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Stages of Mediation, Role of Mediators, Communication in Mediation, Negotiation, bargaining in Mediation, Impasse;

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.

ROLE OF MEDIATORS

Mediation is a process in which an impartial and neutral third person, the mediator, facilitates the resolution of a dispute without suggesting what should be the solution. It is an informal and non-adversarial process intended to help disputing parties to reach a mutually acceptable solution. The role of the mediator is to remove obstacles in communication, assist in the identification of issues and the exploration of options and facilitate mutually acceptable agreements to resolve the dispute. However, the ultimate decision rests solely with the parties. A mediator cannot force or compel a party to make a particular decision or in any other way impair or interfere with the party's right of self-determination.

QUALITIES OF A MEDIATOR

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

- (i). complete, genuine and unconditional faith in the process of mediation and its efficacy.
- (ii) ability and commitment to strive for excellence in the art of mediation by constantly updating skills and knowledge.
- (iii) sensitivity, alertness and ability to perceive, appreciate and respect the needs, interests, aspirations, emotions, sentiments, frame of mind and mindset of the parties to mediation.

- (iv) highest standards of honesty and integrity in conduct and behaviour
- (v) neutrality, objectivity and non-judgmental.
- (vi) ability to be an attentive, active and patient listener.
- (vii) a calm, pleasant and cheerful disposition.
- (viii) patience, persistence and perseverance.
- (ix) good communication skills.
 - (x) open mindedness and flexibility.
 - (xi) empathy
 - (xii) creativity.

ETHICS AND CODE OF CONDUCT FOR MEDIATORS

1. Avoid conflict of interest
2. Awareness about competence and professional role boundaries
3. Practice Neutrality
4. Ensure Voluntariness
5. Maintain Confidentiality
6. Do no harm
7. Promote Self-determination
8. Facilitate Informed Consent
9. Discharge Duties to third parties
10. Commitment to Honesty and Integrity.

The mediators shall attempt to facilitate voluntary resolution of the dispute(s) by the parties. He shall assist them in understanding the problems, identifying the underlying issues, reducing mis understandings, generating the options and developing option which are mutually acceptable to both the parties.

COMMUNICATION IN MEDIATION

1. Communication is the core of mediation. Hence, effective communication between all the participants in mediation is necessary for the success of mediation.
2. Communication is not just Talking and listening. Communication is a process of information transmission.
3. The intention of communication is to convey a message.
4. the purpose of communication could be any or all of the following:
 - To express out feelings/thoughts/idea/emotions/desires to others.
 - To make others understand what and how we feel/think
 - To derive a benefit or advantage
 - To express an unmet need or demand.
5. Communication is conveying a message to another, in the manner in which you want to convey it. For example, a message of disapproval of something can be conveyed through spoken words or gestures or facial expressions or all of them.
6. Communication is also information sent by one to another to be understood by the receive in the same way as it was intended to be conveyed.
7. Communication is initiated by a thought or feeling or idea or emotion which is transformed into words/gestures/acts/expressions. Then, it is converted into a message. This message is transmitted to the receiver. The receiver understands the message by assigning reasons and attributing thoughts, feelings/ideas to the message. It evokes a response in the Receiver who conveys the same to the sender through words/gestures/acts/expressions.
8. Consequently, a communication would involve:-

A sender	-	person who sends a message
A receiver	-	Person who receives the message
Channel	-	the medium through which a message is transmitted which could be words or gestures or expressions.
Message	-	thoughts/feelings/ideas/emotions/knowledge information that is sought to be communicated

- Encoding - transforming message/information into a form that can be sent to the receiver to be decoded correctly.
- Decoding - Understanding the message or information.
Response – answer/reply to a communicated message.

Requirement for effective communication

- i) Use simple and clear language
- ii) Avoid difficult words and phrases.
- iii) Avoid unnecessary repetition
- iv) Be precise and logical
- v) Have clarity of thought and expression.
- vi) Respond with empathy, warmth and interest
- vii) Ensure proper eye contact.
- Viii) Be patient, attentive and courteous.
- ix) Avoid unnecessary interruptions.
- x) Have good listening abilities and skills.
- xi) Avoid making statements and comments or responses that could cause a negative effect.

