Criterion-1: Curricular Aspects

Key Indicator – 1.3: Curriculum Enrichment

Metric: 1.3.3

Programmes:

L.L.B. (Bachelor of Law)

L.L.M. (2-Year)/ M.C.L.

L.L.M. (3-Year)

Syllabus	**L.L.B. (Bachelor of Law):** https://www.du.ac.in/uploads/Revi_syll_19082019/19082019_B.TECH_IT_MI.pdf **L.L.M. (2-Year)/ M.C.L.:** https://www.du.ac.in/uploads/RevisedSyllabi1/Annexure-169.%20REVISED%20SYLLABUS%20OF%20M.SC.-FINAL-16.07.2019.pdf **L.L.M. (3-Year):** https://www.du.ac.in/uploads/RevisedSyllabi1/Annexure-168.%20REVISED%20SYLLABUS%20OF%20B.A.%20HONS-FINAL-16.07.2019.pdf
Moot Court, Mock Trial and Internship	Annexure-I
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Sample Field Visit Documents	Annexure-III

Annexure-I

Moot Court, Mock Trial and Internship

LL.B. V Term

LB—501:
MOOT COURT, MOCK TRIAL AND INTERNSHIP

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LL.B. V Term

LB—501: Moot Court, Mock Trial and Internship

Course Objectives:

This Course aims to impart the practical skills of research, case analyses and strategy, witness handling, presentation of arguments at the trial and appellate stages of a case, and to draft and prepare the relevant documents pertaining to Moot Court, Mock Trial and Internship. The course has been divided into four components dealing with Moot courts, Mock trials, Court visits and Viva Voce/attendance. The purpose is to expose the students to the system of administration of justice in real life by visiting various courts and chambers of practicing counsels. This learning is basic and essential for the study of professional course of Law. By learning the practical aspect throughout the Course, the students shall gain the expertise in research and preparing the legal documents, filing and contesting the cases on strong grounds before the Courts of Law in India as well as in other countries.

Course Learning Outcomes:

After successful completion of this Course, students should be able to:

1. practice at all the stages of any case/matter and at all the fora with critical thinking

2. do appellate advocacy by independent research, preparation of arguments and presenting arguments in a persuasive manner in appellate courts

3. do trial advocacy, i.e., case analysis, client interviewing and advise, how to conduct examination–in-chief and cross-examination of witnesses, preparation and presentation of arguments on facts and law in the trial courts.

4. interview clients and advise them on procedural aspects of litigation, costs and possible legal and social consequences, etc.

5. work in teams and develop the cooperative nature essential for the legal practice.

Contents:

Unit I: Mock Trial including Client Interviewing and Counselling and Case Analyses

A- Client Interviewing Counselling- Oral exercise (5 marks)
The students will learn the basics of client interviewing and counseling through simulation exercises.

B- Case Analyses-Witten exercise (5 marks)
The students will be required to do case analyses in the mock trial exercise to be done by them.

C- Mock Trial including Examination in Chief, Cross Examination, oral arguments, and written submission of arguments-5 marks each (Total 20 marks)
At least two mock trials, one Civil and one Criminal will be conducted during the course of the semester. The students will be divided in teams of lawyers and

witnesses. Each student will be required to function as a lawyer and witness in the mock trials being simulated in the classroom.

Unit II: Moot Courts

The teacher teaching this course will supply three Moot Court problems to the students in the course of a single semester requiring them to work on all three problems assigned to them, prepare written submissions (memorials) and present oral arguments in a moot court setting. 30 marks for this component are divided equally between written submission and oral arguments. Students may be asked to work in teams at the discretion of teacher. Each student will prepare a case only on one side.

A. Rules re Memorial submissions:

1. Each student must submit one typed and bound copy of the memorial on either side no later than the date fixed and announced in the class. Memorials will not be accepted after the prescribed date and time and the student will lose the marks assigned for that assignment.

2. Memorial specifications:

a) Memorials must be printed on A4 size white paper with black ink on both sides of the paper.

b) The body of the memorial must be in Fonts Times New Roman, Size 12 and footnotes in Fonts Times New Roman in Size 10.

c) Each page must have a margin of at least one-inch on all sides. Do not add any designs or borders on the pages.

d) Memorials should be submitted with differently coloured Title Page for each side:

- Title page in blue colour for Petitioner / Appellant
- Title page in red colour for respondent
- The students shall provide their full name, enrollment number and exam roll number on the title page only.

e) The Memorial should not exceed 20 typed pages (line space 1.5) and shall consist of the following Parts:

- Table of Contents
- Statement of Facts
- Statement of Jurisdiction
- List of References and Cases
- Statement of Issues
- Summary of Arguments

- Detailed Pleadings
- Prayer
- Affidavit, if necessary

f) Relevant Annexures may be kept by the student and may be used during oral arguments, if necessary.

B. Rules re Oral Arguments:

- Court Language shall be English unless prior permission is sought from the teacher to speak in Hindi.
- Each student would be given 10 minutes to present their oral arguments
- Judges may, at their discretion extend oral argument time, up to a maximum of 5 minutes.
- Rebuttal would be allowed only to the petitioner and they would have to specify in the beginning the time they want to set apart for rebuttal.
- Evaluation: The oral performance will be evaluated on the basis of communication skills, application of facts, persuasion / use of authorities, and response to questions.

Unit III: Internship - Court Visit / Chamber placements

This part will require the students to be attached with **practicing lawyers with a minimum of ten years standing at the Bar.** Preparation for this component has to begun from the first semester. Each student is required to spend at least one month doing internship during the summer vacation / winter break / mid-semester break. Full time internship during the semester is not permitted by the Bar Council of India and students may do only project work during the semester. During the internship, the students must keep record of client dealings, research and drafting done, fact investigations, etc. A certificate confirming the student's attendance and the work done during internship shall have to be attached with the internship diary to be submitted at the end of this semester.

During the court visits, the students are required to observe the following stages and write reports of their observation in the diary:

- Framing of charges/Issues
- Examination-in-Chief
- Cross-examination
- Final arguments

In the lawyer's chamber, they are required to do and record the following:

1. Read minimum of four case files to learn how files are prepared and maintained
2. Learn how to maintain records and accounts
3. Do legal research in at least two cases
4. Draft minimum of two documents in an ongoing case in the chamber
5. Observe client interviewing and counselling with the permission of the lawyer and clients in at least two cases

The students are expected to maintain a diary of their field visits, work done during placement and their observations. In the diary, they have to keep a log of the time spent by them each day including factual accounting of their experience of what they are doing, seeing and hearing. However, the diary should not be only descriptive of each day but should focus on what they learnt during the day. What were they thinking and feeling about their experiences? What is exciting or surprising? What is bothering them? What are their questions or insights about lawyering and judging? What criticism or praise do they have for the legal system? What else would they like to be taking place in their experience? They should be careful that while writing their accounts they do not reveal any confidential information.

The diary should contain two parts: (a) the factual and analytical information about their internship; and (b) two legal documents drafted by them during internship. Each part will be evaluated separately for 15 marks each. This part carries a total of 30 marks.

The diary is an integral part of the course and they will be evaluated in terms of thoughtfulness and reflections about their learning experience. They must be sure to write the journal in their own words even if they went with another class fellow or were in a group and observed the same things.

Note: ***In case of copying under any of the Units of the Course, matter will be reported to the authorities and a suitable action will lie as per the rules of University.***

Suggested Readings

1. NRM Menon (ed.) *Clinical Legal Education* (1998)
2. Don Peters, *The Joy of Lawyering: Readings for Civil* Clinic (1996)
3. B. Malik, *The Art of a Lawyer* (9th Ed. 1999)
4. Steven Lubet, *Modern Trial Advocacy: Analysis and Practice* (1993)
5. Thomas A. Mauet, *Trial Techniques* (1996)
6. Thomas A. Mauet*, Pre- trial* (1995)
7. Inns of School of Law, *Advocacy* (1999/2000)
8. Inns of School of Law, *Case Preparation* (1999/2000)

Readings Supplied in Course Material

Assessment of Students' Performance and Scheme of Examinations:

1. There is no written examination at the end of the semester in this paper.

The break up of marks in each unit may be changed in the paper from time to time. Broad division of marks is as follows:

Unit 1 = 30 marks

Unit 2 = 30 marks

Unit 3 – 30 marks

10 marks have been kept for attendance in these courses as follows:

71-75% - 1 mark	76-80% = 2 marks	81-85% = 4 marks
86-90% = 6 marks	91-95% = 8 marks	96-100% = 10 marks

IMPORTANT NOTE:

1. The topics, cases and suggested readings given above are not exhaustive. The Committee of teachers teaching the Course shall be at liberty to revise the topics/cases/suggested readings.

2. Students are required to study/refer to the legislations as amended from time to time, and consult the latest editions of books.

Don Peters: The Joy of Lawyering

CLIENT INTERVIEWING

"I want a divorce."

"It's all so confusing. I don't know why I am here or where to begin."

