

CONCEPT AND PROCESS OF MEDIATION

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1. Mediation is a voluntary, party – centered and structured negotiation process where a neutral third party assists the parties in amicably resolving their dispute by using specialized communication and negotiation techniques. In mediation, the parties retain the right to decide for themselves whether to settle a dispute and the terms of any settlement. Even though the mediator facilitates their communications and negotiations, the parties always retain control over the outcome of the dispute.
 - 1.1 Mediation is voluntary. The parties retain the right to decide for themselves whether to settle a dispute and the terms of settlement of the dispute. Even if the court has referred the case for mediation or if mediation is required under a contract or a statute, the decision to settle and the terms of settlement always rest with the parties. This right of self- determination is a essential element of the mediation process. It results in a settlement created by the parties themselves and the therefore acceptable to them. The parties have ultimate control over the outcome of mediation. Any party may withdraw from mediation proceeding at any stage before its termination and without assigning any reason.
 - 1.2 Mediation is a party-centred negotiation process. The parties, and not the neutral mediator are the focal point of the mediation process. Mediation encourages the active and direct participation of the parties in the resolution of their dispute. Though the mediator, advocates , and other participants also have active roles in mediation, the parties play the key role in the mediation process. They are actively encouraged to explain the factual background of the dispute, identify issues and underlying interest, generate options for agreement and make a final decision regarding settlement.
 - 1.3 Though the mediation process is informal, which means that it is not governed by the rules of evidence and formal rules of procedure it is not a extemporaneous or casual process. The mediation process itself is structured and formalized, with clearly identifiable stages. However, there is a degree of flexibility in following these stages.
 - 1.4 Mediation in essence is an assisted negotiation process. Mediation addresses both the factual/legal issues and the underlying causes of a dispute. Thus, mediation is broadly focused on the facts, law, and underlying interest of the parties, such as personal, business/commercial, family, social and community interests. The goal of mediation is

to find a mutually acceptable solutions that adequately and legitimately satisfies the needs, desires and interest of the parties.

- 1.5 Mediation provides an efficient, effective, speedy , convenient and less expensive process to resolve a dispute with dignity, mutual respect and civility.
- 1.6 Mediation is conducted by a neutral third party – the mediator. The mediator remains impartial, independent, detached and objective throughout the mediation. In mediation, the mediator assists the parties in resolving their dispute. The Mediator is a guide who helps the parties to find their own solution to the dispute. The Mediator' personal preferences or perceptions do not have any bearing on the dispute resolution process.
- 1.7 In Mediation the mediators works together with parties to facilitate the dispute resolution process and does not adjudicate a dispute by imposing a decision upon the parties. A mediator's role is both facilitative and evaluative. A mediator facilitates when he manages the interaction between the parties, encourages and promotes communication between them and manages interruption and outbursts by them and motivates them to arrive at an amicable settlement. A mediator evaluates when he assist each party to analyze the merits of a claim/defence, and to assess the possible outcome at trial.
- 1.8 The mediator employs certain specialized communication skills and negotiation techniques to facilitate a productive interaction between the parties so that they are able to overcome negotiation impasses and find mutually acceptable solutions.
- 1.9 Mediation is a private process, which is not open to the public. Mediation is also confidential in nature, which means that statements made during mediation cannot be disclosed in civil proceedings or elsewhere without the written consent of all parties. Any statement made or information furnished by either of the parties, and any document produced or prepared for / during mediation is inadmissible and non-discoverable in any proceeding. Any concession or admission made during mediation cannot be used in any proceeding. Further, any information given by a party to the mediator during mediation process, is not disclosed to the other party, unless specifically permitted by the first party. No record of what transpired during mediation is prepared.
- 1.10 Any settlement reached in a case that is referred for mediation during the course of litigation is required to be reduced to writing, signed by the concerned parties and filed in Court for the passing of an appropriate order. A settlement reached at a pre-litigation

stage is a contract, which is binding and enforceable between the parties.

- 1.11 In the event of failure to settle the dispute, the report of the mediator does not mention the reason for the failure.
- 1.12 The mediator cannot be called upon to testify in any proceeding or to disclose to the court as to what transpired during the mediation.
- 1.13 Parties to the mediation proceedings are free to agree for an amicable settlement, even ignoring their legal entitlement or liabilities.
- 1.14 Mediation in particular case, need not be confined to the dispute referred, but can go beyond and proceed to resolve all other connected or related disputes also.

TYPES OF MEDIATION

1. COURT-REFERRED MEDIATION - It applies to cases pending in Court and which the Court would refer to mediation under Sec 89 of the Code of Civil Procedure, 1908.
2. PRIVATE MEDIATION - In private mediation qualified mediators offer their services on a private, fee-for-service basis to the Court, to members of the public, to members of the commercial sector and also to the governmental sector to resolve disputes through mediation. Private mediation is used in connection with disputes pending in court and pre-litigation disputes.

