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with mediation.

1. If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services.

2. A mediator's fee arrangement should be in writing unless the parties request otherwise.

B. A mediator shall not charge fees in a manner that impairs a mediator's impartiality.

1. A mediator should not enter into a fee agreement, which is contingent upon the result of the mediation or amount of the settlement.

2. While a mediator may accept unequal fee payments from the parties, a mediator should not allow such a fee arrangement to adversely impact the mediator's ability to conduct mediation in an impartial manner.

STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:

1. Fostering diversity within the field of mediation.

2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.

3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.

4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.
5. Assisting newer mediators through training, mentoring and networking.
B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.
[1]The Association for Conflict Resolution is a merged organization of the Academy of Family Mediators, the Conflict Resolution Education Network and the Society of Professionals in Dispute Resolution (SPIDR). SPIDR was the third participating organization in the development of the 1994 Standards.

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