"I still love him but I can't take anymore." "He tried to kill me last night." "She never loved me. I don't want her to get a cent."

It's the lawyer's move. What should she do? Her client is sitting there, looking at her expectantly. She could remain silent and convey a non-verbal message that her client should continue. Or she could say something. But if she decides to say something, what should she say?

Lawyers need information before they can apply their knowledge of matrimonial law and practice to their client's situation. Information about their clients, their situations, and what they would like to do about them is absolutely essential. They also need to build rapport with their clients. They want working relationships where trust and accurate communication can flourish. How can they achieve these goals in interviews with matrimonial clients?

Matrimonial practice attaches to a set of human experiences that are laden with emotional content. Matrimonial interviews typically involve discussing the possible dissolution of what was once a close human bond, allocation of custody and support privileges and obligations, and distribution of marital assets. Building rapport and acquiring accurate information simultaneously in this environment is challenging. No model exists that helps lawyers attain these twin objectives in every matrimonial interview. Several specific techniques, however, can be consciously employed to reach these goals. These techniques are the tools of an effective matrimonial interviewer. They are the building blocks of all effective interviewing approaches and the units with which lawyers may analyze their performances. This chapter will describe and demonstrate them using specific examples from matrimonial contexts.

Although lawyers who choose to dominate or compete with clients use these tools to some degree, they work best with a decision to collaborate with clients using a participatory model of representation. This choice proceeds from an assumption that matrimonial clients are rational, self-directed, and capable of making their own decisions. Although the strong emotional currents of the divorce experience occasionally challenge these assumptions, most clients ultimately derive more satisfaction from a divorce outcome in which they actively participate.

A client-centered choice makes sense in interviewing. Clients must participate in the fact gathering process because lawyers cannot function competently unless they know basic information about both their clients' marital situations and what they want to do about them. Lawyers also need client participation to develop a working relationship featuring mutual trust, understanding, and respect. A client-centered approach is the most likely way to generate a client commitment to this type of working relationship. This value bias underlies this and all subsequent chapters.

A. LISTENING

Assume a matrimonial interview begins this way:

C: She never loved me. I don't want her to get a cent.

L: How long have you been married?

C: Seven years and love's been dead the last six. She's never respected me (spoken with increasing agitation and vocal tone)

L: Where were you married?

C: Here. Downtown, at the Courthouse.

L: Are you living together now?

C: No .... (short pause) Not exactly, you see, she ran off with . . .

L: (interrupting) How long have you been separated?

Crisp, probing questions like these are not the only way to gather information. Although they may be entirely appropriate in chambers or a courtroom before a judge who wants to hear a preordained testimonial checklist, they usually are an inefficient way to gather information at the beginning of an interview. They often are also not an effective way to build rapport and they can harm the relationship between lawyer and client.

The lawyer in this excerpt took immediate control of the interview and forced the client to respond to questions from his agenda. This approach does not gather information efficiently because the lawyer cannot, at least at this stage, ask every conceivably relevant question. This approach may also harm rapport because it communicates implicitly that the lawyer knows what is important and what should be talked about. The client here, for example, may incorrectly conclude that his wife's running off with someone is not relevant because the lawyer did not seem to want to hear about it. He may also become passive and dependent, a non-participant in a process that will ultimately ask him to make the inevitably difficult human choices that most matrimonial cases present.

There are other ways to gather information and build rapport. Listening is an excellent way to accomplish both. Lawyers cannot hear and understand information if they are talking and not listening. In addition, a particular kind of listening, called active listening, is the most effective rapport-building tool available to lawyers. So this exploration of effective interviewing tools begins with listening.

To talk and be listened to is a deep and basic hum3n need. This need is often particularly acute for clients suffering the stresses and storms of matrimonial dissolutions. Notwithstanding its basic value, the skill 0f listening is elusive. It is hard work and difficult to do well. Perhaps it is the demise of radio. Maybe it stems from the fact that many people learn in infancy that being quiet accomplished little while initiating communication by talking or yelling sometimes worked better. Whatever the reason or reasons, lawyers, like many others, are often not effective listeners. Many lawyers think listening is inconsistent with their duty and desire to "do something" for their clients. They fail to see that supportive listening is a way to help clients. These lawyers, during those few times when they are not talking, are usually busy thinking about what they will do, say, or ask next. Listening fully with their ears, eyes, and complete attention is seldom thought important and "lawyerly." It is done skillfully even less frequently.

Listening well can be surprisingly difficult to do. Although it may seem to involve simply sitting back, not talking, and hearing what clients say, it is not that easy. Studies show that people normally speak at the rate of about 125 words per minute while we are able to listen at a rate of 500 words a minute. How lawyers fill this gap determines whether they are listening effectively.

Sometimes lawyer fill this gap with preoccupations about what is going on in their minds. Anxiety and insecurity, which can accompany an inexperienced lawyer's first interviews, are common, distracting preoccupations. They can intensify concern about what to do or say next and minimize concentration on hearing what the client is saying. This tendency also may be aggravated by the chaotic way that information often flows in matrimonial interviews. A client tells a fact relevant to custody in one sentence and jumps to an aspect of property distribution in the next. He then contradicts himself about his feelings toward his wife in the same sentence. This can be both very hard to follow and understand and a so terribly unsettling to a lawyer's need for order and structure.

Experienced lawyers need to beware of filling the gap with anticipated information that may or may not actually be involved in the client's situation. The routines of legal practice can easily lead to incorrect factual assumptions and premature diagnoses of situations. Not all divorcing thirty-five year old mothers of two children, for example, fit patterns that a lawyer may have evolved over years of matrimonial practice.

Another common listening mistake that lawyers often make is keeping quiet only to find an opening to get the floor again. This dynamic often occurs when lawyers feel a need to regain control of the interaction. Asking questions retakes control so lawyers concentrate on what to ask next rather than what their clients communicate.

Daydreaming and fantasizing, although vital to psychological wellbeing, are two more common listening errors. Lawyers must resist them and concentrate on listening to their clients during interviews. Another similar listening problem involve associations which lawyers make to client statements which can distract attention and even cause them to change topics. A client's mention of disciplinary problems with children, for example, may prompt an association with the lawyer's children or parents and cause him to lose track of what his client is saying. These associations can also cause lawyers unconsciously to attribute aspects of their experience to their clients, a phenomenon which psychologists call counter-transference. This can affect the content or tone of what the lawyer says next and trigger a response by the client. The risk of such distracting associations is great because matrimonial cases inevitably involve fundamental human dynamics that everyone has experienced on either a personal or vicarious level.

Awareness of, and determination to avoid, these and other listening traps may help lawyers listen more effectively. The skill of listening involves two broad approaches, passive and active listening:

1. Passive Listening

Passive listening is what most people probably conceptualize listening to be: not talking and letting someone else speak. It is a skill that begins with being silent. Doing it well requires learning to be comfortable with periods of silence. It also requires consciously realizing that being passive is not being incompetent. Talking connotes power and control. Remaining silent, however, is not necessarily the reverse. Lawyers do not lose control of interviews by listening passively. They may by listening, bear amazing things; things that can save them and their clients enormous amounts, of time and energy as their relationship progresses. Listening also builds rapport by conveying, in a powerful way, that lawyers care enough about their clients to stop talking and allow them to speak.

One specific way to use passive listening effectively in matrimonial interviews is to avoid filling every pause in a client's narration with a question. Assume a client suddenly stops speaking. What does that mean? It could mean that she has exhausted that topic and wants further direction from her lawyer. It could also mean that she is pausing to catch her breath; or she has seen a relationship between what she was saying and something else that she wants to organize mentally before sharing. She may even be generating her courage to tell something that is very difficult for her to articulate. There are countless other possibilities. A new question from her lawyer could easily destroy something important. It

probably will change the topic. A more effective response would be passive listening, remaining silent and conveying a non-verbal expectation that she should continue.

The non-verbal and non-committal encouragers of communication that are frequently used in social discourse are another type of essentially passive listening responses. Non-verbal encouragers include attentive eye contact, bead nods, and receptive posture. Non-evaluative responses include the "I sees," ''yeses," "sures," and all of the other variations that are used to communicate nothing more than the speaker's statement is followed. Although these verbal remarks become troublesome echoes at deposition and trial, they are useful in interviewing. These remarks and actions acknowledge that lawyers are listening while not indicating how they are evaluating the client's messages. They remove the discomfort that might be caused to both participants if lawyers remain completely silent. They also combat inferences that lawyers are bored, disinterested, or falling asleep, possibilities that may be enhanced if nothing is said for long periods of time.

Passive listening is valuable because it lets lawyers receive information from their clients. It also affords a way of giving their clients freedom to communicate thoughts and feelings in interviews.

2 Active Listening

Another type of listening response that builds rapport and gathers information even more effectively than passive listening, is called active listening. This involves responding to pauses, and sometimes even questions, with a response that reflects, in different words, what clients have said. It is called active listening because it forces lawyers to bear what is said, and then to communicate it back in different words that prove an understanding of the client's message. The understandings generated by active listening may be crucial. A client who fears for her physical safety, for example, should receive different information about the economic importance of remaining in the marital home if her lawyer beard and understood her concerns.

