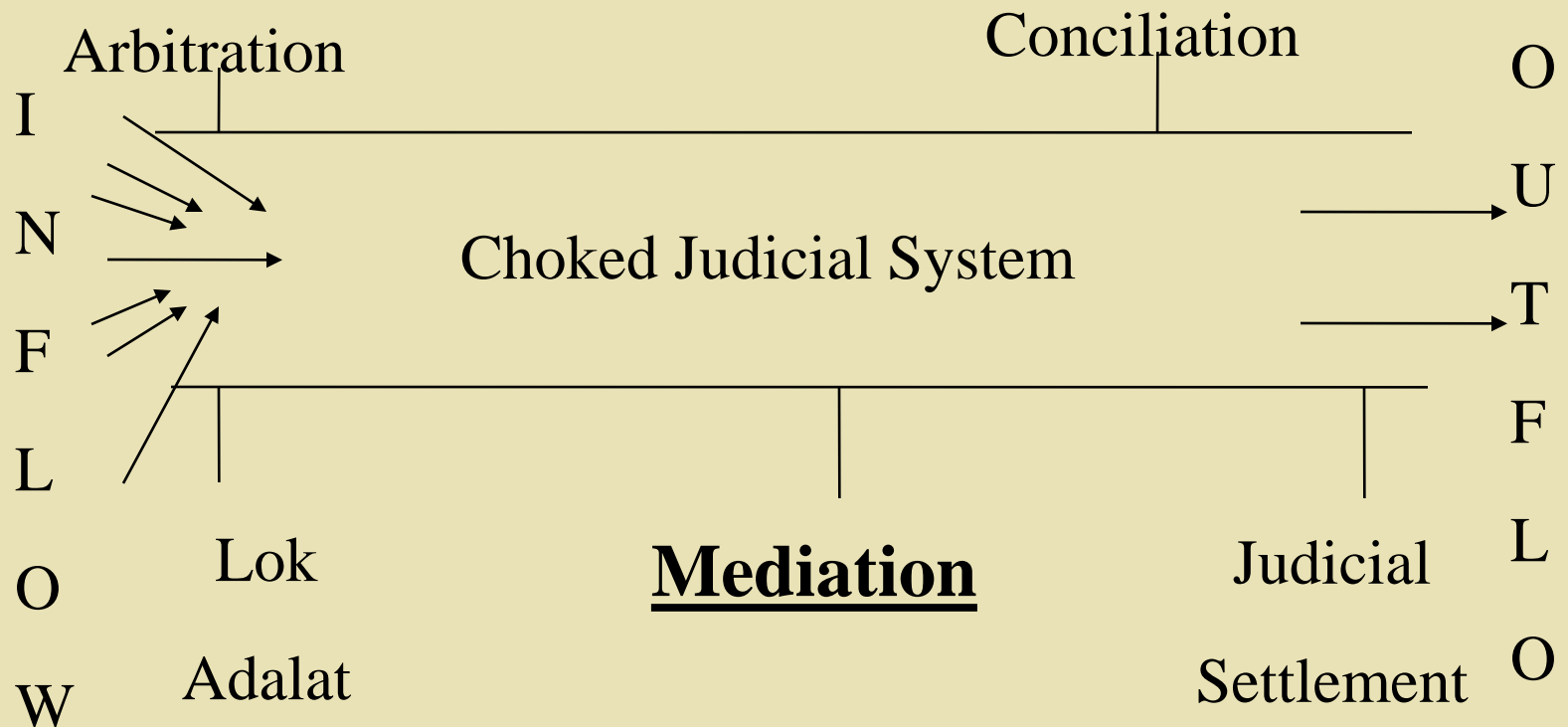




# Alternative Dispute Resolution

(ADR)

- ◆ ADR is complimentary like bye pass and not substitutive/competitive to court litigation.
- ◆ Best solution to reduce overcrowded thoroughfare.





