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# A Procedural Analysis of the Role of Skilled Mediation in Settling Conflicts

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DR. NAGALATHA BATHINA<sup>1</sup> AND DR SITAMANIKYAM<sup>2</sup>

## ABSTRACT

*To avert war, Krishna serves as an intermediary between the Pandavas and the Kauravas. The idea was unquestionably ancient. The idea of alternative dispute resolution is not new to the people of this country. Since time immemorial, it has been common throughout India. The course of legal history demonstrates that throughout the years, man has explored strategies for making it simple, inexpensive, reliable, and convenient to attain justice. The administration of justice displays the social consciousness of the public. It is an endeavor to develop an alternative conflict resolution system from the ones that are already in place. ADR methods were emphasized as a way to deal with this delay and court arrears. Alternative conflict resolution methods are alternatives to the court system for resolving disputes. Win-win concept possible through ADR despite of fail-win notion which related regularly with litigations. As a professional mediator, she focused on the mediation process and the significance of the mediator's negotiation skills, such as social skills, personal skills, communicative skills, as well as perception of the mediator in evolving the issues.*

**Keywords:** ADR-alternate dispute resolution, Her/his is interchangeable words of a mediator, BATNA-best alternative to a negotiation agreement, Win-win concept.

## I. INTRODUCTION

A cost effective and amicable ADR mechanism, mediation offers a mutually acceptable resolution to a dispute between two parties. This dispute resolution mechanism has proved to be effective mainly due to its confidential nature, the involvement of a neutral third party, and the safe environment provided where parties can discuss and resolve their issues. Mediation, being a time-saving process, not only fulfils the legal objectives of the litigants but also reduces the burden on the judicial machinery. Over 28,000 cases were settled through mediation by Legal Services Authorities across the country. At present, there are 393 ADR centres and 576 mediation centres across the country. Till today, mediation was the most informal and influential ADR system in India. There is no appeal or revision in mediated cases.

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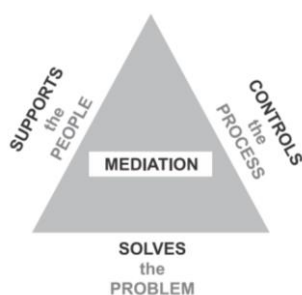
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In Afcons Infrastructure case <sup>3</sup>, the Supreme Court referred to the definition of mediation as given in the Model Mediation Rules, according to which “settlement by mediation” means the process by which a mediator appointed by parties or by the court, as the case may be, mediates the dispute between the parties to the suit by the application of the provisions of the Mediation Rules, 2003 in Part II, and in particular, by facilitating discussion between the parties directly or by communicating with each other through the mediator, by assisting the parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute and emphasizing that it is the parties’ own responsibility for making decisions which affect them.”

Section 89(2)(d) of the Code contemplated scenarios where the court could refer matters to mediation. would report to the court and the court, after giving notice and hearing the parties, would give ‘effect’ to the compromise and pass a decree in accordance with the terms of settlement accepted by the parties, thereby rendering finality to the situation.

The Supreme Court even referred to the high- profile and extremely sensitive Ayodhya dispute<sup>4</sup> to mediation. Additionally, even for commercial and patent disputes, mediation was resorted to. Examples are several including disputes between the Ambani brothers, disputes over the takeover of South African telecom major MTN and as well as between Hoffman La Roche and Cipla and Merck and Glenmark. The efforts of the judiciary finally saw light at the end of the tunnel in form of amendments to the Commercial Courts Act, 2015, which made mediation mandatory before the institution of a suit. The Ministry of Law and Justice gave mediation the necessary boost when Section 12A was introduced in the Commercial Courts Act, 2015. Section 12A made pre-institution mediation mandatory.<sup>4</sup>



**Source:** Mediation Training Manual of India<sup>5</sup>

According to CJI Justice D Y Chandrachud in the Memorial Lecture on inaugurating the Indian Law Society’s ILS Centre for Arbitration and Mediation (ILSCA). “The future of mediation in India is its ability to impact social change in a manner that law does not”. the resolution arrived

<sup>3</sup> M/S. Afcons Infra. Ltd. & Anr vs M/S Cherian Varkey Constn ... on 26 July, 2010 (Supreme Court of India)

<sup>4</sup> [https://en.wikipedia.org/wiki/Ayodhya\\_dispute](https://en.wikipedia.org/wiki/Ayodhya_dispute)

<sup>5</sup> <https://main.sci.gov.in/>

at mediation, secures true justice for individuals and groups in their terms, in a language they can comprehend and a platform that protects their emotions and which lie close to their existence and soul.<sup>6</sup>

**(A) There are two types of Mediation: Court- Referred Mediation and Private Mediation**

**1. Court referred mediation:** It applies to cases pending in Court and which the Court would refer to mediation under Section 89 of the Code of Civil Procedure, 1908.

