

**INITIATIVES & INNOVATIONS
FOR EFFECTIVE
COURT MANDATED MEDIATION.**

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There can be no caveat to the statement that the essential criterion for Justice Dispensation is collection of data and analysis. Communication is essential for exchange of information or understanding. This communication can be either verbal, para-verbal or non-verbal, that is by words, by how it is said and by body language. In all these forms, there is an exchange of data/information/ clarification, but when it involves understanding and getting through, listening is important. Every event generates a thought, and the thought is always fed by an emotion. Satisfaction of the emotional quotient in a dispute leads to real resolution. The exchange of information, ought to therefore address concerns and that is possible through ***persuasion***. Change in the mind set of disputants happens by sheer persuasion and the choice made by them after exchange of information is due to equanimity as hard feelings get dissipated.

Mediation attempts to use Persuasion as the main tool for resolution. It is said that a Professor of Medicine taught his students to touch the patient while listening to them instead of standing by the bed. By standing near the bed, he felt that the patient would get the impression that the doctor wanted to move away, but by touching the patient, the doctor revealed special concern. ***Persuasive listening*** is said to be concerned listening as opposed to mere listening.

An understanding of this language of communication which is speaking and listening, and its usage to assist negotiation for mutual benefit is the core factor of mediation. Resolution of a dispute by encouraging parties to participate in unravelling the conflict, acknowledge and understand the differences and opt for a realistic approach to enable parties to move into the future is the hallmark of mediation. The words, pramana thatparya and anumana which has been in common usage supports the theory of mediation. An understanding of what is, what is the crux and what is perceived enables the disputants to make a realistic choice. The referral Judge as the motivator has to primarily look out for these opportunities while considering referral.

MEDIATION AS ADR:

Sir Dennis Byron refers to the quintessential objectives that have fuelled reform in the present justice dispensation system around the world by citing the Civil Justice Review Committee's Report, 1995 which states that the benchmark for a civil justice system must be fairness, affordability, accessibility, timeliness, accountability, efficiency, cost effectiveness, streamlined process & administration. "Unreasonable delay in the disposal of disputes is indeed the worst enemy of justice and peace of the community. It leads to unreasonable costs. It breeds inaccessibility. It fosters frustration, and frustrates fairness. Administration of justice falls into disrepute." It is to address this issue that we have realised that there is a necessity for highly trained, efficient and motivated persons to manage the justice dispensation system. It is more so, when the process like mediation is more personalised.

Mediation has evolved as a form of problem solving which also lays emphasis on the fact that justice dispensation need not essentially be by confrontation. Frank Sanders, the pioneer of Mediation describes the process as a "sleeping giant". The potential for resolution has to be prodded and then the awakening will happen on its own. The creative solutions and the different dimensions

given during resolution never fail to astonish the mediator. Let us first understand the basics.

Mediation is widely understood to be assistance by a ***Qualified, Certified, Impartial Neutral to the conflict***, who opens up channels of communication between disputing parties and empowers them to make a voluntary and informed choice in the resolution of their dispute so that the disputants reach a negotiated accord. Emphasis is on ***Self determination, Collaboration and Creative Resolution of the dispute by addressing underlying concerns of the parties***. Issues, Perceptions and Alternatives are analysed and the full range of issues are brought to the table for discussion. It is not just a decision on the issue raised, but all that the parties consent to discuss. So a broader spectrum is available in mediation for exploring probabilities and accepting possibilities. A climate for mutual trust has to be established for effective mediation and the mediator has therefore to understand the psychodynamics of the conflict. In this regard while consent and trust of the parties, empowers mediation, we have to note that they are also it's weakness.

POUND CONFERENCE:

Mediation in the present form gained credence from the Pound conference 1976. Federal rules of Civil Practice, USA envisaged pre-trial conference to explore the potential for better case management and so the Judges had a large role to play at this stage/ or in the settlement. Prof Frank E.Sanders, one of the participants in the Roscoe E.Pound conference to explore causes of popular dissatisfaction with the administration of justice, suggested the multi door courthouse facility which is the basis for the present day ADR.

In India, Mediation is slowly gaining credence due to the concerted efforts of the Mediation and Conciliation Project Committee and the fact that any settlement reached is tested at the anvil of justice before it is made a decree.

The Justice Dispensation system today, thanks to the amendment of Sec. 89 C.P.C. and the decision of the Apex Court, in the now popularly known as AFCON's case, has made the multi door courthouse a reality.

The Mediation project in courts is now aimed to expand access to justice, prevent conflicts from escalating into violence or vengeance litigation. So the why, what and when of referral to mediation has become important for the path that the dispute would take in mediation. Further, even though, we have only court-annexed mediation, but in time the practice and acceptance of private and court referred/assigned mediation and online mediation are in the offing. Alignment of mediation with the judicial process is therefore essential.

