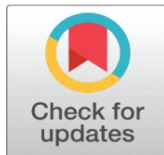
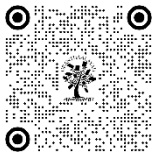


MEDIATORS OR MAGICIANS? THE MEDIATOR'S PSYCHOLOGICAL CRAFT IN MIRACULOUSLY RESOLVING MOST COMPLEX LEGAL DISPUTES AMICABLY

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DOI

[10.29121/shodhkosh.v3.i1.2022.2615](https://doi.org/10.29121/shodhkosh.v3.i1.2022.2615)

Funding: This research received no specific grant from any funding agency in the public, commercial, or not-for-profit sectors.

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ABSTRACT

There are so many cases in Indian Judiciary for which after a period of time, even the litigants give up the hope of them being resolved. But when the same cases get referred to Mediation, it has been witnessed that quite often they end up not just settling amicably but the parties at disputes also come back together. When the conflict is same, the parties in the conflict are same then what does actually change is the process and approach that was used to solve the dispute. Mediation is the ship that travels at the will and self-determination of the parties and the reaches to its shore. But like every ship needs a captain for it to travel in the both, the peaceful oceans and the cross through the fierce storm, Mediation also is impossible without a skillful Mediator who plays the role of the captain in this process. The Mediator uses his skill to help the parties get a clear vision through the storm of their dispute and helps them analyze how deep they are in waters. What are the chances of their survival if they travel solo and what if they come together. The Mediator helps the parties realize their actual intent and whether they want to continuously keep travelling at the ocean or actually reach the shore too. For all of this self-deliberation of the parties, the Mediator has to keep an extremely balanced state of mind and emotion to actually make this happen. The Mediator has to be very cautious about the length and breadth of his role and the extent to which he gets involved. This paper discusses about the soft skills and crucial role that the Mediator plays that shifts the psychology of the parties from dispute to amicable settlements even after hating and fighting with each other for years.



1. INTRODUCTION

Since whenever we remember, each one of us have heard about cases of all nature and types and how they remain stuck in courtrooms for decades. Contrary to this, Mediation has turned around some most difficult matters and disputes and have closed it with amicable settlements. There must be something actually correct in either the idea, approach, or procedure of Mediation that turns the table around for the parties and help them to resolve their years old conflicts amicably. This research paper quotes examples of several real-life cases in which the mediation process has been considered to have done a miracle. But more that the process, it is the skill and intellect of the Mediator that does the real magic. The soft skills that the mediator possesses, the accommodating but firm voice and tone, the opening statement delivered, all contribute to the shift in the perception of the parties at the dispute and pushes them to settle it. Contrary to litigation, that keeps the parties at the backseat, Mediation brings them to the driving seat and help them decide for themselves. The psychological transformation that the Mediator performs over them is the essence of it all that lays down the field for cultivation and harvest. Neither just the dispute resolves quickly, but also at a much lower cost. The paper discusses what all these skills are and how they can and do help the parties resolve their conflict with such miraculous results. And when this happens, each party does end up saying that “we wish it would have happened years ago”.

Case Studies: Here are some real case studies that have been solved through Mediation. Honoring the aspect of confidentiality in Mediation, attempt have been made to keep the identity of the parties anonymous.