**2. Private Mediation:** Private mediation is used in connection with disputes which are at the stage of pre-litigation.<sup>7</sup> The Commercial Courts (Pre-Institution Mediation and Settlement Rules), 2018 (“PIMS”) provides for a detailed procedure on mediation.

**(B) Features of the Mediation**

- Mediation is a non-adjudicatory process
- Voluntary process.
- Service of lawyer is available.
- Mediation is party centered negotiation.
- The function of the Mediator is mainly facilitative.
- The consent of the parties is not mandatory for referring a case to mediation.
- The referral court applies the principles of Order XXIII Rule 3, CPC for passing decree/order in terms of the agreement.
- Not appealable.
- The focus in mediation is on the present and the future.
- Mediation is a structured process having different stages.
- In mediation, parties are actively and directly involved.
- Confidentiality is the essence of mediation.

**(C) Three important key areas to select a mediator**

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<sup>6</sup> <https://indianexpress.com/article/india/courts-extremely-burdened-mediation-important-tool-to-tackle-case-pendency-justice-chandrachud-8101721/>

<sup>7</sup> the Court has held that the statutory pre-litigation mediation under Section 12A of the Commercial Courts Act, 2015 is mandatory and any suit instituted violating the mandate of Section 12A must be visited with rejection of the plaint under Order VII Rule 11 of the Civil Procedure Code, 1908.

**Rapport:**

The mediators concurred that building rapport is a crucial component of a successful mediation. A skilled mediator develops rapport with the parties, forging connections of empathy, trust, and understanding with each of the contending parties. Having a good connection with the parties might encourage them to open to the mediator, which frequently gives her the information she needs to come to an amicable agreement.

**Creativity:**

Creativity, or the capacity to come up with original solutions, is another essential quality of effective mediators. This skill undoubtedly results from a focus on the parties' interests. The only way a mediator can develop imaginative solutions that satisfy each party is by comprehending their respective interests. Finding solutions that consider feelings, perceptions, and emotions is crucial since doing otherwise prevents difficulties from being resolved in a way that is fair and meaningful.

**Patience:**

Undoubtedly, a patient mediator is needed; this provides the parties plenty of time. A skilled mediator establishes a connection with the parties and encourages them to completely express their feelings and ideas while paying close attention to the main objective—resolving the conflict. Most parties are reluctant to fire the mediator, so they sit and typically come up with something, especially if I occasionally throw out an idea. This is especially true with parties who have stated they simply don't see a way to a resolution and said, "Well, we'll just sit for a while and think more on it."

**Trust building**

To earn your trust by acting with genuine honesty, goodwill, competency, and openness when you are both in awkward situations.

**(D) Types of Mediation:**

Facilitative Mediation, Evaluative/Directive Mediation, Transformative Mediation, Transactional Mediation<sup>8</sup>, Ard-Med and E-Mediation.

**Facilitative mediation:**

The conventional style of mediation, involves the mediator facilitating discussions between the

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<sup>8</sup> Bruce P. Matez, Esquire is a Divorce and Family Law mediator in Southern New Jersey. He has been mediating for over 25 years. He practices mediation both in person and online (via Zoom). For more information visit the website of BorgerMatez, P.A. [www.njfamilylaw.net](http://www.njfamilylaw.net). Bruce is the president of the NJAPM- <https://njapm.org/>

conflicting parties. Instead of giving suggestions or forcing a decision, the mediator helps disputants find a solution by analyzing their goals and interests. In facilitative mediation, mediators offer solutions without expressing their personal ideas. Facilitative mediation prioritizes disputants' needs, wants, goals, and interests over the law. The mediator helps them reach a solution that suits them, not the law or others.