REFERRAL JUDGE:

Primarily a Judge has to therefore be knowledgeable about the different forms of ADR, and in particular be able to remove the apprehensions of parties when the dispute is referred for resolution by mediation. The Judge should not be apprehensive that a referral would mean, decrying the present judicial system or shirk their responsibility in the system of justice by denying the disputants a decision on facts. A referral should not be understood as belying the value of the court systems in place.

The initiative and review power of a Judge is the main feature in mediation. The control of the Judge while initiating mediation and when it comes back, either as settled or not settled, for further action, will be equally important. Unless the referral Judge points out the possibilities of settlement and areas for discussion, while taking time to figuratively hold the hand of the disputants, the parties may think that they have been shunted out of the regular stream of justice. Unless parties realise at the intake of mediation, that it is part of the judicial system and an opportunity to understand who is responsible for the conflict, the progression of mediation will be stunted.

Further, Case Management also means referral to mediation. Starting and administering a mediation programme in court involves a lot of supervision and initiative. The encouragement by the court to adopt Mediation as a dispute resolution process and the sanctity given by the Court to the agreement are the factors that influence settlement. The effectiveness of the mediation is based on how the court starts, administers and runs the mediation programme. The Referral Judge has to therefore be totally involved and catch the moment for stressing on the need to settle. In fact, when mediations fail, and the parties go back to court, a query of the Presiding Officer or concern expressed with regard to an issue, works as a catalyst and parties come to a consensus at that stage. Even then, if necessary, the referral Judge can send the parties back for another round of mediation or record the settlement that they arrive at if it is mutually satisfactory. This could be even understood as Judicial Settlement.

Maryland, USA, after extensive study has reported, that to effectively settle cases by ADR we have to include:

Starting or Expanding an ADR Program – including, but not limited to, case screening and referrals, hiring/recruiting new mediators, case management, creating a quality assurance program, program evaluation, and public awareness projects for ADR programs.

Mediator/ADR Practitioner Quality – including, but not limited to, trainings, workshops, conferences, and assessments.

Public Conflict Resolution Education – including, but not limited to, conflict resolution skills trainings and conflict prevention workshops for members of the public.

Conflict Resolution Services – including, but not limited to, providing and/or using mediation, community conferencing, large group facilitation, etc. to resolve disputes or complex, problematic issues.

Research- structured academic research on topics related to dispute resolution.

Once started, mediation will not always have a smooth run. In jurisdictions where mediation was started and practiced, it has come to near termination, and a study then gave us pointers to sustain mediation.

The study in New Jersey USA is a case in point. The conclusion was that:

1. Referral to mediation by the court and asking parties to appear can be at anytime after filing of the petition.
2. Mediators have to be assigned from the roster maintained by the Mediation Office of the concerned court
3. Parties are given an option to choose a different mediator within 14 days of referral order if they so desire.
4. One hour is to be spent in preparation and initiating parties to mediation without fee.
5. thereafter parties have to bear costs equally and costs will be fixed by mediator and the court-[this may happen to us in due course].
6. Provisions to ensure confidentiality and inadmissibility of mediation communications.
7. Training and continuing education requirements for mediators

We could benefit from these suggestions.

CRITERIA FOR EFFECTIVE SUSTENANCE OF MEDIATION:

To activate, administer and evolve our system, we have to pay attention to :

- quality of mediators and concerns about how it is carried out.

- Continuing education and regular interaction to understand problems in mediation
- Unreasonable delay in mediation and using mediation as a dilatory tactic
- Coercion to settle
- Using the process to unfair advantage
- Mediators using their status to make gain
- Ineffective/ unworkable agreements, or failure to cover all issues properly
- Delay in reports of mediators
- Allotment of cases to mediators, - good and bad get the same proportion of cases
- Following the roster system at times hampers quality
- Time spent by mediators based on fee quotient.
- Institutionalising mediation, raising the bar to enhance professional skills and honing the process into a refined problem solving technique
- Ensuring self-determination, confidentiality and ambience for healing

While choosing mediation as the effective ADR method, it is necessary to keep in mind the derisive attitude of disputants and the bar. While reticence may be due to misinformation or lack of information about mediation, parties who participated reluctantly have reaped great benefits. Participation in Good faith and self determination calls for a lot of trust and so Mediation has to be above 'suspicion'. It is essential therefore to understand that mediation is possible when:

- A] relationship between the parties
- B] willingness of the parties to collaborate
- C] When opportunities for joint gain will not be available in the litigation process
- D] any other issues which may be considered as a possibility for settlement

The stake holders in the dispute resolution process have to believe in negotiation, formulate areas that are possibilities for discussion, identify issues that will bring out mutual gain, and not the least frustration with the progression of the litigation system. It is apparent that the traditional decision making process needs to be:

