

## WORKSHOP-IV

### INTRODUCTION, UNDERSTANDING CONFLICT, CONCEPT OF MEDIATION

Paper presented by

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#### CONCEPTS OF CONCILIATION AND MEDIATION AND THEIR DIFFERENCES

One of the questions constantly asked by many is as to what is meant by conciliation and mediation, whether they are the same and, if not, whether there are any differences?

#### Conciliation and Mediation

Whether, in common parlance, there is some difference between conciliation and mediation or not, it is however clear that two statutes by Parliament treat them as different. (a) In the year 1996, the Arbitration and Conciliation Act, 1996 was passed and sec. 30 of that Act, which is in Part I, provides that an arbitral tribunal may try to have the dispute settled by use of 'mediation' or 'conciliation'. Sub-section (1) of sec. 30 permits the arbitral tribunal to

“use mediation, conciliation or other procedures”, for the purpose of reaching settlement.

(b) The Civil Procedure Code (Amendment) Act, 1999 which introduced sec. 89, too speaks of 'conciliation' and 'mediation' as different concepts. Order 10 Rules 1A, 1B, 1C of the Code also go along with sec. 89.

Thus our Parliament has made a clear distinction between conciliation and mediation. In Part III of the 1996 Act (sections 61 to 81) which deals

with 'Conciliation' there is no definition of 'conciliation'. Nor is there any definition of 'conciliation' or 'mediation' in sec. 89 of the Code of Civil Procedure, 1908 (as amended in 1999).

### Conciliation

In order to understand what Parliament meant by 'Conciliation', we have necessarily to refer to the functions of a 'Conciliator' as visualized by Part III of the 1996 Act. It is true, section 62 of the said Act deals with reference to 'Conciliation' by agreement of parties but sec. 89 permits the Court to refer a dispute for conciliation even where parties do not consent, provided the Court thinks that the case is one fit for conciliation. This makes no difference as to the meaning of 'conciliation' under sec. 89 because, it says that once a reference is made to a 'conciliator', the 1996 Act would apply. Thus the meaning of 'conciliation' as can be gathered from the 1996 Act has to be read into sec. 89 of the Code of Civil Procedure. The 1996 Act is, it may be noted, based on the UNCITRAL Rules for conciliation.

Now under section 65 of the 1996 Act, the 'conciliator' may request each party to submit to him a brief written statement describing the "general nature of the dispute and the points at issue". He can ask for supplementary statements and documents. Section 67 describes the role of a conciliator. Subsection (1) states that he shall assist parties in an independent and impartial manner. Subsection (2) states that he shall be guided by principles of objectivity, fairness and justice, giving consideration, among other things, to the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties. Subsection (3) states that he shall take into account "the circumstances of the case, the wishes the parties may express, including a request for oral statements". Subsection (4) is important

and permits the ‘conciliator’ to make proposals for a settlement. It states as follows:

“Section 67(4). The conciliator may, at any stage of the conciliation proceeding, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.”

I shall briefly refer to the other provisions before I come to sec. 73. Section 69 states that the conciliator may invite parties to meet him. Sec. 70 deals with disclosure by the conciliator of information given to him by one party, to the other party. Sec. 71 deals with cooperation of parties with the conciliator, sec. 72 deals with suggestions being submitted to the conciliator by each party for the purpose of settlement. Finally, Sec. 73, which is important, states that the conciliator can formulate terms of a possible settlement if he feels there exist elements of a settlement. He is also entitled to ‘reformulate the terms’ after receiving the observations of the parties. Subsection (1) of sec. 73 reads thus:

“Sec. 73(1) settlement agreement. (1) When it appears to the Conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the Conciliator may reformulate the terms of a possible settlement in the light of such observations.”

The above provisions in the 1996 Act, make it clear that the ‘Conciliator’ under the said Act, apart from assisting the parties to reach a settlement, is also permitted to make “proposals for a settlement” and “formulate the terms of a possible settlement” or “reformulate the terms”. This is indeed the UNCITRAL concept.

### Mediation:

If the role of the ‘conciliator’ in India is pro-active and interventionist as stated above, the role of the ‘mediator’ must necessarily be restricted to that of a ‘facilitator’.

In their celebrated book ‘ADR Principles and Practice’ by Henry J. Brown and Arthur L. Mariot (1997, 2<sup>nd</sup> Ed. Sweet & Maxwell, Lord on Chapter 7, p 127), the authors say that ‘mediation’ is a facilitative process in which “disputing parties engage the assistance of an impartial third party, the mediator, who helps them to try to arrive at an agreed resolution of their dispute. The mediator has no authority to make any decisions that are binding on them, but uses certain procedures, techniques and skills to help them to negotiate an agreed resolution of their dispute without adjudication.”

In yet another leading book on ‘Dispute Resolution’ (Negotiation, Mediation and other processes’ by Stephen B. Goldberg, Frank E.A. Sander and Nancy H. Rogers (1999, 3<sup>rd</sup> Ed. Aspine Law & Business, Gaithesburg and New York)(Ch. 3, p. 123), it is stated as follows:

“Mediation is negotiation carried out with the assistance of a third party. The mediator, in contrast to the arbitrator or judge, has no power to impose an outcome on disputing parties.

Despite the lack of ‘teeth’ in the mediation process, the involvement of a mediator alters the dynamics of negotiations. Depending on what seems to be impeding (an) agreement, the mediator may attempt to encourage exchange of information, provide new information, help the parties to understand each others’ views, let them know that their concerns are understood; promote a productive level of emotional expression; deal with differences in perceptions and interest between negotiations and constituents (including lawyer and

client); help negotiators realistically, assess alternatives to settlement, learn (often in separate sessions with each party) about those interests the parties are reluctant to disclose to each other and invent solutions that meet the fundamental interests of all parties.

Prof. Robert Baruch Bush and Prof. Joseph Folgen (ibid, p 136) say:

“In a transformative approach to mediation, mediating persons consciously try to avoid shaping issues, proposals or terms of settlement, or even pushing for the achievement of settlement at all. Instead, they encourage parties to define problems and find solutions for themselves and they endorse and support the parties’ own efforts to do so.”

The meaning of these words as understood in India appears to be similar to the way they are understood in UK. In the recent Discussion Paper by the Lord Chancellor’s Department on Alternative Dispute Resolution (<http://www.lcd.gov.uk/Consult/cir-just/adi/annexald/htm>) (Annexure A), where while defining ‘Mediation’ and ‘Conciliation’, it is stated that ‘Mediation’ is a way of settling disputes by a third party who helps both sides to come to an agreement, which each considers acceptable. Mediation can be ‘evaluative’ or ‘facilitative’. ‘Conciliation’, it is said, is a procedure like mediation but the third party, the conciliator, takes a more interventionist role in bringing the two parties together and in suggesting possible solutions to help achieve a settlement. But it is also stated that the term ‘conciliation’ is gradually falling into disuse and a process which is pro-active is also being regarded as a form of mediation. (This has already happened in USA).

The above discussion shows that the ‘mediator’ is a facilitator and does not have a pro-active role. (But, as shown below, these words are differently understood in US).

The difference between conciliation and mediation:

Under our law and the UNCITRAL model, the role of the mediator is not pro-active and is somewhat less than the role of a ‘conciliator’. We have seen that under Part III of the Arbitration and Conciliation Act, the ‘Conciliator’s powers are larger than those of a ‘mediator’ as he can suggest proposals for settlement. Hence the above meaning of the role of ‘mediator’ in India is quite clear and can be accepted, in relation to sec. 89 of the Code of Civil Procedure also. The difference lies in the fact that the ‘conciliator’ can make proposals for settlement, ‘formulate’ or ‘reformulate’ the terms of a possible settlement while a ‘mediator’ would not do so but would merely facilitate a settlement between the parties.

Brown quotes (at p 127) the 1997 Handbook of the City Disputes Panel, UK which offers a range of dispute resolution processes, facilitative, evaluative and adjudicative. It is there stated that conciliation “is a process in which the Conciliator plays a proactive role to bring about a settlement” and mediator is “a more passive process”.

This is the position in India, UK and under the UNCITRAL model. However, in the USA, the person having the pro-active role is called a ‘mediator’ rather than a ‘conciliator’. Brown says (p 272) that the term ‘Conciliation’ which was more widely used in the 1970s has, in the 1970s, in many other fields given way to the term ‘mediation’. These terms are elsewhere often used interchangeably.

Where both terms survived, some organizations use ‘conciliation’ to refer to a more proactive and evaluative form of process. However, reverse usage is sometimes employed; and even in UK, ‘Advisory, Conciliation and Arbitration Service’ (ACAS) (UK) applies a different meaning. In fact, the meanings are reversed. In relation to ‘employment’, the term ‘conciliation’ is

used to refer to a mediatory process that is wholly facilitative and non-evaluative. The definition of ‘conciliation’ formulated by the ILO (1983) is as follows:

“the practice by which the services of a neutral third party are used in a dispute as a means of helping the disputing parties to reduce the extent of their differences and to arrive at an amicable settlement or agreed solution. It is a process of orderly or rational discussion under the guidance of the conciliator.”

However, according to the ACAS, ‘mediation’ in this context involves a process in which the neutral “mediator takes a more pro-active role than a conciliator for the resolution of the dispute, which the parties are free to accept or reject. (The ACAS role in Arbitration, Conciliation and Mediation, 1989). It will be seen that here, the definitions, even in UK, run contrary to the meanings of these words in UK, India and the UNCITRAL model.

The National Alternative Dispute Resolution Advisory Council, (NADRAC), Barton Act 2600, Australia (see [www.nadrac.gov.au](http://www.nadrac.gov.au)) in its recent publication (ADR terminology, a discussion Paper, at p 15) states that the terms “conciliation” and “mediation” are used in diverse ways. ( The ‘New’ Mediation: Flower of the East in Harvard Bouquet: Asia Pacific Law Review Vol. 9, No.1, p 63-82 by Jagtenbury R and de Roo A, 2001). It points out that the words ‘conciliation’ and ‘counselling’ have disappeared in USA. In USA, the word ‘conciliation’ has disappeared and ‘mediation’ is used for the neutral who takes a pro-active role. For example:

“Whereas the terms ‘conciliation’ and ‘conselling’ have long since disappeared from the literature in reference to dispute resolution services in the United States and elsewhere, these terms have

remained enshrined in Australian family laws, with ‘mediation’ grafted on as a separate dispute resolution service in 1991.”

Conversely, policy papers in countries such as Japan still use the term ‘conciliation’ rather than ‘mediation’ for this pro-active process (see [www.kantei.go.jp/foreign/judiciary/2001/0612](http://www.kantei.go.jp/foreign/judiciary/2001/0612) report of Justice System Reform Council, 2001, Recommendations for a Justice System to support Japan in the 21<sup>st</sup> Century). NADRAC refers, on the other hand, to the view of the OECD Working Party on Information, Security and Privacy and the Committee on Consumer Policy where ‘conciliation’ is treated as being at the less formal end of the spectrum while ‘mediation’ is at the more formal end. Mediation is described there as more or less active guidance by the neutrals. This definition is just contrary to the UNCITRAL Conciliation Rules which in Art 7(4) states

“Art 7(4). The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute....”

In an article from US entitled “Can you explain the difference between conciliation and mediation” (<http://www.colorado.edu/conflict/civil-rights/topics/1950.html>), a number of conciliators Mr. Wally Warfield, Mr. Manuel Salivas and others treat ‘conciliation’ as less formal and ‘mediation’ as pro-active where there is an agenda and there are ground rules. In US from the informal conciliation process, if it fails, the neutral person moves on to a greater role as a ‘conciliator’. The above article shows that in US the word ‘mediator’ reflects a role which is attributed to a pro-active conciliator in the UNCITRAL Model. In fact, in West Virginia, ‘Conciliation’ is an early stage of the process where parties are just brought together and thereafter, if conciliation has not resulted in a solution, the Mediation programme is applied which permits a more active role (see

<http://www.state.wv.us/wvhic/Pre-Determination/20comc.htm>) The position in USA, in terms of definitions, is therefore just the otherway than what it is in the UNCITRAL Conciliation Rules or our Arbitration and Conciliation Act, 1996 where, the conciliator has a greater role on the same lines as the 'mediator' in US.

I have thus attempted to clear some of the doubts raised as to the meaning of the words 'conciliation' and 'mediation'. Under our law, in the context of sec. 30 and sec. 64(1) and sec. 73(1) of the 1996 Act, the conciliator has a greater or a pro-active role in making proposals for a settlement or formulating and reformulating the terms of a settlement. A mediator is a mere facilitator. The meaning of these words in India is the same in the UNCITRAL and Conciliation Rules and in UK and Japan. But, in USA and in regard to certain institutions abroad, the meaning is just the reverse, a 'conciliator' is a mere 'facilitator' whereas a 'mediator' has a greater pro-active role. While examining the rules made in US in regard to 'mediation', if we substitute the word 'conciliation' wherever the word 'mediation' is used and use the word 'conciliator' wherever the word 'mediator' is used, we shall be understanding the said rules as we understand them in connection with 'conciliation' in India.

# ***Mediation - a Method to Resolve Conflicts Without Going to Justice***

## **Abstract**

*Conflict in a society such as the present, where disputes are born every minute, whether it is minor conflicts inherent in community life, or it is a major conflicts involving large groups of people, communities or even states, it takes more effort to restore peace. Appeal to the court or an authoritarian leader to judge and decide who are right, is not a long term solution because there will always be dissatisfaction with the solution found.*

*Thus alternative methods are needed to restore the natural order, moving into the conflict to find a compromise solution to please all parties. And one of the methods that can do this is mediation, seen as a quick and confidential way of resolving conflict and finding a viable solution.*

*This study aims to present the main techniques used to obtain the desired result in mediation: a durable peace between the parties.*

**Key words:** *conflicts, judge, mediation, peace.*

**JEL Classification:** *J52*

## **1. Introduction**

A conflict is an essential and inevitable phenomenon of social life, because existence of human interaction involves a series of agreements or disagreements between individuals or social groups, and they may easily entail a conflict, which always affects the parties involved, even if there are perceptions that consider conflict as a constructive process.

In fact, no conflict is constructive or destructive – the way it is resolved can have positive or negative effects, so there are many interpretations of the notion of conflict because of its assimilation with the circumstances leading to various conflicts.

The attitude towards the conflict and its resolution depends on the situation which caused strict conflict, so that an organization can identify the following types of potential conflict: intrapersonal (individual relationship with him - inner conflict, this conflict can be resolved by a third party), interpersonal (among members of same group - because of differences in attitude, personality, values, goals, experience, education, an important factor in interpersonal conflict is adapting correct the situation so that you can achieve the goal) and inter-group (between groups belonging to the same organization, for reasons of cohesion - causing hostility outside the group structure - the type of leadership and individual status within the group, actions of power takeover - cause conflict with weaker groups).

A conflict has always a cause which determines the nature and intensity of that conflict, including possible sources of conflict such as: poor communication, competition for common, but limited resources, incompatible purposes and desires, inequality and social discrimination, access to competitive opportunities or increased desire for domination, power or prestige.

## **2. The structure of conflict**

Many analysts have described the development model of conflict through five relatively distinct stages with disagreement as a starting point that begins with simple misunderstandings, differentiating individuals or groups by their way of being and thinking, minor insignificant differences for social interaction or for the group, but which can degenerate into real conflict if uncontrolled in time. The confrontation, mentioned in the next phase, widens the differences between individuals, groups or classes. They are perceived by the parties in conflict as important for group interaction, group threatening unit<sup>1</sup>. In this phase each side presents its position, emphasizing an ideology based

on evidence (engagement parties intensify the line initial disagreement, each side pointing out errors of the others' way of thinking, the phase in which each side convinces itself that it is necessary to persuade the opponents to change their opinion or give up their position, accepting his argument. Persuasive action is exaggerated, it may degenerate into action force, coercion, because the emotional side prevails over logical arguments, thus resulting in a tense atmosphere, which leads to chain successive frustrations, hostilities, acts of violence, language aggression and a solution must be found. The escalation triggers negative elements that support an over competitive behavior, tensions and hostilities in the group increased in intensity, self-defense reaction of each party raises physical and symbolic violence, maximum aggression, at this stage the conflict reaches its climax which may completely destroy the group interaction or may rebuild it through structural change.

