

## **Lawyers As A Hindrance To Mediation Process**

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### **Abstract**

In recent times alternate dispute resolution has gained a significant primacy in the process of dispute resolution. The term alternate dispute resolution refers to an alternative method of dispute resolution rather than the traditional way of approaching the lengthy and time taking process of the court of law. Society has always desired simple and quicker justice which paved the way for alternate dispute resolution and it has become a need for the day. In the present era, saving time is of great importance for every section of people and professionals due to which the avoidance of lengthy and time taking processes of traditional courts has been increased. In India, ADR has become more popular as most individuals or industries, or corporations adopt this method to resolve their disputes.

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Even in Industries and businesses regardless of how well contracts are structured, miscommunications and disagreements will always occur throughout business transactions. One of the techniques of ADR is mediation which is being used extensively by the Indian courts in resolving the disputes of civil nature. But as it is cheaper and less time consuming than traditional litigation process, therefore, Lawyers becomes hindrance to mediation process in fear that it will decrease their practice and reduction in income. This paper will analyze the effectiveness of mediation in resolving the dispute. This paper will analyze challenges regarding the mediation process and observation on how lawyers become the hindrance in the process of Mediation.

## **Introduction**

Participation by lawyers in ADR, and mediation in particular, is becoming more commonplace in legal practice. Governments at all levels want to change the legal culture from one of adversarial conflict resolution to one of collaboration and conciliation, increased access to justice, and full utilization of ADR methods.<sup>2</sup>

With a wide range of duties in different practice areas and jurisdictions, lawyers come in many shapes and forms. Despite their differences, all lawyers have one thing in common: they all operate as a bridge between their clients and the various legal systems. Lawyers are responsible for

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<sup>2</sup> Kathy Douglas and Becky Batagol, *The Role of Lawyers in Mediation: Insights from Mediators at Victoria's Civil and Administrative Tribunal*, 758-792, Monash University Law Review, (2014).

assisting their clients in understanding the law and its processes, determining the right mechanism to settle a specific matter, and achieving the best possible result. In recent years, mediation has emerged as one of the most effective strategies for achieving the greatest potential results. As a result, mediation has become an integral aspect of many lawyers' practice areas across the world.<sup>3</sup>

As counsel, advocates, and mediators, lawyers are participating in mediation more and more. Such rising participation has an influence on how mediations are performed, their underlying power dynamics, and how society perceives them. Because of this profound influence, several researchers have identified lawyers as "gatekeepers" of mediation, because the way lawyers view and use mediation shapes the practice of mediation. Lawyers have a strong effect on which issues are submitted to mediation, which mediators are chosen, and how the whole process is structured, among other aspects of mediation. As a result, lawyers' impressions of mediation have a significant impact on the process's acceptance as well as its potential advantages<sup>4</sup>.

In light of this, initiatives aiming at popularizing mediation should concentrate on improving lawyers' opinions of the procedure. Such an approach has been taken in part by the United States, where initiatives aimed at increasing the voluntary use of mediation have concentrated on

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<sup>3</sup> Achman Shekhar, *Mediation in the Modern Legal Practice: An Overlooked Money-Maker?* LSE Law Review Blog, <https://blog.lselawreview.com/2021/10/mediation-modern-legal-practice-overlooked-money-maker>, (last accessed: 05/12/2022: 6:30 PM).

<sup>4</sup> Id.

lawyers rather than potential disputants. The explanation is straightforward: if we want more individuals to mediate, we must persuade more lawyers to do so.

## **Research Hypothesis**

Rising popularity of Mediation demonstrates that individuals are becoming aware of its benefits and using it to their advantage. However, many lawyers still either does not believe in it or continue to argue that a speedier and less expensive process, such as mediation, which helps their clients, does not best serve their financial interests.

## **Research Question**

1. Whether mediation helps in resolving the resolving the cases?
2. Whether mediation benefits the both lawyer and their clients?
3. How lawyers become hindrance in the process of mediation?