Case Study No:	Dispute at Court	Result of Mediation
1.	X and Y are husband and wife. The husband doubts over the pregnancy of his wife and believes the child not to be his own. He asks for divorce to which the wife denies and give birth to her child. Now the child is 22 years old and the father and daughter have never seen each other face to face. The Wife and Husband hate each other, the case is in court for years now for divorce and other legal actions. Even when the parties did not want to, the judge referred the case to Mediation.	The director of the Mediation Institute while handling the case to the Mediator stated that if the mediator would be able to settle this case, he would consider it to be a miracle. The mediator after few sessions submitted "the reunion report". Consider the parties who were apart for 22 years are now reunited and living together with love.
2.	P and Q are husband and wife. Both of them after few years of marriage have now separated and have been granted divorce by the honourable court. The only dispute that remains is over the maintenance and custody of the children. The case goes into Mediation.	The Mediator takes up the case and tried to break the ice between the couple. She brings them into the shoes of each other and gradually after few sessions, to the wildest of everybody's imagination, Both P and Q ended up marrying back each other again and are now staying peacefully together.
3.	The case involves the death of a South Indian cinema producer who was not at talking terms with his brother. But at the time of his death his son and wife were abroad and could not reach on time for the last rites. Thus, his brother performed the rites. Later on, when he wanted to immerse the ashes in holy river, the son returned from abroad and stopped his uncle from performing the rites further. The case went to court and was finally referred to Mediation.	During the initial sessions of the Mediation, the nephew and the uncle did not even want to see each other. But later on, with the compassionate intervention and support of the skilful Mediator, both of them hugged each other and cried like a child. The last rites were not just mechanically performed but was completed by both of them with utmost love and respect for each other.
4.	30 Top Notch executives of various corporate firms live in a posh area of the city and are otherwise friend. But are fighting from the side of their companies over whether the area should be converted for commercial use or residential. They have been at Litigation for 10 good years and had spent immense fees for the same.	When they enter into Mediation, the Mediator invites suggestions and idea for resolution from their side for which they contribute very creatively. Later on, in a period of Just 1 month, they submit the settlement terms in the court and decide to reshuffle their individual properties to different sides so that wants of all of them can be satisfied. After seeking permission to speak, one of the parties says in court that "If only we had this chance ten years back..."

There are so many examples of successful mediations and how the mediators have made the impossible possible. It is no wonder that the parties who were already done by getting divorced married back again. The father who had not seen the face of his daughter for 22 long years, is not living with his family again. The daughter also forgave her father. There has to be some gravity in the process and something very impressive about the person conducting the process that resolves a property issue in just one month that was ongoing for a past decade and was even charging heavily to the pockets of the litigants. Let us see what makes the process of Mediation and the art and skill of Mediators that make us witness these miracles happening.

What is so special about the process of Mediation?

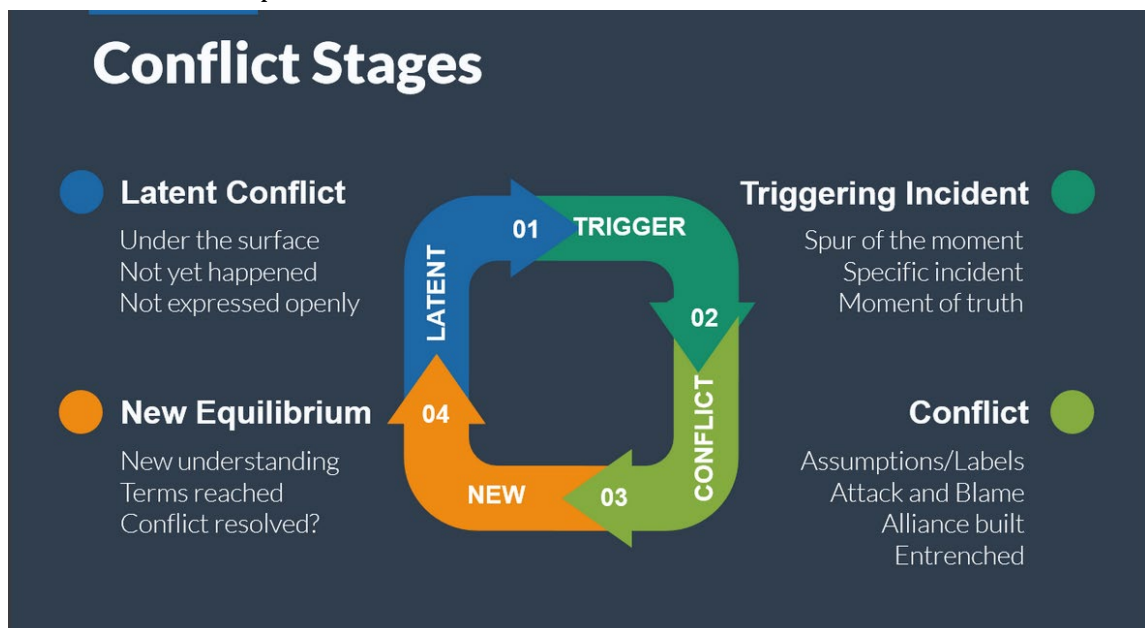
“When you Confront a problem, you begin to solve it - Rudy Giuliani”