Interference, inherent in the conflict escalation, is naturally followed by orientation towards rational solutions to resolve conflicting condition, the institutional legal interventions through negotiation and compromise, by encouraging open communication possibilities between the parties, the emergence of a third person as mediator, moderator or negotiator, all of them aiming at restoring normal social interaction and de-escalation.

To be successful in time and efficient in the social interaction group, the final solution for conflict resolution should not be regarded as a compromise by either party, but there should be identified the positive-integrative function for the organizational unit. The failure to adopt constructive, mutually acceptable solutions may result in the dissolution of the organization or may generate a temporary balance, based on force. Various responses to conflict, come up in the last phase, the conflict resolution and its many roles are strictly derived from the existence of multiple types and causes of generating misunderstandings. If the conflicts are resolved constructively they create a satisfactory outcome for all parties and improve the relationship between opposing parties and

the ability to resolve future conflicts in a constructive way. Conflict resolution can be defined as a philosophy and a set of skills that help individuals or groups to better understand the concept of conflict and resolve it, as long as it occurs in every aspect of our life, being part of our life. However, if we can't stop conflicts it's up to us if we use the energy around a conflict or if we uselessly waste our efforts.

### **3. Mediation**

Resolving conflicts involves entrusting their traditional justice and conflict resolution on the principle of win-loss (winner-defeated) solution still unresponsive to the various conflicts we know in the current society, mainly because of economic diversification and social relationships and the very fast rhythm of our present life.

Starting from these considerations a conflict resolution can be achieved through mediation, with great success in family conflicts, divorce, collective labor disputes, inheritance, co -ownership, contracts, conflicts between students, between employees, political parties or even countries, bringing a better response to the parties to the conflict by focusing on the interests at stake, as mediation aims at finding affordable and realistic solutions for both sides in the conflict, in accordance with the law, unlike the traditional conflict resolution where the focus is mainly on the legal aspects of the case<sup>2</sup>.

Participation in the mediation process is voluntary, because mediation does not establish guilt or innocence of the conflicting parties, the mediator's role is not one decision, but by providing procedural information, it stimulates the dialogue, facilitates exchange of views and information between parties, helping the parties to clarify the needs and interests, to overcome communication barriers and get to solving disagreements by finding mutually beneficial solutions.

This environment is based on the parties' trust in the mediator, the person able to facilitate negotiations between them and support them to

resolve the conflict, by obtaining a mutually agreed solution, efficient and sustainable, an optional way of solving conflicts in a friendly way, with a specialized third party as mediator, in terms of neutrality, impartiality and confidentiality.

Thus mediation is, above all, the mediator's art to turn a conflict in an agreement as a result of options generated and selected by the parties, the conflict management process, allowing prevention or resolution of a conflict due to third person's intervention, being impartial and with no decision power, who guarantees communication between partners and thus helps to restore the social bond.

Methods and techniques used by the mediator shall serve only the legitimate interests and objectives of the parties to the conflict, so the mediator can not impose a solution on parties to the conflict submitted to mediation.

Conflicting parties are entitled to be assisted by a lawyer or other persons, as provided by mutual agreement, but the submissions made during the mediation by the parties to the conflict and by the mediator are confidential to third parties and can not be used as evidence in legal proceedings or arbitration unless the parties make another agreement or the law stipulates something else.

The mediator will inform the persons who participate in mediation on the obligation of maintaining the confidentiality and will be required to sign a confidentiality agreement, and if, during mediation, there is a situation likely to affect its purpose, neutrality and impartiality of the mediator, he is required to bring it to parties who will decide on maintaining or breaching the mediation contract.

The mediator has the right to abstain and close the mediation being required to return the fee proportional to the not covered stages of mediation, or, if appropriate, to ensure the continuation of the mediation, the mediation contract terms<sup>3</sup>.

If the dispute submitted to mediation presents difficult or legally controversial aspects or from any other specialized field, the mediator, the parties' agreement, may request the standpoint of a specialist in that field, only highlighting controversial issues, without disclosing the parties' identity.

When the conflicting parties reached an agreement, the mediator will assist parties in drafting the final agreement for mediation, which specifies the commitments of each party to settle the conflict, and that is equivalent to a written document under private signature.

#### **4. Resolving conflicts through mediation**

Regardless the type of conflict, mediation has its own time during the conflict, usually in the next phase of confrontation, when the conflict begins to escalate, but the later the intervention the more difficult the situation can be relieved so that this intervention would ideally take place when the disagreement comes up when without waiting for a confrontation.

Sensitivity of a part in choosing the time to use mediation is sufficient to determine the stage of the conflict, as mediation aims at getting a cognitive response that provides a rational solution for each side, accompanied by an affective and behavioral response used by each party to change their attitudes and feelings, moving from hatred, desire of fighting and destruction of each other to an atmosphere of peace where they can live together without conflict.

Therefore the results putting away a conflict depend not so much on the content, skills and knowledge as on the parties involved - management relative to the situation as "fleeing "from the conflict (or avoid it) is important to avoid a conflict escalation.

The parties' collaboration leads to an acceptable and realistic solution and it is related to honesty, openness and life attitudes of those involved, who choose correctly to describe the events that led to the

conflict, otherwise, you do not want to find out the causes, and the discussion is limited just to the visible effects of the conflict and by creating a greenhouse "gases" effect conflict resolution efficiency decreases.

A thorough analysis of events is necessary so that the effect on parties to occur after mediation by preserving and accepting solutions found together, otherwise, in the best case, a fragile peace will be broken by a mere misunderstanding , since the problems are in fact unresolved.

The best way to achieve sustainable results in mediation is the dialogue between the parties, which implies their willingness to get together on a common solution, according to a realistic approach that would remove existing prejudices and preconceived ideas, based on authentic values making it relevant to the expectations of the parties).

A dialogue involves the parties desire to communicate, knowing that most of the conflicts occur because of the lack of communication or poor ways of performing it , to clear the problems, namely to determine the positions of the parties to the addressed issues, as an effective way for a better knowledge and mutual understanding and a necessity also in the process of evolution to find solutions – which instead of cancelling differences of principles between the parties it relies on finding common ground to allow their joint action in some sense).

The work style of mediation depends on the parties' behavior and personality, but also on the mediator skill to facilitate communication and above all, on how well he knows what actually happened, because knowing the cause he is likely to facilitate the proper conduct of both mediation and the positive results which lead to final peace agreement.

In order to solve the conflict the mediator and the parties must especially understand the motivation, know the feelings, motivations and concerns of each of them, just as the parties must know the methods

discussed in mediation, to interact with each other as and with the mediator as well.

Only when the parties know well the methods and styles approached in mediation there is a communication likely to substantially contribute to positive developments in addressing the current conflict, through a rational understanding of the contribution of each party, without making them give in to reasoning not to pressure.

The other reason that parties demonstrate in mediation is often seen as a starting point for dialogue, the actors involved can be centered on existing conjunctures and their transformation processes.

Thus, the negotiated procedure is optimal when the parties do not want only to make or obtain concessions consented subjective negotiation positions, but rather - they try to settle the basic dispute , being unbiased, their position being of neither parties.

In this respect there should be clearly defined the mutual interests in a transparent and total sincerity, without the slightest recourse to dissimulation or fear, and that's why it begins with wording out the problems to be solved as answers to questions such as: what does not work, what happened and what was the evolution of conflict, which are the elements that prevent the solving of the situation.

Analyzing the answers to these questions we can get a diagnosis of the current situation, insisting on the causes that prevent the problem, because depending on this we can find solutions to solve the theoretical and practical ways agreed upon.

Once established these measures and their implementation way there can be approached the methods of defusing conflict and peace between the parties, going to be established the guarantees to make this peace long-last, respectively what these parties do when the mediation is over so that the last conflict would no longer appear.

## 5. Conclusions

A conflict is an inevitable phenomenon of social life, because we live in the society with an unprecedented people's closeness, through the existence of urban life in the communities exceeding one million.

In these conditions the conflict is less important than the way it is approached, namely whether the solution found is positive or negative. Thus we can solve a conflict by resorting to a court where a judge will decide who is right and who is wrong, doing "justice", even if through this method both parties get to be pleased with the solution and conflict is more amplified than put down.

We also appeal to a leading authority, and this is specific to closed communities to settle the dispute based on moral or religious authority available, but that does not guarantee either the solving of the conflict, as it only establishes a winner and a loser.

So the best way of resolving the conflict seems to appeal to mediation, the parties, in the presence of a mediator, a third specialist, impartial and neutral, to try to clarify the underlying causes of conflict to achieve a settlement thereof.

Note that this is a method where no one loses, everyone gets a benefit because besides the conflict solved even by the parties, themselves, its causes are found, so the future this can be avoided , by restoring communication between the parties.

The mediator neither gives solutions nor decides who is right or wrong he only restores, through way used in mediation, a safe and communication for the parties to be able to reach, through dialogue, from a state conflict to one of collaboration, which can be maintained even after the mediator's departure, because only the parties can determine what is best for them and especially how they want to "exploit" the conflict in their interests by using the energy created around a conflict, to rediscover communication with others or to waste their energy.

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## WORKSHOP-IV

### COMPARISON BETWEEN JUDICIAL PROCESS AND VARIOUS ADR PROCESSES & PROCESS OF MEDIATION

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ADR is an Acronym for Alternative Dispute Resolution. Just as the acronym suggests it's the alternative method to protracted litigation in court. ADR utilizes methods like mediation and arbitration among other things to settle cases between parties in court without the need for a formal trial where cases can become protracted. While cases litigated in court may last between 1 and more years in court, with an adoption of ADR processes court cases can be resolved within a matter of weeks to a few months. In the majority of cases where ADR is applied parties either insert a clause in an existing agreement that disputes arising between them be resolved through ADR while in the other cases the courts can ask the parties to submit to ADR where empowered to do so.

#### Settlement Procedure Models

The lawyers were asked to rate five settlement procedures on eleven Dimensions and provide an overall preference ranking of the five procedures. The lawyers rated two types of judicial settlement

#### Conferences:

conferences with judges or magistrate judges assigned to hear the merits of the case (hereafter "judges assigned" to the case) and conferences with judges or magistrate judges not assigned to hear the case (hereafter "judges not assigned" to the case). The lawyers also rated two types of court -

connected mediation:

mediation with court staff mediators (hereafter “staff mediators”) and mediation with volunteer mediators (hereafter “volunteer mediators”). The fifth settlement procedure the lawyers rated did not involve the court, either in terms of service provision or case referral: mediation with private, paid mediators (hereafter “private mediators”). In order to increase the likelihood that lawyers’ ratings reflected their actual experience with the different settlement procedure models rather than their preconceptions, lawyers’ assessments of a given procedure were excluded from the analyses if they indicated they had not had experience with that procedure. Lawyers’ ratings likely reflect their experience with settlement procedures in other districts as well as in the present district, as the questionnaire instructions asked about their “general experience with settlement conferences and mediation in federal courts.”

Each settlement procedure model has certain features that are consistent across courts and certain features that vary depending on how the model is implemented in a particular court.

To provide some context for interpreting the lawyers’ responses, we describe below the settlement procedure models as implemented in the present district, while also noting how they are implemented in other courts. In brief, the form that the settlement procedure models took in the present district is consistent with their basic underlying structures and is largely typical of their implementation in other courts, with the primary exception that volunteer mediation in the present district took place in the context of periodic Settlement Weeks rather than on a continuous basis.

1. Settlement Conferences with Judges Assigned to the Case Judicial settlement conference practices in this district vary among the judges.

Many of the district judges hold settlement conferences in some of the cases assigned to them, on their own initiative or at the request of the parties, however some of the judges hold settlement conferences in all of their cases that survive summary judgment.

Some of the judges do not hold settlement conferences in cases that will have a bench trial; others do so only if the parties consent, and still others hold settlement conferences in both the bench and jury cases assigned to them.

Settlement conferences typically are scheduled for a half -day or less and most often take place late in the case, shortly before summary judgment rulings or trial.

Lawyers and clients generally are required to attend the settlement conference.

Cases that do not settle proceed to trial before the same judge.

2. Settlement Conferences with Judges Not Assigned to the Case  
Settlement conferences in this district are also conducted by judges not assigned to the case. Magistrate judges conduct settlement conferences in cases referred to them on the initiative of the assigned district judge or at the request of the parties. Magistrate judges generally rule on discovery motions and conduct preliminary pretrial, status, and settlement conferences in cases assigned to them; they typically do not rule on issues regarding the admissibility of evidence at trial or on dispositive legal or factual issues, except in a few specified types of cases.

Regardless of whether the judge conducting the settlement conference is or is not assigned to the case, a settlement conference is typically scheduled for a half -day or less, takes place late in the case, and requires the attendance of lawyers and clients.

The results of a conference are reported to the judge assigned to that case.

3. Court -Connected Mediation with Staff Mediators Two models of Court- connected mediation are provided in this district: staff mediation and volunteer mediation. The District Court Staff Mediation Program, which began in August 2007, provides mediation at no cost to litigants. Cases are referred to the District Court Staff Mediation Program primarily at the request of the parties or on the initiative of the assigned judge, either by unilateral order or with the input of counsel. Certain categories of cases are exempt from mandatory referral to mediation, although parties in any type of civil case may request staff mediation. Cases are mediated at any stage of litigation, from before discovery to after trial.

The single court staff mediator is a lawyer who has prior, court litigation and trial experience, as well as prior mediation experience in a variety of civil subject areas. Before mediation in the District Court Staff Mediation Program, each party submits a brief statement of the factual and legal issues, the party's interests, and prior settlement efforts to the court staff mediator, who has access to case filings. Parties with full settlement authority and lead lawyers in the case are required to personally attend mediation. Additional lawyers who are significantly involved in the case also often attend the mediation. The initial session typically is scheduled for a full day in one of the three court houses in the district.

Mediation usually begins with a joint session to discuss the process and ground rules, followed by separate caucuses with each side to discuss the substance of the dispute. If additional work is required, extra in-person sessions or follow - up telephone conferences are arranged. All mediation communications are confidential.

The staff mediator reports to the court only whether mediation efforts are continuing or whether the case has settled or reached impasse.

4. Court -Connected Mediation with Volunteer Mediators The second model of mediation used in this district is volunteer mediation. Each of the three court divisions has a roster of volunteers from the local bar who receive no compensation and who can be assigned to mediate cases at no cost to litigants. These volunteers typically mediate cases during Settlement Week events, which are held several times a year in two of the court's divisions.

Cases not exempt from mandatory referral to mediation typically are assigned to Settlement Week mediation by judges without input from counsel, although parties may opt out if they believe mediation will be unproductive.

Parties may also request referral to Settlement Week mediation. In most cases, discovery has been completed and motions have been decided before mediation takes place, though the parties may specify which of the Settlement Week events during the year they think will permit the most productive mediation timing. Cases are randomly assigned to a mediator from a list of approved mediators. The volunteer mediators are lawyers who have substantial federal litigation experience and mediation training. Before volunteer mediators conduct mediation, parties must exchange written settlement demands and offers. The mediator receives this information, as well as relevant portions of the case file, prior to the initial session. The trial lawyer and someone with settlement authority for each party are required to personally attend mediation. Mediation sessions are typically held in the courthouse. The initial mediation session usually is scheduled for ninety minutes, although the mediator and the parties often agree to extend the session or schedule an additional session if they think it will be productive. All mediation communications are confidential. Unless otherwise

authorized by the parties, volunteer mediators may report to the court only: whether the case has settled or may soon settle; suggestions for case management if the case did not settle, such as whether additional discovery, motions, or a judicial settlement conference might be helpful; and “information about the parties’ conduct if the neutral concludes that a party did not participate in good faith or otherwise violated a Court order or Disciplinary Rule relating to the proceeding.”

5. Private Mediation This district encourages the use of private mediators when they are preferred by the parties. Parties are free to arrange and pay for private mediation, but the court does not refer cases to private mediators. Because the focus of this Article is on court-connected settlement procedures, only limited comparisons with private mediation are reported herein.