An effective active listening response is probably a lawyer's best rapport-building tool. It proves that the lawyer bas both heard and comprehended what the client communicated. Passive listening, even when accompanied by non-verbal and non-committal encouragers, only implies that bearing and understanding have occurred. Clients have to believe that their lawyer was listening because no explicit proof is provided.

Being heard and understood usually makes speakers feel better both about the person with whom they are communicating and the process of talking with that person. It creates a motivation for, and a climate conducive to, further sharing. This is particularly true when the topic is a personal, private matter and the listener is a busy professional; precisely the environment of matrimonial interviews.

Making a short speech which produces no feedback from the audience either during or after the presentation is roughly analogous to bow matrimonial clients feel when their lawyers provide no active listening. Active listening is a way to provide feedback, and no feedback is usually experienced negatively. The speech was probably so bad that no one wants to talk about it. Withholding feedback also encourages less sharing, not more. Getting no feedback on a speech can minimize desire to give another. Similarly, withholding feedback from clients often makes them unwilling to share by narrating. Speeches also seldom involve the personal, intimate, and emotionally charged topics that clients commonly discuss in matrimonial interviews. Feedback in these situations can be crucially important for reasons that will be developed later.

Analogizing active listening to feedback is not completely accurate because feedback often implies evaluation and the most effective active listening responses are neutral and non-evaluative. They convey only proof of hearing and understanding by reflecting statements in different words. They are mirrors, not evaluations. The speech-maker probably wants someone to tell him how good the speech was. Matrimonial clients often also want their lawyers to tell them how good they are but neutral reflections ultimately are more effective.

Active listening responses may be directed at either the content or feelings contained in client statements. Content refers to objective "facts" the who, what, where, and when of situations. It is what courts are usually concerned with. Peelings are the terms clients use to describe their emotional reactions, both past and present, to events and situation. Formulating an active listening response on either level builds rapport and facilitates information gathering.

a. Content Reflections

C: I'd like custody but I just don't think I've got the time it takes to see to their needs. My job is very time-consuming and requires a lot of travel.

L: It would be difficult to balance the time demands of parenting with those of your career.

This is an example of an active listening response focused on the content of a client's statement; the conflict between parenting and a job requiring a lot of time and travel. The listener could have also reflected feeling here, perhaps frustration or anger about this conflict. The content reflection chosen had several advantages over passive listening. It proved that the lawyer heard and understood what the client said. Assuming an appropriate voice tone was used, it was neutral conveying no judgment about the merits of the choice of career over custody. It permitted clarification. If the client's present job was not his career objective, for example, the client could have clarified that and by doing so, perhaps

identified a decision to be made regarding the importance of the position. The response also encouraged further sharing on this topic because the client could choose to respond by elaborating further about the conflict, or the career, or both. This content reflection also left the client free to choose whether to continue on this topic or go to another one. An open question such as "tell me more" might have been more intrusive and less likely to produce information. Such a question, for example, might cause the client to wonder why more detail is wanted. A concealed judgment also might be implied in the question.

Content reflections typically follow a short statement about one fact or a related series of events. It is usually a single statement that follows a fairly short client narrative. You said this about that is how the response is phrased. Here are other examples:

C: I want the house because I was responsible for acquiring it.

L: Getting the house is a priority because your efforts enabled you to get it.

C: I was in the park walking to the subway. He was supposed to be watching our son.

He was reading and not paying any attention. Then Jeremy fell from the jungle gym.

L: You saw both the fall and that your husband was not supervising Jeremy.

The phrasing of content reflections is similar to leading questions because they follow a "you said this about that" pattern. If reflections are limited to what the client said, mistakes usually present no problem because clients will usually correct them. Content reflections are usually heard as requests for clarification if they are inaccurate. Additional information is then often provided.

C: I was in the park walking to the subway. He was supposed to be watching our son but he was reading and not paying any attention. Then Jeremy fell from the jungle gym.

L You were coming out of free subway and saw the fall.

C: No. I was walking to the subway. I had not gone down into the station. I was still in the park when Jeremy fell.

Problems can develop, however, with inaccurate content reflections that go beyond what the client has said. These typically occur when lawyers either reflect content that the client did not present or anticipate what they think the client will say next. If the lawyer in the last illustration had said, "you saw Jordan fall and your husband did not," for example, she would be reflecting something that the client did not say; whether her husband saw the accident. The suggestive phrasing raises a risk that the client will agree with the content reflection thinking that it is what the lawyer wants to heat.

Anticipating what the client will say can result from an empathetic presence with the client to the extent that the lawyer has a strong, perhaps intuitive, sense of what is coming next. Supplying the words on the content level, however, runs the same risk of suggestiveness. It should be avoided unless the client will not respond to suggestiveness. This is difficult to ascertain, particularly early in an interview. Anticipating and identifying unexpressed feelings do not present the same problem.

Both of these problems can be minimized by using frequent invitations to correct errors if accuracy is uncertain. "Please correct me if I get this wrong," "Let me see if I understand this," and "am I correct that" are useful introductory clauses to minimize risks that content reflections are inaccurate. Content responses should also be reflective, not interrogative. Conversational, neutral voice tones should be used.

Content summaries which synopsize larger segments of information are useful and should be used frequently in matrimonial interviewing. Summaries work best after long client narratives. Summarizing the "facts" after a long narrative to see if they are "right" can be an effective way to prove both listening and understanding. They solicit clarification of anything either missed or erroneously understood. They often also invite further elaboration effectively.

Another technique involves phrasing a question by incorporating a portion of the client's previous remarks. This technique, commonly done during direct examination to provide repetition and emphasis, is useful in interviewing to build rapport and stimulate memory. It works best after initial rapport has been established when information gathering is the primary objective. For example, the statement "my husband came home that night very intoxicated; it was quite unusual behavior for him" might be met with a question.

Phrasing the question this way builds more rapport than simply saying ''what happened next" because it proves that at least a portion of the client's previous statement was heard and understood. A response that asked "what else did he do that night besides come home drunk" also can stimulate memory by indicating that intoxication has already been mentioned and understood. Since these responses accompany questions focusing on specific information, however, their rapport-building potential are limited. Non interrogative content reflections are more effective earlier in interviews because they invite further elaboration. Reflecting the above statement by saying "it was surprising to see him that way," for example, would permit this client either to elaborate more on this episode.

Many lawyers may find it difficult to conceptualize listening as a process of reflecting back messages received from clients. It takes practice to develop this skill once the values of active listening are acknowledged. Practicing content reflections is a good way to start because reflecting the content of what matrimonial clients say may be easier to do than reflecting the feelings they either express or imply. Most lawyers can identify facts more

easily than feelings because they are the building blocks used in litigation. Claims for relief are constructed on facts so lawyers are thinking about and looking for them during matrimonial interviews.

b. Feeling Reflections

Representing matrimonial clients often means working with people experiencing emotional crises. Matrimonial interviews explore the disintegration of what was presumably once a very important, personal relationship and clients typically experience a progression of emotional reactions as they divorce. Discussing the marital breakdown and its consequences, including how children should be cared for and supported and how marital property should be divided, inevitably generates strong feelings and emotions.

These feelings and emotions are neither logical nor rational requiring neither legal analysis nor therapeutic intervention by matrimonial lawyers. They should, however, be acknowledged because they are important parts of the human experience of divorce. They should not be ignored. They are facts in the sense that they often influence outcomes as much as or even more than objective data.

The most effective way to respond to emotional expressions is with active listening statements that reflect them non-judgmentally. Here is an example:

> Ms. smith: (clenching her fist, speaking with an increasingly loud tone of voice) Then I found out he has been playing around with his secretary. (bangs her fist on the table) I couldn't believe it:
>
> Lawyer: His conduct makes you furious.

The lawyer here identified a strong feeling expressed non-verbally and reflected it. The statement mirrored the feeling; it did not evaluate it. Doing this can both build rapport and generate information with extraordinary effectiveness.

Rapport is built by this type of active listening response in two ways. The most powerful way is its potential for conveying empathy. Reflecting the emotional content of client statements and capturing their correct feeling tone conclusively demonstrates an understanding of their situation. It conveys that the lawyer can enter the client's world and see the situation from that perspective. It proves that the lawyer is, in a sense, feeling with, not for, the client, the crucial distinction between empathy and sympathy.

No one knows exactly why skillful feeling reflections are so effective. Perhaps it is because it is such an unusual experience to have someone listen to intimate feelings without either judging them or substituting other agendas. It also feels good to share a difficult experience in both its factual and emotional components and to be heard and

understood on both levels. That good feeling generates rapport and motivates continued disclosure. It also engenders feelings of importance and self-worth when a busy professional listens this carefully.