Contrary to the Adversarial System in which the Lawyers are at the driving seat, Mediation places the parties at dispute to the front row. It is the **“Self-Determination”** of the parties that decides the direction of the Mediation. They get to decide the structure of Mediation and what to and what not to share. They also decide the scope of mediation. This is also a **“Quicker”** and much lesser time taking process, but this realization only happens when the parties enter into mediation and witness the case progressing so speedily. The sanctity of this process is still maintained because of the **“Confidentiality”** aspect that allows the parties to just be themselves and let out all that is inside them for the other party. Generally, a lot of emotion baggage is being carried by them and all that they want is the other party to hear them out. Mediation facilitates this. The process of Mediation is completely **“Voluntary”** in nature and after the first meeting the parties can at any stage step out of the process. This minimizes the **“Risk”** of winning or losing and makes the process worth giving a try. Also, the result of Mediation is **“Non-Binding”** in nature that means that the parties at the dispute can still go to litigation if they feel that justice has not been served. All these factors make Mediation a more favorable process than Litigation but only when realized.

Mediator of Magicians? The Mediator’s Craft:

“We can’t solve a problem by using the same kind of thinking we used when we created them - Albert Einstein”

It is often wondered that when the judges and courts, with the amount of authority and command they hold are unable to deliver timely and desirable results, then what actually is different when the dispute comes to the hands of a Mediator? The answer to this is related to the Psychology of a dispute. The dispute was actually a disagreement in viewpoint that over a period of time sucked in various emotions like ego, hatred, self-esteem, anger, fear etc. in it that made the picture ugly and the parties developed a mindset that the dispute is a matter of their pride in which they need to anyhow win. This is why they keep investing their time, energy and money into it. Here the image below depicts how a disagreement turns itself into a dispute with addition of external factors.



<https://www.mvmediation.org/blog/conflict-resolution-ideas-day-8>

A mediator understands that the conflict is not actually as big as it might seem. They are trained to understand the psychology behind what is being said by the parties and why it is being said. Also, because of the fight and sessions of litigation attended earlier at courts the parties escape from the thought of confronting each other. The Mediator promotes the parties to keep their sides and also make sure that the other party listens carefully. Here are some steps that the mediator takes to solve the conflict among the parties. Firstly, let us understand the difference between a Mediator and Accredited Mediator. As per Mr. B C Thiruvengadam, an accredited mediator, **an accredited mediator** is someone who

- 1) does not evaluate the merits of the claims involved in a dispute
- 2) does not judge who is right or who is wrong
- 3) does not render any opinion to any of the parties, and
- 4) Refrains from suggesting solutions to resolve the dispute.