***Comparison Between Judicial Process and Various ADR Processes***

<b>JUDICIAL PROCESS</b>	<b>ARBITRATION</b>	<b>MEDIATION</b>
Judicial process is an adjudicatory process where a third party (judge/ Other authority) decides the outcome.	Arbitration is a quasi-judicial adjudicatory process where the arbitrator(s) appointed by the Court or by the parties decide the dispute between the parties.	Mediation is a negotiation process and not an adjudicatory process. The mediator facilitates the process. Parties participate directly in the resolution of their dispute and decide the terms of settlement.
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.
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.
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.
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.
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.
Decision is appealable.	Award is subject to challenge on specified grounds.	Decree/Order in terms of the settlement is final and is not appealable.
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.
Involves payment of court fees.	Does not involve payment of court fees.	In case of settlement, in a court annexed mediation the court fee already paid is refundable as per the Rules.

***Comparison Between Judicial Process and Various ADR Processes***

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<b>MEDIATION</b>	<b>CONCILIATION</b>	<b>LOK-ADALAT</b>
Mediation is a non-adjudicatory process.	Conciliation is a non-adjudicatory process.	Lok Adalat is non-adjudicatory if it is established under Section 19 of the Legal Services Authorities Act, 1987. Lok Adalat is conciliatory and adjudicatory if it is established under Section 22B of the Legal Services Authorities Act, 1987.
Voluntary process.	Voluntary process.	Voluntary process.
Mediator is a neutral third party.	Conciliator is a neutral third party.	Presiding officer is a neutral third party.
Service of lawyer is available.	Service of lawyer is available.	Service of lawyer is available.
Mediation is party centred negotiation.	Conciliation is party centred negotiation.	In Lok Adalat, the scope of negotiation is limited.
The function of the Mediator is mainly facilitative.	The function of the conciliator is more active than the facilitative function of the mediator.	The function of the Presiding Officer is persuasive.
The consent of the parties is not mandatory for referring a case to mediation.	The consent of the parties is mandatory for referring a case to conciliation.	The consent of the parties is not mandatory for referring a case to Lok Adalat.
The referral court applies the principles of Order XXIII Rule 3, CPC for passing decree/order in terms of the agreement.	In conciliation, the agreement is enforceable as it is a decree of the court as per Section 74 of the Arbitration and Conciliation Act, 1996.	The award of Lok Adalat is deemed to be a decree of the Civil Court and is executable as per Section 21 of the Legal Services Authorities Act, 1987.
Not appealable.	Decree/order not appealable.	Award not appealable.
The focus in mediation is on the present and the future.	The focus in conciliation is on the present and the future.	The focus in Lok Adalat is on the past and the present.
Mediation is a structured process having different stages.	Conciliation also is a structured process having different stages.	The process of Lok Adalat involves only discussion and persuasion.
In mediation, parties are actively and directly involved.	In conciliation, parties are actively and directly involved.	In Lok Adalat, parties are not actively and directly involved so much.
Confidentiality is the essence of mediation.	Confidentiality is the essence of conciliation.	Confidentiality is not observed in Lok Adalat.

## **A Role Play to Demonstrate the Differences Between Adjudication and Mediation**

### ***“The Family Portrait”***

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

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

#### Exercise (i) Arbitration (Adjudication)

- The arbitrator has to first decide upon what the “issue” in dispute is : Which child fits the definition of the "favourite child"?
- Each party (child) presents reasons to the arbitrator as to why they believe that they were the favourite child.
- The arbitrator evaluates the evidence and decides who fits in the definition of "favourite child"
- the painting is awarded to that child.
- No compromise is permitted. The arbitrator must make a decision as to who is right and who is wrong depending on (i) the meaning of "favourite child" and (ii) an appraisal and comparison of each party's evidence as to why they were the "favourite child".

#### Exercise (ii) Mediation

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

Mediator is to demonstrate

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

## WORKSHOP-IV

# STAGES OF MEDIATION, ROLE OF MEDIATORS, COMMUNICATION IN MEDIATION, NEGOTIATION, BARGAINING IN MEDIATION, IMPASSE

Paper presented by

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## Skills and Values: Alternative Dispute Resolution: Negotiation, Mediation, Collaborative Law, and Arbitration

### INTRODUCTION

*Skills & Values: Alternative Dispute Resolution: Negotiation, Mediation, Collaborative Law and Arbitration* (“Skills & Values”) is authored by John Burwell Garvey and Charles B. Craver.<sup>1</sup> The authors wrote this book to introduce law students to the theoretical and practical skills needed to understand alternative dispute mechanisms.<sup>2</sup> The authors’ goal was to provide a useful, real-world learning environment so that students can understand different types of alternative dispute situations.<sup>3</sup> To accomplish this goal, the authors developed exercises where students would assume different roles in an alternative dispute resolution (“ADR”) process tailored to specific factual scenarios. The exercises allow the students to apply the skills learned from the text, which explained the particular dispute mechanisms, while encouraging classroom discussion.<sup>4</sup> Through completion of the exercises, students are able to reflect and refine their ADR skills in order to better serve their future clients.<sup>5</sup>

The book is a great tool for law school because of the various exercises, concise explanation of negotiation and mediation processes, and its reasonable price. Implementing this book in a classroom setting will provide maximum benefit because it will enable readers to practice the skills learned from the text.

### OVERVIEW

*Skills & Values* is comprised of fifteen chapters and four parts. Part One discusses negotiation: the importance of negotiation skills, characteristics of effective

negotiators, the negotiation process, verbal/nonverbal communication, and ethical concerns.<sup>6</sup> Part Two discusses mediation: why choose mediation instead of negotiation, selecting the mediator, mediator styles, tactical considerations, and ethical considerations.<sup>7</sup> Part Three discusses collaborative law: the collaborative law process and the related advantages and disadvantages.<sup>8</sup> Part Four discusses arbitration: basic characteristics, the Federal Arbitration Act (“FAA”),<sup>9</sup> sources of arbitration, the arbitration process, benefits and limitations, and ethical considerations.<sup>10</sup>

The authors define alternative dispute resolution as an alternative mechanism to trial by judge or jury.<sup>11</sup> ADR was said to have started at the Pound Conference of 1976 when Professor Roscoe Pound presented a paper entitled “The Causes of Popular Dissatisfaction with the Administration of Justice.”<sup>12</sup> According to the authors, “ADR has gained acceptance in American law today to the point that it is no longer really considered ‘alternative’ but mainstream.”<sup>13</sup> ADR programs now exist in most courts.<sup>14</sup> Even when parties decide to litigate, courts regularly compel some form of ADR, usually mediation, prior to trial.<sup>15</sup> In fact, many cases are regularly mediated even when mediation is not required.<sup>16</sup> In most courts, fewer than five percent of civil and criminal matters are adjudicated.<sup>17</sup> The authors believe that “ADR is everywhere. Whether you draft business agreements, real estate contracts, employment agreements, consumer contracts or many other kinds of documents, dispute resolution procedures will be part of the equation.”<sup>18</sup>

## PART ONE: NEGOTIATION

Part One introduces the ADR process of negotiation. At its simplest, the negotiation process is the means by which two or more individuals attempt to reach an agreement.<sup>19</sup> Crafting good negotiation skills is important because “fewer than five percent of civil and criminal matters are adjudicated” – meaning that most cases settle.<sup>20</sup> Therefore, negotiation is an important skill for lawyers to master to achieve the best result for their clients.<sup>21</sup>

Traits that good negotiators possess include: good interpersonal skills,<sup>22</sup> the willingness to prepare, the ability to employ tactics and certain counter tactics, knowledge of strengths and weaknesses of position, knowledge of client needs and interests as well as opponents, and an inner confidence.<sup>23</sup> The authors state that negotiators must fundamentally decide what the opposing side really wants and how

much they are willing to give up to convince the other side to settle.<sup>24</sup> The authors challenge students to analyze their personalities and ask themselves questions related to how they handle disputes to alert students to certain patterns as they proceed through the negotiation exercises.<sup>25</sup>

In addition to the baseline traits listed above, negotiators tend to exhibit a particular style.<sup>26</sup> The authors categorize negotiator styles into two main categories: (1) cooperative problem solvers; and (2) adversarial negotiators.<sup>27</sup> Cooperative problem solvers try to create a comfortable negotiating environment to achieve a mutually beneficial agreement that will satisfy both parties.<sup>28</sup> On the other hand, adversarial negotiators want to obtain optimal results for their own side at all costs.<sup>29</sup> Adversarial negotiators tend to minimally disclose information and try to manipulate the other party.<sup>30</sup> The authors believe “the notion that one must be uncooperative, selfish, manipulative, and even abrasive to be successful is erroneous. To achieve beneficial negotiation results one must only possess the ability to say ‘no’ forcefully and credibly to convince opponents they must enhance their offers if agreements are to be achieved. This can be very effectively accomplished while being firm, fair and friendly.”<sup>31</sup> Classroom studies completed by the authors prove three important points: (1) adversarial negotiators usually reach extreme agreements; (2) adversarial negotiators generate more non-settlements; and (3) cooperative problem solvers achieve more efficient combined results for both parties than adversarial negotiators.<sup>32</sup>

Negotiation involves six stages: (1) preparation; (2) preliminary; (3) information; distributive; (5) closing; and (6) cooperative.<sup>33</sup> The preparation stage is a fact gathering stage during which the client must disclose to the lawyer what he or she desires from the negotiation proceedings.<sup>34</sup> Lawyers will better understand their client’s true definition of value if the client provides the lawyer with relevant information.<sup>35</sup> Lawyers must listen carefully and ask questions to uncover available alternatives to enhance the party’s bargaining position when meeting with the opposing party because more options allow for more flexibility in the bargaining process.<sup>36</sup> The lawyer must then divide the client’s goals into essential, important, and desirable categories.<sup>37</sup> Essential goals are items that are non-negotiable and must be obtained to have a successful agreement.<sup>38</sup> Important goals are items that the party wants to acquire but would exchange for an essential item.<sup>39</sup> Desirable goals are items that the party would like to acquire but would exchange for important or essential items.<sup>40</sup> Negotiators must assign respective point values to compare each item within their respective category to evaluate how well the negotiator performed their client.<sup>41</sup>

During the preliminary stage, “lawyers must familiarize themselves and develop legal theories to support their positions and anticipate counter arguments they expect the opposing side to make.”<sup>42</sup> The preliminary stage helps lawyers calculate their bottom line or Best Alternative to Negotiated Agreement (“BATNA”).<sup>43</sup> BATNA is the point where it would be better not to enter into a negotiated agreement because alternatives are more attractive.<sup>44</sup> The preliminary stage requires a lawyer to evaluate the probability of a claim’s success and the amount of the award if the parties could not negotiate a settlement.<sup>45</sup>

At the onset of a negotiation, it is important for a negotiator to have an elevated aspiration level which involves the negotiator setting high ambitious goals that are reasonably attainable.<sup>46</sup> Outlandish or unreasonable offers may discourage the opposing side from thinking a negotiated agreement is possible, diminishing the likelihood of a negotiated agreement.<sup>47</sup> Modest or reasonable offers may result in a phenomenon called “anchoring,” where people will reassess their own aspirational levels when they receive an offer better than expected.<sup>48</sup> Therefore, it is best to set ambitious goals that are reasonable, coupled with principled rationales that explain the negotiator’s position.<sup>49</sup> The opposing party will be less likely to dismiss a negotiator’s position if the negotiator supplies a logical rationale supporting his or her conclusions.<sup>50</sup>

Once the negotiators are face-to-face, it is important to develop a positive non-threatening interaction with the opposing negotiator to create a less adversarial environment.<sup>51</sup> The authors suggest discussing common interests to break the tension.<sup>52</sup>

During the information exchange, the negotiator’s objective is to uncover the goals of the other party.<sup>53</sup> The authors suggest the best way to do this is by asking broad, open-ended questions to induce the opposing party to speak.<sup>54</sup> The opposing party is more likely to relay important information to the negotiator, such as how the opposing party values certain items.<sup>55</sup> Throughout the negotiating process, skilled negotiators listen to what the opposing party says and observe how the opposing party acts.<sup>56</sup> A skilled negotiator tries to make opposing parties feel that they are being heard and respected. This will facilitate more discussions that could lead the opposing negotiator to disclose more information.<sup>57</sup> According to the authors, “active listeners not only hear what is being said but recognize what is not being discussed, since they understand that omitted topics may suggest weaknesses opponents do not wish to address.”<sup>58</sup> Above all else, the authors suggest to proceed through each stage slowly. The more

knowledge a negotiator can obtain from the opposing party, the more effective the negotiator will be at negotiating a deal.<sup>59</sup>

The authors suggest that lawyers utilize certain techniques employed by politicians to avoid disclosing certain information.<sup>60</sup> Some techniques the authors suggest include: (1) ignoring the question being asked; (2) answering part of the question; (3) answering the question by changing the scope of the question; and (4) answering by saying the information requested is privileged.<sup>61</sup>

During the distributive stage, negotiators begin discussing what they have and what they are willing to give up.<sup>62</sup> Whoever makes the first offer has a distinct disadvantage for two reasons.<sup>63</sup> First, the side who receives the first offer has a better idea of the expectations of the other side and can react strategically according to what information he or she received.<sup>64</sup> Second, negotiators who make first concessions tend to be anxious and therefore generate a less favorable outcome for their client than the opposing side.<sup>65</sup> The authors suggest that the most skilled negotiators always find a way to receive the first offer even though sometimes it may be difficult.<sup>66</sup>

Skilled negotiators must have a plan with regard to concessions or what they would be willing to give up.<sup>67</sup> The authors suggest that each concession should be smaller than the preceding one, and each should be made in response to an appropriate counter offer from the opponent.<sup>68</sup> The authors suggest abiding by these rules to demonstrate to the opposing party that the negotiator has control and patience.<sup>69</sup> When a negotiator establishes control and patience in a transaction, the opposing party will more likely respect the negotiator's position.<sup>70</sup> At a certain point, a negotiator should be willing to disclose alternatives to the opposing party.<sup>71</sup> As always, the negotiator must remember the BATNA associated with the current scenario and be willing to walk away when negotiations have passed that point.<sup>72</sup>

The closing and cooperative stages are the final two stages of the negotiation process.<sup>73</sup> In the closing stage, both sides are "psychologically committed" to a joint resolution.<sup>74</sup> The authors warn that a negotiator should not make a final concession they were unwilling to make previously just to finalize a deal.<sup>75</sup> The authors implore a negotiator to stay patient until all the details are finalized.<sup>76</sup> In the cooperative stage, negotiators focus on alternatives that may benefit both parties.<sup>77</sup> The goal is for both sides to cooperate to create win-win situations that were not previously discussed.<sup>78</sup> Ultimately, the parties must reach an agreement in writing so the agreement can be enforceable and binding.<sup>79</sup>

Throughout the negotiation process, negotiators are bound by the Model Rules of Professional Conduct (“Model Rules”).<sup>80</sup> Rule 4.1 of the Model Rules states that “an attorney shall not knowingly make a false statement of material fact or law to a third party.”<sup>81</sup> Comment 2 to Rule 4.1 specifically mentions that “different expectations are involved when lawyers are negotiating: Whether a particular statement should be regarded as one of fact can depend on the circumstances”<sup>82</sup> Under generally accepted negotiation conventions, certain types of statements ordinarily are not taken as statements of material fact.<sup>83</sup> The authors discuss that “Comment 2 not only permits attorneys to misrepresent their side’s settlement intentions, but also to misrepresent the way in which they subjectively value the items being exchanged.”<sup>84</sup> Negotiating lawyers do not have trouble complying with the Model Rules because items being exchanged in negotiation have subjective value, and therefore there is no need to comply with a truthfulness requirement.<sup>85</sup> Negotiators must tell the truth with regard to affirmative factual misrepresentations.<sup>86</sup> An affirmative factual misrepresentation is information that a person would rely on when making a decision that is not mere puffery or embellishment.<sup>87</sup>

