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Law

**THE ROLE OF LAWYERS AS MEDIATORS:
NAVIGATING THROUGH ADVOCACY TO
NEUTRALITY**

KEY WORDS:

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ABSTRACT

Mediation, an alternative dispute resolution (ADR) process, has gained significant traction as an efficient and less adversarial method of resolving conflicts. Mediation is a process in which an impartial and neutral third person, referred to as 'mediator', facilitates the resolution of a dispute without suggesting what should be the solution. In this process, the role of the mediator is to remove obstacles in communication, assist in the identification of issues and the exploration of options and facilitate mutually acceptable agreements to resolve the dispute. However, the ultimate decision rests solely with the parties. A mediator cannot force or compel a party to make a particular decision or in any other way impair or interfere with the party's right of self-determination.

Lawyers, traditionally advocates in litigation, have increasingly assumed the role of mediators in this context. Lawyers who are trained to win cases and defeat the opponent in the court, have now to shift their gear to a reconciliatory mode and help create a win-win situation for both the adversaries ridden by bitterness and acrimony, to a process which is least expensive, most desirable and efficient way of resolving disputes amicably in the most cordial and congenial atmosphere. This article explores the evolving role of lawyers as mediators, examining their unique positions, the benefits they bring to the mediation process, the challenges they face, and the ethical considerations inherent in this dual capacity. Through a comprehensive analysis, the article underscores the significance of lawyers as mediators and their contribution to the effectiveness and integrity of the mediation process.

INTRODUCTION

The legal profession in India is deeply entrenched in modern history, enriched by a multifaceted journey shaped by the colonial influences and the struggle for independence. This profession demonstrates a profound commitment to justice and equality in today's world. It tells the story of lawyers transcending traditional roles to become architects of modern India, contributing significantly to the development and transformation of the nation. Adversarial litigation has historically been the cornerstone of the justice delivery system, shaping the training, habits, practices, and mindset of legal professionals toward a winner-loser dynamic.

However, for the majority of the population, the situation is starkly different. While access to courts is theoretically available to all, in practice, most people's legal rights are severely hindered by the high costs of legal services, the perplexing complexities of existing rules and procedures, and the long, frustrating delays in concluding proceedings. Consequently, the legal system appears grossly inequitable and inefficient from afar, offering too much law for those who can afford it and too little for those who cannot (Pirie, 1985). Thus, justice has become elusive and illusory for many litigants.

This disparity has necessitated new approaches, evident in the adoption and application of Alternative Dispute Resolution (ADR) mechanisms within the Indian legal system. Section 89 of the Code of Civil Procedure, 1908, imposes a duty on the courts to explore whether disputes can be resolved through any of the ADR methods. This mandate for alternatives prompted the lawyers to shift from an adversarial mindset to a conciliatory approach. Integral ADR mechanisms in India popularly includes *Lok Adalats* and *Mediation*, organized under the aegis of Legal Services Authorities, where the legal community plays a constructive role in encouraging the amicable settlements of disputes in a speedy and cost-effective manner.

Mediation has assumed great importance currently, for resolving disputes in an amicable manner, which has got a boost after the recent enactment of the Mediation Act, 2023 (NO. 32 OF 2023) which again requires change in the attitude,

mindset of a lawyer. This new legislation requires parties to engage in pre-litigation mediation before approaching a court, regardless of any prior mediation agreement, and mandates the maintenance of a panel of trained mediators. This presents a new opportunity for lawyers to act as professional mediators.

Lawyers traditionally trained to win cases and defeat opponents in court must now shift gears to facilitate reconciliation, helping in creating a win-win situations for adversaries plagued by bitterness and acrimony. This process is less expensive, more desirable, and efficient for resolving disputes in a cordial and congenial atmosphere. Equally important is the lawyer's role in raising awareness among litigants and the public about the benefits of Mediation mechanism.

This article explores the evolving role of lawyers as mediators, examining their unique positions, the benefits they bring to the mediation process, the challenges they face, and the ethical considerations inherent in this dual capacity. Through a comprehensive analysis, the article underscores the significance of lawyers as mediators and their contribution to the effectiveness and integrity of the mediation process.