A neutral, non-judgmental feeling reflection is what most people want when seeking out a friend with whom to share a disturbing personal situation. People want to have their feelings heard and understood, rather than ignored, judged or minimized. Secrets are told to friends who listen well and complete disclosure from most matrimonial clients usually involves sharing several. Skillful active listening responses will uncover these secrets much quicker than reassurances that the communications are protected by evidential privileges will.

Feeling reflections also build rapport by removing blocks to communication. They allow a potential release of emotion because clients who encounter understanding of their feelings may experience a discharge and a sense of relief. This discharge of feelings often makes clients feel better. It also may facilitate their willingness to move on and talk about other issues after their emotions have been acknowledged and discharged. Ms. Smith in the above illustration, for example, may continue to display her anger by other non-verbal means and vague statements if it is not acknowledged. Once it is reflected, however, she may be more inclined to move on to talk about other things. She may sense that there is no point dwelling on her anger since it has been heard and understood.

Reflecting feelings can temporarily intensify the emotions experienced by matrimonial clients. This intensification can be an unpleasant experience for lawyers. It can also discourage them from using additional feeling reflections even though more active listening is usually the best response to make if these storms develop. Remembering that most clients experience this discharge positively may also help lawyers weather these storms.

Although this discharge has slight therapeutic potential, lawyers should not reflect feelings for this purpose. They should reflect feelings to demonstrate empathy and to motivate further communication. They should not press a client to discharge emotion.

If clients choose to do so; fine; if not, fine. It is their choice.

If the intensification continues and no discharge occurs, a lawyer could share his desire to move to another topic and make a motivating statement to encourage it. A statement like this might be effective, for example, with a client who demonstrated a reluctance to do anything other than share anger:

> "Ms. Smith, you clearly express your anger. I understand it. It is something you have to live with. You may want to work on resolving it. I have a reading list here of books that may help you start. I will also be happy to refer you to another helping professional who has the skills to work with you on this process. Without

minimizing your anger, I'm feeling a need to get additional information about your situation. Could you tell me about …

If this doesn't work, the other option to consider is adjourning the interview and making a therapeutic referral.

A matrimonial client who chooses not to discharge emotion may often respond to a feeling reflection in a way that generates information because the response is heard as an invitation to talk more about the facts underlying the emotion. The angry Ms. Smith in the above illustration, for example, may respond: "Yes, I am angry. And let me tell you what else that rat has done." Then she may tell me bout his penchant for poisoning neighborhood cats. This is a fact that may be relevant to case strategy and probably was not on the lawyer's checklist of topics to explore.

Feeling reflections also generate information in the same clarifying or self-correcting way wat content summaries do because clients are usually happy to clarify or correct inaccurate responses. These clarifications also often add additional facts that enhance understanding of the overall situation. Consider this example:

C: I couldn't believe he would stoop so low as to associate with that woman.

L: You were angry.

C: No, I was disgusted, and convinced that the marriage was over. After that I cleaned out our joint accounts and moved in with my sister.

(1) Phrasing Feeling Reflections

Accuracy in reflecting feelings requires correctly gauging the intensity of the emotion rather than its existence. Rapport and motivation to communicate are developed best by feeling reflections that accurately capture the intensity of the emotion mirrored. Grossly inaccurate reflections may actually harm rapport. Responding to a clients clenched fist, desk- banging remarks about her husband's behavior by saying, ''you seem a little bit upset about what he did" demonstrates the point. This client communicated a much more intense feeling than "upset." The minimizing phrase "a little bit" was also inaccurate. Common conversational phrases like "little bit," "sort of," "kind of," and the like often make feeling reflections inaccurate. This client may clarify and correct these mistakes and appreciate the effort to hear and understand. On the other hand, she may react negatively and wonder why her strong feelings were minimized.

Although content summaries should be limited only to the facts communicated, reflecting unexpressed feelings and emotions can be very effective because empathy can be dramatically displayed where feelings are either implied by tone and non-verbal conduct or

stated vaguely. Bearing and understanding emotions that were not clearly communicated vividly demonstrates careful, attentive listening. Erroneous feeling reflections also seldom cause substantive harm. Reflecting anger when clients feel frustration, for example, usually has little effect even if they choose not to correct it. Since substantive results do not hinge on feelings, erroneous reflections do not compare to the havoc that occurs when mistaken facts stemming from inaccurate and uncorrected content responses are blasted away by the other lawyer at deposition or trial.

Phrasing feeling reflections is more challenging than content responses for several reasons. The non-objective nature of feelings often tempts lawyers to deviate from neutral responses and use judgmental or reassuring formulations. Both of these common responses present problems. Neither is fully empathetic.

Judgmental responses inhibit subsequent communication because even positive evaluations imply a willingness to judge less than favorable situations negatively. Statements approving a client's anger at her husband's infidelity, for example, may inhibit her willingness to disclose her extra-marital activity. Matrimonial clients typically receive a lot of judgment, much of it predictably negative, from their spouse, children, family, and friends. They don't need more from their lawyers and they may be less than candid to avoid it.

Positive judgments can also inadvertently minimize client emotions and overlook the complexity of situations. Saying "Its good to be angry at that drunken, abusive man" 'minimizes a client's anger by not acknowledging its intensity. It also communicates unclear, disturbing implications about her choice to live with this person for years.

Many matrimonial clients have strong needs to express anger at their spouses and want their lawyers to share their bitterness. Judgmental statements responding to this wish should be avoided. They will undermine explanations that the legal system is no longer concerned with finding fault and vindicating victims that may be necessary later. They also keep clients extremely partisan which usually harms chances to achieve either a creative settlement that benefits both spouses or a favorable outcome if the matter is ultimately litigated.

Lawyers should also recognize that powerful urges to help their clients may cause them to offer reassurances. They are not as effective as neutral reflections are despite their noble motivation. Reassuring responses are often heard as minimizations of feeling. Telling a matrimonial client, "don't worry, everyone is anxious at the start of a divorce, you'll get over it," minimizes the feeling by not acknowledging its intensity. It also communicates subtly that it, and perhaps other emotions as well, are not relevant.

Another ineffective tendency is to use an introductory phrase, often the same one, to begin every feeling reflection. "I can understand," as in "I can understand how that would make you angry," is the chief culprit. Clients often hear this as phony and patronizing, particularly when they are talking about feelings relating to events that, in their perception, a lawyer would never have experienced. If Ms. Smith was talking about her husband's sexual abuse of her daughter, for example, a lawyer expressing understanding of her anger probably is damaging rather than building rapport. Ms. Smith will probably find it hard to accept that her lawyer has ever dealt with such a situation personally. She will feel patronized arid belittled.

Using other introductory phrases like "so you're saying," "I hear you saying," and "as I see it," all lengthen feeling reflections and threaten their effectiveness. They often make feeling reflections seem hollow and insincere. The goal is reflecting emotions that clients express without mechanically applying a communication technique. It is usually more effective to eliminate introductory phrases and use simple reflective statements like ''you're angry, frustrated, anxious, frightened," etc.

Making feeling reflections often feels awkward, forced and uncomfortable initially. These problems can seep into voice tones causing reflections to sound mechanical and insincere. An empathetic, confident reflection of the feeling or emotion either expressed or implied should be the goal. The cure for the problem is practice.

Another possible problem may involve finding the right words. Lawyers get so preoccupied with the rational and objective aspects of lawyering that their vocabulary for describing emotions often diminishes. Here is a list of thirty feeling words that may enlarge feeling vocabularies: happy, anxious, depressed, inadequate, fearful, confused, hurt, angry, lonely, guilty, suspicious, resentful, vulnerable, bored, miserable, disappointed, helpless, rejected, embarrassed, distressed, uncomfortable, abandoned, cheated, tricked, nervous, afraid, impatient, worried, troubled, and shocked.

Most matrimonial clients will experience all of these feelings, and others, during their divorce. Some may experience this entire vocabulary during their initial interviews. Looking for opportunities to reflect these feelings neutrally and non-judgmentally with these words will increase rapport and improve communication.

(2) Types of Feeling Reflections

Effectively reflecting client feelings that are either implied by non-verbal conduct or vaguely expressed requires identifying the emotion communicated. Precise identification can help clients understand their emotional reactions and facilitate their ability to make decisions later. Anger is a good guess when a client clenches fists, bangs on the desk, and increases voice tones. Vaguely expressed emotions can be more difficult to discern. What

does a client mean, for example, when he says "I'm really freaked." Is he angry, surprised, shocked, disgusted, frightened, or happy? Although identifying this emotion is not easy, wrong guesses run few risks because errors do not affect substantive results.

Feeling reflections can be even more difficult when emotions are expressed clearly and when none are communicated in situations where some would be expected. For example, it can be difficult to reflect with a paraphrase if a client says, "I am so angry when be acts this way." The emotion bas been expressed clearly. Reflecting by parroting, or using the exact words, usually produces a negative reaction. At best it only produces a confirmation as clients either think or say "Yes, that's what I said." using a synonym, like furious or livid, also does little to build rapport and motivate further communication.