## PART TWO: MEDIATION

Part Two introduces the ADR process of mediation.<sup>88</sup> Mediation is classified as a type of negotiation that involves a neutral third party, called a mediator.<sup>89</sup> The mediator is trained to help the parties reach a voluntary resolution of their dispute and facilitates the negotiation process between the parties.<sup>90</sup> Mediation is a flexible ADR process that can be triggered by court, contract, or party choice.<sup>91</sup> Many state and federal courts implement mandatory or voluntary mediation programs to encourage settlement of disputes to conserve judicial resources.<sup>92</sup> The point in time which a mediation is held directly impacts how the mediation will proceed because the discovery process that occurred will affect what information is available to both parties.<sup>93</sup> Mediation is viewed as a favorable alternative to litigation because mediation is substantially cheaper, the emotional costs are much lower, and mediation allows parties to control their own fate instead of a judge or jury.<sup>94</sup> However, some lawyers feel mediation is a waste of time and money and fear their litigation strategy will be revealed through disclosures during the mediation process. Even though mediation is traditionally more expensive than negotiation, mediation is preferred to negotiation in some cases

because a party can speak with a mediator instead of directly saying something potentially damaging to the opposing party.<sup>95</sup>

Parties are free to choose a mediator for their mediation, but sometimes the parties are limited to selecting mediators from a preapproved list.<sup>96</sup> Skilled negotiators do their research to identify a mediator who has the “style and experience that will best suit their clients’ needs, based upon the facts and personality of the case.”<sup>97</sup> Through all phases of the negotiation process, skilled negotiators make strategic, calculated choices to improve their client’s position.<sup>98</sup> Novice negotiators are passive and accept the selection of a mediator instead of being heavily involved in the selection process.<sup>99</sup> To correct this problem, the authors suggest that negotiators need to ask the following questions when selecting a mediator: (1) Do they need to be competent in a certain area of expertise?; (2) Do they need to be practicing law?; and (3) Are there any conflicts of interest?<sup>100</sup>

Mediators are usually categorized to be facilitative,<sup>101</sup> evaluative,<sup>102</sup> or transformative.<sup>103</sup> Each type of mediator has a unique style and method for conducting a mediation process.<sup>104</sup> As a result, each mediator has a different approach to caucusing.<sup>105</sup> Caucusing occurs when disputants retreat to a more private setting to process information, agree on negotiation strategy, and confer privately with counsel and/or the mediator.<sup>106</sup> During private caucus sessions, the mediator talks to each party individually.<sup>107</sup> Facilitative mediators resort to caucus sessions only when face-to-face talks are not progressing well.<sup>108</sup> Alternatively, directive mediators prefer to start with caucus sessions to confidentially determine what each side wants to achieve.<sup>109</sup>

Many mediations require confidentiality and the actual clients to be present at all mediation sessions.<sup>110</sup> Mediators usually conduct sessions at neutral locations that are suitable to all of the parties involved in the mediation.<sup>111</sup> At the beginning of a mediation, the mediators indicate that any information shared by a party will not be disclosed to the other party by the mediator without the party’s consent.<sup>112</sup> Mediators also stress the benefits of mediation as a “forward looking” mechanism, which focuses on the present

and future implications of a dispute, as opposed to litigation, which focuses on the past.<sup>113</sup>

Throughout the mediation process, the parties have to keep track of the negotiation proceeding as it relates to the client, mediator, and the opponent.<sup>114</sup> The authors analogize this process to playing “three dimensional tic-tac-toe” because of

how complicated it can be to keep track of each party's position.<sup>115</sup> The parties are trying to convince the mediator of the "strength and sincerity of their position" so that the mediator will work their hardest to achieve the best possible outcome for their side.<sup>116</sup> Skillful mediators always remind each party of the benefits of controlling the outcome of the dispute rather than risking the uncertainty of a judge or jury deciding the outcome.<sup>117</sup> The mediator effectively conveys the benefits of mediation compared to litigation by asking the parties the following questions: (1) What are the weak points of their case?; (2) How effective will their representation be in making their case?; (3) How will a jury will react to their case?; (4) What the trial will cost?; and (5) What is the probability of a favorable result at trial?<sup>118</sup> If mediation is successful, parties will reduce their agreement to writing and avoid judicial adjudication of the dispute.<sup>119</sup>

Ethical requirements of mediation are listed in the Model Standards of Conduct of Mediators, which were created in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Society of Professionals of Dispute Resolution.<sup>120</sup> If the parties did not adopt mediation rules of these organizations, then the parties can draft an agreement which will set out the rules of mediation.<sup>121</sup> Lawyers who advocate for a party during mediation must follow the Model Rules. Rule 1.4 requires a lawyer to "reasonably consult with [his or her] client about means by which the client's objectives are to be accomplished."<sup>122</sup> Rule 1.4 implies that lawyers should mention ADR mechanisms to their clients.<sup>123</sup> Although Rule 1.4 does not specifically mention ADR, the authors believe it would be prudent for a lawyer to mention this alternative to his or her clients.<sup>124</sup> At the beginning of mediation, mediators<sup>125</sup> need to be mindful of disclosing potential conflicts of interest to the parties involved in the mediation. Model Rule 1.12(a) requires written consent from the parties if there is a potential conflict of interest, but some states do not allow a mediation to proceed even if there is consent by the parties.<sup>126</sup>

### PART THREE: COLLABORATIVE LAW

Part Three introduces a relatively new form of ADR called collaborative law. Collaborative law involves the lawyers and clients who commit to resolving their dispute through cooperative strategies without the help of a mediator or third party.<sup>127</sup>

Negotiation in a collaborative law environment is much different from standard negotiations because “lawyers attempt to ascertain all of the true interests and needs of the parties and find solutions to meet as many needs as possible.”<sup>128</sup> Collaborative law is a process designed to build trust and transparency between the parties, and it is an effective ADR procedure for parties who wish to maintain amicable business relationships.<sup>129</sup> The unique aspect of collaborative law is that if the parties are unable to agree to a resolution of their dispute, the lawyers involved in collaborative law will not represent their respective clients through any form of litigation or other court-like proceeding.<sup>130</sup> Therefore, parties most likely do not retain their in-house counsel to handle a collaborative law meeting because the in-house counsel would be barred from representing their client in subsequent litigation.<sup>131</sup> The Uniform Law Commission drafted a Uniform Collaborative Law Rules Act that has since been accepted by several states.<sup>132</sup> The authors discuss that “more than 22,000 lawyers have been trained in collaborative law worldwide and more than 1,250 lawyers have completed their training in England and Wales, where collaborative law was launched in 2003.”<sup>133</sup>

Most lawyers believe that collaborative law is an ineffective, or soft, process because of the belief that there only can be “winners” and “losers” when a conflict arises.<sup>134</sup> However, trained collaborative lawyers believe in this process because they believe focusing on the needs and interests of the parties will create a resolution to a dispute that will maximize both parties’ benefits while reducing costs.<sup>135</sup>

The advantages of collaborative law make it an attractive ADR option.<sup>136</sup> Collaborative law is less adversarial, which benefits parties who wish to maintain ongoing relationships.<sup>137</sup> The collaborative environment encourages lawyers to think of creative solutions which may better suit the needs of the parties.<sup>138</sup> Another benefit of a collaborative law agreement is that both parties remain committed to settling the dispute.<sup>139</sup> In addition, the confidentiality of collaborative law proceedings is another benefit.<sup>140</sup> A Collaborative Law Participation Agreement, signed by the parties at the beginning of the process, provides that the parties agree to maintain the confidentiality of any oral or written communications made by the parties or their lawyers or other participants in the collaborative law process, whether before or after a lawsuit is formally filed.<sup>141</sup> Texas law provides that “a communication related to the subject matter of the dispute made by a participant in the collaborative law process is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial proceeding.”<sup>142</sup>

Collaborative law has some drawbacks for disputes that are too adversarial in nature.<sup>143</sup> Some parties are unable to work in a collaborative law environment due to the emotion attached to their claim. If lawyers are not properly suited for a collaborative law environment then a collaborative law process would be emotionally tolling as well as a waste of time and money.<sup>144</sup> Also, some parties do not have the funds necessary to pay for collaborative negotiation as well as litigation counsel if collaborative negotiations fail.

Collaborative law has become a more popular form of ADR utilized in divorce proceedings.<sup>145</sup> A study completed by David Hoffman, an attorney and mediator at Boston Law Collaborative Group, reported the average cost of a divorce to be \$6,000 to \$7,000 for mediation; \$19,000 to 20,000 for collaborative law; \$35,000 for traditional attorney to attorney negotiation; and a minimum of \$20,000 to \$50,000 for trial.<sup>146</sup> However, the authors of *Skills & Values* suggest that “while collaborative law is normally less expensive than traditional litigation, it typically involves the use of multiple professionals in addition to attorneys for both parties, including a divorce coach, a child development/parenting specialist, and an accountant.<sup>147</sup> The result is that this route typically costs three times as much as a mediated divorce.”<sup>148</sup>

Under a collaborative law agreement, a four way contract between two clients and two law firms that provides for mandatory withdrawal of counsel if a settlement is not agreed to between the parties has been viewed as “not inherently inconsistent with the Model Rules.”<sup>149</sup> Colorado is the only state that has not approved this type of agreement because Colorado viewed the contract as a non-waivable conflict of interest.<sup>150</sup> The ABA has since issued an opinion that directly rejects Colorado’s stance on the issue.<sup>151</sup> The opinion explains that the four-way agreement was permissible under Model Rule 1.2(c), where a lawyer can limit the scope of the representation with the client if the limitation is reasonable under the circumstances and the client gives informed consent.<sup>152</sup>

#### PART FOUR: ARBITRATION

Part Four introduces the ADR process of arbitration.<sup>153</sup> In an arbitration proceeding, each party presents evidence and legal arguments to the arbitrator, or a panel of arbitrators, who resolves the dispute by rendering an award.<sup>154</sup> Arbitration is

meant to be a streamlined,<sup>155</sup> court-like process that brings a sense of finality to disputes.<sup>156</sup> Parties have the ability to choose an arbitrator, or a panel of arbitrators, who have specific subject matter expertise.<sup>157</sup> Many people would rather have a complex dispute resolved by someone with subject matter expertise than a judge who most likely knows little about a specialized field.<sup>158</sup> Another basic characteristic of arbitration is that most proceedings are private.<sup>159</sup> Parties have the ability to apply administrative rules to an arbitration proceeding such as the AAA rules or put the rules of arbitration directly into the arbitration agreement.<sup>160</sup> Arbitration proceedings are generally shorter than a trial because no jury is involved and the discovery process is generally limited.<sup>161</sup> The authors state that arbitrators are not bound by substantive law, by quoting Justice Blackmun when he stated, “[A]rbitrators are not bound by precedent.”<sup>162</sup> According to the authors, “[arbitrators] may rule based upon their perception of what is fair as determined by common practice in the industry without regard to what the actual law may be.”<sup>163</sup> Another characteristic of arbitration is that the grounds of appeal are immensely limited.<sup>164</sup> The grounds for an appeal involve fraud, corruption, bias, evident miscalculation, and evident material mistake.<sup>165</sup>

The law that applies to arbitration agreements is the Federal Arbitration Act (FAA).<sup>166</sup> The FAA was enacted in 1925 to end judicial hostility toward arbitration agreements.<sup>167</sup> The FAA made arbitration agreements valid, irrevocable, and enforceable.<sup>168</sup> Since the FAA, “a great deal of law has developed regarding the enforceability of arbitration agreements.”<sup>169</sup> The Supreme Court has described the FAA as a broad, liberal policy favoring arbitration.<sup>170</sup> In addition, the Supreme Court declared that a fundamental principle of arbitration was a matter of freedom of contract.<sup>171</sup>

Once an arbitral clause exists, the arbitration process commences via written notice to the other party or the administrative agency, whichever is required by the arbitral clause.<sup>172</sup> A pre-hearing conference is planned and usually held over the telephone with the arbitrators and the two parties.<sup>173</sup> At the pre-hearing conference, the parties discuss scheduling, discovery requests, and evidentiary issues.<sup>174</sup> Next, the arbitration hearing is held, where the parties present evidence and deliver opening and closing arguments to the arbitrator who sits as the judge and jury.<sup>175</sup> The rules of evidence are relaxed, and each party has flexibility in the way they present their case to the arbitrator.<sup>176</sup> Sometimes, the arbitrators determine the outcome of a case based upon document submissions of the parties.<sup>177</sup> Finally, the dispute is resolved after the arbitrator renders an award, which is usually short and lacks sufficient detail to

prepare an appeal.<sup>178</sup> Types of disputes submitted to arbitration include commercial,<sup>179</sup> construction,<sup>180</sup> employment,<sup>181</sup> and sports disputes.<sup>182</sup>

## CONCLUSION

*Skills & Values* is a book that focuses on theory and practical application of skills needed to better understand and appreciate ADR. The book is intended for students in a classroom setting but could be helpful for lawyers looking for an initial introduction to the various ADR processes. The authors state specifically that the book is not intended to be a final authority on each ADR subject matter. This book achieves the authors' purpose by introducing students, in a survey fashion, to each area of ADR. Despite the length of the book, only 264 pages, the text contains useful information intended to help the reader understand each ADR field. Each section addresses a different ADR process by discussing the underlying theory, applicable rules of professional responsibility, and exercises to practice the learned skills. The exercises provide the most benefit to the reader because the book encourages a hands-on learning approach for the reader to fully understand each ADR process.

The authors did a masterful job explaining negotiation and the six stages of negotiation which include: (1) preparation; (2) preliminary; (3) information; (4) distributive; (5) closing; and (6) cooperative. Throughout the section, the authors provide extensive detail on how an effective negotiator should strategically approach each stage. Even an experienced negotiator would probably learn something new from reading this section. Therefore, I highly recommend this section to both experienced and novice negotiators.

The authors did an excellent job in the mediation section by defining meditation and describing the benefits of meditation. The authors focus on the advantages to mediation compared to negotiation, as well as different styles of mediators. Ultimately, the section was informative and provide the reader with a solid understanding of mediation.

The authors do a great job of explaining the new ADR technique called collaborative law. According to the authors, collaborative law is different from other ADR techniques because its main purpose is to bring both parties and their lawyers together in order to work collaboratively and creatively to produce a win-win situation for both parties involved. The authors recommend collaborative law in divorce proceedings but caution that it may be too expensive because the parties may have to

obtain new attorneys for litigation if the parties are unable to agree to an amicable resolution under collaborative law. Overall, the section was informative and provided the reader with adequate information to evaluate whether collaborative law would be an effective ADR mechanism for a dispute.

The arbitration section is much more underwhelming than all the other sections. Arbitration has been crafted and changed through the case law of the Supreme Court of the United States; therefore, it makes no sense that the authors decided to cite a handful of cases in the arbitration section of the book. I do not think there can be a good survey of arbitration, but the authors do a decent job of describing how a generic arbitration proceeding would work. Although, students can benefit by learning what an arbitration proceeding might be like, it is arguably more important for a student to understand what an arbitral clause must contain (or not contain) to be enforceable. Therefore, I believe another book could provide more comprehensive coverage on arbitration.

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WORKSHOP-IV

SETTLEMENT OF DISPUTES OUTSIDE COURT, FIRST HEARING

Paper presented by

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**Judicial Settlement under Section 89 C.P.C.**

**A Neglected Aspect.**

Section 89 C.P.C.

*"Settlement of disputes outside the Court. (1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for*

- a) arbitration;*
- b) conciliation;*
- c) judicial settlement including settlement through Lok Adalat; or*
- d) mediation*

*(2) Where a dispute has been referred*

*(a) for arbitration or conciliation, the provisions of the Arbitration and [Conciliation Act, 1996](#) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;*

*(b) to Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of subsection*

*(1) of [section 20](#) of the Legal Services Authorities Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;*

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*(c) for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the [Legal Services Authorities Act, 1987](#) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;*

*(d) for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed."*

(Corresponding Rules being Order 10 Rules 1A, 1B & 1C) Section 89

C.P.C. and the corresponding Rules were inserted

by Act No. 46 of 1999 (w.e.f. 1.7.2002). However the section contained some glaringly anomalous drafting errors due to clerical or typographical mistakes. Supreme Court in *Afcons Infrastructure Limited v. Cherian Varkey Construction Company Private Limited 2010 (8) SCC 24*, hereinafter referred to as *Afcon* under compulsion of circumstances rewrote the provision.