Inclusive- early initiation

Who and when

Building relationships

possibilities

Transparent- awareness of process

Rapport

Credibility of process

Responsive - collect new information

Respond to information and clarifications

Nudge parties to take control

Use opportunities

'COERCION INTO Vs COERCION WITHIN MEDIATION':

The first step in mediation is for parties to agree to mediation. Consent of parties though essential, ought not to be the sole criteria for referral. Statistically it has been noted that 80% of cases settle before trial. So the court can invite the parties to explore the possibilities through mediation by issuing a notice to the parties, once pleadings are complete and need not wait for parties to opt for or agree to mediate. As parties have the option to go back to the regular system, self-determination or voluntary aspect of mediation will not be impinged by referral when parties do not opt for it. Most often, parties and their counsel are not aware of what mediation is.

Should mediation be mandatory? In England's Central London County Court, out of 4500 cases sent for mediation, only 160 were resolved and after the introduction of the Civil Procedure Rules making mediation mandatory,

mediated settlements increased by 142 % thus showing that at the intake level it need not be voluntary or cannot always be voluntary [vide Dorcas Quek on Mandatory Mediation- an Oxymoron?] Prof Sanders has said that mediation has to be made mandatory as parties have to understand the benefits by going with the flow of the power of mediation to experience the benefits. Until the litigating public is aware of the benefits of mediation, mandated mediation is essential for effective dispensation of justice.

Even today mediation is seen as a sign of weakness and a default method as the present system is clogged and unwieldy. For the development of a proper mediation culture we need to set out

GOALS:

- 1.** Increase the involvement of parties in resolution by providing a forum which is not intimidating or daunting
- 2.** Provide a mechanism to unravel the conflict and enabling the parties to understand the consequences
- 3.** End user satisfaction and compliance by evaluating and making an informed choice
- 4.** Assist parties to save time and money and relationships
- 5.** Access to justice
- 6.** Litigation prevention/future
- 7.** developing rapport/trust
- 8.** preventing further discord
- 9.** Good faith participation
- 10.** enhancing value of justice.

The primary goal of mediation is to understand the conflict and then negotiate for mutual gains. The Mediator uses special skills to turn the negative aspects of a conflict to positive, probabilities to possibilities:

9	NEGATIVE [-ve]	POSITIVE[+ve]
C	Confusion/lack of clarity	Clarify/connect
O	Opinion/beliefs	options/opportunities
N	Negative behaviour	Needs
F	Fear	Feelings validated
L	Lack of data/information	Legitimacy of claim
I	Impressions	Interests
C	Collusion	Consensus
T	Threats	Trade-offs.

Possibilities are collectively referred to as “persuasive principles”. It is important for the referral Judge therefore to understand the Persuasion progression. The acronym coined by Robert Mayer LANCER could be termed in mediation as - linkage, alignment, needs, control, evaluation and retribution and reconciliation.

LINKAGE- personalising, ambience for shaping tone and mood, rapport and trust.

Personalising the justice system entails making a proper connection. To do that the process should be made user friendly. Ambience of the mediation rooms, the comfort given to the disputants would assist in reducing the tension between the parties. It would help to have the mediation centre within the court premises. A comfortable reception area would help parties at the intake level to understand the seriousness of the process and at the same time help them to relax. Materials, both written and visual, on mediation for giving an insight about the programme may be made available at this point.

Once taken inside the mediation room, it is essential that the seating is comfortable and ensures confidentiality. Soft music could assist parties emotions to simmer instead of escalating. The mediator should be seated at a distance when he/she is not looked at in awe or dismissed as yet another crying aunt’ shoulder. Credibility of the process and the climate for

negotiation will determine the receptiveness to options and so humanising the process is essential. The attitude of the mediators, their approach will determine the result of the mediation. The choice of mediators, their ability and willingness to allow parties to find their way out of the dispute without coercing them or advising them, would help to raise the bar in mediation.

Awareness programmes about mediation both for the bar and the bench, visual and written material being made available for the public to understand what mediation is about, role-play and enacting of a mediation, orientation at school and college levels to handle conflict, will go a long way in accepting mediation as the appropriate process for dispute resolution. Thereafter, updating and feedback will help to formulate further plans. Human behaviour is so diverse, that understanding the approach to conflict may at times be facilitated by inputs from psychologists and so the referral Judge must be open to explore a flexible and diverse process to aid parties to come to a solution.

The administrative staff should be trained to reassure who need help and also make their waiting comfortable. Making water, coffee/tea available on hand also helps. When a case is referred, a Xerox copy of the pleadings alone should form the file materials and court papers should never be handled by the mediators.