Several options are more effective when feelings have been expressed clearly. Passive listening involving pausing and not saying anything is one approach. The silence, accompanied by supportive and encouraging non-verbal conduct, may produce the same reactions that are generated by effective reflections of implied or vaguely expressed feelings. Passively listening to clients who express anger clearly, for example, might encourage them to discuss the reasons for their anger and generate additional information.

A neutral statement that both comments on a process point and reflects using the same words is another effective response. Clients, for example, can be rewarded for expressing themselves clearly. Examples of this include: "You express your anger clearly;" ''you are in touch with that anger;" ''understanding that you are angry is important because it helps me to get the full picture."

Another option is a statement that mirrors the client's tone. Saying with intensity ''yes, you are angry," for example, can minimize the damage done by the paraphrase. This emphasizes that the lawyer has heard the intensity of the emotion that has been clearly expressed.

Lawyers may also express understanding of the feeling if the situation is something either very common or clearly within the client's perception of their experience. No understanding should be expressed if neither is true to avoid patronizing the client. Saying "I can understand how angry you'd feel after seeing your husband drunk again," is probably acceptable because intoxication is an unfortunately common experience. A short statement that explains credibly how the lawyer can understand may also be effective. For example, saying "I've had family experiences with alcoholism and I can relate to how angry that makes you," for example, can make an expression of understanding more credible. These bridging statements should not, however, divert focus from the client's situation to the lawyers experience.

Occasionally matrimonial clients describe situations which would be extremely emotional for most people without expressing or implying any feeling. What should lawyers do then? Speculating about an expressed emotion might be received as intrusive prying." On the other hand, it might be either facilitative or corrected the speculation was inaccurate. Judging which way to go depends on an almost intuitive sense of how clients will respond. This is another occasion when a feeling reflection should include a short introductory phrase, such as "I imagine you felt angry and frustrated," or "the situation could have made you quite concerned about your health."

There is no easy answer to the question of how much feeling reflection should be done in matrimonial interviews. Much more that most lawyers do now is probably a safe prescription. After every client response is too often. It's always a judgment call in between. Factors in making these judgments include an evaluation of how much rapport has been developed, how openly and freely the client is narrating, and the intensity of the expression.

It may also be useful to distinguish between de3criptions of past feelings and emotions that clients are presently experiencing. Matrimonial interviews present ample numbers of each. Strongly implied present feelings should usually be reflected early in the interviews because little rapport has developed and the intensity suggests strong potential for empathetic facilitation of further communication. A clenched fist, desk banging implication of anger is an example of an opportunity to listen actively that should not be ignored. Although brief reflections of past feelings when they are expressed or implied can be empathetic, exploring them in depth may sidetrack interviews. A weak implication of a past feeling later in an interview thus might not warrant a reflection. A statement of how angry it made a client when her husband ignored her birthday seven years ago made late in the interview, for example, should probably be left unreflected.

Every feeling reflection should be purposeful. Lawyers are not going to resolve emotional conflicts therapeutically so they should not focus on feelings unnecessarily. Feeling reflections should not be used for voyeuristic reasons, to satisfy curiosity, or to control clients.

Developing and using active listening skills neither manipulates clients to express their feelings nor invades their privacy. It is simply a way to gain information and build rapport. It is a way to respond to the fact that lawyers can listen faster than clients can speak. It gives lawyers something to think about and concentrate on while their clients are talking. It also gives them a safe harbor during the emotional storms that matrimonial clients frequently experience during interviews. Lawyers often feel that they must say something when these storms come and feeling reflections are usually the most appropriate and effective responses they can make. They usually help both lawyers and clients weather the storm and emerge more fit for a better voyage together.

B. MOTIVATING STATEMENTS

Although active listening is the best general tool for encouraging matrimonial clients to talk during interviews, statements designed to motivate communication can also be effective. They can often be combined with active listening responses but they do not involve reflections of the client's message using different words. Instead, they focus on other aspects of the communication process. The three primary types of motivating statements are: positive feedback about the communication process; expectative motivators; and remarks that recognize and combat communication inhibitors.

1. Positive Feedback about the Communication Process

The technique is simple but important and often overlooked. It involves giving clients occasional, sincere praise for behavior that is cooperative and helpful. Here are some common examples:

> "You are doing an excellent job giving me details; I understand much better now."
> "This is very helpful narration; I'll be able to focus my questions much more effectively later."
>
> "Your sharing of this information even though it brought back unpleasant memories, has been valuable to my understanding of your situation."

A client-centered interviewing approach stresses active client participation in the information gathering and rapport building processes. Giving clients positive feedback about the valuable contributions they make during interviews motivates them to be more cooperative and communicative. This feedback responds to human needs for recognition and the esteem of others.

Statements providing positive feedback should identify and reinforce specific behaviors. Focusing positive evaluation on communication behavior rather than on either the content or the emotional aspects of client messages is important. Positive feedback about communication behaviors motivates by providing recognition and desire to repeat the rewarded conduct.

2 Expectative Motivators

This technique simply involves sharing expectations with clients. Making statements about expectations motivates communication in two ways. First, it alleviates client anxiety and discomfort creating greater freedom and willingness to communicate. Second, communicating expectations that information will be forthcoming often overcomes a reluctance to talk because the client's need to meet his lawyer's expectation may be stronger than his need to block disclosure.

Many matrimonial clients lack realistic expectations about the process, the law and lawyers. These inaccurate expectations can generate threatening perceptions and be a significant source of stress. Sharing how the system actually works can help many clients communicate better during interviews. Clients who present routine cases from the system's perspective, for example, may unrealistically fear that massive publicity will accompany their divorces. They don't know that the final hearing will take three minutes or less, be held in the virtual privacy of a judge's chambers, and be totally unpublicized. A general explanation of these kinds of systematic features may alleviate many of these concerns and it is probably an appropriate thing to do later in the interviews even if no block has been discerned. Specific expectative statements are usually effective any time client confusion or concern about a role or legal issue is sensed.

Many matrimonial clients have unrealistic expectations about interviews that can be alleviated by expectative statements. Some, for example, will be concerned about the role they should adopt during the interview. They may find a participatory approach discomforting if they expect their lawyer to ask the questions and see their responsibility only as answering them. A statement explaining an expectation that they should be an active participant throughout, beginning with a narration explaining both what their situation is and wishes are, may help alleviate that discomfort.

All clients want to know how much the divorce and their" lawyer are going to cost and concerns about these questions can produce anxiety and harm communication throughout an interview. Stating early what fee, if any, is charged for the initial consultation - together with an explanation that later fees and costs will be explained thoroughly usually allays these concerns. Some clients are concerned about how long the interview will last. An expectative statement on this topic is usually effective. This and the initial consultation fee can also be communicated at the time the appointment is made. Questions produced by any of these general expectative statements provide additional opportunities to minimize client worries.

Expectative motivators can also be focused effectively on specific pieces of information. Telling clients that information on a particular topic is expected can powerfully motivate them to meet that expectation. This technique works because of the human tendency to conform o another's explicit expectation. This desire to conform may also be stronger than other client needs being met by not sharing information. Research shows that this dynamic is even more pronounced when the suggestion comes from one perceived, as lawyers often are, as having higher status.

An empathetic identification of the difficulty of remembering the information can often be combined with an expectative statement on specific information. Lawyers need to be explicit about their expectation that information will be forthcoming because simply empathizing with the difficulty in remembering sends a message that no information is

expected. Assume a client indicates that she cannot remember what happened immediately after her husband caught her with a lover. An effective empathetic, expectational motivator would be:

> "I understand how hard it can be to recall unpleasant details that happened some time ago. I have the same difficulty myself. I often find that if I concentrate for a few minutes, things start to come back. Why don't you think about it for a bit? The information could be very significant to our decision-making down the road."

C. RECOGNIZING AND COMBATIING COMMUNICATION INHIBITORS

Matrimonial clients do not block information simply to make their lawyer's lives miserable even though it sometimes seems that they do. Subjectively valid reasons for the non-disclosure usually exist. Lawyers need to know the psychological factors that inhibit communication to make effective judgments about when and how to use motivating statements regarding these blocks. Although the underlying psychological sources of these inhibitors do not need to be diagnosed, lawyers should know the common blocks and how to counter them. Professors Binder and Price describe the following six common inhibitors which impede complete communication in legal interviews. All of them are often present in matrimonial interviews.

1. Ego Threat

Most matrimonial clients do not share information which they perceive as threatening to their self-esteem easily. People want to be evaluated favorably; that's why positive feedback is an effective motivator. They also typically fear and seek to avoid negative evaluations. Negative feelings about past or anticipated conduct make it difficult to disclose that information. This concern about self-esteem may also carry over to worry about these negative acts becoming public through the litigation process.

In matrimonial cases these inhibitors range from feelings of embarrassment and failure that the marriage did not work to shame and guilt about either past acts or future plans. Motivations for wanting the divorce may be ego threatening. Aspects of relationships to children may threaten clients' self-esteem. Remaining fault issues such as the relationship of marital misconduct to alimony also require inquiry about potentially ego-threatening topics.