Part of Para 9 and paras 15 and 25 are quoted below:

*"9. If Section 89 is to be read and required to be implemented in its literal sense, it will be a trial Judge's nightmare. It puts the cart before the horse and lays down an impractical, if not impossible, procedure in subsection (1). It has mixed up the definitions in subsection (2)....."*

*15. If subsection (1) of Section 89 is to be literally followed, every trial Judge before framing issues, is required to ascertain whether there exist any elements of a settlement which may be acceptable to the parties, formulate the terms of settlement, give them to the parties for observations and then reformulate the terms of a possible settlement before referring it to arbitration, conciliation, judicial settlement, Lok Adalat or mediation. There is nothing that is left to be done by the alternative dispute resolution forum. If all these have to be done by the trial court before referring the parties to alternative dispute resolution processes, the court itself may as well proceed to record the settlement as nothing more is required to be done, as a Judge cannot do these unless he acts as a conciliator or mediator and holds detailed discussions and negotiations running into hours.*

*25. In view of the foregoing, it has to be concluded that proper interpretation of Section 89 of the Code requires two changes from a plain and literal reading of the section. Firstly, it is not necessary for the court, before referring the parties to an ADR process to formulate or reformulate the terms of a possible settlement. It is sufficient if the court merely describes the nature of dispute (in a sentence or two) and makes the reference. Secondly, the definitions of 'judicial settlement' and 'mediation' in clauses (c) and (d) of Section 89(2) shall have to be interchanged to correct the draftsman's error. Clauses (c) and (d) of Section 89(2) of the Code will read as under when the two terms are interchanged:*

*(c) for 'mediation', the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authorities Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;*

*(d) for 'judicial settlement', the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.*

*The above changes made by interpretative process shall remain in force till the legislature corrects the mistakes, so that Section 89 is not rendered meaningless and infructuous."*

In respect of judicial settlement it was observed in *Afcon* that 'judicial settlement is a term in vogue in USA referring to a settlement of a Civil case with the help of a judge who is not assigned to adjudicate upon the dispute' (para 12).

In the case of *Salem Advocate Bar Association v. Union of India* validity of amendments made in C.P.C. in 1999 and 2002, (both enforced w.e.f. 1.7.2002) including Section 89 was challenged. The first order was passed by the Supreme Court on 25.10.2002 reported in *AIR 2003 SC 189* hereinafter referred to as *Salem ABA* first order. Through the said order a committee was formed to devise inter alia,

'rules and regulations which should be followed while taking recourse to the ADR referred to in section 89. The model Rules which are formulated may be adopted by the High Courts concerned for giving effect to section 89 (2) (d)' para 12. Earlier the para 9 it had been observed that '*section 89 (2)(d), therefore contemplates appropriate rules being framed with regard to mediation,.*' (Underlining supplied)

In the end the matter was directed to be listed after 4 months to consider the report of the committee.

The requisite report was submitted which was considered in the second order reported in *AIR 2005 SC 3353* hereafter referred to as *Salem ABA* second order. The report was in three parts, report no. 2 dealt with Model ADR and Mediation Rules and was considered in paras 55 to 69. In para 69, covering

more than 9 pages of AIR the entire Rules prepared by the committee were reproduced. In para 73 it was hoped 'that the High Courts in the country would be in a position to examine the aforesaid rules expeditiously and would be able to finalize the Rules within a period of four months.'

Thereafter various High Courts adopted the Rules almost in verbatim including the High Courts of West Bengal (2006), Maharashtra (2007), Bihar (2008) & U.P. (2009). The Rules were framed / adopted exercising power under Section 89 and 122 C.P.C.

ADR Rules framed by Allahabad High Court define judicial settlement under Rule 2(g) as follows:

2(g) "*Judicial Settlement means a final settlement by way of compromise entered into before a suitable institution or person to which the Court has referred the dispute and which institution or person are deemed to be the Lok Adalats under the provisions of the Legal Service Authority act, 1987 (39 of 1987) and where after such reference, the provisions of the said Act apply as if the dispute was referred to a Lok Adalat under the provisions of that Act.*"

Rule 6 dealing with 'Procedure for Reference by the Court to the different modes of settlement provides under Subrule (c) as follows:

6(c) "*Where all the parties to the suit decide to exercise their option and to agree for judicial settlement, they shall apply to the court within thirty days of the direction under subrule (b) of Rule 3 and then the Court shall, within thirty days of the application, refer the matter to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and thereafter the provisions of the Legal Service Authority Act, 1987 (39 of 1987) which are applicable after the stage of making of the reference to Lok Adalat under that act, shall apply as if the proceedings were referred for settlement under the provisions of that Act.*"

Corresponding Rules of ADR Rules framed by Bihar, Maharashtra and West Bengal are word by word same.

It is strange that neither in first nor second order of *Salem ABA* the drafting errors in section 89, as pointed out subsequently by *Afcon* were noticed. As in para 9 of first order it was held that section 89 (2) (d) required framing of rules with regard to mediation, supra, hence the committee did not frame any

appropriate rule with regard to judicial settlement. Even though the Rules use the words 'judicial settlement' but they relate to Lok Adalat alone due to drafting error in Section 89 (undetected till then) under which the Rules were framed.

These Rules (in respect of Judicial Settlement) have become meaningless after correction of Clause (d) of sub section (2) of Section 89 by *Afcon*, supra in bold letters.

In fact section 89, as corrected by *Afcon*, require framing of Rules only in respect of judicial settlement as is evident from its last clause i.e. clause (d) of subsection (2) as per corrections affected by *Afcon*, supra in bold letters.

If the definition of judicial settlement given in para 12 of *Afcon*, supra, is to be fully incorporated in the section then until framing of proper Rule, it will remain a dead letter. In view of the definition given in *Afcon* no Court before whom the case is pending can by itself attempt judicial settlement and without proper Rule such Court has got no power to send the matter to other court for Judicial Settlement. Neither C.P.C. nor General Rules Civil warrant it. If the file is sent to District Judge on administrative side he will also feel the same inhibition. Moreover it will be quite difficult for the District Judge to decide that to which Court/ Judge such matter should be sent. All these requirements may be supplied by the Rules. However in my opinion there is no need to completely debar the hearing judge from attempting judicial settlement. The section does not warrant such approach. In *Afcon* also even though it was repeatedly stated that for judicial settlement matters should preferably be sent to some other judge but absolute bar was not prescribed vide para 44 (iv) infra:

*“(iv) If the Judge in charge of the case assists the parties and if settlement negotiations fail, he should not deal with the adjudication of the matter, to avoid apprehensions of bias and prejudice. It is therefore advisable to refer cases proposed for judicial settlement to another Judge.”*

In *Afcon*, it was held that framing and reframing of terms of settlement by the trial judge, even though matter of settlement etc. is to be referred to some other authority / agency, will be his nightmare (para 9) and it is not necessary (para 25). In para 44 (iii) it was observed that:

*(iii) The requirement in Section 89(1) that the court should formulate or reformulate the terms of settlement would only mean that the court has to briefly refer to the nature of dispute and decide upon the appropriate ADR process."*

However it was not explored that there might be some purpose not properly expressed for which such exercise was prescribed in the very first sentence of the section. Here also there is a drafting error. Such exercise is required only for judicial settlement and not when matter is to be referred for other modes of ADR provided in the section.

If this interpretation is correct then it cannot be assumed that the section imposes absolute bar on the trial judge to attempt judicial settlement.

The correct approach and interpretation will be that the trial judge may, at any stage of the suit, either before settlement of issues or even after hearing arguments in part, try to persuade the parties to settle the dispute amicably or may send the matter for the said purpose to some other judge, if Rules in this regard are framed. (However it shall not be done during continuance of oral examination as it may be used as a tool to delay, para 41 of *Afcon*) Same exercise may be done by the appellate Court also with greater chances of success as a judgment will already be there making each party realize the worth of his case to some extent. Section 89 uses the word 'Court' and not the words 'Trial Court'. It is utmost essential that if the judge finds that the learned counsel for both the parties, and the parties if present, are showing some interest in settlement, however faint or strong it may be, the proposed terms as come in the mind of the judge are reduced in writing on the order sheet and the parties are given two or three days time to consider the same. The counsel must be either supplied free copy of the said order sheet or be permitted to copy the order at once. The judges have to develop the skill of persuasion by practice. This is how I interpreted judicial settlement in section 89 C.P.C. and as Allahabad High Court judge attempted judicial settlement in about one thousand writ petitions, applying the principle of Section 89 C.P.C. My success ratio was about one third.

If the judge concerned considers that in attempting judicial settlement lot of time may be consumed, he may avoid that and persuade the parties to have recourse to other modes of ADR.

If the judge hearing a case attempts judicial settlement but fails, he may request the District Judge to transfer the case to some other judge only if one of the parties, request for the same otherwise there is no need for it. However in *Afcon* para 44 (iv), supra it has been directed otherwise.

If the terms of settlement formulated or reformulated in writing by Court have been accepted by parties and such acceptance, conveyed through their learned counsel has been recorded in the order sheet by the Court, there is no need to ask the parties to file formal compromise in terms of Order 23 Rule 3 C.P.C. This aspect also requires to be taken care of by Rules adverted to in Section 89(2)(d). However as far as U.P. is concerned, there is no need for separate Rule in this regard as by virtue of Allahabad High Court Amendment (31.8.1974) the following Explanation has been added to Rule 3 of Oder 23:

*“Explanation – The expression “agreement” and “compromise”, include a joint statement of the parties concerned or their counsel recorded by the court, and the expression “Instrument” includes a statement of the plaintiff or his counsel recorded by the court”.*

In this regard second sentence of para 39 and first sentence of para 40 are also quoted below:

*“39.....Where the matter is referred to another Judge and settlement is arrived at before him, such settlement agreement will also have to be placed before the court which referred the matter and that court will make a decree in terms of it.*

*40. Whenever such settlements reached before non adjudicatory ADR fora are placed before the court, the court should apply the principles of Order 23 Rule 3 of the Code and make a decree/order in terms of the settlement, in regard to the subjectmatter of the suit/proceeding.....”*

Clause (d) of sub section (2) of section 89 C.P.C. even after correction by *Afcon* (supra, in bold letters) requires further correction. It mandates that ‘court shall effect compromise’.

Through judicial settlement compromise cannot be forced upon the parties. It may be read as follows:

(d) for 'judicial settlement', if the parties accept the suggestion of the court for settlement of dispute, the court shall effect.....

(e) In *Afcon* also it was observed in para 43 (h) as follows:

*“(h) If the reference to the ADR process fails, on receipt of the report of the ADR forum, the court shall proceed with hearing of the suit. If there is a settlement, the court shall examine the settlement and make a decree in terms of it, keeping the principles of Order 23 Rule 3 of the Code in mind.”*

To the same effect is order 10 Rule 1c, infra:

*“1C. Appearance before the court consequent to the failure of efforts of conciliation. Where a suit is referred under Rule 1A and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then, it shall refer the matter again to the court and direct the parties to appear before the court on the date fixed by it.”*

As a topping to the title reference is made to the underlined part of the following portion of para 45 of *Afcon*:

*45. “.....We have referred to the procedure and process rather elaborately as we find that Section 89 has been a non starter with many courts. Though the process under Section 89 appears to be lengthy and complicated, in practice the process is simple: know the dispute; exclude 'unfit' cases; ascertain consent for arbitration or conciliation; if there is no consent, select Lok Adalat for simple cases and mediation for all other cases, reserving reference to a Judgeassisted settlement only in exceptional or special cases.” (underlining supplied) It is submitted with respect that judicial settlement, if used judiciously and tactfully, can do wonders and become most effective of all the five ADRs referred to in Section 89.*

In the end it is suggested that after 14 years of introduction of section 89 C.P.C., an impact assessment exercise may be done. Either High Courts from all the districts of their States or the Supreme Court from all the districts of the Country may get the following information in respect of suits instituted in a particular year say 2014:

- i. Total number of suits instituted

- ii. Number of suits in which any of the ADRs under Section 89 was attempted, and their split subject wise and ADR wise
- iii. Number of suits in which attempted ADR succeeded and their split subject wise and ADR wise
- iv. Number of suits in which attempted ADR failed and their split subject wise and ADR wise
- v. Number of suits in which attempted ADR are pending and their split subject wise and ADR wise

(For subject wise split only broad categories, 4 or 5 in number may be chosen)

Result of the survey may help in better implementation of the provision.

## Out-of-Court-Settlement

An out-of-court settlement occurs when the two parties make an agreement on any claim without having a judge come to a decision in the case. Generally, an out-of-court settlement allows one party to pay a sum of money to the other and in return the other party will close their lawsuit. Mainly, a settlement is a lawfully binding agreement which ends the case exclusive of going to court. The best ways to record an out of court settlement is to enter into an agreement that is binding on both parties detailing the terms of settlement. This agreement must be carefully drafted.

It is also possible to do an out of court settlement even when a court case is going on.

However, the most common way to reach a solution in a dispute without having to go to court, which in India is expensive and can take decades to come to a conclusion, is “Alternative Dispute Resolution” (ADR).

- **Alternative Dispute Resolution** (ADR) mainly refers to dispute resolution outside of the courtroom which mainly includes arbitration, mediation or mini-trials. ADR techniques can be applied in some categories of disputes, especially, civil, commercial, industrial and family disputes.
- **Alternative Dispute Resolution** is a term used to express several different modes of resolving lawful disputes. It is practiced by the business world with common men because it is impossible for many people to file lawsuits and get appropriate justice on time. To resolve this problem of unsettled justice, ADR method has been developed in answer to thereof.

- **Alternative Dispute Resolution is generally less official, less expensive and less time-consuming than a usual trial.** It provides people additional opportunity to settle on when and how their dispute will be determined. The key reasons that the parties may prefer ADR procedures are often two-way and let the parties to recognize each other's positions.
- **It also allows the parties to come out with more innovative solutions that a court may not be legally permitted to enforce.** Using Alternative Dispute Resolution (ADR) method to resolve disputes can save time, money, provide more control over the case and on the outcome.

## **The first hearing**

The first court hearing, called the First Directions Appointment (FDA), will take place around 3 or 4 months after the first form (Form A) was received by the court. The main purpose of this hearing, is to ensure that all parties (including the court) have the information needed to make a decision regarding the financial settlement.

The court can make various directions to enable any disputes to be resolved at this stage, that each party may have to comply with. These could include an order to get a property valued or for any further questionnaires to be answered and exchanged by a certain date.

This hearing can sometimes be used as an FDR hearing, if matters are relatively simple and full and frank disclosure has taken place. Sometimes, an agreement is reached at this hearing, so there is no need to proceed with the expense of further court hearings.

## **The financial dispute resolution hearing - what is it?**

Formally incorporated into court proceedings in June 2000, the financial dispute resolution hearing is the second court hearing.

It was designed so that the parties involved in the proceedings, could discuss and attempt to resolve any issues with regards to their financial settlement, with the ultimate aim of reaching an agreement, with the help of a judge.

In the [Financial Dispute Resolution Appointments: Best Practice Guidance](#) produced by the Family Justice Council in 2012, the FDR hearing was talked about as an “innovative development”, which is there to help parties resolve the “real issues in the case, at a time and in a manner intended to limit the overall financial cost for the parties, to reduce delay in resolving the case and to lessen the emotional and practical strain on the family of continuing litigation.”

The FDR hearing is an opportunity to openly discuss and negotiate. Sometimes, refusing to negotiate could result in an order for costs.

As well as full and frank financial disclosure, it is also important that you and your spouse provide the court with details of any previous offers of settlement that have been made and subsequently rejected by you or your spouse.

### **Will the judge make a final decision regarding my financial settlement at the FDR hearing?**

At the FDR hearing, the judge should be able to provide you and your spouse with an indication as to what your final settlement could look like, if a judge was asked to decide it at the Final Hearing.

This is not binding. The judge at the FDR does not make a final decision regarding your financial settlement. If you cannot reach an agreement and progress to the Final Hearing, there is no guarantee that the judge at this hearing would reach the same conclusion. However, many people find this to be a ‘turning point’ and reach an agreement soon after hearing this ‘objective’ point of view from the judge at the FDR.

The judge at the FDR hearing should also advise you and your spouse of how important it is to reach a settlement at this stage, in part because of the expense of a Final Hearing.

Additionally, judges may also remind both parties of how unpredictable a Final Hearing can be.

