



ETHICAL DILEMMA IN MEDIATION

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ABSTRACT

Mediation refers to the non-binding procedure in which an impartial third party, the conciliator or mediator, assists the parties in resolving their dispute by reaching a mutually satisfactory and agreed-upon settlement. It is a process where disputing parties engage the assistance of a neutral third party to act as a mediator. Being an informal process, mediation requires the mediator to bear in mind the globally recognised principles of Impartiality, Neutrality, Self-governance and Confidentiality. As such, a mediator also has to follow a set of ethics as prescribed by various forums. JAMS puts forward these practices in a concise manner. Ethics encompasses the responsibility of a mediator. If these ethics were made relative, no one would ever reach a consensus in a fair, effective and justifiable manner. The entire mediation process would lose legitimacy and respect amongst the parties and the fraternity.

Keywords: Non-Binding Procedure, Neutral Third Party, Impartiality And Confidentiality, Mediator Ethics, Mutually Satisfactory Settlement.

INTRODUCTION

Mediation refers to the non-binding procedure in which an impartial third party, the conciliator or mediator, assists the parties in resolving their dispute by reaching a mutually satisfactory and agreed-upon settlement. It is a process where disputing parties engage the assistance of a neutral third party to act as a mediator. The mediator is a facilitating intermediary who has no authority to make any binding decision but uses various procedures, techniques, and skills to help the parties resolve their dispute by negotiated agreement without adjudication.

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Adjudication means a trial held in court. Mediation is a form of alternative dispute resolution (ADR), meaning that settlements are made out of court between two parties without the use of the judiciary.

In some models, the mediator may also provide a non-binding evaluation of the dispute's merits, if required, but cannot make any binding adjudicatory decisions.

MEDIATION IN INTERNATIONAL LAW

Mediation is a concept frequently applied in the realm of international law, where it plays a significant role in the peaceful settlement of disputes. Unlike domestic mediation, which typically involves individuals or private entities, international mediation concerns relationships between sovereign states. Because conflicts at this level can escalate quickly and have global consequences, mediation becomes an essential diplomatic tool.

In this context, mediation refers to the interposition of a neutral and friendly state between two nations that are either engaged in war or are on the brink of armed conflict. The mediating state offers its good offices, meaning it facilitates communication, negotiation, and compromise between the disputing parties. Its primary aim is to restore or preserve peace, reduce tensions, and prevent the situation from escalating further. The mediator does not impose solutions but helps guide the parties toward mutually acceptable outcomes.

Although the term "mediation" is sometimes loosely used as a synonym for "intervention," the two concepts differ fundamentally. Intervention often implies some degree of coercion, pressure, or interference in the internal affairs of another state. Mediation, on the other hand, is strictly a friendly and voluntary act based on consent, goodwill, and neutrality. It seeks to build trust, encourage dialogue, and support peaceful resolution without undermining the sovereignty or autonomy of the states involved.

PRINCIPLES OF MEDIATION

Being an informal process, mediation requires the mediator to bear in mind the globally recognised principles of:

1. Impartiality
2. Neutrality

3. Self-governance

4. Confidentiality

In India, courts have adopted and strengthened these mediation principles, recognising that a mediator is not bound by the technical rules of the Code of Civil Procedure, 1908, or the Evidence Act, 1872. This allows the process to remain flexible and informal, enabling the mediator to focus on guiding the parties toward resolution based on broader principles of fairness, equity, and justice.

ROLE OF A MEDIATOR

A key role of a mediator is to treat all parties equally and never impose settlement terms. Other equally important roles include^[3]:

1. Facilitating the voluntary resolution of a dispute between the parties.
2. Communicating each party's views to the other.
3. Assisting parties in identifying issues.
4. Reducing misunderstandings.
5. Clarifying priorities.
6. Exploring areas of compromise.
7. Generating options to solve the dispute.

ETHICAL PRACTICES IN MEDIATION

Ethical practices in mediation are essential to ensuring a fair and trustworthy dispute-resolution process. Since mediation operates outside the strict rules of procedure and evidence, mediators must rely on principles of neutrality, fairness, confidentiality, and justice. These ethical standards guide the mediator's conduct, maintain the legitimacy of the process, and help parties reach mutually acceptable solutions with confidence.