2. Case Threat

This block is the reluctance to share information which clients perceive to be harmful to their case. Substantial misinformation about matrimonial law and procedure exists on cocktail and other circuits. It often produces strange ideas about what and what will not affect a position in a divorce adversely. This inhibitor is similar to ego threat but the two are not always present simultaneously. A client, for example, may have no ego qualms about

sharing information about his extra-marital sexual activity. He may even derive ego satisfaction from talking about it. That same client, however, may be reluctant to mention it because he perceives that it could be harmful to his case.

3. Etiquette

This inhibitor includes all of the reasons that information is not disclosed because of role, cultural, or status notions. Candidly disclosing this kind of information would violate client notions of propriety. A man, for example, may think it is inappropriate to talk about relevant but intimate sexual matters with a female lawyer he has just met. There are things that black clients more easily tell black attorneys.

4. Trauma

This block occurs when a person has such unpleasant associations with a topic that recalling and retelling it are extremely painful. Most people are strongly motivated to avoid thinking and talking about unpleasant past events. A spouse who had been savagely beaten in the past, for example, might be very reluctant to discuss it. Recalling and retelling the unpleasant situation can also generate a re-experience of these feelings. Gathering information in matrimonial interviews often requires exploring areas where this inhibitor may be present.

5. Greater Need

This block occurs when a client has a need to talk about a topic different than the one which the lawyer wants to discuss. The inhibition does not come from a perception that the questions are either threatening or irrelevant but rather from a greater need to talk about something else. Clients who insist on sharing angry feelings about their spouses and resist sensitive efforts to move on after a reasonable time offer one common temple of this inhibitor.

6. Perceived Irrelevancy

This block stems from client perceptions that there is no reason to communicate on the point since it has nothing to do with what he or she perceives to be relevant. This block also does not involve client feelings of either threat or discomfort. It is often resolved by a motivational statement indicating why, in general terms, the topic is important. A matrimonial client discussing a custody question, for example, may not be motivated to respond to questions about his spouse's friends until he is told that they may be important sources of information to refute parental fitness claims.

Combatting these communication inhibitors requires recognizing them initially. Then an empathetic statement showing understanding of the difficulty combined with an

appropriate motivating expression often dissolves the block. The diagnosis of the block may need to be either general or specific because many topics involve more than one inhibitor. A client who is manifesting verbal and non-verbal reluctance to discuss how she cared for her four year old son immediately after leaving her husband and moving in with another man, for example, could be inhibited by ego threat, case threat, trauma, or perceived irrelevancy. Attempting to identify the specific blocks that are present could both confuse the client and waste time. A general empathetic statement is probably more appropriate. This, for example, might work.

> "I sense that this topic is difficult for you to discuss. The information could be very important so I need to ask these questions. Your cooperation will help me analyze the case and give you better information about your options and their consequences."

If it is pretty clear what the block is, a more specific diagnosis and motivating statement will probably be more effective. Assume a client has been divorced for several years and is now living with another man. Her ex-husband has filed a motion to modify the final judgment seeking to acquire custody of their children. The client has not fully answered questions about how the potential step-father gets along with her children and the block is probably either ego or case threat or both. This might be an effective motivator in this situation:

> “This seems to be a difficult area. It is an important topic that I must explore fully before I can help you develop options and information about them. I will not think less of you if there have been some problems here. It is not my role to judge you or your behavior. I want to help you make the best decisions possible and, to do that, I need you help in sharing all relevant information. That includes even things that you fear might either harm our case may embarrass you."

Facilitating communication from a client blocked by trauma is also best done by a specific diagnosis and motivating statement. Motivating clients blocked by trauma also often requires extensive feeling reflections and may produce the same type of cathartic discharge that can occur when other emotions are mirrored by active listening. This, for example, might work with the client who was savagely beaten and who doesn't want to remember, much less talk, about it:

> "This is a painful memory for you and talking about it may cause you to relive some of that agony. I regret that our legal system makes this information important to our case but it does. That's why we need this information. I assure you that I'm not asking these questions to cause pain. These details could be crucial to our case."

Motivating statements indicating that the topic is open for discussion and important can also be used to combat etiquette blocks. This, for example, might be an effective way to begin asking questions about a client's past sexual conduct to ascertain whether an adultery defense will be an obstacle to an alimony claim:

> "You may think it is inappropriate to discuss extra-marital sexual conduct by both you and your spouse in this interview These issues, however, have important legal significance and could bear directly on some decisions you will have to make about the case in the near future. I have to ask you some questions on these topics to help you make fully informed decisions. I don't ask you these questions to pry into your life or to embarrass you. I hope you will understand and give me complete answers."

Motivating statements can also help clients blocked by a greater need to talk about something else. Sensitively phrased comments can help clients who insist on staying on intensely emotional levels see the need to discuss other topics. Greater need blocks that are not based on emotions can also be removed by statements of the lawyer's need. This, for example, could be effective:

> "I'm concerned that we have only twenty minutes left today and I need to find out more information about other topics so that I can do the legal research necessary before our next appointment. I sense that you need to keep talking about this topic but I've got enough detail on it for now. I would prefer moving on."

Motivating statements should be phrased supportively, empathetically, and flexibly. They should not be presented as demands. Effective motivating statements often produce questions because they usually indicate that the information sought could be important to either the lawyer's full understanding of the situation or the legal standards that apply to it. Clients, after hearing this, occasionally ask why the information is important.

Lawyers should respond to these questions to build rapport and keep the interview a shared, non-threatening experience. They should not be specific about the law if the facts are unknown, however, because of the possibility that clients will then tailor their remarks to produce the best result. A client who learns that marital misconduct might preclude alimony before answering questions exploring this topic, for example, might be motivated to give answers that avoid this result. The best response to such inquiries is a statement slightly more specific than the motivating expression but one that provides no detail that might distort. Here is an example:

> L: I need to know whether you have been sexually involved with any men other than your husband since you were married. This information is important. It will help me

determine what our options are so I ask the question not intending to embarrass you or to pry needlessly into your privacy.

C: Why is it important?

L: It bears upon some of the options and their potential consequences that you may want to consider.

C: I thought we have no-fault divorce.

L: We do. This information has no effect on your ability to get the divorce. It affects some of the relief you said you wanted.

C: What relief?

L: I'd rather not get into an extensive discussion of bow the law applies to your situation until I understand it better. We can certainly talk about this topic later if you wish. It is, however, possibly relevant Everything you tell me is completely confidential. Should we move to another topic and come back to this later?

C: No, I'm willing to talk about this if it is really important.

L: It is.

D. QUESTIONING

Although asking for information may seem to be the easiest way to get it, that is not the case in matrimonial interviews. Passive listening, reflections of content and feelings, and motivating statements often produce information and build rapport better than questions do. There are times during interviews with matrimonial clients, of course, when asking questions is totally appropriate. Using responses other than questions fifty percent of the time is a good rule of thumb in matrimonial interviews. Although this percentage should be even higher near the beginning of interviews if clients are comfortable narrating, a fifty percent rule should help most lawyers avoid taking control of interviews prematurely by excessive questioning.

Global Alliance for Justice Education (TOT) December 2013

Client Interviewing and Counseling

Margaret Barry and Brian Landsberg

(Excerpts adapted for CLE Course from Teaching Materials)

1.Initial Client Interview

Lawyer's Goals: Some Ideas

--Obtain necessary facts and information (Get leads for further investigation)

--Obtain client's version of facts

--Establish appropriate A/C relationship (Characteristics: respect and mutual trust)

--Establish rapport (Open questions and active listening are important techniques)

--Identify and clarify client's goals (Caution: don't leap to conclusions prematurely)

--Get authorization; establish contractual relationship

* Written retainer agreement; supervisor's express approval required
* Release of Documents
* Conflict check
* Explain student status, sign certified student form

-Determine if lawyer can/should accept the case

--Professional expertise and experience

--Time

--Personal and professional values

--Motivate client to participate fully

Client's Goals: Some Ideas

--Desire to tell her/his story to helping professional

--Desire to control to some extent how the interview proceeds
(What topics are discussed; what details are discussed)

--Reassurance

--Emotional contact with professional (analogy: doctor, dentist, car mechanic)

--Basis for deciding whether s/he wants to enter into an attorney/client relationship (N.B. You should always approach relationship as if the client has a choice b/ she/he does!)

--Wants to accomplish some substantive result

* Wants violence to stop
* Wants to have c/s at adequate level to cover expenses
* Wants to know what options are

--Gain understanding of the legal system (legal options; what she can expect)

--Fees (potential fees, costs, expenses)

--Closure (Wants to know what to expect next and when)

D. The Lawyer/Client Relationship

1. Opening/small talk

--How to plan for small talk

--Things that put people at ease (greeting, small talk, furniture arrangement, appearance, genuine-ness, listening, empathy)

2. Was There Rapport?

-Did lawyer promote a relationship of trust and confidence?