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WORKSHOP-IV

SIGNIFICANCE OF SECTION 89, ORDERS X, XI, XII, XIII ETC., OF CODE OF CIVIL PROCEDURE

Paper presented by

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Section 89 of the Code of Civil procedure was introduced with a purpose of amicable, peaceful and mutual settlement between parties without intervention of the court. In countries all of the world, especially the developed few, most of the cases (over 90 per cent) are settled out of court. The case/ dispute between parties shall go to trial only when there is a failure to reach a resolution. Section 89 of the Code of Civil Procedure States that:

*(1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the court may reformulate the terms of a possible settlement and refer the same for (a) arbitration;*

*(b) conciliation*

*(c) judicial settlement including settlement through Lok Adalat; or*

*(d) mediation.*

*(2) Where a dispute had been referred-*

*(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act.*

*(b) to Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;*

*(c) for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;*

*(d) for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.]*

Section 89 came into being in its current form on account of the enforcement of the CPC (Amendment) Act, 1999 with effect from 1/7/2002. At the commencement of the Code, a provision was provided for Alternate Dispute Resolution. However, the same was repealed by the enactment of the Arbitration Act ( Act 10 of 1940) under Section 49 and Sch. 10. The old provision had reference only to arbitration and its procedure under the Second Schedule of the Code. It was believed after the enactment of the

Arbitration Act, 1940, the law had been consolidated and there was no need of Sec 89.

However, the Section was revived with new alternatives and not only restricted to arbitration. A new Section 89 came to be incorporated in the Code by Section 7 of the CPC Amendment Act, 1999 to resolve disputes without going to trial and pursuant to the recommendations of Law Commission of India and Malimath Committee report.<sup>[v]</sup>

Section 89 along-with rules 1A, 1B and 1C of Order X of First schedule have been implemented by Section 7 and Section 20 of the CPC Amendment Act and cover the ambit of law related to Alternate Dispute resolution. The clauses under Order X are specified to ensure proper exercise of jurisdiction by the court. Sub-Section (1) refers to the different mediums for alternate resolution and sub-section (2) refers to various Acts in relation to the mentioned alternate resolutions.

The changes brought in by the CPC Amendment Act, 1999 have no retrospective effect and *shall not affect any suit in which issues have been settled before commencement of Section 7 of CPC Amendment Act, 1999 and shall be dealt as if Section 7 and 20 of CPC Amendment Act never came into force.*

The decision of the forums specified under Section 89 shall be as effective, having same binding effect, as court orders/decrees and arrived at a relatively cheaper cost and within a short span of time.<sup>[vi]</sup> The rules inserted under Order X provide for when court

may direct to take recourse to alternate means to resolve disputes, the duty of parties to appear before such forums and the responsibility of the presiding officer to act in interest of justice and return the suit if better suited for the court.

#### ARBITRATION AND CONCILIATION ACT, 1996 AND SECTION 89

There are various modes for the settlement of disputes in India. One such mode is the Alternative Dispute Resolution modes which is summarized and formulated in terms of Section 89 of the Civil Procedure Code. Alternative Dispute Resolution in itself involves Arbitration, Conciliation and mediation. Section 89(2) provides that where a dispute has been referred for Arbitration or Conciliation, the provisions of the Arbitration and Conciliation Act, 1996 would apply and thus, it would imply that the proceedings of such a matter for Arbitration and Conciliation took place under the provisions of the 1996 Act. The power of the Court to refer the parties to arbitration is dealt by Section 8 of the 1996 Act. This however is subjected to the presence of an arbitration agreement between the parties involved.

A point of difference between the Arbitration and conciliation Act and Section 89 of the code is that under the Act, the parties would referred to arbitration whereas under the Code, the court actually asks the parties to choose one or other ADRs including Arbitration and parties may choose accordingly. Thus, Section 89 cannot be resorted to for interpreting Section 8, Arbitration and Conciliation Act, 1996 as it stand son a different footing and it

would be applicable even in case where there is arbitration agreement.<sup>[xxxii]</sup>The High Court is empowered to make rules to all proceedings before the Court under the provisions of the Arbitration and Conciliation Act, 1996 under Section 82. These rules however have to be consistent with the said Act. The same power is conferred upon the Central Government under Section 84 of the Act. Contrary to this, when parties agree to go for arbitration under section 89 of the code, the option of the parties to choose arbitration and the procedure for the same is not contemplated by the Arbitration and Conciliation Act, 1996 and Section 82 and 84 has no application under these circumstances. Arbitration and Conciliation Act, 1996 would apply to proceedings only after the stage of reference and not before the stage of reference when options are given under section 89 of the code, if reference to arbitration is made by the parties under Section 89. Drawing analogy on the same, it will be only after the stage of reference to conciliation that the 1996 Act pertaining to conciliation would apply.

A similar analogy can be drawn with respect to the Legal Services Authority Act, 1987 or the rules formed by the State government cannot act as impairment upon the High Court making rules under Part X of the Code incorporating within itself the option that Lok Adalats can also be made one the modes provided under Section 89. Similar to the Arbitration and Conciliation Act, 1996, the Legal services Authority Act, 1987 also does not provide to the parties the option to choose one of the four ADR methods as mentioned in Section 89. Section 89 makes applicable 1996 Act

and 1987 Act from the stage after exercise of options and making of reference.[xxxiii] The power under Section 89(1)(a) and 89(2) (a) to refer the parties for arbitration would and must necessarily include , imply and inhere in it the power and jurisdiction to appoint the Arbitrator also.[xxxiv]When the Arbitration and Conciliation Act which is a special law provides for a forum to adjudication, Section 89 Code of Civil Procedure cannot be resorted to refer a dispute for arbitration unless there is mutual consent of all parties or arbitration agreement.[xxxv] It was also held by a SC judgement that Section 5 of the Act does not debar a revision being filed against the order passed by a civil court in an appeal under Section 37 of the act.[xxxvi]

As aforementioned, Section 89 of the Civil procedure Code cannot be used to interpret and understand the provisions under Section 8 of the Arbitration and Conciliation Act,1996. Still, for this purpose, the court has to apply its mind to the condition contemplated under Section 89 of the Code and even if the application under Section 8 is rejected, the Court is bound to follow the procedure as laid down under the said section.[xxxvii]

## WORKSHOP-IV

# ROLE OF REFERRAL JUDGES, LAWYERS AND PARTIES IN MEDIATION

\_\_Paper presented by  
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### *Role of Advocates and Referral Judges in Mediation*

#### INTRODUCTION

Now it is well accepted notion that mediation is one of the Alternative Dispute Resolution Mechanism. The process of mediation consists of the Parties, Mediator, Referral Judge as well as Advocates of the concerned parties. Mediation being a somewhat new process there is little support from the Advocates in this process. At the same time, though the Parliament has amended Section 89 of the Code of Civil Procedure by introducing various modes of Alternative Dispute Resolution Mechanism to be followed by the Judge while dealing with the pending matter, it is generally observed that number of cases referred to the Mediation process is not commensurate with the pendency of the cases in the Court. There is misconception prevailing in the Advocates' community as well as Judicial System that the role of the Advocates and Judges in Mediation is optional. But, this conception is erroneous. The Advocates as well as Referral Judges have important roles in the process of Mediation. The roles of both are discussed here-in-below.

#### ROLE OF ADVOCATES IN MEDIATION

It is a common belief that in Mediation the participation of Advocates is optional and or that they have no role to play. This belief is erroneous. Advocates

do play dominant and prominent and active role in the mediation process during preparation, during mediation and after the conclusion of mediation. Mediation of a case is incomplete without the consent, presence and active participation of the advocates representing the parties in the mediation process.

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

Hon'ble Mr. Justice C. Nagappan,<sup>169</sup> emphasized the vital role played by advocates in mediation to assist the parties by preparing their clients, motivating them by informing of the benefits of mediation and assist them in mediation. The Advocates should change their attitudes of 'winning at all cost' and acting as an adversary to talking a reasonable approach and behaving in a non-adversarial manner to assist the party to reach an amicable settlement, which is a statutory obligation under section 89 of Code of Civil Procedure, 1908.

Mediation is assisted negotiation. Negotiation is central to Advocacy. Advocates play a critical role in many society's negotiations. "Because of their skills and experience advocates have superior opportunities to do good", said Abraham Lincoln. They can be peacemaker. They can help people construct fair and durable commitments, feel protected, recover from loss and resolve disputes. They also have an ability to do considerable harm. They can aggravate hostilities and run up substantial transaction costs. Given a choice most of us would choose to good.

The adversarial nature of our judicial system, the temptation to act out of self-interest, the rewards of playing the hard ball, the inflated expectations of clients and constraints of bargaining are the shadows of law. The incentive to act combatively can be compelling. However costs in adversarial tactics can be ruinous. Deals blow up, cases don't settle, expenses escalate, relationships fail, reputations suffer, court dockets jam up, commitments fall apart, justice is delayed and opportunities to create value – to, make both sides better off – slip away. Mediation is for advocates who feel sickened by trench warfare and exhausted by cases that drag on unnecessarily for years. Advocates who want to change the way things work, the advocates who wonder whether they picked the right profession. Whether people are making deals or negotiating settlements conflict is inevitable. None of us can control that. What we can do is to offer a new way to look at these conflicts that will minimize costs and create value for both parties. Advocate's main duty and function is to advise their clients what is most advantageous to them and how their disputes can be resolved in the fastest manner. If clients get quick results they will be willing to pay more. Again reputation of an advocate that he helps in bringing satisfactory results speedily, either by settlements or by trial will fetch more work and clients. By trial one can hardly bring quick results and the matter would not end in the trial court. The mediation process not only encourages advocates to appear in mediation proceedings but also welcomes them to continue to represent their clients before the mediator.

In mediation reference advocates continue to represent the same clients in the same case. They can properly advise the clients whether the case is proper for mediation or not, they can help the clients in negotiation and can supervise and advise whether mediation proceedings are progressing well. They can advise their clients on questions of law, on disadvantages of court litigation and uncertainties ahead in the adjudicative process. They can help assess the merits of the case, preparing to present mediation briefs and contribute very effectively at every stage of mediation. Most importantly, presence of their advocates during the mediation process will give the greatest security to the clients process wise and also substance wise. While appearing in mediation advocates will develop a specialized new branch of practice, help in creating harmony in the society and with appropriate

experience and training can also develop practice as a mediator. By practicing and promoting mediation one takes up the challenges of helping people resolve their disputes in a peaceful manner. Advocates will find this kind of work very rewarding and challenging. Each time one is able to help people find their way to an agreement one would feel personally responsible for their deliverance from a state of disharmony to a state of harmony. There is always a difference between winning a case and finding a solution. To preserve, develop and improve communication between estranged parties, build bridges of understanding, find out options for settlement for mutual gains, search unobvious from obvious, dive underneath a problem and dig out underlying interests of the disputing parties, help them find out their needs and priorities, preserve and maintain relationships and participate in collaborative problems solving are some of the soul-searching exercises one undertakes in mediation. Ignorance ignites anxiety, irritability, hatred, lack of faith and suspicion leading to insecurity and hostility. Mediation helps in overcoming negative human values and leads to peace and harmony. Mediation is a welcome challenge to the spirit of advocacy and helps restore the benevolence of the profession.

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

- (i) Pre-mediation;
- (ii) During mediation; and
- (iii) Post-mediation.

### **PRE-MEDIATION**

The role of the advocate in our legal system is associated with the functioning of Courts. Mediation does not postulate the displacement of the advocate. Mediation does, however,

contemplate a shift in the focus of the legal profession. The role play in mediation would require advocates to be effective participants in dispute settlement outside the Court. When faced with a dispute and the prospect of approaching an adjudicatory forum for relief, apart first contacts an Advocate. The Advocate must first consider whether there is scope for resorting to any of the Alternative Dispute Resolution mechanisms. Where mediation is considered the appropriate mode of Alternative Dispute Resolution, educating the party about the concept, process and advantages of mediation becomes an important phase in the preparation for mediation. The Advocate is best placed to assist his client to understand the role of the mediator as a facilitator. He helps the client to understand that the purpose of mediation is not merely to settle the dispute and dispose of the litigation, but also to address the needs of the parties and to explore creative solutions to satisfy their underlying interests. The Advocate can help the parties to change their attitude from adversarial to collaborative. The party must be informed that in a dispute involving the break down of relationship, whether personal, contractual or commercial, mediation helps to strengthen/restore the relationship. While helping the party to understand the legal position and to assess the strength and weakness of his case and possible outcome of litigation, the Advocate makes him realize his real needs and underlying interest which can be better satisfied through mediation. Before their clients decide whether to mediate, Advocate(s) may give initial advice concerning whether it is in the clients' best interest to participate in mediation.

More importantly, the role and function of the advocate has to be radically modified from being a participant in formal legal resolution of disputes to being an important functionary who will guide parties in the true realization of their interests and towards achieving negotiated settlements. The most fundamental change in perception has to be that mediation must provide effective intervention before disputes assume the formal legal character of a Court case. The vital role of

the legal profession is being associated through the mediatory process of being willing participants in dispute settlement.

The Bar Council performs an important role in relation to legal education and it is, therefore, only legitimate to expect that formal changes in the curriculum for legal education are brought about. Legal education centered on precedents and cases must now accommodate practical training in mediation. Some of the premier law schools in the country have incorporated alternative dispute resolution techniques as a part of the curriculum but this development has largely been isolated and sporadic. The programme of awareness and advocacy must extend to students of law who will be lawyers of the tomorrow. The success of the movement towards the mediation will depend in a large measure upon the co-operation of the legal profession. Awareness, advocacy and the need for positioning senior members of the Bar in positions of leadership is the sine qua non in order that mediation is able to develop into a viable system<sup>171</sup>

Advocate(s) assist the mediator in educating and informing the mediator of the validity and sustainability of the legal contentions urged in the case. Quite often, the parties to a dispute become aware of the strengths and weaknesses of their case only at the mediation. Hence, the information provided by the Advocate(s) could make the difference between a successful and failed mediation. Advocate(s) may prepare mediation brief to summarize the legal issues/claims and defenses in order to facilitate the mediator. Advocates typically prepare exhibits for mediation, including relevant documents, bills, vouchers and other documents etc. Prior to mediation, Advocates should discuss with their clients the strengths and weaknesses of their cases, their overall negotiation goes, their opening offer, their bottom line (reservation price), and can guide their parties to end the litigation if really the mediation is beneficial to their clients.

Whenever any party approaches an Advocate mediator before the litigation comes to the court, the advocate can scuttle the matter, by using the skills of mediation and avoiding the litigation going to the court.

### **DURING MEDIATION**

The role of Advocates is very important during mediation also. The participation of Advocates in mediation is often constructive but sometimes it may be non-cooperative and discouraging. Advocate(s) may attend mediation sessions and participate directly in mediation in the same manner as they participate in Arbitration. Advocate(s) can help their clients in choosing appropriate process and assist their clients to participate in mediation. The attitude and conduct of the Advocate influence the attitude and conduct of his client. Hence, in order to ensure meaningful dialogue between the parties and the success of mediation, Advocates must have a positive attitude and must demonstrate faith in the mediation process, trust in the mediator and respect for the mediator as well as the other party and his counsel. The Advocate must himself observe the ground rules of mediation explained by the mediator and advise the party also to observe them. The Advocate must be prepared on the facts, the law and the precedents. At the same time, he must enable and encourage the party to present his case before the mediator. Considering that the party may not always be able to state the complete and correct facts or refer to the relevant documents, the Advocate must be alert and vigilant to supplement them. With the help of reality-testing, using the BATNA/ WATNA analysis, the Advocate must constantly evaluate the case of the parties and the progress of mediation and must be prepared to advise the party to change position, approach, demands and the extent of concessions. When it is felt necessary to have a sub-session with the Advocate(s) the mediator may hold such sub session with the Advocate(s) and the Advocate(s) must cooperate with the mediator to carry forward the process and arrive at a settlement. Such sub-sessions with the Advocate(s) can be held by the mediator also at the request of the party or the Advocate. The Advocate participates in finalizing and drafting the settlement between the parties. He must ensure that the settlement recorded is complete, clear and executable. He must also explain to his client and make him understand every term of the settlement.<sup>172</sup>

During the process of the mediator about the legal issues involved, the relative strengths and weaknesses of each other's case is assessed by the Advocates of the opposite party thereby leading to a reality check. The reality check assists the mediator in moving the parties towards resolution of the dispute as unrealistic claims become apparent. As advocate(s) represent the disputing parties in the court, their

knowledge of the real needs/ interest of their clients and current judgments, law relating to the subject matter of dispute would also be up to date. Providing such ~~information in mediation process~~ to the mediator ensures that neither party suffers injustice nor that settlement is contrary with prevalent law. Advocates can help in explaining to their clients consideration of costs and potential benefits of mediation to their clients. Advocates advice prior to mediation will be useful in explaining process and finding our underlying interests, priorities and in generating and selecting options of settlement. Presence of advocate(s) during mediation facilitates discussion with their clients and also can help in preparing mediation brief. Advocate(s) can act as a crucial check against uninformed and pressured settlements. Further proper advice by advocate to the clients on legal assessments of their cases can be of great value. In impasses situations create during mediation, advocate by their creative contribution help in coming of impasse situation.