The Mediator

Mediation consists of influencing the parties to come to agreement by appealing to their own interests (Eckhoff, 1966). The Mediator may make use of various means to attain this goal. He may work on the parties' ideas of what serves them best, or may also look for possibilities of resolution which the parties themselves have not discovered and try to convince them that both will be well served with his suggestion. The very fact that a suggestion is proposed by an impartial third party, in many circumstances is sufficient to alter the dynamics of the dispute resolution. Unlike resolution of the dispute by the adjudicator, which must of necessity be done within the rigid framework of legal rules, the mediator can act innovatively and enable the parties to reach creative solutions to their differences or dispute.

The Mediation Act, 2023 defines 'mediation' as a process,

whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person referred to as mediator, who does not have the authority to impose a settlement upon the parties to the dispute. Similarly, 'mediator' is defined under the Act 32 of 2023 as a person, who is appointed to be a mediator, by the parties or by a mediation service provider, to undertake mediation, and includes a person registered as mediator with the Council'. The above definitions of the Act 32 of 2023 only illustrates who can be appointed and registered as a mediator, without describing the essential characteristics, qualities, attributes of a mediator.

However, Mediator simply is only a facilitator in mediation process. He/she is to assist the parties in understanding their problems, identifying their underlying issues, reduce their mis-understandings, and generating and developing options that are mutually acceptable to all the parties. The mediator is a friend, philosopher and guide for the parties in the process of resolution of differences or dispute through the medium of mediation (Kulsrestha, 2012). Mediators can be the best peacemakers and restores of fractured relationships, as mediation is a process which provides peace with satisfaction and peace with honour (Aishwarya, 2022). As Gulliver observes, "In negotiations there may be, but not invariably, a third party who, though he has no ability to give a judgment, acts in some ways as a facilitator in the process of trying to reach agreement. This is a mediator" (Sibley, 1986).

Thus, mediator is an impartial and neutral person, who primarily enables disputants to vent their concerns without imposing his decision or solution on them (Srikrishna, 2007). Without actually participating in the mediation process of resolution of dispute, the mediator catalyses the disputants to become more communicative, accommodating towards each other and helps them in understanding their opposing interests. Mediators are assumed to be neutral third parties; however, effective fulfillment of their role involves exercising a significant amount of authority and power (Gerami, 2009). They are expected to take on an impartial role, and facilitate in dispute resolution, in order to help the disputing parties to reach "a voluntary, mutually acceptable resolution of some or all of the issues of their dispute." In order to reach this goal, the Mediators are to respect and encourage self-determination of the parties and preserve their objectivity and impartiality, while at the same time carry out their own role effectively.

The Role Of Mediator In Dispute Resolution

Lon Fuller, the distinguished professor and arbitrator, described the goal of the mediator in elegant fashion when he wrote: "The central quality of mediation is its capacity to reorient the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitude and dispositions toward one another (Stulberg, 1981). Mediator role is thus to act as a catalyst and facilitate the parties to themselves to come up with suggestions and enter into a settlement, without making any proposal for settlement of the disputes. The basic functions of the mediator include: chairing the parties' discussions, helping the parties clarify their communications, educating the parties about the mediation process and the realities of the case in which they are engaged, translating the proposals of the parties into non-polarizing terms; expanding the resources available for settlement, testing the reality of the proposed solutions, ensuring that the proposed solutions are capable of compliance by the parties, and continually protecting the confidentiality and privacy of the proceedings (Tompkins, 1996).

Specifically, the mediator helps disputants to identify the issues, reduce misunderstandings, vent emotions, clarify priorities, find points of agreement, explore the new areas of compromise and negotiate an agreement (Rubin and Brown,

1975; Deutsch, 1973). Therefore, Mediator have no legitimate authority to render a decision and cannot even force or compel a party to make a particular decision, or in any other way impair or interfere with the party's right of self-determination. Yet, the mandate for all mediators is to settle cases (Smilovitz, 2008). The mediator's thus faces a dilemma; to settle a case without imposing a decision. Thus, the process of mediation, and the role of mediator in particular, is shaped by the strategies adopted to cope with this tension between the need to settle and the lack of power to do so.

