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ON THE MEDIATION PROCESS

Mediation is the flagship of the ADR movement, which for us is not alternative dispute resolution but **appropriate** dispute resolution. Mediation is a different paradigm and path from litigation. In litigation the focus is on the past, on establishing blame and liability and a win-lose result. In mediation the emphasis is on the future, on cooperation and communication, on sustainable solutions, which are a win-win for all parties.

Mediation focuses on long-term interests, shows parties the weaknesses, not just the strengths of their case, and makes them examine their alternatives to a negotiated agreement. It gives the parties the freedom to suggest options for settlement. Mediation is a voluntary process where the parties retain decision-making rights all through and are only bound when they enter into a written agreement concluding the mediation.

Mediation is an extremely flexible process. It can work in disputes before they are taken to Court, to disputes pending in Courts and even after a Court verdict has been given. The mediator can be a retired judge or a lawyer or a person who is respected in the community.

The response to mediation has been very good in the western world. Courts of Law have set up Court Annexed Mediation programmes. Judges have taken to mediation after their tenure on the bench, some have even retired early for to do so. Lawyers have found that mediation is a new skill, which aids their clients. Clients have realized that this is a cost and time effective process and prefer lawyers who can suggest mediation before going to court.

The corporate community has been the fastest to embrace mediation. It allows them to participate in finding solutions apart from its savings of cost and time. Many of the Fortune 500 companies now insist that before going to Court their legal department tries ADR, essentially mediation. In many

agreements now mediation is placed as the first dispute resolution method before arbitration and the Court.

The success rate of mediation worldwide is high; some commentators have mentioned a figure of 85% of cases which are brought to mediation. It should be remembered that success means that all the contesting parties have reached an agreement that they feel serves their interests.

Too often conflict amongst people and organizations has seen recourse to adversarial combat. With mediation we can show that conflict can be resolved and justice rendered by healers and peacemakers.

THE INDIAN CENTRE FOR MEDIATION AND DISPUTE RESOLUTION

We started the Centre in July 2001 at Chennai. On its Board of Advisors are the country's foremost jurists and lawyers. Its core group has lawyers and members from varied professions. Among its activities the Centre has

- a) conducted awareness workshops for the Bench, the Bar, companies, Family Court judges and lawyers.
- b) trained its first batch of 22 mediators including Judges of the High Court, retired senior IAS (premier civil service) officers, Vice – Chancellors of Universities, Chairmen of companies, senior and junior lawyers, social activists. The training was imparted by Mrs Geeta Ravindra, a senior trainer at the Supreme Court, State of Virginia who volunteered her time and effort.
- c) Members of the Centre have written for the press and addressed several meetings on the advantages of mediation.
- d) Given advice to companies and others on which method of dispute resolution would be most appropriate to use.

Among the mediations conducted by us are

- i) dispute between a Company and its convertor involving the loss of a large amount of raw material; remedied by agreement continuing

the business relationship and recovery of the monies over a length of time.

- ii) dispute between a property developer, agreement holder and a religious body involving ownership of a large piece of land. The case had been in litigation for 10 years and was in an appellate Court. A solution accepted by all sides was worked out in 3 months and the case withdrawn.
- iii) Dispute amongst members of a professional firm, who could not agree on valuation and division of assets on dissolution. Resolved in 4 meetings. They returned later, seeking mediation on other aspects of the dissolution, which was also done.
- iv) Family disputes revolving around matrimonial, custody and property issues. In one case mediation was followed by a regular long-term review process to ensure that the agreement worked.

In February 2003 the Centre signed an Agreement of Collaboration with the Confederation of Indian Industry (C I I), a leader in the business and corporate community. The Agreement provides that both parties will work to promote the use of mediation amongst industry, and the Centre will handle the disputes referred to mediation. The first awareness workshop under the Agreement was held in Coimbatore on the 19 April 2003. One of early results was a request from a leading federation of importers to examine their dispute settlement processes and advise on creating a better model. Similar workshops will be held at Hyderabad, Bangalore and Cochin.

The Centre plans to

- a) foster the teaching of mediation in law schools along with study of the Codes of Civil and Criminal Procedure so that emerging practitioners will have knowledge of a range of dispute resolution possibilities. The first of these is likely to be at the National Academy of Legal Studies and Research (NALSAR), Hyderabad.