If the Advocate knows the skills of Mediation, in the court also he can use the skill, to advice the parties as his counsel and even the other counsel appearing for other side, to explore the possibility of settlement.

### **POST-MEDIATION**

After conclusion of mediation also, the Advocate plays a significant role. If no settlement has been arrived at, he has to assist and guide the party either to continue with the litigation or to consider opting for another Alternative Dispute Resolution mechanism. If a settlement between the parties has been reached before the mediator, the Advocate has the responsibility to reassure his client about the appropriateness of the client's decision and to advice against any second thoughts. To maintain and uphold the spirit of the settlement, the Advocate must cooperate with the court in the execution of the order/decreed passed in terms of the settlement.

Bar members are officers of the court and owe a duty to the courts to be fair and assist the court in dispensation of justice. Similarly, in mediation they are expected to render assistance in settlement of cases, there by contributing actively to the dispensation of justice in the country. The presence of Advocate(s) in the mediation is reassuring to the parties as they feel safer and more secure in the presence of their respective advocate(s). It allows parties to seek advice/opinion from their counsel whether they desire to do so during the process. When the impasse occurs, the skill and knowledge of the Advocate(s) is required for by the mediator to resolve the impasse.

Therefore, it is the need of the day that the Bar should actively cooperate with the Bench, in litigation exploring the benefits of the mediation process in order to avoid initiation and continuation of a litigation. They must develop a culture that they are also part of mediation institution and their role is also one of the important components of the institution.

Mediation is assisted negotiation and negotiation is central to advocacy and thus advocacy play a critical role in many of society's negotiations and can be peacemakers and can help people construct fair and durable commitments, feel protected, and recover from loss and resolve disputes. If advocate(s) encourage their client to go in for mediation, it will result in speedy resolution of their disputes and will in turn fetch meaningful work for the advocate. Mediation is a welcome challenge to the spirit of advocacy and helps restore the benevolence of the profession, which has also developed a specialized new branch of practice.<sup>174</sup>

The role of advocate(s) representing the parties in the entire process of mediation and advocate(s) in an adversarial system in a Court, is completely different from a role which play in mediation where the entire enterprise is based on the co-operation of the parties. Advocate(s) is expected to approach the entire issue not in terms "My way" and "Your way" but in a synergy of the two, which leads to "our ways". The Advocate is also required to play a role in explaining to his/her client the entire process of mediation, and that his job also involves conveying to his client the possible outcomes of the disputes depending upon the merits of his/her case, and thereby the advocate positions his client for better settlement. The skill required in mediation for a advocate would also be different from those required in the Court proceedings, for whereas in Court the Advocate needs oratorical skills, in mediation he needs the skill to negotiate effectively in mediation. The objective of the advocate is to get maximum benefit for his client, based on his interest and learn when to "let go" at the right time. The advocate(s) role is crucial as ethical issues are also involved and that the Advocate has an important role to play in drafting the final settlement between the parties.<sup>175</sup>

Good Advocate(s) must have the skills required for professional competence. But this is not enough. They must know how to carry the burdens of other people on

their shoulders. They must know of pain, and how to help heal it. Advocate(s) can be healers. Like Physicians, minister and other healers. Advocate(s) are persons to whom other people open up their innermost secrets when they have suffered or are threatened with serious injury. People go to them to be healed, to be made whole, and to regain control of their lives.<sup>176</sup>

It is believed only a legal system based on the principles of impartiality, integrity and independence can reinforce public faith in the courts. But when a person finds himself in the complex world of litigation both as financially and emotionally, he is left with no option but to resort to the mediation mechanism.

Amidst such condition, it is the obligation of lawyers to advice clients about litigation alternative to conflict resolution. Mediation allows people to resolve their disputes outside the court in a cooperative manner and is generally viewed as an attractive incentive for lawyers who want to push for settlement.<sup>177</sup>

If all the Advocates are trained as mediators, they can very well mediate cases before the parties approaching the court and even after, sitting across the table together. Using the mediation technique in their daily affairs changes the perception, personality and develops a wide vision, and magnanimous attitude towards the litigants and society. If the skills are not properly used, or they are misused, it definitely creates a lot of problems to the litigants, Courts and also to Advocates.

Warren Burger once said<sup>178</sup>

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“The obligation of the legal profession is ... to serve as headers of human conflict... (we) should provide mechanisms that can produce an acceptable result in shortest possible time, with the least possible expense and with a minimum of stress on the participants. (Courts) should provide mechanism that can produce an acceptable result in the shortest possible expenses and with a minimum of stress in the participants. That is what all about.”

## **ROLE OF REFERRAL JUDGES IN MEDIATION**

In mediation, the key to success depends on Judges referring appropriate cases, which occurs at the very beginning of the process. Conversely, failure is dependent on referring inappropriate cases.

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

The advantage of court annexed mediation is that the Referral Judge, counsels and litigants become participants therein, thereby giving them a feeling that negotiated settlement is achieved by all the three actors of justice delivery system.

In Court annexed mediation, the fountainhead of mediation is the Referral Judge who initiates the process by passing a referral order in a pending litigation, either with the consent of the parties who are willing to try mediation or in cases where the referral judge considers it fit and appropriate to send parties for mediation after being satisfied that there exist elements of settlement. Hence, “reference” is a pre-requisite to initiate the mediation proceedings. Section 89 read with order X Rule 1-A<sup>179</sup>, 1-B<sup>180</sup> & 1-C<sup>181</sup> of the Code of Civil Procedure is the source of power of a Referral Judge. Section 89 is the substantive section which empowers the court to refer appropriate cases for settlement outside the court and Order X Rule 1-A, 1-B & 1-C are the procedural provisions. As per the provision of Order X Rule 1-A, after recording admission or denial of documents, the court is under an obligation to direct the parties to the suit to opt for any of the four modes of settlement as specified in sub-section (1) of the Section 89 Code of Civil Procedure and on the option of the parties, the court fixes the date of appearance before the forum or authority as opted by the parties. This is not to say that the courts cannot permit/call upon parties to undergo mediation at an earlier stage of completion of pleadings and even at a later stage, during the course of evidence. A

case may be referred for mediation at any stage of the trial, but courts must ensure that a request for sending the parties to mediation does not become a tool for procrastination in the hands of a party inserted in unnecessarily delaying the court proceedings.

Success in mediation depends to a great extent on the Referral Judges ~~referring such cases, which~~ in their opinion, they think are fit for mediation. The responsibility cast on the Judge while making a reference is therefore onerous and crucial. Proper referrals help reduce the caseload, maximize success of mediation and increase the litigant's satisfaction with the justice system. While making appropriate referrals reduces the work load of a judge, inappropriate referrals results in waste of precious time and delays the trial. It also damages the perceived effectiveness of the Alternative Dispute Resolution process and results in ending up back in Court with a failed experience.

### **MOTIVATING AND PREPARING THE PARTIES FOR MEDIATION**

The referral judge plays the most crucial role in motivating the parties to resolve their disputes through mediation. Even if the parties are not inclined to agree for mediation, the referral judge may try to ascertain the reason for such disinclination in order to persuade and motivate them for mediation. The referral judge should explain the concept and process of mediation and its advantages and how settlement to mediation can satisfy underlying interest of the parties. Even when the case in its entirety is not suitable for mediation a Referral Judge may consider whether any of the issues involved in the dispute can be referred for mediation<sup>182</sup>.

### **STAGE OF REFERENCE**

The appropriate stage for considering reference to Alternative Dispute Resolution processes in civil suits is after the completion of pleadings and before framing the issues. If for any reason, the court did not refer the case to Alternative Dispute Resolution process before framing issues, nothing prevents the court from

considering reference even at a later stage. However, considering the possibility of allegations and counter allegations vitiating the atmosphere and causing further strain on the relationship of the parties, in family disputes and matrimonial cases the ideal stage for mediation is immediately after service of notice on the respondent and before the filing of objections/written statements by the respondent. An order referring the dispute to Alternative Dispute Resolution processes may be passed only in the presence of the parties and/or their authorized representatives.

The role of Referral Judges in the mediation process can be recognized into three stages<sup>183</sup>;

1. Pre – Mediation,
2. During Mediation and
3. Post – Mediation

#### **PRE – MEDIATION:**

At the pre - mediation stage, in proceedings in a civil suit, after the pleadings are complete and documents of the parties are put to admission/denial, at the stage of framing of issues, the Referral Judge has the benefit of perusing the pleadings and examining the respective stands of both the parties. At this stage, the Referral Judge is expected to objectively evaluate all the important factors which in his/her discretion will facilitate a successful mediation. Before selecting the cases appropriate for mediation, he/she is expected to take into consideration the following factors:

- (a) The factor as to ripening of the case for mediation.
- (b) The factors as to the elements of settlement.

(c) The factor of Government being a party to the suit.

**(a) The factor as to ripening of the case for mediation**

As noted earlier, the stage of the trial is not material. Statistics reveal that quite a large number of cases which were at the stage of completion of pleadings have been successfully settled through mediation. At the same time, it may be mentioned that a pre-mature reference can be self-defeating as the parties may not be ready for it. Some points that the Referral Judge needs to ascertain at this stage as to:

- (1) Whether the parties are agreeable to a negotiated settlement of their disputes?
- (2) Are the parties ready for it?
- (3) Whether the parties and their advocates have positive attitudes?
- (4) Are there any reservations to mediation and if so, can they be overcome?
- (5) Have previous attempts to mediate been made and failed and if so, why?
- (6) Have the parties reached the “Fatigue Stage”?
- (7) Whether the parties want a prompt resolution of their disputes?

- (8) Whether the parties are inclined to maintain/build upon their relationship in the future?

**(b) The factors as to the elements of settlement**

The nature of dispute involved must be assessed by the Referral

Judge before selecting cases for mediation. The general rule is that every case can be settled through mediation, exception being such case where there is some law point to be settled or constitutional issues are involved for decision by the court or the question involved relates to public policy or there are so many parties involved in the case, that mediation is not a viable solution or where parties simply refuse to negotiate a settlement and also where either of the parties have been proceeded against ex-parte.

**(c) The factor of Government being a party to the suit**

If the Government, its agency or a statutory body is one of the litigators, than in such a case, Alternative Disputes Resolution through LokAdalat is preferable and more accepted route for exploring settlement. However, there can be no hard and fast in this regard, and each case has to be scrutinized by the Referral Judge in its own context before sending it to mediation.

Once the Referral Judge identifies a case as being fit for mediation, he/she must call the parties and highlight the benefits of settlement of disputes through mediation. This is the time when all misgivings about the process must be dispelled by the Judge. The parties and their advocates must be informed that it is quick and responsive process and that unlike the court process, there are no strict or binding rules of procedure that require to be followed. It is economical and there is no extra cost involved in the proceedings. While explaining the process, the referral judge should clearly indicate to the parties that the counsels would be present before the mediators to assist them and that not only will the entire process be confidential, there will be no compulsion to settle. Parties should be

made aware that the court will maintain overall supervision on the process as the matter still remains in court and that, if settled, the court will put its seal on it by passing a final order/judgment. It should be explained to the parties that the mediators would facilitate the parties in examining the best and worst alternatives to settlement (BANTA, WANTA, and MLATNA):

- BATNA stands for the ‘Best Alternative to a Negotiated Agreement’;
- WATNA for the ‘Worst Alternative to a Negotiated Agreement’ and
- MLATNA for the ‘Most Likely Alternative to a Negotiated

Agreement, give them the freedom to create options and refine their suggestions to reach a mutually acceptable agreement and once a consensus is reached, the settlement agreement would be signed by the parties, their advocates and the mediator and sent back to the Court. Parties must be told that in such a process, they are the key players and that it would lead to harmonious settlement of the dispute as mediation will enable disputing parties to interact on a one-to-one basis and will enable them to settle their own terms of agreement. The confidentiality of the process must be emphasized and it may be indicated that agreeing to mediation will not be treated as a weakness of a party’s case. Also it should be made clear that if the dispute is successfully settled through mediation, the plaintiff/appellant would additionally stand to gain by being entitled to claim refund of full court fees as per Section 16 of the Court Fees Act.<sup>184</sup>

### **DURING MEDIATION**

While the mediation proceedings are talking place, the Referral Judge ought to monitor the process giving short dates and placing the matter before him/her from time to time. This helps the judge in keeping his hands on the pulse of the case and at the same time, the litigants don’t feel abandoned. By doing so, the counsels also take the proceedings seriously as they realize that the judge is constantly monitoring the process of the case. This sends a message to the parties to take the mediation process seriously and not delay the proceedings unnecessarily. At this stage, absence of the parties or their counsels can be brought to the notice of the court by the other

side or even the mediators in their interim report. Any other hurdles faced in the smooth process of mediation can be pointed out by the parties and redressed by the Court. If mediation is not completed within the time frame mentioned in the referral order, the Referral Judge may extend the time after checking the process. In other words, the Referral Judge must keep an overall supervision on the progress, as the court is the parental institution for resolution of disputes and mediation under its control, guidance and supervision has more authenticity and smoother acceptance. In this whole process, the Referral Judge must not call upon the Mediator(s) to appear in Court or the Chamber or have any direct interaction with them. The confidentiality of the process must not be breached at any stage, even while checking the progress of the case.

### **POST – MEDIATION STAGE**

At the post-mediation stage, the following three eventualities can arise:

- (a) Mediation is a “non-starter”
- (b) Mediation is not successful.
- (c) Mediation is successful and a settlement report is filed.

—When mediation is a “non-starter” or is not successful, the mediator informs the court by filing a report. No details or reasons are required to be given in the report by the mediator and no blame is apportioned as the proceedings are strictly confidential between the parties and the mediator. The report therefore does not prejudice the court or affect the merits of the case. As per Order X rule 1-C<sup>187</sup> Code Civil Procedure, when the case referred for mediation, is referred back to the court, the parties are directed to appear before the court on the date fixed by it for taking the case for trial from the point at which it was when forwarded to the Mediation Centre for the parties to explore the possibility of a negotiated settlements. It is to be remembered that there is nothing like “Failure” in mediation, as there is always a likelihood of a breakthrough even after the mediation has not been successful. This is so because by now the initial ice has been broken between the parties. They have interacted freely with each other in an

informal atmosphere and have assessed each other's stands and weighed their options. As a result, there is more clarity of thought. The Court / Judge can still intervene after receiving a 'Non-Starter' Report of a "Non-successful" and take the matter further after interacting with the parties and tooling out an acceptable settlement at this stage. In other words, the fruits of mediation can still be reaped in court by some constructive intervention.

Once the parties at a settlement and an agreement is drawn, signed by all parties and their counsels, as also the Mediator(s), the settlement agreement is then filed in the court for appropriate directions and the Court/Judge then peruses the same carefully before passing an order recording the settlement. At this stage, the judge is expected to examine the settlement agreement carefully to ensure that it is worded clearly and is unambiguous, that all loose ends are tied, specific time frames. If any, are indicated, amounts payable are clear, it is duly signed and dated by all parties and their counsels. The agreement ought to ensure that it can be implemented effectively and smoothly and there is no lingering dispute or foreseeable legal impediment in giving effect to the settlement. As against a formal trial, where while passing a decree, a judge cannot go beyond the prayers made in the plaint, in court annexed mediation, the terms of the settlement may travel beyond the scope of pleadings. When signed by the parties, their counsel and the mediator, the presiding judge passes a decree in terms of the settlement. In accordance with Order XXXIII Rule 3 of the Code of Civil Procedure, other civil and criminal cases can also be compromised concurrently which can be recorded in the settlement agreement. Hence if the parties adhere to the terms of settlement, several pending cases can be finally disposed of at one go and thus reduce the pending list of cases.