## **Literature Review**

Kathy Douglas writes<sup>5</sup> that with the institutionalization of alternative or suitable conflict resolution in our legal system, mediation is becoming an increasingly essential aspect of legal practice. Courts have welcomed mediation, and it may be part of pre-action procedures in some jurisdictions.

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<sup>5</sup> Supra note 1.

Jean R. Sternlight writes<sup>6</sup> many people feel that Lawyers adversarial practices and mind-sets are fundamentally incompatible with mediation. Lawyers' concentration on advocacy and victory is viewed as unsuitable for non-adversarial, problem-solving approach of mediation to conflict settlement. Nonetheless, as mediation becomes more widespread, lawyers are routinely accompanying their clients to mediation.

Avtar Singh writes about mediation that this is an artistic practice. It has very little evidence of the law. There is no requirement for any legal information. If the solution-based compromise is not illegal, it will be enforceable by law just like any other compromise agreement.<sup>7</sup>

## **Evolution Of ADR System In India**

In the process of litigation, each side argued its legal claims in front of a judge who was unbiased while doing so. After hearing both parties' arguments, the Judge renders a decision that defines the parties' rights and liabilities. Without a doubt, this system is better than the Monarchical System of delivery of the justice. Because litigation has limits as well, people have searched for more effective ways to settle disagreements, leading to the development of the alternative dispute

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<sup>6</sup> Vol 14, Jean R. Sternlight, Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting, 269, Ohio State Journal On Dispute Resolution.

<sup>7</sup> Avtar Singh, Law of Arbitration & Conciliation and Alternative Dispute Resolution Systems, (9<sup>th</sup> ed., 2009).

resolution system, which is both efficient and effective.<sup>8</sup>

ADR is a procedure for resolving disputes without going to court that includes mediation, arbitration, conciliation, negotiation, settlement by the judiciary, and any other process that does so. It is controlled by a set of norms. The settlement (or outcome) of the procedures must be legally enforceable. Out of other forms Mediation is made most popular by judges and lawyers.

Since the commencement of India's economic liberalization policies and the global adoption of law reforms, legal thought leaders have determined that mediation should be a crucial component of the solution to the serious problem of civil court case backlog.

Mandatory mediation through the courts now has legal validity. Now the courts have begun referring cases to Court-Annexed Mediation and Conciliation Centers which has been created at various Indian courts. In Court-Annexed Mediation, the court provides mediation services as part of the same legal system, as opposed to Court-Referred Mediation, in which the court only refers the issue to a mediator. One element of court-annexed mediation is that judges, lawyers, and litigants all become participants, giving them the impression that a negotiated solution is reached by all three players in the justice delivery system.

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<sup>8</sup> Lalit Sharma, *Evolution of ADR Mechanisms in India*, SCC Online, <https://www.sconline.com/blog/post/2021/02/07/evolution-of-adr-mechanisms-in-india/>, (last accessed: 05/12/2022; 08: 45 PM).

## Modern Concept Of Mediation

Mediation, as practiced in modern times, is a party-centric process in which a neutral third party through structured discussion, specialized communication and negotiating strategies helps the party to amicably resolve the disagreement between them. As it is a voluntary, the parties have the ultimate authority to determine whether or not to settle a disagreement between them by mediation. Despite the fact that the mediator helps their discussions and conversations, the parties have complete authority over the result of the dispute.<sup>9</sup>

Although the mediation process is informal, it is not an extemporaneous or casual process since it is not regulated by the rules of evidence and the norms of procedure. The mediation process is well-structured and institutionalized, with distinct stages.

## Reason Behind Emergence Of Mediation

Mediation has well-established and well-publicized benefits for disputants, such as cost effectiveness, voluntariness, flexibility, and secrecy, which explains its rising popularity. However, the debate about the advantages of mediation has overlooked one essential element of the puzzle as how mediation might benefit lawyers.