ADVANTAGES OF MEDIATION

1. The parties have CONTROL over the mediation in terms of 1) its scope (i.e. the terms of reference or issues can be limited or expanded during the course of the proceedings) and 2) its outcome (i.e. the right to decide whether to settle or not and the terms of settlement)
- 1.1 Mediation is PARTICIPATIVE Parties get an opportunity to present their case in their own words and to directly participate in the negotiation.
- 1.2 The process is VOLUNTARY and any party can opt out of it at any stage if he feels that it is not helping him. The self-determining nature of mediation ensures compliance with the settlement reached.
- 1.3 The procedure is SPEEDY, EFFICIENT and ECONOMICAL.

- 1.4 The procedure is SIMPLE and FLEXIBLE. It can be modified to suit the demands of each case. Flexible scheduling allows parties to carry on with their day-to-day activities.
- 1.5 The process is conducted in an INFORMAL, CORDIAL and CONDUCIVE environment.
- 1.6 Mediation is a FAIR PROCESS. The mediator is impartial, neutral and independent. The mediator ensures that pre-existing unequal relationships, if any, between the parties, do not affect the negotiation.
- 1.7 The process is CONFIDENTIAL
- 1.8 The process facilitates better and effective COMMUNICATION between the parties which is crucial for a creative and meaningful negotiation.
- 1.9 Mediation helps to maintain/ improve/restore relationships between the parties.
- 1.10 Mediation always takes into account the LONG TERM AND UNDERLYING INTERESTS OF THE PARTIES at each stage of the dispute resolution process – in examining alternatives, in generating and evaluating options and finally, in settling the dispute with focus on the present and the future and not on the past. This provides an opportunity to the parties to comprehensively resolve all their differences.
- 1.11 In mediation the focus is on resolving the dispute in a MUTUALLY BENEFICAL SETTLEMENT.
- 1.12 A mediation settlement often leads to the SETTLING OF RELATED/CONNECTED CASES between the parties.
- 1.13 Mediation allows CREATIVITY in dispute resolution. Parties can accept creative and non conventional remedies which satisfy their underlying and long term interests.
- 1.14 When the parties themselves sign the terms of settlement, satisfying their underlying needs and interests, there will be compliance.
- 1.15 Mediation PROMOTES FINALITY. The disputes are put to rest fully and finally, as there is no scope for any appeal or revision and further litigation.
- 1.16 REFUND OF COURT FEES is permitted as per rules in the case of settlement in a court referred mediation.

DIFFERENCES BETWEEN JUDICIAL PROCESS, ARBITRATION AND MEDIATION.

	JUDICIAL PROCESS	ARBITRATION	MEDIATION
1	Judicial process is an adjudicatory process where a third party (Judge/other authority) decides the outcome	Arbitration is a quasi-judicial adjudicatory process where the arbitrator(s) appointed by the Court or by the parties decide the dispute between the parties.	Mediation is a negotiation process and not an adjudicatory process. The mediators facilitate the process. Parties participate directly in the resolution of their dispute and decide the terms of settlement.
2	Procedure and decision are governed, restricted, and controlled by the provisions of the relevant statutes.	Procedure and decision are governed, restricted and controlled by the provisions of the Arbitration & Conciliation Act 1996	Procedure and settlement are not controlled, governed or restricted by statutory provisions thereby allowing freedom and flexibility.
3	The decision is binding on the parties	The award in an arbitration is binding on the parties.	A binding settlement is reached only if parties arrive at a mutually acceptable agreement
4	Adversarial in nature, as focus is on past events and determination of rights and liabilities of parties	Adversarial in nature as focus is on determination of rights and liabilities of parties	Collaborative in nature as focus is on the present and the future and resolution of disputes is by mutual agreement of parties irrespective of rights and liabilities.
5	Personal appearance or active participation of parties is not always required	Personal appearance or active participation of parties is not always required	Personal appearance and active participation of the parties are required.
6	A formal proceeding held in public and follows strict procedural stages	A formal proceeding held in private following strict procedural stages	A non-judicial and informal proceeding held in private with flexible procedural stages
7	Decision is appealable	Award is subject to challenge on specified grounds	Decree in terms of the settlement is final and is not appealable.
8	No opportunity for parties to communicate directly with each other	No opportunity for parties to communicate directly with each other	Optimal opportunity for parties to communicate directly with each other in the presence of the mediator
9	Involves payment of court fee	Does not involve payment of court fees	In case of settlement, in a court annexed mediation the court fee already paid is refundable as per the Rules.