- b) organize training for conciliators appointed under the Family Courts Act. Lacking training in mediation, they are unable to fulfill the function envisaged for them under the Act.
- c) A similar training programme for conciliators under the Industrial Disputes Act.
- d) A three – pronged pilot project at a High Court to sensitise Judges to mediation and referral of appropriate cases, organize and train a pool of volunteer lawyers to handle mediations, and also to impart knowledge of mediation to the members of the Lok Adalats (People’s Courts).
- e) Set up a full-fledged ADR Centre not only to handle mediations and arbitrations, but also to evaluate disputes for appropriate remedial methods and provide consultancy services to companies and other organizations to design dispute prevention systems.
- f) Help to create Centres at other places; a beginning has been made.

SOME PROBLEMS OF THE INDIAN LEGAL SYSTEM

The legal system in India and elsewhere, is characterized by detailed technical procedures and overwhelming use of the adversarial system. Huge delays, indeterminable procedure and taxing cost are its accompanying features. The Judge – population ratio is low. Growing administrative illegality has increased court dockets with cases demanding judicial review of administrative action. While Courts have responded to the challenge of fulfillment of constitutional mandates, this has caused further pressure on timetables already collapsing under the weight of private litigation.

The indiscriminate use of the adversarial method also raises fundamental ethical problems for members of the legal profession, characterized as a learned and a noble one. The system places a premium on winning, not on establishing the truth or finding the best solution. This leads to repeated use of the legal process, aggravation of conflict, and worsening

of relationships. Hidden under generalizations and defenses are fundamental ethical issues relating to our conduct, the behaviour we promote and the dichotomy between theory and practice of law.

There are fears that the system is collapsing. Many suffer injustice since they are deterred from approaching the legal system; on the other hand, a mafia culture promising speedy results has taken root. Equally worrying is the fact that, frequently, the resolution offered by the Courts does not deal with the substantive issue in dispute or give the parties an effective solution and end to their conflict. The disturbing ethical questions may also prevent the best from joining the profession, and prevent those within from giving of their best.

REFORM

Effective reform lies in measures which promote both efficiency and ethics. The adversarial system is the appropriate method in a number of situations especially those needing authoritative interpretation or establishment of rights or which manifest severe negotiating imbalance. It is also required as a last resort of resolution. However, its indiscriminate and unvarying application across a broad band of conflict is a major cause of the several ills plaguing the legal system.

Even where the adversarial method is to be employed, it is necessary to look at ways of reducing the confrontational element within it. Part of the solution lies in giving the judge a greater role in the conduct of cases, using independent experts and assessors, and creating incentives and disincentives to induce parties in conflict to behave more reasonably.

Other methods of conflict resolution are available, and must be used. These include arbitration, conciliation, mediation and judicial advice. In general, these are less formal, encourage disputants to communicate and participate in the search for solutions, focus better on the root issues of the conflict, salvage relationships, and have significant savings in time and cost.

The point is that the roots and symptoms of conflict differ from case to case. The treatment must be appropriate for each case instead of herding all of them through a civil procedure code system. Somewhat like the treatment of

a medical problem, proper evaluation and diagnosis and appropriate prescriptions from the range of conflict resolution methods is needed.

Again, it is better to avoid categorizing conflict resolution into “orthodox” and “alternative” methods. A cautionary example is the medical profession, where “alternative medicine” has come to stand for numerous approaches of varying application and effectiveness which are all somehow kept outside the dominant system. It would be best for the legal system if the several methods of dispute resolution could win equal standing, both in practice and professional training. Justice will be better served by a holistic approach which recognizes that there are legal problems of various kinds, for which different methods of resolution are appropriate and effective. The emphasis ought not to be on competition between such methods, but on a unified system encompassing a sufficiently varied repertoire of processes and enabling the identification and application of the most efficacious and appropriate one. This may even involve combining elements from more than one method, or use of another where one has failed or only succeeded partially.

Perhaps the time has come for a new way of looking at conflict resolution and the legal profession – one that will harmonize the ethics of practice, the values of the law and the demands of public policy.

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