This shows that the Mediator only facilitates the process and creates a comforting as well as amicable atmosphere for the process to happen. The mediator promotes the parties to firstly, identify the conflict between the parties, then finding out the underlying cause(s), and after that, assisting the parties to resolve their disputes by adopting certain principles and techniques. This process followed is called "**Structured Mediation**". This is called so because the trained mediator administers the process stage-by-stage in a structured manner. The foundation of structured mediation rests on **Five Basic Principles**. Firstly, the entire mediation process is voluntary, second principle is confidentiality. The third principle is that the entire process is party-centric, i.e. the parties are the one who directly interact with the mediator instead of the respective legal advisors, relatives, friends etc. The fourth principle is the self-determination of the outcome by the parties in arriving at the settlement. Finally, **mediation is a conflict resolution mechanism rather than a dispute resolution mechanism**. Mr. Thiruvengadam rightly says that, "*Litigation or Arbitration may resolve a dispute, but not the conflict*". Many judgements and court decrees are challenged in appeals because the losing party is not happy with the outcome; that is to say, the conflict remains despite court decision. Whereas the accredited mediator tries to unravel the earth from over the root of the conflict buried in deep sands. i.e. identifying the real cause of why the conflict or disagreement took birth at the first place. Many a times, the root cause is not that big but the verbal abuse, anger and ego involved along with ruins the matter and makes the situation look bigger than it actually is. **There are many Psychological Factors that creates a conflict and how mediators help the parties to realize, acknowledge and get over the same.**

- 1) **Perception:** Often both the parties view the conflict with different perceptions. Both tend to subconsciously support their own viewpoint and feel that the other party should take the first step for resolution. The Mediator takes the parties back in time and help them ponder over questions like, what triggered you back then? Do you actually mean what you said? Can you not think about forgiveness now etc.
- 2) **Position, Interest and Rights:** In the process of negotiation, the mediator analyses, to what extent the position aligns with the party's genuine interests in the dispute, the nature of rights, and the principles and values they stand for. The mediator helps them realize the reality behind what they are demanding and what they would actually get if continue to litigate
- 3) **Factors like Anger, Ego, Pride and Fear:** Whenever a conflict or disagreement arises, the rational mind takes backseat and emotions comes to the front. Anger for how the other person can disagree with me, Ego of being more correct, Pride of being superior and Fear of being seem like a loser if now take a back step. All these factors together support the conflict and shape it into a dispute.
- 4) **Dishonesty, Suspicion, Greed and Conflict of Interest:** These are some other factors that do not let the issue resolve. Many a times one or both the parties have actually been dishonest in their deed or might have performed a mistake due to their greed. The private sessions with the Mediator help them to discuss their fears with someone with complete confidentiality and get help for same.
- 5) **Mistrust and Misunderstanding:** Mostly in family matters, or even between employer and employees, mistrust and misunderstanding is the greatest reason for a conflict. An honest employee not happy with someone else's new recruitment. The wife saw her husband talking happily to a beautiful woman. Employer finding some disparity in company accounts but hesitate to confront the same with his employee. All these scenarios gradually develop misunderstandings between the parties. They have never opened their heart out to the other person and

feel more comfortable in fighting over the court. This is where the Mediator actually helps them out with self-realization and confrontation. Thus, when free from this emotional baggage, they tend to look towards the brighter side and years long estranged relations connect together again.

- 6) **Bias and Prejudices:** Each one of us are filled up with preconceived notions about situations and people. This party is good, that is not. My religion is better, women are not good drivers, this particular caste should not rise up in the society, differently-abled peoples cannot prove to be performing employees, the younger generation is of loose character and careless etc. are some of the biases and prejudices that people are filled with. Thus, their problem is not with that particular person, but has there been any one else too, their reaction would have been same. The Mediator with his skillful assistance and communication skills, helps the person frame and acknowledge a new viewpoint and proceed further towards appreciating it.
- 7) **Influence of Third Parties:** Many a times the reason for conflict is because someone else said something or has been continuously feeding them up with misinformation that gradually became belief. Like in the case study 1, the wife heard from her friend that her husband was talking to a beautiful woman seeded suspicion in her mind, also the husband was told by an astrologer that he cannot be a father ever seeded the suspicion in his mind that the baby with whom her wife is pregnant is not his own. He never confirmed about his impotency medically and spent 22 long years not even looking at his daughter once. Similarly, initially the wife did not believe that her husband is disloyal but when he blamed her that the child is not his, she tends to believe that he must be having an affair and thus, denying from his responsibilities. All these curtains get unveiled by a skillful mediator who shows mirror to the parties and help them self-reflect over what why and how of the conflict. This is why, mediation is more helpful than litigation because it helps the parties reflect and realize their faults and fruits.