### **Evaluative/Directive Mediation:**

Evaluative/directive mediators will advise parties on their legal and factual positions, unlike facilitative mediators. Evaluative mediators' direct settlement by examining the legal merits of the dispute and offering their recommendations.

### **Transformative Mediation**

Like Facilitative Mediation, transformative mediation empowers disputants to resolve their issue and recognizes each other's needs, aspirations, and interests. The method helps parties build and learn skills to make positive changes and communicate and cooperate better. This helps parents in custody and parenting conflicts, employment disputes, and other situations where the parties must retain a relationship. Mediation is more about helping people change their relationship than reaching an agreement.

### **Transactional Mediation**

Transactional Mediation only aims to reach an agreement utilizing a more typical negotiation method and the mediator as a settlement director. "Shuttle" diplomacy entails the mediator meeting with each party alone and going back and forth. Transactional mediation often needs facilitation and evaluation.

### **Arb-Med**

In arb-med, a trained, neutral third party hears disputants' evidence and testimony in an arbitration; writes an award but keeps it from the parties; tries to mediate the parties' dispute; and unseals and issues her previously determined binding award if the parties fail to reach agreement Arb-Med or Med-Arb was suitable.<sup>9</sup>

### **E-Mediation:**

In e-mediation, a mediator provides mediation services to parties who are located at a distance from one another, or whose conflict is so strong they can't stand to be in the same room, E-mediation can be a completely automated online dispute resolution system with no interaction

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<sup>9</sup> writes Richard Fullerton in the Dispute Resolution Journal.

from a third party at all. But e-mediation is more likely to resemble traditional facilitative mediation. It became popular after Covid Pandemic disaster through out the world.<sup>10</sup>

**(E) BATNA:**

Mediators should consider all their options before starting the process. If the negotiation fails, they should calculate their reserved values. This is your BATNA—the course to find the best problem-solving choices. These four processes determine a negotiation's BATNA.<sup>11</sup>

1. If negotiations fail, list your options. No-deal options?
2. Assess your options. Assess each choice's value.
3. BATNA. Select the option with the highest predicted value. This is your BATNA if negotiations fail.
4. Reservation value. Knowing your BATNA, determine your reservation value—the lowest bargain you'll accept. If the deal is below your reservation value, reject it and pursue your BATNA. Accept a higher offer than your reservation value.