The settlement once accepted by the Court, becomes enforceable under the provisions of the Code of Civil Procedure. The Court enforces the settlement agreement by the legal process of Execution/Contempt. No Appeal or revision lies or is entertained in a mediated case as all the disputes get finally settled and the settlement is voluntarily reached after a consensus by both the parties. If the dispute has been settled in mediation, the referral judge should examine whether the agreement between the parties is lawful and enforceable. If the agreement is found to be unlawful or unenforceable, it shall be brought to the notice of the parties and the referral judge should desist from acting upon such agreement. If the

agreement is found to be lawful and enforceable, the referral judge should act upon the terms and conditions of the agreement and pass consequential orders. To overcome any technical or procedural difficulty in implementing the settlement between the parties, it is open to the referral judge to modify or amend the terms of settlement with the consent of the parties.<sup>188</sup>

### **CHOICE OF CASES FOR REFERENCE**

The referring Judge should evaluate all the important factors which in his discretion will facilitate a successful mediation. For example, if it is an older case where the parties have a lower emotional investment, and it involves quantum issues between educated investment, and it involves quantum issues between educated litigants, these factors would strongly suggest that the matter should be referred for mediation. There may be other factors which, in the judge's experience, make a case suitable for a successful mediation. However, no case should be sent to mediation merely to clear a Judge's docket; it will only delay resolution, result in a failed experience, and end up back on the Judge's calendar's referral Judge should select appropriate cases for mediation. A referral Judge before selecting the cases appropriate for the mediation should consider following factors<sup>189</sup> :-

#### **1. Party Characteristics**

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- Costs and time in mediation are not more than litigation.
- The parties and their advocates have a positive attitudes towards mediation.
- Government is not a party to the suit.

#### **2. Case Characteristic**

- case should not involve complex legal issues, ambiguous precedent, Constitutional issues or Public Policy.
- A referral Judge should ascertain whether previous attempts to mediation have failed and why.

### **3 Consent**

1. It has been found in some cases, that where there are too many parties involved, these are unsuitable for mediation. It is advisable not to refer such cases for mediation unless all the parties have a very positive frame of mind.
  - Section 89 of the CPC mandates referral of a case for mediation only if there is an element of settlement. It is critical for the Judge to make inquiries which lay the foundation for successful referral. The elements of laying such a foundation are :-
    - Determine whether the parties have consented to mediation and whether they wish to settle their cases. Do not allow referral to mediation in which there is no evidence of good faith intent to settlement but mediation is intended to delay the legal proceedings. It should be made clear that mediation does not delay the proceedings.
    - Referral is appropriate when one party has agreed to mediation, and the other party is willing to go to mediation, though not necessarily committed to settlement.
    - Referral to mediation is proper even when neither party has agreed to settle, but both parties are honestly willing to explore the possibilities of settlement through mediation.

However, the referring Judge should believe it can be settled before he refers such cases to mediation.

- Lastly, referral is appropriate where neither party has expressed a desire to settle a case, but where the referring Judge should believe that a settlement may be possible. The referring Judge's careful exercise of discretion is critical here. An example of such a situation might involve parties who are unaware of the law, and with the careful attention and time that could be given by a mediator, a case may very well settle with a credible explanation of the law and the damages can be easily worked out.

#### **4 Conference with the parties**

- (A). Where parties are not open to a settlement, they may be given a copy of the Mediation Centre pamphlet. Sometimes it may be worthwhile talking to the parties for a few minutes. This kind of a discussion can sometimes go a long way in resolving disputes. It helps the parties to think about the benefits of settlement through mediation.
- (B). As a referring Judge, you should probe the issues with the parties to determine whether the possible terms of a settlement and the identified issues are proper subjects of mediation. For example, where “quantum” issues such as monetary damages can resolve a case, this has a high likelihood of settlement in mediation.
- (C). The parties should be informed by the referring Judge about the utility of mediation, and they should invariably be given the Mediation Centre pamphlet if they have not already received one.

- It should be made clear to both the parties that mediation is free of cost and that if mediation process succeeds, the Plaintiff/Appellant will be entitled to refund of Court fees.
- It should be explained that mediation provides a friendly non adversarial opportunity to talk with a skilled Judge mediator and seek a solution to the entire litigation.
- It should be emphasized that this is a voluntary process, and it is also confidential.

#### **5. Schedule set for the Trial:**

Mediation does not imply the delay of the trial. Overall schedule set for the trial should not be disturbed. A referral judge should fix the case for further proceedings before the court, at the time of referral. It will provide definite time limit for a mediator and the parties will not be encouraged to delay the trial.

#### **6. Points to be considered:**

The cost and time spent in mediation should not exceed the cost and time spent in litigation. Do the parties wish to maintain a future relationship either personal or business? In case one of the litigants is Government or its agency of a company or any entity whatsoever then a referral judge should ascertain whether the official/officer appearing has authority to settle. The case should not involve interpretation of statutory rules and regulations.

As held by the Supreme Court of India in *Afcons Infrastructure Ltd. and Anr. V. CherianVarkey Construction Co. Pvt. Ltd. and Ors.*<sup>190</sup>, having regard to their nature, the following categories of cases are normally considered unsuitable for alternative dispute resolution process.

- i. Representative suits under Order I Rule 8 CPC which involve public interest or interest of numerous persons who are not parties before the court.
- ii. \_\_\_\_\_  
Disputes relating to election to public offices.
- iii. Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.
- iv. Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion, etc.
- v. Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against the Government.
- vi. Cases involving prosecution for criminal offences.

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

- i) All cases relating to trade, commerce and contracts, including-disputes arising out of contracts (including all money suits);
  - Disputes relating to specific performance;
  - Disputes between suppliers and customers;

- Disputes between bankers and customers;
  - Disputes between developers/builders and customers;
  - Disputes between landlords and tenants/licensor and licensees;
  - Disputes between insurer and insured
- ii) All cases arising from strained or soured relationships, including
- Disputes relating to matrimonial causes, maintenance, custody of children;
  - Disputes relating to partition/division among family members/coparceners/co-owners; and
  - Disputes relating to partnership among partners.
- iii) All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including
- Disputes between neighbours (relating to easementary rights, encroachments, nuisance, etc.);
  - Disputes between employers and employees;

- Disputes among members of societies/associations/apartment owners' associations;
- iv) All cases relating to tortious liability, including
- Claims for compensation in motor accidents/other accidents; and
- v) All consumer disputes, including
- Disputes where a trader/supplier/manufacturer/service provider is keen to maintain his business/professional reputation and credibility or product popularity.

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

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

Civil cases including suits for –

- Injunction,
- Possession,
- Specific performance,
- Recovery of money,

- Business disputes,
- Labour and service matters,
- Insurance disputes,
- Motor accident claim cases,
- Matrimonial cases including divorce,
- Custody and dowry cases,
- Community disputes and
- Criminal cases including complaints made under section 406/498-A Indian Penal Code and
- Section 138 of the Negotiable Instrument Act can be referred for mediation.

Promoting mediation, particularly for resolving family and matrimonial disputes, is the best option as it helps in healing relationships and minimizing emotional damages. Apart from the abovementioned benefits, it also promotes the interest of the entire family including those of the children and reduces economic and emotional cost associated with the resolution of family disputes. Mediation in the context of matrimonial disputes is different in its form and content from disputes in respect of commercial and property matters on account of presence of certain factors which are unique to such disputes. These factors include the motivation of parties, their emotional quotient and social compulsions and their personal liabilities and responsibilities towards their near and dear ones. The views that two parties may hold regarding their life pattern and the institution of marriage, can be diametrically opposed and so can their perception of security for the future life etc. Thus, in cases of mediation for matrimonial disputes, the elements that weigh with the parties are not purely commercial, logical and cut and

dried. Very often irrational and sentimental factors have a pre-dominant role in the eruption of the disputes as well as their resolution. The job of the Referral Court in family disputes is to explore the elements of settlement by calling upon the parties to appear in court, briefly interact with them and open their mind to a lasting solution through an alternative dispute redressal forum of mediation.

### **THE REFERRAL ORDER**

The significance of the referral order cannot be overemphasized. As it sets the tone for mediation, it is essential for a Referral Judge to word the referral order carefully. A mention may be made in the referral order of the relevant provision of law which empowers a Referral Judge to refer the case for mediation. A referral order may indicate in brief the nature of dispute being forwarded to the Mediation Centre, to enable the Centre to have some clue as to the nature of the dispute between the parties to enable it to assign Mediator(s) having adequate expertise in the field, if necessary. A referral order should contain specific directions to parties and advocates to appear before the mediator, on a fixed date and time. It may clarify that parties would be at liberty to submit relevant documents before the mediator to help clarify the issues and facts during mediation. The time frame for undertaking the mediation process ought to be specified in the referral order. At the same time, the next date of hearing before the Court needs also be fixed, so as to make the parties aware of the fact that the Court is not only keeping an overall control on the conduct and conclusion of mediation, but will not permit the parties to delay the proceedings. The consent of the parties to participate in mediation of their own free will must be recorded in referral order. In case any/both the litigants are a government body, Corporation or firm, the referral order must mention that an officer authorized and competent to take a decision on behalf of his client in the matter, is present before the Mediator(s) with the counsel on the record.

Components of a Referral Order:

- 1. Authorization:**

The relevant statute or rule authorizing a referral judge to refer the case should be mentioned.

**2. Identification of Alternative Dispute Resolution:**

A referral judge should mention the particular mode of alternative resolution to which referral is being made.

**3. Administrative matters:**

A referral order outlines the administrative matters such as who is authorized to appear before a mediator; whether the parties may submit documents before a mediator; the limit of the mediation etc.

**4. Fee:**

A referral order should state whether the parties are required to pay a fee to the mediator.

**5. Good faith participation:**

A referral order should contain that the parties agree to participate in mediation in good faith.

**6. Time Limit:**

A referral order should mention the definite time for conducting and conclusion of mediation. It will not allow the parties to use mediation as a delaying tactic. The court may direct the parties to appear before the court

on a given fixed date and ask for the progress report on that date and if satisfied about the process may grant further time for continuation of mediation.

#### 7. **Confidentiality:**

A referral order should spell about the aforesaid aspects of mediation.

#### 8. **Consent:**

A referral order should contain that the parties have consented for participation in mediation out of their free will. If a mediation is not completed within the time mentioned in the referral order, case can be called in court to check progress.

A referral order is an important document which initiates the mediation. A referral order should contain the following<sup>191</sup> :

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A referral order should state relevant statute or rule authorizing a referral

\_\_\_\_\_ Judge to refer to mediation.

- A referral order should outline proposed duties and responsibilities of the mediator.
- The parties may be advised to file/submit documents or any other relevant materials before the mediator.
- A referral order should state who is authorized to appear before a mediator. It should be mentioned whether advocates are permitted to appear during mediation proceedings.

- A referral order should contain that parties are required to participate in mediation in good faith.
- A referral order should spell out a definite time frame for conduction and conclusion of mediation proceedings.
- A referral order should spell out in unambiguous forms that mediation proceedings are confidential in nature.

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COMMUNICATION BETWEEN A REFERRAL  
**JUDGE AND A MEDIATOR:**

A referral judge should not have exparte communication on the merits of the case with the mediator. A mediator should only communicate the final outcomes of the case to the referral judge. There should be no remarks made blaming either party for failure to settle. If any communication is necessary, then it should be in writing. Mediation Rules also prohibit direct communication between the mediator and a referral court.

**ROLE AFTER CONCLUSION OF MEDIATION**

To sum up, mediation is a far more satisfactory way of disputes as compared to regular litigation. In a settlement negotiated through the process of mediation, both sides are in a win-win situation as there is no court verdict in favour of one party and against the other, Instead, the dispute is resolved on mutually acceptable terms and there is no acrimony left. Instead of discord, disharmony and a bitter relationship at the end of an adversarial proceeding, there is peace, accord and re-established relationship between parties at the end of consensual proceedings. It is therefore apparent that in walking the litigants through this time entire process, from the time when a reference order is passed, till the settlement Agreement is acceptable or the matter is returned un-settled, the Referral Judges play a pilot role. No doubt, the Referral Judges do not conduct

mediation, but by exercising their authority to refer a case for mediation, and finally by receiving the case back, they remain the starting point and the ending point of the entire process. Their contribution to establish mediation as a system of dispute resolution is immense. Without their correct assessment of a case before reference of the same for mediation and without their overall supervision of the entire process, till the matter comes back in court, successful mediation is simply not possible.

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

**DO...S FOR REFERRAL JUDGES:**

There are certain positive actions to be taken by the referral judges while referring the matters to the mediation process. They can be enumerated as follows:

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- 1) Ensure the presence of the parties before referral for information.
- 2) Assess the relevant facts of the case.
- 3) At the time of referral, interest with the litigants eliciting information and explaining the process
- 4) Explaining the benefits such as no cost, refund of court fees, timely resolution of disputes and process of the mediation to the litigants.
- 5) Pass an appropriate referral order and obtain signatures of the parties/Advocates on referral order.

- 6) Direct the parties as well as their advocates to appear before the Mediation Cell on a fixed date and time.
- 7) Fix date schedule of the trial i.e. next date of effective hearing before the court at the time of referral.

### **DON'TS FOR REFERRAL JUDGES**

There are certain things which the referral judge should not do while considering the point of reference of a matter to the mediation center. They can be stated as follows: -

- 1) Do not refer a case where either of the parties are ex-parte.
- 2) Cases pertaining to Constitution/ Public Policy should not be referred.
- 3) Mediation should not be allowed as a tool for delay of the trial.
- 4) The case should not be referred for mediation only for the sake of reference.
- 5) Do not refer the case without making an objective assessment of the case.
- 6) Do not have any communication with the mediator as the mediation proceedings are confidential.
- 7) In order to ensure that the confidentiality of the mediation process is not breached, the referral judge should not ask for the reasons for failure of the parties to arrive at a settlement. Nor should the referral judge allow the parties or their counsel to disclose such reasons to the court. However, it is open to the referral judge to explore the possibility of a settlement between the parties. To protect confidentiality of the mediation process, there should not be any

communication between the referral judge and the mediator regarding the mediation during or after the process of mediation.

Skills can be used, even during Lok Adalats and also mediation of cases of other courts, and effectively used at the time of invoking the provision of Section 89 and Order X of Code of Civil Procedure for directing the parties to opt for mediation method. They can be used in court to explore the possibility of settlement, at any time before pronouncing the judgment even after the parties came back to the court after option for alternative dispute resolution methods.

Mediation has significant potential not merely for reducing the burden of arrears, but more fundamentally for bringing about a qualitative change in the focus of the legal system from adjudication to the settlement of disputes. The success of mediation will depend not merely upon the evolution of an appropriate legal and regulatory framework, but upon addressing basic issues of human resource development. Inducing a system to evolve from a litigation oriented approach to a more curative or preventive approach involves much more than the development of law. The development of law is an important step, but it has been to suggest that various other key factors are involved. Meeting the resistance to change, creating awareness in society as well as amongst other participants of the benefits of the mediation process, developing capacities and involving the Bench and the Bar in a co-operative effort are critical elements in the success of the process. Above all, confidence in the mediation process will be fostered only if the mediator discharges in positive terms the ethical concerns of a process to which the role of the mediator is central<sup>192</sup>.

Hon'ble Justice C. Nagappan,<sup>193</sup> emphasized that the role of the Judges is also very important, both at pre-mediation stage as well as post mediation. The trial judge must have the knowledge of mediation and should also be convinced of the benefits of mediation to be able to prevail upon the advocates, and encourage them and motivate the parties to resort to mediation. However, care has to be taken that mediation, is not used as a tool for delay and the participation of the party must be in good faith.

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