



**FREQUENTLY ASKED QUESTIONS
ON
MEDIATION**

Prepared by

JHARKHAND STATE LEGAL SERVICES AUTHORITY

Nyaya Sadan, Near A.G. Office, Doranda, Ranchi

Phone : 0651-2481520, 2482392, Fax : 0651-2482397

Email : jhalsaranchi@gmail.com, www.jhalsa.org

This FAQ Booklet is also available on official website of JHALSA "www.jhalsa.org"

1. What is Mediation ?

Ans. Mediation is a voluntary process in which a trained and impartial third person, the mediator, helps the parties in dispute to reach an amicable settlement that is responsive to their needs and acceptable to all sides.

During the process, each party to the dispute has a chance to put his/her case and to hear what the other side has to say. The mediator's job is not to make a decision for the parties, but to assist the parties to explore the strengths and weaknesses of their own cases and to identify possible solutions, so as to facilitate them to reach a settlement agreement. The mediator does not decide who is right or wrong and has no authority to impose a settlement on the parties, the decision-making power rests in the hands of them. The mediator is skilled in unlocking negotiations that have become deadlocked and in keeping everyone focused on finding a solution.

2. Why should I choose mediation? What are the advantages of mediation?

- Ans.**
- ◆ Parties can avoid suffering from the anxiety and disturbances to their normal life which are the natural consequences of an adversarial litigation in court.
 - ◆ Parties can avoid the risk of losing the litigation.
 - ◆ Parties can avoid confrontation with the other as an amicable settlement can be achieved by mediation.
 - ◆ Parties can save time and money in not having to contest matters in court with an early settlement as litigation is a much longer process than mediation.
 - ◆ Parties can make their own decisions and reach agreements with which the parties may be more willing and ready to comply.
 - ◆ The settlement terms can be kept private and confidential.
 - ◆ Mediation can result in terms of settlement of greater flexibility and in more practical ways going beyond the legal remedies that the court is empowered to grant. The solutions developed by the parties can be unique to the dispute and are ones that the court cannot provide.
 - ◆ Mediation can help to maintain a continuing relationship with the other party or parties involved in the dispute and may improve that relationship.
 - ◆ The chance of appeal is minimal, in contrast to litigation.

There are other advantages over going to court:

- ◆ If the parties' dispute involves undisclosed issues, mediation, unlike a structured court case, offers the opportunity and flexibility to search them out.
- ◆ Unlike the formal and tensed atmosphere in the court, mediation is conducted in a more relaxed and informal manner under which parties tend to be more open to compromise.
- ◆ Especially for Family Mediation:
- ◆ In particular, family mediation can improve the communication between the parties.

3. How much will mediation cost?

Ans. It is free.

4. How long does mediation take?

Ans. Time limit for completion of mediation

On the expiry of Ninety days from the date fixed for the first appearance of the parties before the mediator, the mediation shall stand terminated, unless the Court, which referred the matter, either suo moto, or upon request by any of the parties, and upon hearing all the parties, is of the view that extension of time is necessary or may be useful; but such extension shall not be beyond a further period of thirty days.

5. What cases are suitable for mediation and what are not?

Ans. The following categories of cases are normally considered to be not suitable for ADR process having regard to their nature:

- (i)** Representative suits under Order 1 Rule 8 CPC which involve public interest or interest of numerous persons who are not parties before the court. (In fact, even a compromise in such a suit is a difficult process requiring notice to the persons interested in the suit, before its acceptance).
- (ii)** Disputes relating to election to public offices (as contrasted from disputes between two groups trying to get control over the management of societies, clubs, association etc.).
- (iii)** Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.
- (iv)** Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc.
- (v)** Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against government.
- (vi)** Cases involving prosecution for criminal offences.

All other suits and cases of civil nature in particular the following categories of cases (whether pending in civil courts or other special Tribunals/Forums) are normally suitable for ADR processes :

- (i)** All cases relating to trade, commerce and contracts, including
 - disputes arising out of contracts (including all money claims);
 - disputes relating to specific performance;
 - disputes between suppliers and customers;
 - disputes between bankers and customers;
 - disputes between developers/builders and customers;
 - disputes between landlords and tenants/licensor and licensees;
 - disputes between insurer and insured;
- (ii)** All cases arising from strained or soured relationships, including

- disputes relating to matrimonial causes, maintenance, custody of children;
 - disputes relating to partition/division among family members/co-parceners/co-owners; and
 - disputes relating to partnership among partners.
- (iii)** All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including
- disputes between neighbours (relating to easementary rights, encroachments, nuisance etc.);
 - disputes between employers and employees;
 - disputes among members of societies/associations/Apartment owners Associations;
- (iv)** All cases relating to tortious liability including
- claims for compensation in motor accidents/other accidents; and
- (v)** All consumer disputes including
- disputes where a trader/supplier/manufacturer/service provider is keen to maintain his business/professional reputation and credibility or `product popularity.