Mediators Approaches And Strategies

Mediators employed a range of approaches, orientations, and strategies in resolving a dispute. They work to reconcile the competing needs and interests of involved parties. The Mediator's underlying tasks are to assist disputants to, identify, understand and articulate their needs and interests to each other; identify mutually acceptable ways to address and meet them; negotiate an exchange of promises or benefits that meet their standards of fairness; and redefine their relationship in a manner that is mutually acceptable (Moore, 2014). The fact that Mediators do not have decision-making authority makes mediation attractive to disputants because they retain ultimate control upon the outcome. However, mediators are not without influence. The mediator's authority, such as it is, resides in his personality, personal credibility and trustworthiness, expertise in enhancing the negotiation process, experience in handling issues, ability to bring parties together on the basis of their own interests, reputation as a resource person, and his relationship with the parties.

Although mediators take on a range of orientations and approaches, they carry out a number of functions to varying degrees viz. establishing a framework for cooperative decision making, promoting constructive communication, providing appropriate evaluations, empowering the parties, and ensuring a minimum level of process and outcome fairness (Gerami, 2009). Mediators try to reach a resolution of a particular conflict through various tactics, strategies and methods that further dialogue, discussion, concession, compensation and understanding between the disputants. Each particular mediation attempt contains a range of unique contextual and process related variables, which makes difficult to compare across mediation efforts. Nevertheless, within the process of mediation, the mediator is recognized as the distinguishing feature. So, whether the mediator is classified as a state, individual or institution, the role of the mediator as a third party is the distinguishing feature of mediation as compared to other dispute resolution processes (Smilovitz, 2008).

Role Of Lawyers In Mediation

In the words of Warren Burger, the former Chief Justice of the United States of America, "the obligation of legal professionals is to serve as 'healers of human conflict'. To fulfil this traditional obligation means that legal professionals should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense and with the minimum stress on the participants. That is what justice is all about" (Burger, 1983). This re-articulation by Chief Justice of lawyers' historical and traditional obligation of being 'healers of human conflict' emphasizes the role and need of lawyers to resolve disputes by means other than the adversary process.

The approach of lawyers to mediation is important in achieving resolution to a dispute, as lawyer is the intermediary who influence the process and success of mediation (Poitras, 2010). Lawyers in mediation can embrace the underlying philosophy of much of mediation practice and engage in collaborative problem-solving that is non-adversarial in orientation (Macfarlane, 2008). Alternatively, lawyers may stymie the potential for settlement by taking an

adversarial, rights based approach in mediation (Douglas, 2014). At times lawyers may need to advocate vigorously for their clients' rights, but automatically approaching mediation with an adversarial mindset may defeat some of the potential of mediation to meet their clients' needs.

Increasingly, now lawyers are involved in mediations as 'gatekeepers'. As gatekeepers, lawyer's influence which cases proceed to mediation, prepare clients for the process, and guide them through the intricacies of mediation. This engagement of lawyers in mediation is seemingly attributed to the growth of court-annexed mediation provisions, in which disputants are represented by legal counsel. Lawyers have often used their comparative advantage in the practice of law over laymen to influence whether clients pursue mediation by acting as the gatekeeper to the dispute resolution mechanism (Clark, 2012). Since lawyers tend to dominate the advocate-client relationship, and legal education often emphasizes legal norms over extralegal needs, lawyers are often in a unique position to effectively reduce mediation referrals and development (Sharma, 1977).

Lawyers Role During The Process Of Mediation

The role of lawyers in mediation can be divided into three phases *i.e* pre-mediation; during mediation; and post-mediation (MCPC, 2005).

Pre-Mediation

When a party faces a dispute and considers seeking relief from an adjudicatory forum, they typically first contact a lawyer. The lawyer's initial task is to evaluate whether any ADR mechanisms are viable options. If mediation is deemed appropriate, it is crucial to educate the party about the concept, process, and benefits of mediation during the preparation phase. The lawyer is ideally positioned to help the client understand the mediator's role as a facilitator.

