
ROLE OF THE LAWYERS IN THE MEDIATION PROCESS

Pradeep Kumar Bharadwaj, Research Scholar, Department of Law, Koneru Lakshmaiah Education Foundation, Green Fields, Vaddeswaram, Andhra Pradesh, 522302.

ORCID ID: 0000-0002-9862-4967

Dr. Megha Ojha, Associate Professor, Department of Law, Koneru Lakshmaiah Education Foundation, Green Fields, Vaddeswaram, Andhra Pradesh, 522302.

ORCID ID: 0009-0003-0825-6529

ABSTRACT

A lawyer is an expert trusted by a party for the length of the litigation and thereon. But, Mediation by its core principles is autocentric to parties with the disputing parties participating and finding ways towards amicable settlement of their disputes.

Mediation has gained significant importance and necessity towards quick and effective resolution of disputes. The process emphasises the presence and control of the mediator heavily to remove the impediments in creating the impasse and enabling the resolutions. However, the final approval and consent to the resolution agreement vests on the parties who clings more with his lawyer than the impact of the mediator. As such, the role of a lawyer in the process of mediation becomes very curtail and necessary to assist the mediator as well as the respective parties to develop conviction towards resolutions and aiding in carving out the best outcome to the respective parties mutually. Let us therefore explore the role of a lawyer in the process of mediation hereunder.

Introduction

Lawyers and their Bar Associations in America were enthusiastic about the promotion and use of mediation in the United States of America. American lawyers recognized that the legal system is overburdened and on the verge of collapsing due to its improper use. By the mid-1980s, lawyers and state bar associations in the United States had professionalized mediation by developing mediator training standards, providing lawyer mediation training and prescribing ethical standards for lawyers acting as mediators and advocates in mediation.¹

While judges in India have rushed to recognize the expanded use of mediation in USA as an useful tool for reducing case overabundances and postponements, Indian lawyers have been slow to grasp it. Alongside, large sections of Indian lawyers, unlike American lawyers of the mid-1980s, are traditionalists. They dislike the change and are hesitant to expose their customers to an obscure ADR process. It is also a fact that alternative dispute resolution through mediation can potentially deprive the remuneration of lawyers since the case gets hastily settled impeding the lawful fees that would have been otherwise earned through a long drawn adversarial court room process.

The same has been substantial for American legal advisors during the advancement of mediation in the US over the last four decades.² Regardless, by their underlying affirmation and use of intervention, attorneys became not the very best ready and most qualified middle people, nonetheless they transformed into the gatekeepers for intercession, picking more than 80% of the cases suitable to be mediated and finding amicable results without having to approach a Court.

The Participation of Lawyers in the Mediation

Litigation usually causes communication between the disputing parties to halt, with the void filled by lawyers' legal notices followed by pleadings that gradually move the parties towards a long-drawn court room litigation. The conventional legal system cannot provide quick

¹ Comparative Analysis of Mediation Laws in India and other countries: <https://articles.manupatra.com/article-details/Comparative-Analysis-of-Mediation-Laws-in-India-and-other-countries>

² Staying in Orbit, or Breaking Free: The Relationship of Mediation to the Courts Over Four Decades to the Courts Over Four Decades - by Robert A. Baruch Bush in North Dakota Law Review, Volume 84, Number 3, Article 2 dated 1-1-2008

remedies; rather, it is intended to find the truth in the manner prescribed the procedural laws and get the wrong doer compensate to the wronged.

According to author Jerold S Auerbach,³ commercial disputants should not have to tolerate an experience that resembles “a sudden regression to childhood,” where they do not understand the procedures or the language, where the lawyer assumes the role of a parent and the parties become the dependent children.⁴

Whatever would be the cause of a dispute, most of them would be unanticipated, unforeseeable and most importantly pardonable. In such cases, there is a reasonable chance that an attempt to discuss the problems openly with the parties involved and to devise a workable solution acceptable to all, can put an end to that dispute even before the rooting of a litigation. Such considerations invariably imply that, whenever possible, an honest effort should be made to discuss the facts, issues and the differences between the parties in good-faith of mediating towards an amicable resolution.