6. How is mediation different from arbitration and litigation?

Ans. Arbitration

- ◆ Arbitration is a legal process which is the resolution of disputes outside the courts. It results in an award imposed by the arbitrator or arbitrators. For an arbitration to take place, the disputing parties must agree to take their dispute to arbitration. If parties have agreed to arbitration, they will generally have to go to arbitration rather than court as the courts will normally refuse to hear their case by staying it to force the reluctant party to honour their agreement to arbitrate.
- ◆ Arbitration awards are final and binding on the parties and can only be challenged in very exceptional circumstances. An award has a status very similar to a court judgment and is enforceable in a like manner. Arbitration awards made in Hong Kong are enforceable through the courts of most of the countries involving in international trade.
- ◆ Arbitration is a form of binding dispute resolution, equivalent to litigation in the courts, and entirely distinct from the various forms of non-binding dispute resolution, such as negotiation, mediation, or non-binding determinations by experts.

Litigation

- ◆ In the absence of an arbitration agreement or other consensual means of dispute resolution, the parties may commence proceedings in the courts.
- ◆ The judicial system in Hong Kong is adversarial. The parties should present their case to the court for its determination. The judge will act as an umpire and make decisions after considering the evidence and hearing the arguments from the parties. The losing party will normally be ordered to pay the costs to the winning party. The costs are the expenses that the winning party has to spend on the preparation and hearing of the matter,

including the expenses for the solicitors and barristers representing them. The amount of the costs can be substantial, depending on factors including the complexity of the case, the work required for preparation of hearing and the length of the hearing.

7. How can the parties be sure that mediation will produce a fair result?

Ans. The work of a mediator is not to make a decision for the parties. The mediator helps the parties think beyond the present situation for possible solutions to the dispute, thus enabling the parties to find the path to dispute resolution that suits them best. The parties will work to come out a solution to their own dispute. Unless they totally agree, there will be no final resolution and nobody can force them to sign any agreement.

In a mediation session, the mediator will help the parties to:

- ◆ Discuss and decide what matters are in dispute;
- ◆ Explore each party's real needs and interests;
- ◆ Expand settlement options and assess the most suitable solution;
- ◆ Draw up the settlement agreement in detail, setting out how the parties have agreed to resolve each matter in dispute.

8. If I choose mediation, will I still need to appoint a lawyer?

Ans. No

9. How can I have a Mediator appointed in my matter?

- Ans. a)** In a Court annexed mediation, the coordinator of the mediation centre shall appoint the mediator as he may deem fit.
- b)** in exceptional cases, the Court may also appoint a mediator who is not necessarily from the panel of Mediators referred to in Rule 4 nor bear the qualifications referred to in Rule 5 but should not be a person who suffers from the disqualifications referred to in Rule 6.

10. Who are the Accredited Mediators?

Ans. A person must have undergone 40 hours of mediation training programme under the aegis of MCPC as per curriculum approved by MCPC from the trainers of Mediation and Conciliation Project Committee. After having undergone 40 hours training only those mediators who have completed atleast 10 successful mediation resulting in settlement and atleast 20 mediation in all, are eligible to be accredited as qualified mediator.

The Committee also resolved that the Mediators who have undergone training programme conducted by institution other than MCPC shall not be accredited as Mediator under MCPC.

11. How does mediation work in civil cases?

Ans. The mediator may conduct a pre-mediation individual interview with each party outside a court setting, usually in a private office. Then the mediator starts the mediation with a joint session to explain the mediation process and ground rules. In the joint session the parties will make opening presentations to share their views on the disputes and clearly define the issues.

Private meetings/caucusing: if agreement is unable to be reached at the joint session, the mediator will usually suggest the parties to retire to separate rooms and he/she will pass

between parties assisting them to assess the feasibility of their negotiation terms. All matters discussed with the mediator at private meetings are confidential, and will not be disclosed by the mediator to the other party without explicit consent.