**(F) Functions of Mediator:**

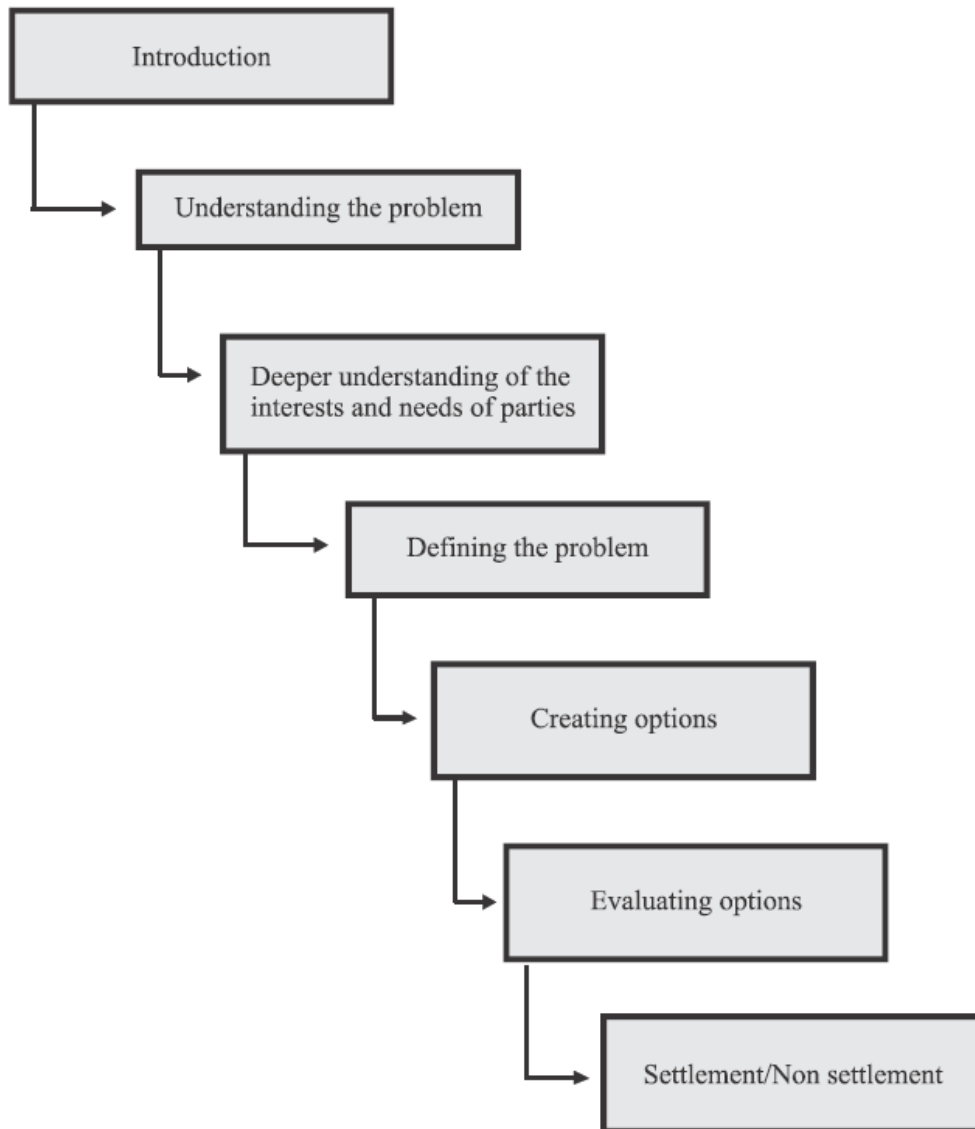
Mediation is a dynamic process in which the mediator assists the parties to negotiate a settlement for resolving their dispute. In doing so, the mediator uses the four functional stages of mediation, namely, (i) Introduction and Opening Statement (ii) Joint Session (iii) Separate Session and (iv) Closing. Though functional stages are used in an informal and flexible manner so that the mediation process gains momentum, following a specific and predictable course as illustrated below:

Mediation is both an art and a science. Issues are settled by negotiation using effective communication strategies during mediation, which is voluntary and non-binding for the parties. The parties are not required to participate in the mediation or to explore the possibilities if they are not interested, even while the mediator makes suggestions. In India, the idea of mediation has not been restricted by any one particular statutory provision. For a variety of reasons, parties are actively contemplating mediation. As a result, the mediator needs abilities to address the conflicts and creates new choices as they are articulated during the mediation process.

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<sup>10</sup> Nitiyog report on ODR, 2021.

<sup>11</sup> <https://www.acas.org.uk/mediation>  
<https://www.pon.harvard.edu/>



Source: Chapter-V, Mediation Training Manual of India<sup>12</sup>

**(G) Stages of Mediation:**

1. Introduction and opening statement

2. Joint Session

3. Separate Session(s)

4. Closing

<sup>12</sup> Mediation and Conciliation Project Committee Supreme Court of India, Delhi.



**Introduction and opening statement:**

The mediator's first and main responsibility is to set up the mediation process and make sure the parties and/or their attorneys are present. In his opening statement, he establishes impartiality between the parties, develops a rapport with the parties, and raises awareness of the mediation process, its steps, and its advantages for achieving a peaceful resolution of the conflict. In his introductory remarks, the mediator discussed the nature of mediation and the ground rules, such as self-determination, non-adjudication, and confidentiality. He inspires the parties by giving them a fair chance to express their opinions.

**Joint Session:**

The mediator gathers information at this stage by watching the parties' emotions, facial expressions, points of view, and interactions. In order to fully comprehend the topic, he may ask questions to obtain further information. He should then summarize his understanding of the issue to give the parties the appearance that he fully understands it. At this point, the mediator notes the parties' areas of agreement and disagreement and makes ensuring that neither party disrupts the session or engages in violent behavior.

**Separate Session(s):**

Explore the conflict. Allow parties to vent more. Allow parties to disclose private information. Recognize the parties' interests. Help parties comprehend the case realistically. Encourage problem-solving. Promote options and mutually agreeable terms.