NEGOTIATION AND BARGAINING IN MEDIATION

Though the words Negotiation and Bargaining are often used synonymously, in mediation there is a distinction. Negotiation involves bargaining and bargaining is part of negotiation. Negotiation refers to the process of communication that occurs when parties are trying to find a mutually acceptable solution to the dispute. Negotiation may involve different types of bargaining.

What is Negotiation?

Negotiation is an important form of decision making process in human life. Negotiation is communication for the purpose of persuasion. Mediation in essence is an assisted negotiation process. In mediation, negotiation is the process of back and forth communication aimed at reaching an agreement between the parties to the dispute. The purpose of negotiation in mediation is to help the parties to arrive at an agreement which is as satisfactory as possible to both parties. The mediator assists the parties in their negotiation by shifting them from an adversarial approach to a problem solving and interest based approach. The mediator carries the proposals from one party to the other until a mutually acceptable settlement is found. This is called ‘shuttle Diplomacy’. Any negotiation that is based on merits and the interest of both parties is Principled Negotiation and can result in a fair agreement, preserving and enhancing the relationship between the parties. The mediator facilitates negotiation by resorting to reality

testing, brainstorming, exchanging of offers, breaking impasse etc.

Why does one negotiate?

- a. To put across one's view points, claims and interests.
- b. To prevent exploitation/harassment.
- c. To seek cooperation of the other side.
- d. To avoid litigation.
- e. To arrive at mutually acceptable agreement.

NEGOTIATION STYLES

1). Avoiding Style

Unassertive and uncooperative:
The participant does not confront the problem or address the issues.

2). Accommodating Style

Unassertive and Cooperative: He does not insist on his own interests and accommodates the interests of others. There could be an element of sacrifice

3). Compromising Style

Moderate level of Assertiveness and Cooperation: He recognizes that both sides have to give up something to arrive at a settlement. He is willing to reduce his demands. Emphasis will be on apparent equality.

4). Competing Style

Assertive and Uncooperative: The participant values only his own interests and is not concerned about the interests of others. He is aggressive and insists on his demands.

5). Collaborating Style

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

What is Bargaining?

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

TYPES OF BARGAINING USED IN NEGOTIATION

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

- (i) Distributive Bargaining
- (ii) Interest based Bargaining
- (iii) Integrative Bargaining

(i) **Distributive Bargaining:** is a customary, traditional method of bargaining where the parties are dividing or allocating a fixed resource (i.e., property, money, assets, company holdings, marital estate, probate estate, etc.). In distributive bargaining the parties may not necessarily understand their own or the other's interests and, therefore, often creative solutions for settlement are not explored. It could lead to a win-lose result or a compromise where neither party is particularly satisfied with the outcome. Distributive bargaining is often referred to as "zero sum game", where any gain by one party results in an equivalent loss by the other party. The two forms of distributive bargaining are:

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

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

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

Negative consequences of Distributive Bargaining are:

- (a) By taking rigid stands the relationship is often lost.
- (b) Creative solutions are not explored and the interests of both parties are not fully met.
- (c) Time consuming.
- (d) Both parties take extreme positions often resulting in impasse.

(ii) Interest-Based Bargaining: A mutually beneficial agreement is developed based on the facts, law and interests of both parties. Interests include needs, desires, goals and priorities. This is a collaborative negotiation strategy that can lead to mutual gain for all parties, viz., “win-win”. It has the potential to combine the interests of parties, creating joint value or enlarging the pie. Relief expands in interest based bargaining. It preserves or enhances relationships. It has all the elements of principled negotiation and is advised in cases where the parties have ongoing relationships and/or interests they want to preserve.

Three steps in interest-based bargaining

There are three essential steps in interest-based bargaining

- (a) Identifying the interests of parties
- (b) Prioritizing the parties interests.
- (c) Helping the parties develop terms of agreement/settlement that meets their most important interests.

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

BARRIERS TO NEGOTIATION

- (1) Strategic Barriers.
- (2) Principal and Agent Barriers
- (3) Cognitive Barriers (Perception Barriers)

1) Strategic Barriers:

A Strategic Barrier is caused by the strategy adopted by a party to achieve his goal. For example with a view to make the husband agree for divorce the wife files a false complaint against her husband and his

family members alleging an offence under section 498 A of Indian Penal Code.