-Was lawyer able to remain nonjudgmental?

-Did lawyer seem to be on the client's side?

-Was lawyer prepared to answer client's questions and deal with client's concerns?

3. Did Lawyer Use Active Listening Responses?

-Were they successful?

-What other types of listening did lawyer try (passive, silence, body language, etc.)

-Why is listening so difficult?

4. Nature of Questioning

-Did lawyer use sufficiently open-ended questions to enable client to tell the story from her own point of view?

-Was the lawyer able to refrain from asking closed, probing questions until the story had sufficiently emerged?

-Did lawyer use T-Funnel technique to clarify, gain specific information?

5. Organization

-Was the organization of the interview helpful?

-How could it have been improved?

-How was interviewed structured?

Opening: Open question such as: Please tell me about your problem, how it began, and what you'd like to do about it.

Chronological Overview:

Open questions/ Active listening
Minimum of probing for details
Minimum interruption

Preparatory Explanation:

Step by step - from beginning - in your own words
event by event
Basically, I want you to do the talking
Planning on one hour today

Theory Development:

-juggling info
-T-funnel
-topic by topic (spark other topics)
-systematically

Conclusion of Interview:

-What you will do and by when
-What client needs to do
-Tell client expectations – don't expect her to read your mind

-establish attorney/client relationship
-signed retainer agreement

6. Did Lawyer Find Out The Necessary Facts:

-What other topics should have been covered?
-Any significant details omitted?

7. Conclusion of Interview

-Did client leave the interview knowing what the lawyer was going to do next, and when they would meet again?
-Did the lawyer give the client any info re the law, legal rights, instructions on how to behave, or the legal system?
-Should more (or less) have been said?
-Was information accurate?

8. Dealing with the Unexpected

-How did lawyer deal with the unexpected?
-Ideas re how to get comfortable with chaos?
-Was lawyer open and encouraging and nonjudgmental?
-Idea: ask client's permission to address topic X, then Y. Shows her she has been heard and understood.
-Watch tone of voice and body-language.
-What was lawyer communicating

9. What Information Should You Share With Clients? When?

-personal experiences/-personal values
-legal theories
-legal advice
-court process

Avoid Premature Diagnosis!

10. Safety Planning: what it is and how to do it

A. Other Critique Topics

1. Techniques

-eye contact
-body language
-tone of voice
-speed of voice

2. Form of Questions and Listening

-open
-closed
-leading
-did questions elicit relevant info
-active listening

-silence

3. **Substance**

-other questions should have asked
-set up next contact
-explain process
-explanation of role and supervisor's role (asked them to skip this time)
-accuracy of info provided re law and process

4. **Team Coordination**
5. **Ice-Breaking/Small Talk**

SPECIAL CONSIDERATIONS WHEN COUNSELING DOMESTIC VIOLENCE CLIENTS?

Domestic Violence

- Non-legal as well as legal consequences are critical, i.e., safety, client's feelings
- Possibility of PTSD – can impair client's ability to make decisions
- Safety planning continues at counseling stage

Impact of race/economic class/ gender on ability to effectively counsel client?

- May affect ability to empathize or see from their perspective
- May affect ability to generate alternatives or see all consequences

What to do?

- Be extra careful to ensure partnership model where you leave space for client to generate alternatives, examine consequences
- Identify your own personal position, what you would do --- make sure this is not what is guiding your advice

Some advice given by Dr. Mary Ann Dutton, clinical psychologist at George Washington University

1. Willingness to Hear Details of Violence
2. You might feel like an intruder or may not want to hear al the gory details, make sure your hesitation does not inhibit gathering of relevant information.
3. Avoid Being A Voyeur, Eliciting Details Just To Hear Details
4. Support, Validation Role
5. Don't get so focused on professional role and forget to be human (e.g., client who confides to you that she is HIV positive)
6. Understand dynamics of control, be aware of power dynamics between you and client
7. (giving decision-making power to clients rather than making decisions for clients)
8. 5. Be aware of compassion fatigue, secondary traumatic stress which can affect those assisting clients who have been battered

ADVICE

Conference Skills, Inns of Court School of Law, pp 131-150 (1999/2000)

7.1 Introduction

As a barrister you hold yourself out as a specialist in various fields of practice and offer your professional expertise and experience in a way that should benefit the client. Commonly the client comes to the lawyer because he or she has been unable to resolve a problem alone. It is likely that this problem is a complex one and almost certainly of great importance to the lay client.

From the outset it is important to recognise that the term 'advising the client' has many connotations. The type of advice you give varies to meet the needs of the different stages of the client's case. You will continue to advise the client throughout your professional involvement, not just at the initial conference. Consider the many decisions that remain to be made by the client during the rest of the litigation process: the pre-trial negotiation, the trial, and in the post-trial period; sentencing and enforcement etc. At each stage you will have some contact with the client and naturally questions will have to be asked and the issues of the case thoroughly investigated. The additional information thrown up by this process will have to be assimilated with any existing knowledge of the case and its issues. Any preliminary conclusions will have to be adjusted to reflect this new, informed picture of the case. It is only at the end of these steps that you will be able to offer the client some concrete advice on the issues in the case. It is crucial that the client not only finds this advice satisfactory and of practical benefit at each stage but that he or she has a thorough understanding of its consequences. In order to meet these requirements you will have to appreciate the client's level of comprehension and be sympathetic to his or her level of education, age, background and so on as well as having an understanding of the legal and factual issues in the case.

The steps that go to make up the advice process are recorded in note form below. Whilst at first glance they may appear mechanical, after some practice the process will become more natural.

7.2 Advising: A Step by Step Guide

(a) Identify the objectives of the conference and isolate all the legal and factual issues of the case. Compare the two to isolate the relevant issues which require your advice in the conference. (See 5.6.)

(b) Gather all necessary information from the papers and ask the client questions as necessary to complete your knowledge of the case. (See 6.6.)

(c) Assimilate the new information with existing knowledge by filling the gaps and clarifying any ambiguities.

(d) Analyse the legal and factual issues in the case considering the new information and your revised view of the client's instructions.

(e) Consider the merits of the case, application and so on with the benefit of this additional legal and factual analysis.

(f) Adjust as necessary any preliminary view that you formulated before the conference.

(g) Formulate your opinion and advice so that it is both practical and appropriate to the needs of the client and the requirements of the case.

(h) Consider how best you may communicate your conclusions to the client b using appropriate language and sufficient explanation.

(i) Identify all the strengths and weaknesses of the case for the client.

(j) Articulate your opinion to the client in a way that he or she can understand. (k) Take the client's final decision and any further instructions.

7.3 Terminology

Before continuing to discuss the advice stage in greater detail it will be helpful to give some explanation of the terminology used in the study of advising clients on legal matters.

7.3.1 ADVICE

This term can be used in a general sense to include the whole process by which a barrister communicates information to clients and assists them during the conference. The information and help may take the form of one or more of the processes described elsewhere in this section. However, the term 'advice' may also be used more narrowly to include the barrister's particular instructions and detailed suggestions for action given to the client. Some commentators on the role of lawyers in conferences suggest that giving specific advice is not appropriate as it imposes the view of the lawyer on the client. However, on many occasions barristers in England and Wales do give overt advice to their clients. Indeed, some would argue that this is what they are engaged to do; in short it is what the client is paying them for.

7.3.2 OPINION

Used in the context of a conference an opinion is a discussion of the merits of the case by the barrister. For example, this might include the chances of success should the case go to trial or the likely outcomes and consequences of a negotiated settlement. In a broad sense this term is also applied to suggestions for future action made by the barrister to the client, but always following an evaluation of the strengths and weaknesses of the relevant features of the case.

7.3.3 COUNSELLING

This is a specific method of advising clients employed by some legal advisors and there is much debate amongst commentators about its various merits. It is designed to be used by the lawyer to advise the client of the full range of options, and the client invited to take the initiative. This involves the selection of a range of options that b suit the client's identified needs and personal characteristics or that accord with the emotional demands of the client. (See 7.16 for a full discussion of this method.) This method of advising should not be confused with psychological support. The sort of counselling that might be offered by a qualified counsellor is not an appropriate method of advising in a legal conference.

7.3.4 EXPLANATION

This is a neutral method of assistance used to give the client definitions, descriptions and explanations. The lawyer acts as a guide and interpreter of the legal process and it may include explanations of legal terminology. Thus although statements of personal preference and suggestions of best choice are not relevant, various and numerous explanations will usually precede another form of advice-giving.

7.4 Standard of Advice

No matter in what style or method you advise your client, as a practising barrister you must reach the standards set by the profession.

Generally, a barrister should ensure that advice which he gives is practical, appropriate to the needs and circumstances of the particular client, and clearly and comprehensibly expressed.

(Paragraph 5.7, Annex F, Code of Conduct of the Bar of England and Wales: Written Standards for the Conduct of Professional Work.)