Mediation works well for commercial parties in dispute because it is forward-thinking towards gaining trust, relationships and profits with least litigations. Whereas the traditional civil disputes, mostly fought one’s own ego looks to determine who was correct and wrong. In contrast, mediation is futuristic to find early solutions that both parties can sustain without having to be apprehensive court-birds for years. The role of lawyers would be crucial here to introspect into the true motto of litigation and advocacy which holds them to be officers of justice but not to be an impediment to best, speedy and effective results to be made available to the litigating parties. The fiduciary duty upon the lawyers is to empower their parties to wisely chose the path of solution, whether it be mandated through adversarial or managed through non-adversarial process like mediation which empower the party’s autonomy to find their own solution with the assistance and guidance of their lawyers.

Myths About Lawyers’ Influence on Mediation

The impact of having lawyers present at the mediation table has been a source of debate and whether their presence is compatible with the mediation process is at the heart of the debate.

³ Jerold Auerbach (born 1936): American historian and professor emeritus of history at Wellesley College, US

⁴ THE ROLE OF THE LAWYER IN THE COMMERCIAL MEDIATION PROCESS: A CRITICAL ANALYSIS OF THE LEGAL AND REGULATORY ISSUES - <https://www.coursehero.com/file/198482284/The-Role-of-the-Lawyer-in-the/>

Indeed, the differences between the missions, ethics, and practices of mediators and that of the lawyers may result in conflicting standards. Unlike the mediator emphasizing parties' autonomy and their cooperation, the lawyer has a niche and biased relationship with his parties respectively and hence is obligated towards getting the best outcome to his client alone. As a result, many a times, there is perceived incompatibility between the approach of a Mediator and the Lawyer.

It is common in training and classrooms to hear novice mediators express concerns that the presence of a Lawyer in the mediation will impasse the mediation process. Certain mediators, particularly those with no legal training, have developed a fear of failure on having lawyer present in the process. Further, few Mediators even opine that the cause of unsuccessful mediation is primarily the presence of the respective lawyers. Nonetheless, the more seasoned mediators emphasise the presence of respective lawyers as a more beneficial outcome or success to the mediation process, as they hold that lawyers are no impediment, but rather a key factor in engineering the resolution of dispute amicably keeping the best interest of the enforceability of the settlement agreement in concern.

Is the presence of a lawyer having a negative impact on the mediation outcome: a myth or a reality? This theory is yet to be confirmed or refuted by collection of more data and empirical research. To obtain a rationale to the said myth, my participation and collection of superficial data from few empirical tests derive the point that the assumption is more a myth but in reality, the presence of a lawyer is both advantageous and disadvantageous depending on several other factors viz., subject matter of the dispute, stage and timing of mediation, vulnerabilities and mindset of the lawyers/parties, control and conviction of the mediator, empowerment and importance given to the presence and participation of lawyers will decide the effectiveness of mediation by comparing the successful results of mediation obtained with and without the presence of the lawyers in the process.

Mediation Styles available for Lawyers to opt

There are various types of mediation which are available to be opted by the lawyers in the best interests of the dispute resolution of their parties. They are:

1. **Statutory or Mandatory:** wherein the lawyers have to necessarily get the parties for

mediation, like for instance, Section 12A of the Commercial Courts Act, 2015,⁵ which was amended in 2018, making it mandatory for the disputing parties to attempt mediation before initiating a suit.

2. **Court-Annexed and Ordered by the Court:** The amendment to Section 89 of the Civil Procedure Code imposes the courts to refer the dispute to any of the alternative dispute resolution (ADR) mechanism if there are elements of settlement and consent of the parties.⁶ The consent of the parties herein which is mandatory for such reference to ADR is highly under the approval and influence of the respective lawyers. Hence, the Mediation Act, 2023⁷ and the process recognizes the importance, approvals and presence of the respective lawyers in the process of mediation.
3. **Private:** The Mediation Act, 2023 gives room for validating and approving the outcome of private mediation conducted by any Qualified or Certified Mediators as approved by the said Act. This move is strategized to woo the averting and apprehensive lawyers to bring their parties to the process of effective mediation outside the supervision of the courts and to help them take home the double advantage of retaining their authority, alongside the full receipt of their desired professional fees from their parties for getting them an early and effective relief.