# Characteristics of Mediation (ADR) vis-à-vis Adversary System

## ◆ Mediation

### *Nature of Proceedings*

1. **Informal**
2. **Non-adjudicatory**
3. **Voluntary**
4. **No due process**
5. **Non-evaluative**  
(may be also)
6. **Parties Control**
7. **Cost saving**

## ◆ Litigation/ Arbitration

**Formal**

**Adjudicatory**

**Non-Voluntary-Coercive**

**Due Process**

**Evaluative**

**Third party Control**

**(Judges, Arbitrators)**

**Expensive**



# Considerations

## Mediation

- Focus on Relationship
- Looks to future
- Seeks to structure relationship/ situations

## Litigation

- ◆ Focus on facts
- ◆ Focus on past
- ◆ Seeks to establish liability/ fault







# Characteristics of Mediation (ADR) vis-à-vis Lok Adalat

## *1. Forum:*

- Pvt. Room
- Parties/relations/advs.
- Proceeding Pvt.

**Open Court Room/ Public place**

**Only Parties/ Advs**

**Public**

**Non-Structured**

## *2. Morphology*

- Structured Process
- Unlimited talks

**Limited talks**



### **3** *Who Controls*

- **Parties Decision**
- **Mediator Process**

**Third Person**

**No Process**

### **4.** *Who Selects neutral*

- **Parties**

**Parties no role**

### **5.** *Time in Process*

- **Depends upon case**
- **Reasonable**
- **Continuity-follow  
up**

**Time constraint**

**Unreasonable**

**No continuity or follow up**

**(back to court forthwith)**



## ***6. Who Controls Outcome***

- **Parties work together**

**Only Conciliator. Advocate  
persuades**

## ***7. How referred to Mediation***

- **Court Order by consent**


**By Court, Consent of Parties/  
Advs.**

## ***8. Confidentiality***

- **Private. Disclosure by  
consent**

**Nothing confidential**





## *10. Types of Disputes*

- **All Types –Commercial, Matrimonial, Labour, Civil, Probate etc.**

**Mainly Compensation**

## *11. Role of Mediator*


- **Neutral, Assistant, Facilitator**

**Persuasive**

## *12. Role of Parties*

- **Active**
- **Assertive**
- **Participative**
- **Developing options**
- **Decision making**

**Non active role**



### ***13. Role of Advocates***

- **Participation**
- **Presenting Facts/Legal**
- **Developing Options**
- **Advisory**
- **Agreement/ Settlement**

**Only Advisory to settle ( If parties so consider)**

### ***14. Range of Outcome***

- **Variable. Broad**
- **Innovative, Creative**
- **Non-Traditional Solution**
- **Future Relationship**

**Case Reduced to Damages/  
Compensation in money.**



# Role of Mediator In Mediation

## *1. General*

- Welcomes all
- Introduces himself and parties –tell about training, success rate etc.
- Explains process-joint session, caucus (purpose)
- Shows Optimism
- Tells them about his role as mediator other than judge
- Sets tone and asks parties to maintain respect and decorum-avoid interruptions
- Explains role of parties, lawyers
- Explains processflexible, - non-binding.



## *2. Establish Neutrality*

### **A. By Conduct and use of Neutral terms**

- (i) By words, body language, eye contact
- (ii) Sitting squarely, avoid wising in waiting areas
- (iii) Avoid calling by first names (ask OK if so called)
- (iv) Disclose previous contacts, if any
- (v) Give the papers to parties to note points
- (vi) In place of breach of contract, use dispute with regard to supply of goods
- (vii) In place of suit for damages, use suit for compensation
- (viii) Regarding date, time, venues, ask both simultaneously.





## **A. By Describing Role**

- i.** Tell them that I am to assist & facilitate. Will not decide. They will decide
- ii.** Tell that shall not evaluate, give opinion
- iii.** Shall promote communication, clarify issues, generate options
- iv.** Shall have joint and separate sessions
- v.** Shall require presence of appropriate person to take decision





### **3. *Address Confidentiality***

**Inside Process** → **In caucus unless consented to disclose**  
→ **Describe (If settled)**

- i. Terms to be outlined**
- ii. Formal Settlement**
- iii. To be Patient with the part of process**

**Outside Process** → **Not make use of mediation talks, offers etc. anywhere**  
→ **If not settled- all ends there**



## ***4. Establish Conducive Environment***

- (i) Remain calm and relaxed**
- (ii) Have complete control of proceeding-avoid interruption diplomatically**
- (iii) When interruption-request to note points**