Throughout the process the mediator helps the parties evaluate the case, identify their fundamental interests, explore and consider possible consequences if the dispute is not settled, develop alternatives to deal with various issues in the dispute, and formulate proposals that would help move the process towards mutual agreement.

The parties may terminate the mediation sessions anytime during the process. If agreement is reached, the parties will sign the agreement which will be binding on the parties. Under the circumstance that an agreement cannot be reached but the outlook is positive, the mediator may take the approach of suggesting parties to take some time to think over the outcome of the meeting. After that the mediator may contact them regarding unresolved matters. Even an agreement is failed to be reached by the parties at the end of the meeting, it can still consider to be helpful as it will contribute to the understanding of the point of view of each party.

12. What do I need to prepare before mediation?

Ans. Familiarize yourself with the facts of the case;

- ◆ Consider in advance various acceptable settlement options;
- ◆ Seek prior legal advice if necessary;
- ◆ Most importantly, arrange to have individuals whose decisions are necessary for resolution present for the entire mediation.

13. Am I compelled to go to mediation?

Ans. No - the mediation process is entirely voluntary, however, if the dispute is or will be subject to Court proceedings, the Court will take into account all relevant circumstances, including whether a party has unreasonably refused to take part in mediation, in exercising its discretion to award costs. You may face an enhanced costs order if the Court finds that you refused an offer to mediate unreasonably.

14. What if the parties don't settle?

Ans. If the parties could not reach any agreement, they may consider bringing the issue/case to Court and going through the litigation process.

Both parties must appreciate that all discussions during a mediation session is on a privileged and without prejudice basis – this means that nothing discussed can be used as evidence in future legal proceedings.

The parties will not be at a disadvantage after trying mediation which turns out to be unsuccessful. They may find out that the issues are clearer as a result.

15. What is provision regarding Confidentiality, disclosure and inadmissibility of information ?

Ans. [1] when a mediator receives factual information concerning the dispute from any party, he shall disclose the substance of that information to the other party, so that the other party may have an opportunity to present such explanation as it may consider appropriate.

Provided that, when a party gives information to the mediator subject to a specific condition that it be kept confidential, the mediator shall not disclose the information to the other party.

- [2] Receipt or perusal of any document by the mediator or receipt of information orally by the mediator while serving in that capacity, shall be confidential and the mediator shall not be compelled to divulge information regarding the document or record or oral information nor as to what transpired during the mediation.
- [3] Parties shall maintain confidentiality in respect of events that transpired during the mediation and shall not rely on or introduce the said information in any proceeding as to :-
 - [a] views expressed by a party in the course of the mediation proceeding;
 - [b] documents produced during the mediation which were expressly required to be treated as confidential or other notes or drafts or information given by the parties to the mediators.
 - [c] proposal made or views expressed by the mediator.
 - [d] admission made by a party in the course of mediation proceeding.
 - [e] the fact that a party had or had not indicated willingness to accept a proposal.
- [4] There shall be no stenographic or audio or video recording of the mediation proceedings.
- [5] A mediator may maintain personal record regarding progress of the mediation for his personal use

16. Who are the persons eligible for training as Mediators?

Ans. The following persons are eligible for training as Mediators:

- (a)
 - (i) Retired Judges of the Supreme Court of India,
 - (ii) Retired Judges of the High Court;
 - (iii) Retired District and Sessions Judges or retired Judges of the City Civil Court or Courts of equivalent status.
- (b) Judicial Officers or legal practitioners with atleast-10 years' standing at the bar at the level of the Supreme Court or the High Court or the District Courts of equivalent status;
- (c) Experts or other professionals with at least fifteen years' standing; or retired senior bureaucrats or retired senior executives;

17. Who shall be deemed to be disqualified for being empanelled as mediators?

Ans. The following persons shall be deemed to be disqualified for being empanelled as mediators:

- (a) any person who has been adjudged as insolvent or persons
 - (i) against whom criminal charges involving moral turpitude are framed by a criminal court and are pending; or
 - (ii) persons who have been convicted by a criminal court for any offence involving moral turpitude.
- (b) any person against whom disciplinary proceedings have been initiated by the appropriate disciplinary authority which are pending or have resulted in a punishment.