**Minimal Documentation:** The available resources frequently influence

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<sup>9</sup> Geetanjali Sethi, *India: Mediation: Current Jurisprudence And The Path Ahead*, Mondaq, <https://www.mondaq.com/india/arbitration-dispute-resolution/957898/mediation-current-jurisprudence-and-the-path-ahead>, (last accessed: 06/12/2022; 03:17 PM).

who wins and who loses in document-intensive procedures. Today, litigations and arbitrations are swamped with reams of papers, and the largest legal firms have seized certain lucrative briefs since the related document review or production constraints are typically prohibitive for smaller competitors.

Mediations, on the other hand, require less paper. Despite the move toward paper, it is argued that mediation is still an oral sport. Because the mediator is not a decision-maker, he or she does not need to be convinced of anything.<sup>10</sup>

**Flexibility in the Process:** Lawyers have the option of submitting any information they deem relevant without having to go through any legal procedures. They have complete authority over the proceedings and can halt or suspend them at any time. The legal and business standards can also be established that will govern the entire process.<sup>11</sup>

**Option for Alternative Remedy:** Choosing mediation does not stop lawyers from exploring other options open to their clients. As stated in the preceding section, lawyers have the authority to cease or interrupt mediation processes at any time. Moreover, throughout the mediation, lawyers might continue to litigate the dispute before courts or tribunals to obtain final remedies.

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<sup>10</sup> Vol. 5, Leanne Cheng, *The Power of Mediation: Exploring Mediation's Approach to Power Imbalance* in Joel Lee & Marcus Lim (eds.), *Contemporary Issues in Mediation*, World Scientific, (2020).

<sup>11</sup> Mediators' Institute of Ireland, *Flexibility*, <https://www.themii.ie/flexibility>, (last accessed: 07/12/2022; 09: 10 PM).



**Power Imbalance is balanced:** The management of power differences between the disputing parties is a skill taught to mediators. By ensuring an equitable playing field and promoting equality of arms between parties, such management might assist lawyers representing the “weaker” party.<sup>12</sup>

**Promotes Talk:** In direct negotiations and other kinds of ADR, lawyers primarily focus on the merits of their clients' claims and utilize posturing to improve their bargaining power. Mediators can assist in removing such posturing and creating a place for serious discourse. Furthermore, lawyers may believe that requesting a settlement will be interpreted as a sign of weakness by the opposing party. Mediators can also assist in resolving this issue by advocating for settlement on behalf of the lawyers.<sup>13</sup>

**Enable Thoroughness:** Parties and lawyers are expected to be comprehensive when presenting their interests or voicing reservations about any suggestions during mediations. As a result, parties feel heard and pleased, as evidenced by the high success rate of mediated settlements.

## **Lawyers As Hindrance In The Process: Observation**

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<sup>12</sup> Sahil Kanuga and Aparimita Pratap, *Online Mediation in India*, (2021) 1 CADR J of DR 25, 36.

<sup>13</sup> J. C. Kent, Getting the best of both worlds: Making partnerships between court and community ADR programs exemplary, *Conflict Resolution Quarterly*, 23: 71-85, (2005). <https://doi.org/10.1002/crq.125>, (last accessed: 08/12/2022; 10: 10 AM).

It's crucial to keep in mind that there is an agency problem in a lawyer-client relationship since the parties' financial interests are never completely matched. For example, lawyers could prefer longer, more expensive processes while their clients are more interested in quick and affordable processes. As a result, trusting that lawyers will pursue mediations only for the benefit of their clients is wishful thinking. This should be resolved of as quickly as possible. There are few scenarios in which lawyers becomes hindrance in the process as observed and analyzed by the author such as –

**Fear of losing client:** The litigation is a way long process it may take years to solve the dispute. Which is though not beneficial to client but it becomes a stable income for the lawyers. In opposite mediation takes very less time to resolve the dispute and most of the time involvement of lawyers are not required which creates fear in the mind of lawyer that they might lose the client. Therefore, they do not encourage their clients to opt for mediation which might provide quicker justice to their clients.