The lawyer assists the client in realizing that the aim of mediation is not just to resolve the dispute and conclude the litigation but also to address the parties' needs and explore creative solutions that meet their underlying interests. The lawyer helps shift the client's attitude from adversarial to collaborative. It is important for the party to know that in disputes involving broken relationships; whether personal, contractual, or commercial, mediation can help strengthen or restore these relationships. While aiding the party in understanding the legal position and evaluating the strengths and weaknesses of their case and potential litigation outcomes, the lawyer helps them recognize their true needs and underlying interests, which can be better satisfied through mediation.

During Mediation

Lawyers play a crucial role during mediation. While their participation is often constructive, it can sometimes be non-cooperative and discouraging. A lawyer's attitude and conduct significantly influence their client's behavior. Therefore, to ensure productive dialogue and the success of mediation, lawyers must maintain a positive attitude, demonstrate faith in the mediation process, trust the mediator, and show respect for both the mediator and the opposing party and their counsel. Lawyers should adhere to the mediation ground rules explained by the mediator and advise their clients to do the same. They need to be well-prepared on the facts, laws, and precedents, while also encouraging their clients to present their case to the mediator.

Since clients may not always be able to present complete and accurate facts or refer to relevant documents, lawyers must be vigilant in supplementing this information. Through reality-testing and using BATNA/WATNA/MLATNA analysis, lawyers should continually assess the parties' positions and the progress of mediation, advising their clients to adjust their

stance, approach, demands, and concessions as needed. If sub-sessions with the lawyer(s) are necessary, the mediator can hold these sessions to advance the process and work towards a settlement. Such sessions can also be requested by either the party or the lawyer.

Additionally, lawyers are involved in finalizing and drafting the settlement between the parties, ensuring that the settlement is comprehensive, clear, and executable. They must explain every term of the settlement to their client to ensure full understanding.

Post-Mediation

Even after mediation concludes, the lawyer's role remains significant. If no settlement is reached, the lawyer must assist and guide the party in deciding whether to continue with litigation or consider another ADR mechanism. If a settlement is achieved, the lawyer's responsibility is to reassure the client about the appropriateness of their decision and discourage any second-guessing. To uphold the spirit of the settlement, the lawyer must also cooperate with the court in executing the order or decree based on the settlement terms.

The Unique Characteristics of Lawyers as Mediators

Traditionally, lawyers were seen as advocates for their clients, focused on winning cases through adversarial means. However, as the limitations of litigation became apparent such as high costs, lengthy processes, and the potential for relationship damage the role of lawyers began to evolve, many are now acting as mediators, leveraging their legal expertise to guide parties toward resolution. Many lawyers started to appreciate the benefits of mediation and sought training to become mediators. This shift was driven by a growing recognition of the need for more holistic and client-centered approaches to conflict resolution.

Legal Knowledge And Expertise

In mediation the parties must, inevitably, understand the law and how it applies to their particular situation. If knowledge of law is essential, so also is the lawyer. No doubt lawyers are not the only persons who will act as mediators, and the non-lawyer can always seek legal advice from someone who is professionally trained. But if knowledge of the law is an essential factor, and lawyers can add other necessary skills to that knowledge, they should obviously play a primary role in mediation itself. If, to a significant degree, lawyers will be mediators, it seems fair to posit that the success or failure of the mediation process may depend on the nature of the role of the lawyer as mediator.

Lawyers possess extensive legal knowledge, which is instrumental in understanding the complexities of disputes. This expertise allows lawyer-mediators to clarify legal principles and implications for the parties involved, fostering informed decision-making. Their ability to interpret laws, regulations, and precedents provides a strong foundation for effective mediation, especially in disputes involving intricate legal issues.

Analytical And Negotiation Skills

Lawyers are trained in critical thinking and analytical skills, which are crucial in identifying the underlying interests and positions of the parties. Their negotiation skills, honed through legal practice, enable them to facilitate discussions, propose creative solutions, and manage the dynamics of negotiation effectively. This skill set is invaluable in mediating complex disputes where parties may have entrenched positions.

Communication And Interpersonal Skills

Effective communication is essential in mediation. Lawyers, through their practice, develop strong verbal and non-verbal communication skills. They can articulate issues clearly, listen actively, and manage emotions, ensuring that all parties feel

heard and respected. These interpersonal skills help build trust and rapport, which are critical for a successful mediation process.