To become and accredited mediator, an individual must undergo training in many areas, such as honing non-evaluation skills, strengthening communication capabilities, negotiation skills, breaking and impasse, neutrality, impartiality etc. No specific academic or professional background is needed to become a mediator. The mediator is a neutral facilitator who helps the parties at dispute self-evaluate their positions and interests, understand each other's perceptions, maintain dialogue, and nudges the parties towards generating settlement options and, after that, arrive at a mutually agreed settlement. While doing so, s/he remains steadfastly independent and neutral. The mediator does not render an opinion for resolution or evaluate the right or wrong or the dispute's merits. They help the parties effectively use empathy, reality, and reasoning techniques to become more self-aware of their positions and interests and be open to assessing solutions. The Mediator often explains the parties about their **BATNA** (Best Alternative to a Negotiated Agreement) and **WATNA** (Worst Alternative to a Negotiated Agreement) and also at times their **MLATNA** (Most Likely Alternative to a Negotiated Agreement) that explains all the way out that the party can take from the dispute. With assessment of these, the parties do tend to think seriously about their positions and tend to take the easy way out of a settlement.

In addition to the main dispute, the parties are at liberty to discuss all other conflicts between them. Skilled and ethical mediators and neutrals can resolve the most stubborn disputes, which is why the outcome is often almost magical. By being independent and neutral and by adopting special communication techniques, a skilled mediator earns the confidence and trust of all parties involved in the dispute. Mediators understand the parties' concerns, aspirations, and genuine interests and help the parties arrive at a mutually acceptable settlement. They refrain from rendering opinions and options to resolve the conflict. The mediator does not merely resolve disputes but helps the parties end the conflict and restore their relationships. The mediator orchestrates a meeting of conflicting minds as a precursor to finding a mutually agreed, legally binding solution to disputes.

2. CONCLUSION

The scale of success and settlement rates that mediation offers cannot be ignored. Neither the crucial role that the mediator plays. To amicably settle years old disputes and that too in a record period of time is no less than remarkable. The only way this task is accomplished is by changing the way in which the parties were thinking and perceiving the matter. The mediator makes them re-evaluate their priorities and needs, when they stand realistically, their view of the opposing party and crucially, he has to open their minds to the range of possibilities for settlement. The mediator understands the anatomy of the conflict, the ways in which it was created and escalated, and the different methods by

which people deal with it. Then the mediator uses his soft skills and communication skills to make the parties think rationally about their position in the conflict, both emotionally and legally. The mediator explains them how much more time, energy and money they might have to invest if they go back to litigation. Also, how the mediation can offer creative solutions which can bring immense profits and make a win-win situation for both the parties. Many a times, the mediator comes up with some interesting and creative activities that promote brainstorming among the parties. Like, keeping an empty bowl at the table or side table in which anyone can anonymously submit solutions that they might believe to be. Then discussions are held over each one of them. The mediator also helps the parties to open up more by asking open ended questions instead of just a yes or no. The mediator in this process has to handle the emotional outbursts and anger of the parties even up to the limit of verbal abuse or use of physical force. But again, and again he has to calm them down and bring them back to their original positions. The mediator also has to win the trust of both the parties and help them reach a solution even without making it look like he is actually suggesting it. Thus, the role that a mediator plays is absolutely crucial and of utmost importance. He has to be like a saint who takes all the blame over him but cannot take much of the credit. Thus, as much as we need the integration of Mediation in our societies, we also do need Mediators who are courageous, smart, of high emotional and intelligence quotient and at the same time compassionate enough to forgive again and again.

As it is very well said by Galileo Galilei, "In questions of Science, the authority of thousand is not worth the humble reasoning of a single individual".

CONFLICT OF INTERESTS

None.

ACKNOWLEDGMENTS

None.

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