1. Confidentiality

Parties must be assured that all documents, statements, and information disclosed in mediation will remain private and will not be used outside the process. The mediator must **explain confidentiality at the outset**. A mediator must communicate to all parties the scope of confidentiality, including any statutory or contractual limitations, and obtain their acknowledgement. The mediator must **prohibit unauthorised disclosures**. It is his duty to ensure that neither party nor he himself discloses mediation communications to outsiders except where legally compelled (e.g., threat to life, mandatory reporting). The mediator must **avoid making public statements** and refrain from commenting to the media or third parties about the mediation, the parties, or the subject matter. The mediator must **disallow recordings and verbatim transcripts** by prohibiting audio/video recording or stenographic transcripts of sessions to preserve candour in discussions. The mediator must **comply with court-recognised limits**. As held in *Moti Ram (D) Thr. L.Rs. v Ashok Kumar* (2010), only the outcome (success or failure) and the signed final agreement may be reported to the court; all other details remain confidential.

2. Integrity and Impartiality

A mediator must uphold the highest ethical standards to ensure fairness, trust, and credibility in the mediation process. Mediators must act with honesty and incorruptibility by maintaining objectivity, avoiding any conduct that compromises integrity, and resisting any form of undue influence or inducement. The mediator must disclose and manage conflicts of interest by revealing any past or present relationships with parties or their representatives and withdraw if impartiality is compromised. This can be further seen in the case *Sreelal v Murali Menon* (Kerala High Court, 2014). The Kerala High Court held that all communications made during mediation are strictly confidential and cannot be disclosed or used as evidence in court. It further clarified that a mediation settlement has no automatic force of a decree, and if its terms are not honoured, the trial must proceed in accordance with the law. The mediator must **restrict private communications** by avoiding one-sided interactions with parties except for authorised caucus sessions, and maintain strict confidentiality. The mediator must **limit court interaction** by communicating with the court only for procedural updates (e.g., scheduling, completion status), never on the merits of the case. The mediator must avoid **bias and appearance of bias** by not letting pre-existing notions or prior knowledge influence the process; recuse if neutrality cannot be preserved.

3. Ensuring Informed Consent

Mediation must be based on the parties' full understanding of the process and their rights. The mediator must **clarify the mediator's role and process** by explaining that the mediator facilitates negotiation, does not impose decisions, and uses agreed-upon methods. The mediator must **describe the mediation procedure** by outlining session formats, confidentiality rules, and the potential for private caucuses.

This was further described in the case *Salem Advocate Bar Association v. Union of India*. The Supreme Court held that mediation is an essential component of the ADR system and directed the formulation of detailed Mediation and Conciliation Rules to standardise the procedure across courts. It clarified that mediation should be conducted in a structured manner, facilitating voluntary settlement through a neutral mediator while ensuring fairness, confidentiality, and party participation. The mediator must **explain the enforceability of settlements** by informing parties about how a signed agreement may be enforced, including any applicable legal requirements. The mediator must **reinforce the right to withdraw** by emphasising that either party may end the mediation at any stage without penalty. The mediator must **ensure voluntary settlement** by confirming that any resolution is reached without coercion and reflects the free will of all parties.

4. Avoiding Harm:

The mediator must ensure the process does not negatively impact the parties or other stakeholders. Mediators must **prevent physical, emotional, or reputational harm** by monitoring discussions to ensure respectful communication and intervening if harm is likely. The mediator must **adapt procedures if tensions escalate** by modifying the format, taking breaks, or using caucuses to de-escalate conflict. The mediator must **consider third-party interests** by ensuring agreements do not harm individuals or entities not present in the mediation. The mediator must **discourage harmful settlements** by avoiding facilitating agreements that are illegal, unconscionable, or unsafe. The mediator must **terminate when necessary** by ending mediation if it becomes harmful or futile, explaining the reasons to all parties.

5. Neutral Intermediary

The mediator serves as an impartial facilitator of dialogue, without siding with any party. The mediator must **maintain equal treatment** by giving all parties equal opportunity to present

their views and respond. The mediator must **avoid advocacy** by never arguing for or against any party's position.

The mediator must **balance information flow** by ensuring that both parties receive the same essential information and opportunities for input. The mediator must **separate personal beliefs from facilitation** by keeping personal opinions, values, and preferences from influencing the process. The mediator must **refrain from imposing outcomes** by guiding discussions towards mutual solutions without dictating terms.

6. Protecting Voluntary Participation

Voluntary agreement is the cornerstone of mediation, and the mediator must safeguard this principle throughout the process. The mediator must **reinforce the right to choose** by emphasising that any settlement reached must reflect the free and mutual consent of the parties. The mediator must identify **signs of coercion** by being alert to situations where a party may be pressured into mediation or decisions by others, such as family members or representatives. The mediator must **address reluctance directly** by privately and respectfully exploring concerns with the hesitant party and, where appropriate, with other parties, while preserving confidentiality. The mediator must **handle court-ordered cases sensitively** by making clear that, although attendance is mandated, agreement is entirely voluntary. The mediator must **promote informed decision-making** by ensuring each party fully understands their rights, options, and the non-binding nature of discussions until a final agreement is signed.