## ***5. Determine whether process understood:***

**Enquire if parties understood and if they have any doubt about process, clarify.**



***6. Generate Momentum:  
and  
Focus towards Agreement***

**Develop positive  
frame of mind in  
parties**

**Keep expressing HOPE  
of settlement if work  
sincerely**

***7. Respect***

**Seek assurances to respect each other during  
proceedings**



# *Stages of Mediation*

**Introduction**

**Joint Session**

**Caucus (Single Session)**

**Agreement**



## **1. Introduction By Mediator/Parties/ Lawyers/ Participants**

**Explain role of Mediator/Parties/ Lawyers/ Participants in the process and rules governing the process.**

## **2. Opening Statement of Parties**

- (i) Provides opportunity to vent grievances.**
- (ii) Parties/Counsel tell their disputes, views and identify issues.**
- (iii) Very important and useful (at later stages in caucus)**





### **3. Mediator gathering information:**

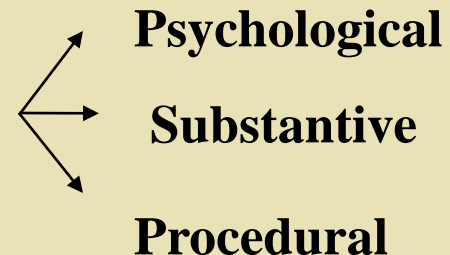
**As Active Listener to gather**

- i. General facts – by open ended questions**
- i. Legal issues –as perceived by parties/lawyers**
- i. Position of parties:**
  - Psychological**
  - Substantive**
  - Procedural**

## *For this what Mediator Does?*

- i. Ask open ended question for more facts**
- ii. Ask parties to tell about situation and what they would like to happen**
- iii. Manage the process/interaction**
- iv. Demonstrate understanding to get information**
- v. Identify disputes and issues**
- vi. Deepen Understanding of facts/issues**
- vii. Identify issues of agreement/disagreement**
- viii. Show empathy**

**i. Identify underlying interests**





## ***4. Mediator working with the problem***

- i. Helps parties in recognizing their underlying interests, values, needs and priorities (Caucus)**
- i. Helps them understand other's view by**
  - Clarifying**
  - Translating**
  - Reframing**
- i. Over comes barriers of communication**
- i. Explores options/develops solution-for this he can have-**
  - Private Caucus/es**
  - Joint Session/s**



**Identify  
Problem**

**Position  
Argument**

**Position  
Argument**

**Underlying Values, Interests Priorities**

**Explore Options**

**Common Interests**

**List possible solutions**

**Develop  
solutions select  
solutions &  
implement**

**Explore Options  
Negotiate winning  
Solutions**





## *For this what Mediator Does?*

- (a) Asks important issues (Caucus)**
- (b) Asks open ended questions (Caucus)**
- (c) Elicits secret information(Caucus)**
- (d) Checks positions taken in joint session(Caucus)**
- (e) Helps parties separate interests from positions (Caucus)**
- (f) Over views legal/positions(Caucus)**
- (g) Discuss consequence of failure/ advisory & evaluate BATNA, WATNA (risks, opportunity, costs) (Caucus)**
- (h) Brainstorm list of options – creative, innovative, alternative**
- (i) Avoids reactive devolution**
- (j) Avoids exchanging offers & demands too soon**
- (k) Show empathy**
- (l) Avoids ownership of idea to any party**
- (m) Express each party’s needs, interests, goals, priorities**





# 5. *Concluding Mediation*

## A. When reaching Agreement

- (i) **Confirmation in caucus & then in joint session**
- (ii) **Confirmation of understanding of agreement (joint)**
- (iii) **Explain future relations/responsibilities (joint)**
- (iv) **Written Statement agreement.**

- (a) **Drafting**
  - Who will draft(Preferably you)
  - Review of draft (parties-lawyers) joint
  - Confirmation of draft (parties & lawyers) joint

(a) **Contents :- Clear, concise, complete (joint)**

(b) **Signatories :- Parties/lawyers & mediator (prefer same day)**



## *B. When No agreement?*

- i. Do not report impressions to Court (However tempting or attitude reflecting)**
  