**Lawyer's Representation:** Mediation is a party centric process. Many of the time it has been seen that in the mediation process where party should be expressing their problems, lawyers start talking on their behalf. Ultimately, it becomes more like litigation instead of mediation. Therefore, Mediators can politely ask the lawyers to leave the mediation to the party and assist only when it is extremely required.

**Adversarial Mindset:** By approaching the mediation process with an

adversarial mindset, lawyers can hinder it in a number of ways. Lawyers are trained to defend the needs of their client's positions and interests, often at all costs. In a mediation setting where the objective is to find common ground and arrive at a mutually beneficial settlement, this strategy may be counterproductive. Lawyers might be reluctant to compromise or make concessions, and they might view any effort to do so as a sign of weakness.

**Barriers to Communication:** Another way that lawyers may hinder the mediation process is by placing unnecessary communication barriers between the parties. Lawyers may require stringent confidentiality or discourage their clients from speaking with the other party directly. This can make it difficult for the parties to build trust and rapport with one another, both of which are necessary for effective mediation.

**Unrealistic Demands:** Lawyers may hinder the mediation process by prolonging procedures or being overly aggressive in their negotiations. In order to gain an edge for their client, lawyers may employ tactics such as making unrealistic demands. This can lead to a hostile atmosphere, making it difficult for the parties working together to find a solution.

**Focusing too much on Legal Technicalities:** Lawyers may hinder mediation by concentrating too much on a legal technicality and not enough on the underlying emotional and interpersonal aspects of the conflict. Mediation is frequently effective because it enables the parties to address fundamental problems that may be unrelated to the legal

aspects of the dispute. Lawyers may be overly concentrated on legal tactics and lack the skills or training necessary to handle these fundamental problems.

**Lack of awareness and trust:** As litigation has been there for hundreds of years it has occupied a significant place in the mind of lawyers and people at large that it is the best and sole remedy to get assured justice. It resulted in lack of trust in ADR System especially in the case of mediation. Many of the lawyers believe that Mediation is not the right place to get justice.

**Request to end:** Lawyers who do not believe in the mediation process or want to get the justice for their client in the traditional way sometimes pursue or try to influence the mediator to just end the process and do not further the stages of mediation.

**Waste of time:** When regarding any dispute put up for mediation fails party resort back to the traditional way of getting justice i.e., trial. It encourages the believe in the lawyer that going through the process of mediation is nothing but a waste of time. Therefore, going for the mediation, as believed by some lawyers, is a complete waste of time.

## **Conclusion**

When it comes to the process of dispute settlement human civilization has gone a long way. The development of ADR procedures has been heavily influenced by the goal of resolving conflicts in a fast and cost-effective way, particularly mediation. While lawyers can be a valuable

resource for parties engaged in mediation, they can also be a detriment to the process. Lawyers who approach mediation with an adverse mindset, create unnecessary communication hurdles, or concentrate too much on legal details may hinder the process and make it more difficult for the parties to reach an agreement. To ensure the success of the mediation process, lawyers must approach the process with an open mind and a desire to collaborate with the other party in the dispute.

On both sides, it creates a win-win situation for both the parties and even the lawyers concerned. Its rising popularity demonstrates that individuals are becoming aware of its benefits and using it to their advantage. However, many lawyers continue to argue that a speedier and less expensive process, such as mediation, which helps their clients, does not best serve their financial interests. Identical erroneous views are widespread among lawyers today, owing to the failure of mediation discourse to demonstrate the professional and financial rewards that come to lawyers who eagerly embrace mediation in their practises. Nonetheless, legal and judicial systems worldwide continue to support mediation as a valid and successful dispute settlement technique. There have been various initiatives from both sides to promote the use of mediation.