7. Refraining from Providing Legal Advice

The mediator's role is to facilitate negotiation, not to act as legal counsel. The mediator must **clarify role boundaries** by explaining clearly that the mediator is a neutral intermediary, not an advocate or representative for any party. The mediator must **avoid giving legal advice** by refraining from advising on legal rights or strategies; if offering an evaluation, ensure parties understand it is not legal counsel. The mediator must **protect unrepresented parties** by explaining limitations of the mediator's role, obtain written waivers of representation, and advise them to seek independent legal review before signing agreements. The mediator must **exercise caution in settlement drafting** by assisting in drafting terms for unrepresented parties, and urge independent review by counsel before execution. The mediator must **stay informed on legal boundaries** by keeping up-to-date with jurisdictional rules and bar opinions on what constitutes the practice of law.

8. Withdrawing from Mediation:

Withdrawal may be necessary to preserve the integrity and fairness of the process. The mediator must **cease if mediation furthers illegal conduct** by immediately withdrawing if the process is used to promote unlawful activity. The mediator must **withdraw for lack of informed consent** by stepping back if a party's participation is uninformed and cannot be remedied. The mediator must **end involvement when impartiality is compromised** by withdrawal if a conflict of interest cannot be waived or neutrality cannot be maintained. The mediator must **recognise personal limitations** by stepping down if physical or mental incapacity affects the mediator's ability to serve. The mediator must **address unfairness** by withdrawing if procedural or substantive unfairness undermines the legitimacy of the mediation.

9. Avoiding Misleading Marketing and Guarantees

Public representation of mediation services must be accurate and impartial. Mediators must **advertise truthfully** by ensuring marketing materials and public statements accurately reflect the services offered. The mediator must **avoid false claims** by not misrepresenting qualifications, experience, or outcomes. The mediator must **never guarantee results** by avoiding promises of success that could create unrealistic expectations. The mediator must **maintain neutrality in promotions** by avoiding marketing that could be seen as favouring one type of disputant, industry, or outcome. The mediator must **comply with professional standards** by following relevant ethical guidelines on public communications.

10. Competence to Mediate the Particular Matter

A mediator must possess the skills, preparation, and capacity necessary to handle the dispute effectively. A mediator must **have relevant knowledge** to understand both procedural and substantive aspects of the dispute. The mediator must **prepare thoroughly** by reviewing party submissions, statements, and documents before the session. The mediator must **stay within their expertise** by declining cases beyond their knowledge or skill set.

The mediator must **monitor personal capacity** by withdrawing if physical or mental limitations prevent effective performance. The mediator must **meet reasonable party expectations** by ensuring competence aligns with the needs and complexity of the matter.

CONCLUSION

Relativity applies to physics, not to ethics, as Albert Einstein famously observed, and this idea perfectly captures the essence of mediation. A mediator cannot adopt a relative or selective approach when it comes to ethical conduct; ethics must be followed uniformly, consistently, and without exception in every case. A mediator cannot choose to maintain confidentiality in one dispute but disregard it in another, nor can they selectively apply principles of neutrality, fairness, or integrity. Similarly, a mediator must strictly avoid any conflict of interest and demonstrate the highest levels of professionalism and ethical responsibility at all times.

A mediation process can function effectively and reach a meaningful resolution only when all ethical rules, procedural guidelines, and regulatory frameworks are properly followed. The mediator must ensure that the forum remains a safe, trustworthy, and confidence-inspiring environment for the parties. This requires the mediator to act with complete neutrality, ensuring that none of their words, actions, or demeanour display even the slightest hint of bias or favouritism. Their role is to facilitate open communication and guide the parties toward a mutually acceptable solution without any intention of deriving personal benefit from the process.

Therefore, the ethical standards discussed above form the core responsibility of every mediator. If these ethics were treated as relative or optional, mediation would lose its fairness, effectiveness, and credibility. Parties would no longer trust the process, and the mechanism itself would lose legitimacy and respect within the legal fraternity as well as among the general public. Thus, ethics serve as the anchor stone of mediation; they provide the stability, integrity, and moral framework without which genuine dispute resolution would not be possible. Ethics in mediation, therefore, cannot be relative; they must remain absolute, consistent, and universally applied.

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