ALIGNMENT- moving with and using the energy

The parties are to be told that once the court hears the matter it will be based on pleadings and evidence, but when it is in mediation, the Mediator will not be a Judge but will assist parties to understand . No evidence can be created in mediation or evaluated in mediation. The information given in mediation being privileged, the process is totally confidential. When disputants hear this, they tend to trust the process as the Judge has opined that it would be to their benefit. When parties are told that after they agree, the agreement will be endorsed by the Court and passed as a decree,

workability of the agreement is guaranteed. At the same time, the Referral Judge has to ensure the quality of the mediator and monitor that self-determination is not affected. Though the referral Judge, cannot ask for any detail about what transpired in mediation, when it fails and goes back to Court, the Judge can again persuade them to work out the differences and this would give the final nudge to settlement.

NEEDS

It is essential to note that quality control is essential. Effort to make statistics, to show higher percentage of settlements, will not really help disputants. Addressing the parties interests and substantial satisfaction which is inclusive of understanding their emotional needs is important for effective mediation. Regular updating of knowledge and exchange of information is also essential. Today, many criminal complaints are being referred to mediation and the referral Judge ought to consider retributive justice and help parties to reconcile where it is possible.

CONTROL- knowing when to start and stop, pushing motivator buttons

Though mediation can be initiated at any stage, when to initiate mediation and how to record the settlement are equally important. Today, there are many cases arising out of complaints under Sec. 498A Cr.P.C. Most of the family members are arrayed as parties. In the real settlement, it will mean only the spouses. So insisting on all parties to participate and agree may not be appropriate. Further, though the sanction for mediation is under Sec. 89C.P.C., in reality pursuant to anticipatory bails applications, many criminal complaints are being referred to mediation on the basis of relationship of the parties. It is essential then for the referral Judge to keep a track of how these cases are handled.

Also mediation is opted by some and not effectively used/ or used as a dilatory tactic. Costs can be awarded by the referral judge when the process is not used in good faith.

As part of the case management, it is essential also to assess the capacity of parties to participate in mediation, ability to look at avenues, their emotional positions and ability to trade information. Socio-cultural issues are involved in different strata of society and so depending on the nature of the dispute and the capacity of the parties, the referral Judge has to decide on mediation as the appropriate process and guide the parties about the avenues available.

Scheduling mediation conference for a specified time every week, and sending notices to parties to appear would give more sanctity to mediation approach. Briefing parties about mediation and enabling them to understand that they alone are not sidelined would also enable effective mediation. The control of the referral Judge over effective mediation can be established at this stage.

While in mediation, the parties may have genuine causes and so there must be a mechanism for addressing complaints in mediation. Starting from allotment of cases, how the mediation is done, or how long parties have been frustrated by events in mediation, it is useful to have a complaint book, based on which there can be a discussion periodically. Proper mediation practice ought to be ensured by participation standards and by ensuring action for non-compliance but this should not be at the risk of giving up voluntariness and flexibility.

Passing of decree after agreement has to be monitored and has to keep pace with the progression of mediation. Time lag in passing of decree whittles away the satisfaction quotient at times. Insistence of lawyers while passing the decree also could cause delay as at times lawyers are not inclined to participate at that stage.

EVALUATION- EFFECTIVENESS & EXPEDIENCY:

The referral Judge therefore has to keep in mind

- information about mediation:
- issues appropriate for mediation
- selection of mediators
- location
- purpose
- confidentiality
- role of the parties
- Advantages
- intake level information
- advantages of a formal record of proceedings

RETRIBUTION, RECONCILIATION:

While passing a decree in terms of the agreement therefore, the Referral Judge has to remember the acronym, **SMART**- specific, measurable, achievable, realistic and time bound. Unless the agreement is legally valid and measures up to these factors, a decree ought not to be passed merely because parties have agreed.

PROBLEM SOLVING:

The structure of mediation enables a step by step problem solving and so it is essential to understand that the stages are :

- * finding the correct problem,
- * defining the problem
- * analysing the problem
- * developing possibilities
- * selecting the best option
- * implementing/workable
- * evaluating

The referral Judge has to keep in mind that

The advantages for the court are:

- docket control and management
- Judicial time can be used optimally
- Litigation comes to an end and so clogging in appellate jurisdictions avoided
- Enforceability is assured and so no need for execution

The advantages for the counsel are:

- parties understand the reality and accept workable solutions
- negotiation is good faith reposes more confidence in counsel by parties and saves reputation of counsel
- client's satisfaction-both in terms of time and money
- more time for optimal spending
- good fee

The advantages for the Parties are:

- empowerment/ understanding and taking responsibility
- fear of uncertainty of trial taken away
- saving on time and expense and avoiding frustration
- appreciation of the best offer
- relationships saved
- prospect of future becomes brighter.

Justice is said to be "Accepting responsibility" . As the torch bearers of the Justice dispensation system, it is now necessary to accept responsibility to promote mediation and ensure it's effectiveness. "Before we conquer the war without, let us conquer the war within". We have to therefore raise to the occasion, set our stables in order and promote and provide qualitative justice.

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