- i. Consider and confirm**
  - (a) If partial agreement possible on any issue**
  - (b) If issue/s could be narrowed**
  - (c) If any lateral thinking could be invoked**
  
- i. Leave the door open to further negotiations**

**When Nothing Possible – It is Impasse (deadlock)**



# *Cases Fit for Mediation*

- i. Parties desire a negotiated outcome**
- ii. Parties have an on-going relationship (family, business, other)**
- iii. Merits to case make a favourable judgment unlikely**
- iv. Litigant does not want to appear as witness**
- v. Costs of trial exceeds projected value of the cases**
- vi. Parties want prompt resolution**
- vii. Parties want control over the outcome**
- viii. Opportunity to develop creative non-traditional remedies**
- ix. Confidentiality/Privacy is desired by the parties**



## *Disputes Where Mediation is Not Appropriate*

- i. Parties refuse to negotiate**
- ii. Parties want to judicial determination**
- iii. Parties want public airing of the dispute**
- iv. Parties want to establish legal precedent**
- v. Delay in resolution benefits party**
- vi. Parties do not have sufficient information**





# *Qualities of Good Mediator*

- i. Patience** - **Not in hurry to rush/listening/attentive**
- ii. Trust** - **(a) to evaluate position impartially  
(b) to maintain confidence**
- iii. Knowledge** - **About subject**
- iv. Intelligence** - **(a) to understand problem/disputes &  
(b) to understand people and their motives**
- v. Communication Skill** - **To make parties understand**
- vi. Leadership with goal** - **move blame to solution  
past to future  
emphasis on understanding**
- vii. Sense of humour**
- viii. Acknowledgment** - **acknowledge parties/lawyers  
contribution**





# ***EFFECTIVE MEDIATOR***

- i. Listen & responds courteously and with understanding**
- ii. Acknowledges points**
- iii. Encourages parties to make decisions**
- iv. Analysis parties presentation**
- v. Asks relevant and insightful questions**
- vi. Probes for clarification**
- vii. Keyes track of changing positions new information**
- viii. Appears relaxed, alert and engaged with the process**
- ix. Demonstrates skill & confidence**
- x. Presents positive aspect of opposite party**
- xi. Presents analytical view of parties**
- xii. Acts as Reality Agent.**



# *INEFFECTIVE MEDIATOR*

- i. Unable to manage outburst, interruption**
- ii. Allows interruption –rather gives him attention**
- iii. Allows parties to cross talk**
- iv. Fail to hold caucus at appropriate time**
- v. Cuts off parties attorneys/friends/reasons**
- vi. Rushing process Fail to follow stages of mediation**
- vii. Reconvenes joint session at wrong time**
- viii. Using coercive, intimidating techniques**
- ix. Unable to maintain trust, confidentiality, tone setting**
- x. Unable to exhibit knowledge, independence, competence, intelligence**
- xi. Does not have communication skills**



# *Communication Techniques*

## *A. Pattern of Communication*

	<b><u>Adversary System</u></b>	<b><u>Mediation</u></b>
<b><i>Goal</i></b>	<b>To Win</b>	<b>To create workable solution</b>
<b><i>Style</i></b>	<b>Debate</b>	<b>Learn</b>
<b><i>Talk</i></b>	<b>To find Flaws</b>	<b>To explain</b>
<b><i>Listen</i></b>	<b>Develop Counter Arguments</b>	<b>To understand</b>



# *Communication Techniques*

## *B. Use of Words by Mediator*

### USE

**We**

**Proposal**

**Interest**

**Common**

**Seek to learn**

**Speak of Situation  
/Concern**

**Names**

**Resolve**

*Instead*

*of*

### AVOID

**I**

**Offer/ Demand**

**Position**

**Differences**

**To tell**

**Problem/ Dispute**

**Plaintiff/ Defendant/**

**Employee/ Claimant**

**Compromise**





# *Communication Techniques*

## *C. Power of Terms*

- i. Neutral Reframing**
- ii. Summarizing**
- iii. Redirecting**
- iv. Deferring**
- v. Restatement**
- vi. Reflection**
- vii. Acknowledgement**
- viii. Empathy**