- (c) any person who is interested or connected with the subjectmatter of dispute (s) or is related to any one of the parties or to those who represent them, unless such objection is waived by all the parties in writing.
- (d) any legal practitioner who has or is appearing for any of the parties in the suit or in other proceedings (s).

18. What is the HONORARIUM TO MEDIATORS ACCREDITED BY MCPC?

Ans. Fee of the Mediators

- (a) the mediators shall be paid honorarium as under :-

S.No.	Nature of Case	Honorarium
1	On settlement through mediation of a matrimonial case [including criminal], custody, guardianship, probate, partition and possession.	Rs. 3000/- per case [with two or more connected cases, the maximum would be Rs. 4000/-]
2	All other matters.	Rs. 2000/- per case [with two or more connected cases, the maximum would be Rs. 3000/-]
3	Connected case	Rs. 500/- per case subject to a maximum of Rs. 1000/- [regardless of the number of connected cases]
4	In case of no settlement	No honorarium

It is subject to revision from time to time as deemed fit by the Hon’ble Chairman and Members of MCPC.

- b) However, in exceptional cases the Court may fix consolidated amount as fee of the **Court nominated** mediator/Mediators.
- c) Each party shall bear the cost for production of their witnesses and experts, as also for production of documents.

19. Whether Mediator is bound by Indian Evidence Act, 1872 or Code of Civil Procedure, 1908.?

Ans. The mediator shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872, but shall be guided by the principles of fairness and justice, having regard to the rights and obligations of the parties, usages of trade, if any, and the circumstances of the dispute(s).

20. What immunity is available to Mediators ?

Ans. No mediator shall be held liable for anything bonafidely done or omitted to be done by him during the mediation proceedings for civil or criminal action nor shall he be summoned by any party to the suit or proceeding to appear in a Court of Law to testify in regard to information received by him or action taken by him or in respect of drafts or records prepared by him or shown to him during the mediation proceedings.

21. What is the provision about settlement agreement?

Ans. Where an agreement is reached between the parties with regard to all the issues in the suit or proceeding or some of the issues, the same shall be reduced to writing and signed by the parties or their constituted attorney. If any counsel has represented the parties, the mediator may obtain his signature also on the settlement agreement.

- [1] The agreement of the parties so signed shall be submitted to the Co-ordinator, Mediation Centre, who shall, with a covering letter signed by him forward the same to the Court in which the suit or proceeding is pending.
- [2] Where no agreement is arrived at between the parties or where the mediator is of the view that no settlement is possible, he shall report the same in writing to the Co-ordinator, Mediation Centre, who shall, with a covering letter signed by him forward the same to the Court in which the suit or proceeding is pending

22. What is Ethics and code of conduct for mediator ?

Ans. The Mediator shall follow and observe these Rules strictly and with due diligence.

- (1) Not indulge in conduct unbecoming of a mediator.
- (2) uphold the integrity and fairness of the mediation process.
- (3) ensure that the parties involved in the mediation are fairly informed and have an adequate understanding of the procedural aspects of the mediation process.
- (4) While communicating with the parties avoid any impropriety or appearance of impropriety.
- (5) The mediator must avoid mediating in cases where they have direct personal, professional or financial interest in the outcome of the dispute. If the mediator has any indirect interest, he is bound to disclose to the parties such indirect interest at the earliest opportunity and he shall not mediate in the case unless the parties specifically agree to accept him as mediator, despite such indirect interest.
- (6) Where the mediator is an advocate, he shall not appear for any of the parties in respect of the dispute which he had mediated.
- (7) Mediators have a duty to know the limits of their competence and ability in order to avoid taking on assignments which they are not equipped to handle.
- (8) Mediators have a duty to remain neutral throughout the mediation.
- (9) Mediators must respect the voluntary nature of mediation and must recognize the rights of the parties to withdraw from the mediation at any stage.
- (10) Mediation being confidential in nature, a mediator shall be faithful to the confidentiality reposed in him.
- (11) Mediator has a duty to encourage the parties to make their own decisions both individually and collectively about the resolution of the dispute, rather than imposing his own ideas on the parties. Self determination is the essence of the mediation process.
- (12) Settlement of dispute must be based on informed consent.
- (13) Conduct all proceeding relating to the resolution of dispute in accordance -with the law.
- (14) Mediator must refrain from promises or guarantee of results.

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