THE STAGES OF MEDIATION

The functional stages of the mediation process are:

- 1) Introduction and Opening Statement
- 2) Joint Session
- 3) Separate Session(s)
- 4) Closing

At the commencement of the mediation process, the mediator shall ensure that the parties and their counsel are present

STAGE 1: INTRODUCTION AND OPENING STATEMENT

Objectives

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

Seating Arrangement in the Mediation Room

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

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

Introduction

- To begin with, the mediator introduces himself by giving information such as his name, areas of specialization if any , and number of years of professional experience.
- Then he furnishes information about his appointment as mediator, the assignment of the case to him for mediation and his experience if any in successfully mediating similar cases in the past.
- Then the mediator declares that he has no connection with either of the parties and he has no interest in the dispute.

- He also expresses hope that the dispute would be amicably resolved. This will create confidence in the parties about the mediator's competence and impartiality.
- Thereafter, the mediator requests each party to introduce himself. He may elicit more information about the parties' and may freely interact with them to put them at ease.
- The mediator will then request the counsel to introduce themselves.
- The mediator will then confirm that the necessary parties are present with authority to negotiate and make settlement decisions.
- The mediator will discuss with the parties and their counsel any time constraints or scheduling issues.
- If any junior counsel is present, the mediator will elicit information about the senior advocate he is working for and ensure that he is authorized to represent the client.

The Mediator's Opening Statement

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

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

The mediator shall highlight the following important aspects of mediation:

- Voluntary
- Self-determinative
- Non-adjudicatory
- Confidential
- Good-faith participation
- Time-bound
- Informal and flexible
- Direct and active participation of parties
- Party-centred
- Neutrality and impartiality of mediator

- Finality
- Possibility of settling related disputes
- Need and relevance of separate sessions

The mediator shall explain the following ground rules of mediation:

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

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

STAGE 2 : JOINT SESSION

Objectives

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

Procedure

- The Mediator should invite parties to narrate their case, explain perspectives, vent emotions and express feelings without interruption or challenge. First, the plaintiff/petitioner should be permitted to explain or state his/her case/claim in his/her own words. Second, counsel would thereafter present the case and state the legal issues involved in the case. Third, defendant/respondent would thereafter explain his/her case/claim in his/her own words. Fourth, counsel for defendant/respondent would present the case and state the legal issues involved in the case.
- The mediator should encourage and promote communication, and effectively manage interruptions and outbursts by parties.
- The mediator may ask questions to elicit additional information when he finds that facts of the case and perspectives have not been clearly identified and understood by all present.

- The mediator would then summarize the facts, as understood by him, to each of the parties to demonstrate that the mediator has understood the case of both parties by having actively listened to them.
- Parties may respond to points/positions conveyed by other parties and may, with permission, ask brief questions to the other parties.
- The mediator shall identify the areas of agreement and disagreement between the parties and the issues to be resolved.
- The mediator should be in control of the proceedings and must ensure that parties do not 'take over' the session by aggressive behavior, interruptions or any other similar conduct.
- Upon completion of the joint session, the mediator may suggest that he meets each party with his counsel separately, usually with the plaintiff/petitioner going first. The timing of holding a separate session may be determined by the mediator's judgment concerning the productivity of the on-going joint session, silence by the parties, loss of control, on request by the parties or if the parties are getting repetitive.

STAGE 3 : SEPARATE SESSION

Objectives

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

Procedure

Re-affirming Confidentiality

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

Gathering further information

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

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

Reality-Testing

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

- (a) A detailed examination of specific elements of a claim, defense, or a perspective;
- (b) An identification of the factual and legal basis for a claim, defense, or perspective or issues of proof thereof;
- (c) Consideration of the positions, expectations and assessments of the parties in the context of the possible outcome of litigation;
- (d) Examination of the monetary and non-monetary costs of litigation and continued conflict;
- (e) Assessment of witness appearance and credibility of parties;
- (f) Inquiry into the chances of winning/losing at trial; and
- (g) Consequences of failure to reach an agreement.

Reality-Testing is often done by;

1. Asking effective questions,
2. Discussing the strengths and weaknesses of their respective cases of the parties, and/or

3. By considering the consequences of the failure to reach an agreement (BATNA/WATNA/MLATNA analysis).

(A) ASKING EFFECTIVE QUESTIONS

Mediator may ask parties questions that can clarify facts and alter perceptions with regard to unrealistic expectations and flawed assessments of the case.