Impact on Satisfaction of the Lawyers with the Mediation Process

There is again a great divide among the lawyers in understanding the process of mediation as an effective tool and a thorn in the resolution of dispute. Lawyers who vote for adversarial battle may advocate negative perception about mediation to their parties. Such lawyers being dragged to mediation mostly feel that representing their clients therein is by voicing in their client's place by wholly dominating the case, cause, concern and conversations during the process of mediation. Also, such lawyers expect their work would be remunerated by their clients only when they speak for them. There are instances where lawyers don't let their parties utter a word but rather engage into a dialogue and arguments in the process of mediation. In such cases, the level of satisfaction to embrace the mediation process by the lawyers is lacking

⁵ Commercial Courts Act, Section 12A. Pre-Institution Mediation and Settlement - Ins. by Act 28 of 2018, s. 11 (w.e.f. 3-5-2018)

⁶ Civil Procedure Code of India, Section 89: Settlement of disputes outside the Court - Ins. by Act 46 of 1999, S. 7 (w.e.f. 1-7-2002), earlier rep. by Act 10 of 1940, S. 49 and the Third Schedule.

⁷ THE MEDIATION ACT, 2023, [ACT NO. 32 OF 2023] enforced on 14-09-2023

from its inception and hence shall be a disaster of an effort in terms of time, cost and dispute resolution.⁸

On the other end, there are lawyers who would feel satisfied in motivating their clients to willingly participate in mediation as this non-adversarial process is harmless, harmonious, accommodative, cost effective, party centric, unbiased and neutral in approach as against the one-sided outcome imminent in the court litigation. In such cases, the lawyer is satisfied by enabling the quick, effective, cost and time saving outcome to his party more than wanting accolades for exhibiting the skills of a lawyer and demonstrating his involvement in the case through his courtroom adventures and skills.

Wherefore, the satisfaction of the lawyers on the impact of mediation is divided and lacks a stiff view among them as it gets varied and contradicting depending on the cases and their clients. Few lawyers elevate the mediator and seek suitable orders from him, and few other lawyers overlook the presence of the mediator and demean him to be powerless and unimportant. Further, while the mediator believes in the processes to be win-win for disputants, the lawyer may place a greater emphasis on winning exclusively with maximum gains to his party over the overwhelming losses to the other. As a result, the parties may find themselves uncertain and torn between the two approaches leading to devalue and disregard the mediation process itself.

It is not surprising that the presence of lawyers appears to reduce parties' appreciation of the mediator's role. However, on the larger scale, the presence of both the mediator and the lawyer shall have a better impact on the outcome of the mediation process, at least from the perspective of the parties. Indeed, if the lawyers are satisfied with the process, a party may give equal weight to the recommendations of both the mediator and the lawyer as he may see them both to be sharing the centre stage. On the other hand, if the lawyer has at least or nil satisfaction with the process, the core purpose of mediation shall be half hearted irrespective of the result of the dispute in the mediation.

Strategies for Reducing the Influence of Lawyers in Reconciliation

In cases where the parties' reconciliation is a major problem in the mediation, the presence of

⁸ DOUGLAS, K. and BATAGOL, B. M. (2014). The role of lawyers in mediation: insights from mediators at Victoria's Civil and Administrative Tribunal, *Monash University Law Review*, 40(3)

lawyers must be taken into consideration seriously. Rather than being defeatist or believing that reconciliation in mediation is impossible, it is critical for mediators to employ strategies designed to limit the inhibitive impact of lawyers on the reconciliation process. They can achieve this by employing one of three strategies, which are briefed hereunder. First, by describing the mediation framework thoroughly to the parties and their lawyers through a proper and detailed opening statement, wherein, all the positives of the mediation process such as time effectiveness, cost effectiveness, collaborative approach, party autonomy, win-win possibilities, confidentiality and resolution of conflict more than the pending dispute. Second, the mediator should consciously take the confidence of the lawyers by empowering them to participate in the process and induce them in developing strategies towards problem-solving, and by gradually disassociating the lawyer from his position to find resolution to problems. According to Dwight Golann,⁹ a law professor and mediator, lawyers who make it easier to find solutions may even encourage the parties for reconciliation. It may be appropriate and advantageous for the mediator to conduct private caucus with the lawyers separately to know their position and motivate them to realise their authority and expertise in motivating ways of resolution among their parties mutually.¹⁰ Third, the mediator should assist both the parties to recognize their share of responsibilities in a conflict and accordingly help them brainstorm towards introspecting and investigating the likelihood of reaching an amicable resolution. The mediator should strictly avoid in creating a situation wherein the parties feel their value being diminished by the process and tilt back towards their lawyers as more reliant than exercising their autonomy conferred by the process.