**Most Important:    - Reframing/Restatement**  
**- Empathy**





# *REFRAMING*

- **Party/Lawyer statement having inflammatory/charged words**
- **Restatement by Mediator MINUS**
- **Inflammatory/ Charged words**

## **Purpose:**

**Changes the focus of statement from:**

**Blame to understanding**

**Person to problem**

**Negative to Positive/ Productivity**

**Positions/ Values to INTERESTS**



# *REFRAMING*

## **VALUE**

**Lowers emotional temperature**

**Demonstrates Mediator neutrality**

**Increases efficiency**

**Demonstrates Mediator creativity**

**Useful at any point in mediation**

## **HOW TO DO**

**Use Active listening skill**

**Shift the Focus**

**Neutralize the speaker**

**Narrow/Broaden the issue**

**Use humor carefully**



## *Restatement*

**It is a Mediator's communication technique used to restate to the party what he stated about facts/law or his issues, positions, priorities, terms, etc.**

**The Mediator may use same or similar words as of party.**

## *Reflection*

**It is a Mediator's communication technique used to repeat to the party about his thoughts, feelings and emotions.**

**It is similar to Restatement except that it involves reflection of emotions by mediator.**



# *EMPATHY*

**Expressing in words that Mediator has heard/  
understood the speaker**

## **How?**

- i. Listen attentatively & exhibit also**
- ii. Reflect back meaning**
- iii. Reflect back feeling**
- iv. Match speaker sensitivity**
- v. Walk with the person (Not with what he said)**
- vi. Show authentic, genuine, curious**
- vii. Use –I understood, I see, I hear**

# *EMPATHY*

## Avoid

- i. Improper/over use of words/phrases**
- ii. Using words –Yes, Okay, Agreed**
- iii. Gestures conveying agreement**
- iv. Being passive listener**
- v. Anyone having complete control of proceedings.**

Else: All these will give expression of your agreeing with speaker.







# *EMPATHY*

## Purpose

- i. Creates trust, credibility, rapport**
- ii. Demonstrates Mediator capabilities, Neutrality**
- iii. Reduces misunderstanding**
- iv. Encourages revealing more informative**
- v. Lowers psychological barriers**

**The Goal is Understanding and Not Agreeing-Advising-  
Persuading**



# *Summarising*

- **It is a Mediator's communication technique to restate the essence of statement of parties/ attorneys regarding their issues, positions, terms etc.**
- **Mediator takes care of :**
  - i. To be accurate**
  - ii. To be brief**
  - iii. To restate the issues, positions, terms in neutral form.**
  - iv. To be complete.**



# *Acknowledgement*

- ◆ It's a Mediators communication technique to convey and reflect back to the parties/ attorneys that he has accurately heard and understood their statement and the position.

## *Deferring*

It is a mediators communication technique which he uses to postpone response to a question or statement.

It may be used :

- i. Where a party/attorney asks premature evaluation
- ii. To gather additional information
- iii. To de-fuse hostile/ adversarial statements
- iv. To follow agenda established by mediator



## *Redirecting*

**It is a Mediator's communication technique which he uses to shift focus of a party from one subject to another.**

**It may be used to:**

- i. Focus on the details**
- ii. Refocus on general issues**
- iii. Respond to a hostile/adversarial statement by a party**

## *Setting an Agenda*

**It is a Mediator's communication technique to establish the order in which issues, positions, claims, terms are to be addressed.**

**It may be used to :**

- i. Organize information**
- ii. Determine the priority and relevant importance of issues to the parties**



# *ACTIVE LISTENING*

**Most Important for Mediator**

**Do:**

**Attentive**

**Quiet**

**Clarify**

**Responsive**

**Restate/Reframe**

**Summarise**

**Respect feelings**





# *ACTIVE LISTENING*

## **Don't:**

**Advice (Un-requested)**

**Solve the problem**

**Express Pity**

**Blame**

**Find Fault**

**Cross-examine**

**Deny feelings**

**Confront**

**Use Harsh words**

**Tell your experience**

**Tell other's negatives**

**Be blunt, coercive, authoritative**