**Closing**

Mediator orally confirms settlement agreements; terms are written down; parties and their counsel sign the agreement. the parties; Mediator may sign the agreement to verify it.

was signed in his/her presence; A copy of the signed agreement is provided to the parties; The original signed agreement is sent to the referral Court for passing appropriate order in accordance with the agreement; As far as practicable, the parties agree upon a date for appearance in court, which the mediator informs the court of; The mediator thanks the parties for their participation in the mediation and congratulates all parties for reaching a settlement.<sup>13</sup>

**(H)Styles of Mediation:**

**Evaluation Style:** Mediator approaches the evaluate style by assisting the parties to draw potential legal outcome. Neutral way he presents the assessment and with a view if the

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<sup>13</sup> Mediation and Conciliation Project Committee Supreme Court of India, Delhi- Mediation Training Manual of India

mediation fails? He explains the benefit of settlement and remain unsettled. In this type of settlements require subject knowledge in the matter of litigations.

**Facilitative style:** The classic mediator is purely facilitator. In this mediator unrevealed the outcome during process generally this kind of mediation needs expertization in the process of mediation rather than the subject expertization. Only it creates suitable environment for the parties to discuss.

### **(I) Skills required for a Mediator as a Negotiator: Interpersonal and Intra Personal Skills.**

#### **Interpersonal Skills<sup>14</sup>**

- Listening Skills
- Verbal and Non-verbal Communication
- Emotional Intelligence
- Working in Groups and Teams

#### **Intra Personal Skills<sup>15</sup>**

- Self-confidence.
- Persistence.
- Being open to change and new ideas.
- Ability to overcome distractions.
- Time Management.
- Resilience.
- Self-discipline.

## **II. DEALING IN DIFFICULT SITUATIONS**

Most people want to avoid conflict and potentially stressful situations – this is human nature. People often find it easier to avoid communicating something that they think is going to be controversial or bad, putting off the communication and letting the situation fester

**There are two distinct types of difficult conversation, planned and unplanned:**

Planned conversations occur when the subject has been given thought, they are planned as the

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<sup>14</sup> <https://www.skillsyouneed.com/quiz/343479Ncbi.nlm.nih.gov/books/NBK84217>

<sup>15</sup> <https://www.peoplesense.com.au/>

time, place and other circumstances have been arranged or are chosen for a reason.

Planned difficult conversations could include asking an employer for a pay-rise or perhaps telling your parents that you are leaving home to live somewhere else. Although these situations are, by their nature, difficult they are controlled and as long as time has been taken to prepare and think properly about how others may react they can often end up being easier than imagined.

Unplanned difficult conversations take place on the spur of the moment; these are often fueled by anger which can, in extreme cases, lead to aggression.

Dealing with Aggression dealing with aggression, it is important to respond appropriately. Responding angrily will almost certainly escalate the situation and make it harder to defuse- as the parents of toddlers will almost certainly confirm.<sup>16</sup>

### **III. AUTHOR'S ELEVATION**

The author focused on mediation in this piece. The major part of the content is focused on mediation solely. Because meditation has a strong cultural foundation in India, everyone has grown up hearing stories like Maryada Ramanna Teerpulu and hearing about Tenali Ramalinga's opinions. People in India, whether consciously or unconsciously, have faith in alternative dispute resolution. If the person is competent, these mediators (also known as village elders) may also impose a fine, assign chores to the wrongdoer, or administer a thrust whipping. any how people in India closely associate with mediation.

Recommendations:

- Parallel ADR must grow nationwide. They must be established remotely like courts.
- Each court must have arbitration and mediation centers. The ADR forum would initially handle conflicts that can be resolved by any ADR procedure. If parties can't settle, then go to court.
- Indian arbitration and mediation centers focus on business problems. New private bodies for non-commercial disputes are needed (such as family disputes).
- Establishing, empowering, and legalizing ADR entities in the country is pointless unless individuals are informed and willing to choose ADR over the courts.
- Street plays can teach poorer people about ADR possibilities. Such performances must be in local dialects and languages.

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<sup>16</sup> [Indianbarassociation.org/suggestive-measure-to-strengthen-adr-in-india/](http://Indianbarassociation.org/suggestive-measure-to-strengthen-adr-in-india/)

- Promote ADR vigorously (especially mediation) and Laws establish procedure trust.

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