**Benefits Of Lawyers As Mediators
Enhanced Credibility and Authority**

Lawyers bring a sense of credibility and authority to the mediation process. Their professional background and understanding of legal procedures reassure parties that the mediator is competent and capable of handling the dispute impartially. This credibility can facilitate trust and cooperation between the parties, increasing the likelihood of a successful resolution.

Efficient Resolution Of Disputes

Given their legal expertise, lawyers can expedite the mediation process by quickly identifying key issues and potential solutions. Their familiarity with legal processes allows them to streamline discussions and focus on the substantive matters, reducing the time and cost associated with prolonged disputes.

Comprehensive And Legally Sound Agreements

Lawyer-mediators can draft settlement agreements that are not only fair and balanced but also legally sound and enforceable. Their understanding of legal requirements ensures that the agreements comply with relevant laws and regulations, minimizing the risk of future disputes or legal challenges.

Lawyers as Mediators: Transition from Advocacy to Neutrality

Mediation, unlike litigation, emphasizes collaboration, communication, and mutual problem-solving. As mediators, lawyers must relinquish this advocacy-driven mindset and embrace a stance of neutrality, facilitating dialogue between disputing parties to help them reach a voluntary, mutually acceptable resolution. This shift demands not only a change in professional behavior but also the development of a new skill set and adherence to a different set of ethical standards. This transition from advocate to neutral facilitator marks a profound professional and philosophical shift.

The journey from advocacy to neutrality is fraught with challenges. Lawyers must navigate the delicate balance between using their legal expertise to inform the mediation process and maintaining an impartial stance. They must also overcome deeply ingrained adversarial habits and develop the ability to manage conflicts impartially. Moreover, the transition requires a commitment to continuous learning and self-reflection to cultivate the empathy, active listening, and facilitation skills essential for effective mediation. The prominent challenges that a lawyer usually faced during this transition is in maintaining neutrality, and avoiding conflict of interest.

Challenges In Maintaining Neutrality

One of the primary challenges for lawyers transitioning to the role of mediator is shifting from an advocacy-based mindset to a neutral, facilitative role. Advocacy and mediation require distinct skill sets and mindsets. As advocates, lawyers are accustomed to representing the interests of their clients vigorously. In contrast, as mediators, they must remain impartial and refrain from favoring any party, which requires a significant adjustment in approach and perspective. Transitioning to a neutral role requires a fundamental shift in perspective and behavior that includes, internal biases where lawyer tends to unconsciously favor one party over another based on their own biases or past experiences, and pre-existing client relationships with one of the parties, making it difficult to maintain impartiality.

This challenge can be overcome by the regular self-reflection and awareness of personal biases, or specialized training

programs in mediation, or seeking guidance from experienced mediators can also offer support and practical advice for handling neutrality challenges.

Challenge In Identifying And Avoiding Conflicts

Lawyers transitioning to mediation must be vigilant about potential conflicts of interest. Unlike advocacy, where the lawyer's loyalty is to their client, mediation requires impartiality. Conflicts of interest can arise from mediating cases involving parties or issues the lawyer has previously represented, or mediating disputes involving friends, family, or close associates. However, this challenge can also be overcome by implementing rigorous screening processes to identify potential conflicts before accepting mediation cases, or fully disclosing any potential conflicts to all parties and obtaining their informed consent, and lastly by recusing oneself from cases where impartiality cannot be assured.

CONCLUSION

The role of lawyers as mediators in mediation is multifaceted and evolving. Their legal expertise, negotiation skills, and ability to manage complex disputes make them uniquely qualified to serve as mediators. While they face challenges in transitioning from advocacy to neutrality and maintaining ethical standards, their contribution to the mediation process is invaluable. As the demand for mediation services grows and technology continues to shape the field, lawyer-mediators will play an increasingly important role in promoting effective and amicable dispute resolution. Their involvement not only enhances the credibility and efficiency of mediation but also ensures that agreements are legally sound and enforceable, contributing to the overall integrity and success of the ADR process. By continuing to expand training programs, raise public awareness, and strengthen legal frameworks, there is potential for mediation to transform dispute resolution landscape in India.

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