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

2) Principal and Agent Barriers

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

3) Cognitive Barriers (Perception Barriers).

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

Example of Cognitive Barriers

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

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

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

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

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

Anchor Price, Aspiration price and Reservation Price

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

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

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

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

ELEMENTS OF PRINCIPLED NEGOTIATION

(a) Separate the parties from the problem

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

For example, if Aparna has been consistently late to work for the past 2 weeks, a perception may develop that "the problem is Aparna". Viewed in this manner the only way to get rid of the problem is to get rid of (dismiss, transfer etc) Aparna. This is an example of merging the people with the problem and illustrates how it limits the range of options that are available for resolving the problem. To separate people from the problem, the key is to focus on the problem itself, independent of the person. In the above example, the employer might frame the problem as lack of punctuality. The employer can ask Aparna about her record being on time for many years and the reasons for the recent two weeks of late arrival enquiring specifically whether there are circumstances that are resulting in Aparana's late arrivals. She may answer that she was

involved in a motor vehicle accident recently and her vehicle repairs will be completed shortly. She might say that she had to change the route to work due to road repair, or she might say that she has to ride in a car pool to work and the driver has a temporary problem that caused the delay. By focusing on the problem itself, the employer has opened the door to understanding the root of the problem, which may lead to various options for handling it.

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

In being hard on the issues, the mediator will request documentation on damages, verify the accuracy of numbers and confirm the evidence provided by both parties. At the same time, the mediator will encourage the parties to be polite and cordial with each other and the mediator will demonstrate the same qualities during mediation.

(c) Focus on interests

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

(d) Create variety of options

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

(e) Rely on objective criteria

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

IMPASSE

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

TYPES OF IMPASSE

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

- (i) Emotional impasse
- (ii) Substantive impasse
- (iii) Procedural impasse

Emotional impasse can be caused by factors like:

- Personal Animosity
- Mistrust
 - False pride
 - Arrogance
 - Ego
 - Fear of losing face
 - Vengeance
- Substantive impasse can be caused by factors like:
 - Lack of knowledge of facts and/or law
 - Limited resources, despite willingness to settle
 - Incompetence (including legal disability) of the parties
 - Interference by third parties who instigate the parties not to settle dispute or obstruct the settlement for extraneous reasons.
 - Standing on principles, ignoring the realities
 - Adamant attitude of the parties.
- Procedural impasse can be caused by factors like:
 - Lack of authority to negotiate or to settle
 - Power imbalance between the parties
 - Mistrust of the mediators

STAGE WHEN IMPASSE MAY ARISE

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

TECHNIQUES TO BREAK IMPASSE

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

- (a) Reality Testing
- (b) Brainstorming
- (c) Changing the focus from the source of the offer to the terms of the offer.

- (d) Taking a break or postponing the mediation to defuse a hostile situation, to gather further information, to give further time to the parties to think, to motivate the parties for settlement and for such others purpose.
- (e) Alerting and cautioning the parties against their rigid or adamant stand by conveying that the mediator is left with the only option of closing the mediation.
- (f) Taking assistance of other people like spouses, relatives, common friends, well wishers, experts etc. through their presence, participation or otherwise.
- (g) Careful use of good humour.
- (h) Acknowledging and complementing the parties for the efforts they have already made.
- (I) Ascertaining from the parties the real reason behind the impasse and seeking their suggestions to break the impasse.
- (j) Role-reversal, by asking the party to place himself/herself in the position of the other party and try to understand the perception and feelings of the other party.
- (k) Allowing the parties to vent their feelings and emotions.
- (l) Shifting gears i.e., shifting from joint session to separate session or vice-versa.
- (m) Focusing on the underlying interest of the parties.
- (n) Starting all over again
- (o) Revising the options.
- (p) Changing the topic to come back later.
- (q) observing silence
- (r) Holding hope
- (s) Changing the sitting arrangement.
- (t) using hypothetical situations or questions to help parties to explore new idea and options.