Futuristic Measures to Appease Lawyers

The lawyer should be aware of what mediation entails. Many lawyers are likely to be unfamiliar with the subject and the process of the mediation. The major impediment among few lawyers still looks to be overhanging between finding amicable resolutions through mediation and losing their prospective remunerations through litigation. Awareness programs that explain the process and its benefits, its effectiveness in resolving the entire conflict alongside the importance of the presence of lawyers in the process more as a shadow mediator than as a disputing lawyer fighting for the sole concerns of his client. It is also suggested to

⁹ Dwight Golann is Research Professor of Law at Suffolk University in Bos-ton, where he teaches mediation and negotiation

¹⁰ Mediation: The Roles of Advocate and Neutral, Fourth Edition: Series / Aspen Casebook Series dated 14-09-2021

enact or amend the legislations to compel the lawyers/parties to go through compulsory process of mediation before instituting suits or cases before the jurisdictional courts.¹¹

It is to be made known to the masses, media and litigating lawyers that mediation is catching up and is the world's fastest-growing ADR method. Its advantages are that it finds workable and practical solutions to disputes, that it is quick, less expensive, and that it respects relationships. The process of mediation should be applied as a chance than a threat, and in this process it is a must to make the lawyers know that they are the better mediators by their rich possession of legal, practical and factual knowledge alongside their brilliant analytical and persuasive skills. Furthermore, the notion that lawyers lose their remuneration from their parties if cases are mediated has to be erased completely. Mediation is also a professional service of the lawyer to get this client the most viable and amicable resolution for rest of the client's life, and as such lawyers can earn through their professional services rendered, along with the respect and reverence for getting the parties such solutions which shall mitigate the whole of the dispute and the conflict deep rooted in the litigation.

Conclusion

For many mediators, the presence of a lawyer in the process complicates the mediation process and almost always leads to its failure. Lawyers, according to these mediators, have a negative impact on the process. This perception also suggests a fact that the presence of a lawyer has no significant impact on the mediation process. However, the real fact is that Lawyers are mostly adept and versatile in the process and can acclimatize their tactics to match the mediator effort and success of mediation.¹² The lawyer's proficiency is not just confined to court appearances but they enact as tacticians, forecasters, instructors, and emotive directors. They contribute in preparing their clients for mediation process, helping them in negotiation process, and safeguarding the clients in drafting and execution of settlement agreement.

As the need, necessity and mandate for the process of mediation spreads wide in this fast-growing world of AI and technological advancements, both the lawyers and the mediators play a crucial role in effective implementation of mediation and to encourage most productive

¹¹ How Your Lawyer Can Help With Mediation: <https://www.anthemcap.com/company-guest/find-legal-support/resources/courts-and-mediation/legal-assist/how-your-lawyer-can-help-with-mediation>

¹² ROLE OF A LAWYER IN MEDIATION: <https://viamediationcentre.org/readnews/ODM0/ROLE-OF-A-LAWYER-IN-MEDIATION>

amicable resolutions. The lawyer's participation in the process of mediation augments the trustworthiness and competence of the process.

It is suggested that lawyers should willingly embark upon this effective process of dispute resolution by motivating and educating their parties to participate in the process of mediation with hope, but not in despair or as a means to protract time of litigation. It is very important to make know the parties that mediation ensures win-win position to all the litigating parties and also encourages to restore their relationships to better terms than developing animosity between them if alive in court litigation. In the spirit of the above facts and statements. Mediation is one of the most successful processes of alternative dispute resolution mechanism with collaboration of mediators, lawyers and the litigating parties. The controller of the process may be the mediator, the participants may be the disputing parties, but to conclude, the lawyers are the true drivers to bring transformation to this effective travelogue of mediating the disputes through alternative dispute resolution.