Examples of effective questions

- OPEN-ENDED QUESTIONS like 'Tel me more about the circumstances leading up to the signing of the contract'. 'Help me understand your relationship with the other party at the time you entered the business.' 'What were your reasons for including that term in the contract?'
- CLOSED QUESTIONS, which are specific , concrete and which bring out specific information. For example, 'it is my understanding that the other driver was going at 60 kilometers per hour at the time of the accident, is that right?' 'on which date the contract was signed?' 'Who are the contractors who built this building?'
- QUESTIONS THAT BRING OUT FACTS : 'Tel me about the background of this matter'. 'What happened next?'
- QUESTIONS THAT BRING OUT POSITIONS : 'What are your legal claims?' 'What are the damages?' 'What are their defenses?'
- QUESTIONS THAT BRING OUT INTERESTS : 'What are your concerns under the circumstances?' 'What really matters to you?' 'From a business/personal/family perspective, what is most important to you?' 'Why do you want divorce?' 'What is this case really about?' 'What do you hope to accomplish?' 'What is really driving this case?'

(B)HELPING PARTIES UNDERSTAND THE STRENGTHS AND WEAKNESSES OF THEIR CASES

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

(C) BATNA/WATNA/MLATNA ANALYSIS

BATNA	- Best Alternative to Negotiated Agreement
WATNA	- Worst Alternative to Negotiated Agreement
MLATNA	- Most Likely Alternative to Negotiated Agreement

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

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

It is helpful for the mediator to work through these possible alternative outcomes by discussing them with the parties/Advocates during the separate session.

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

(iv) Creating options for Settlement

By using the above techniques, the mediator assists the parties to understand the reality of their case, give up their rigid positions, identify their genuine interests and needs, and shift their focus to problem-solving. The parties are then encouraged to invent several creative options for settlement. A mediator may use the two- steps BRAINSTORMING PROCESS: (1) invent options (prepare a written list of all ideas from the parties, including ideas that may not be workable, affordable, or realistic) and (2) evaluate options (systematically work through the written list of ideas, giving attention to the reasons why an idea is not feasible or agreeable). A mediator will also encourage the parties to use LATERAL THINKING, which is creative, intuitive, non-traditional, non-linear thinking in addition to logical thinking (analytical, linear, rational).

(v) *Negotiation*

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

(vi) *Some Additional Points to keep in mind*

I. Sub-Sessions

The separate session is normally held with all the members of one side to the dispute, including their advocates and other members who come with the party. However, it is also possible for the mediator to meet separately with sub-groups – such as only advocates or parties, an advocate or a party individually , or various groupings of parties/advocates in a multi-party dispute.

- Mediator may hold a sub-sessions with **ONLY THE ADVOCATES**, with the parties' consent, in order to discuss the legal issues. During a sub-session, the advocates may be more open and forthcoming regarding their positions and settlement goals.
- Similarly if there is a divergence of interest among the parties on the same side, it is permissible and, at times, advantageous for the mediator to meet with **SUB-GROUPS OF PARTIES** with common interest to facilitate negotiations. This type of sub-session may facilitate the identification of interests and also prevent the dynamics of the whole group, independent of consistent or conflicting interests, joining together to resist the claims.
- There can be several separate sessions. The mediator could revert back into a joint session at any state of the process if he feels the need to do so.

STAGE 4 : CLOSING

- Once the parties have agreed upon the terms of settlement, the parties reassemble and the following steps are followed:
 1. Mediator orally confirms the terms of settlement;
 2. Parties reduce to writing the terms of settlement with the assistance of the mediator. The agreement should be signed by all partiers to the litigation and their respective counsel. Thereafter, a copy of the agreement would be

furnished to the parties while the original would be sent to the referral Court for drawing up a decree in accordance with the agreement.

3. Mediator's Closing Comment - The mediator should briefly thank the parties for their participation and work during the mediation and, where appropriate, congratulate all parties on reaching a settlement.

- THE WRITTEN AGREEMENT SHOULD:

- ✓ Clearly specify all material terms agreed to;
- ✓ Be drafted in plain, precise and unambiguous language;
- ✓ Be concise
- ✓ Use active voice, generally (passive voice does not clearly identify who has an obligation to perform a task pursuant to the agreement)
- ✓ Ensure that neither of the parties feels that he or she has 'lost';
- ✓ Be sufficiently clear and definite in its terms to ensure that the terms of the agreement are executable in accordance with law;
- ✓ Include definite dates for performed by the parties; and
- ✓ Be complete in its recitation of the terms.

- The mediator **SHOULD NOT** sign the settlement /agreement.
- If a settlement between the parties could not be reached, the case would be returned to the referral Court simply reporting non-agreement/failure to settle. The report will not assign any reason for such failure or fix responsibility on any one for the failure. The statements made during the mediation will remain confidential and should not be conveyed by any party, advocate, or mediator to the Court without the prior written consent of all parties.

Whether a settlement is reached or not, the mediator should, in a closing statement, thank the parties and their counsel for their participation and efforts for the settlement.