The standard is a high one, and rightly so, as you will be helping people to make some of the most important decisions in their lives. There are three key objectives for the quality of your advice that can be identified from this paragraph of the Code:

(a) your advice should be practical;

(b) your advice should be appropriate;

(c) your advice should be expressed in a way that your client can understand.

In this chapter we will discuss the advice process in detail and investigate the skills you need to develop to meet the standard set by the profession.

When in pupillage and practice you should refresh your memory periodically of the duties you owe your lay and professional clients and the court. Regular reference should be made to the Bar Code of Conduct. The Code's paragraphs and appendices are not merely collections of professional ethics, but also offer clear guidance on good practice. Sometimes the Code deals with very specific circumstances, but it also indicates the spirit of the Bar's

preferred approach to client care and the execution of the barrister's professional duties. For these reasons the Code's contents should form part of every barrister's general knowledge. (See Chapter 9 and the Professional Conduct Manual.)

7.5 Reaching the Advice Stage: Assimilating New Information

The question stage of the conference will only conclude once you have gathered all the information necessary to enable you to advise your client. Before completing that section of the conference you ought to check with the client that you have addressed all the relevant issues in the case. Next it will be necessary to assimilate this extra information with your existing knowledge of the case and the preparation that you carried out beforehand. When considering your preliminary view of the case you must remember that it was based upon facts that might now have to be revised, changed or rejected altogether. Further this provisional opinion will be based to some extent upon guesswork and speculation. In other words you will have passed judgment before you were in full command of all the relevant facts. If necessary you should adjust this prejudged view so that it is suitable to the circumstances of the client as they now appear. Finally you must take into account your impressions of the client formed from listening to his or her concerns and expectations. This will enable you to formulate advice that is both appropriate to these circumstances and practical to the needs of the individual client.

This process is not time-consuming, laborious nor mechanical. Indeed, you cannot afford to be dilatory when a client eager to hear your advice is in front of you. With practice and the experience that it brings this process will become swifter and more natural.

Throughout the conference you must analyse the legal and non-legal options open to your client. At various times during the questioning stage take an opportunity to collect your thoughts. Consult your notes briefly and consider the client's instructions in light of your preparation.

A practical and thorough plan with a clear layout can be your touchstone in the conference. Such a plan will highlight gaps in your knowledge and contain the appropriate legal research and suggest your preliminary view of the case.

7.6 Preparing for Your Oral Advice in the Conference

To give your opinion of the case you will need to be fully prepared beforehand. This is because you will have little opportunity to consider the case in depth during the conference. The mental and social tasks that are part of the conference itself will occupy your mind most of your time. However, new information and perhaps a revised view of the case will materialise during your discussions with the client. Therefore you will have to rely upon your preparation whilst doing some thinking on your feet or seat. Only rarely will there be the chance to consult legal works or seek assistance from colleagues. The client's responses to your questions must be assimilated, analysed and compared with your preliminary view of the case. The client may introduce additional facts and instructions which will demand

additional analysis and broaden the areas upon which the client will require advice. All this will have to be done whilst the client and solicitor are with you. The client expects and is entitled to professional advice that will help to resolve the problems he or she is facing. The lay and professional client may wish to participate and add to your comments, questions and opinion and you must listen to these interruptions and deal with them appropriately and tactfully. Always remember the needs of the client are immediate and real; the person in front of you is the individual experiencing the difficulties firsthand.

7.7 How and When to Give the Client Advice

Special care is required when you communicate your advice to the client. A common question is, 'when is it appropriate to inform the client of your advice?'. In the majority of conferences some if not all of your advice can be communicated orally and immediately. However, on certain occasions there will be a reason to delay the advice, if the client needs time to consider the options further or because you need to carry out additional research. A choice arises whether to telephone through this delayed advice to the solicitor or to put it into a written form. In either event it is important to let the client know when to expect your advice. However, if you have fully researched the law and understood the brief and received full answers to your questions you should be able to offer the client your advice at the conference itself.

When you are about to communicate your opinion let the client know that you are doing exactly this and ensure you have his or her undivided attention. Check that the client understands that you are moving to the advice stage. This will not only ensure that the client is listening attentively to what you have to say but also maintain your control of the conference.

To avoid confusing the client by delivering ill-informed advice you must exercise control over the conference. A logical order must be maintained. Ensure that you have covered all the issues with the client and that all relevant questions have been answered. Further you ought continuously to monitor the progress of the conference; keep an eye on the time and how efficiently you are addressing the issues of the case and achieving the objectives of the conference. It is your responsibility to decide when it is appropriate to give your opinion of the case to the client; this can only follow a thorough assessment of the issues by you. However, it does not follow that your advice will be at the end of the conference. If it is communicated too late there will be insufficient time to address the consequences of the client's decision. Often there will be many issues to address and several areas to advise upon. On each instance you will need to gather information on various topics, analyse the facts against the law and formulate and present your opinion. Of course, if you have adequately planned in advance, these tasks will be dealt with more efficiently and fully.

7.7.1 HOW TO DO IT: GIVING ADVICE

(a) Any conclusion reached ought to be clear to yourself so that you appear confident and are able to justify your advice.

(b) Formulate the advice in language that is readily comprehensible to the client. Remember to be precise and practical, not vague or patronising.

(c) Explain how you have reached your conclusion and set out the strengths and weaknesses of its consequences for the client personally.

(d) Check that the client has correctly heard your advice and understood it.

(e) Finally, it is of the utmost importance that the client is aware that the final decision is his or hers. Remember, your opinion is merely offered; the client has the freedom to accept or reject it.

7.8 Making Your Advice Clear to the Client

A measure of the acceptable degree of conviction with which you can express your opinion to the client is given in an annex to the Code of Conduct. Although it deals specifically with a conference with a defendant in a criminal case, the spirit of the Code suggests that it may be applied generally to civil and criminal cases.

A barrister acting for a defendant should advise his lay client generally about his plea. In doing so he may, if necessary, express his advice in strong terms. He must, however, make it clear that the client has complete freedom of choice and that the responsibility for the plea is the client's.

(Paragraph 12.3, Annex F. Code of Conduct of the Bar of England and Wales: Standards Applicable to Criminal Cases.)

As is clear from the Code, the client always has freedom to accept or reject the advice that is given. Thus you must make this freedom to choose explicit. This should be done in a way that encourages the client to accept the responsibility rather than in a tone that might suggest that your interest in the conference ends with the client's decision.

At is crucial stage of the conference, when the client is on tenterhooks to hear your opinion of the best course to take, you must proceed with the utmost caution and sensitivity. It is unacceptable, for example, to state your advice boldly in the following way:

What you've just told me suggests that a guilty plea would be appropriate and I must warn you that the maximum sentence for violent disorder is five years' imprisonment.

Imagine the devastating effect of such a bombshell on the client! Also in part at least this advice is misleading.

The suggestion to plead guilty may well be founded on a realistic analysis of the client's position and therefore be justifiable in the circumstances. However, there is a world of difference between robust advice presented with justification to the client and an

insensitive instruction to take the course of action that you as the lawyer have decided upon. Further, the bold and intimidating advice on possible sentence is incomplete therefore erroneous. The maximum sentence is only ever used in those rare ca..l where the offence is at the top end of the bracket; that is, it contains many aggravating features and few if any mitigating ones. There is always something that can be in the defendant's favour and in the majority of cases a sentence well below the maximum can be expected. To overburden the client with the shadow of five years in custody is both inhuman and unprofessional.

7.9 Warning the Client of the Consequences

Clients may not always fully appreciate the consequences of any decision that they take, for example, the implications it might have on costs, the ensuing delay, inconvenience or litigation stress. Some side effects are of great importance to the individual client. Consider, for example, the effect of having a criminal record if the client is a wage earner looking for a new job; or the effect of receiving a bad credit rating if the client is setting up a business. Certain consequences will have a less tangible equally devastating effect. The social effect of being convicted for a violent sexual or the loss of face when an employer loses a case of discrimination are two exam It is therefore part of your duty to offer advice in the light of the consequences o decisions that the client has made. This advice on collateral issues may in non-legal considerations as well as the usual advice on the legal consequences of your client's decision.

7.10 Giving the Client the Full Benefit of Your Services: Time Management

It will be rare for you to receive instructions to hold a conference that covers only o area for advice. If there are several areas to advise upon, time can be scarce during di conference. Clearly you are required to meet all the objectives of the conference to satisfaction of both your lay and professional clients. However, there are limits upon the powers of concentration of both you and your client. Therefore it is legitimate to recognise that some of the issues faced by the client are of greater importance than others.

It is possible to construct a hierarchy of issues that require your advice. Some issues will have priority over others. Some are easy to prioritise; for example, those identified for you in the brief by your solicitor. The relative urgency of other issues can also assist you to decide whether they can be left until later. Thus a sound knowledge of the rules of procedure and the various time limits imposed on litigation is essential. Non-legal considerations that do not have a direct influence on the case may form part of the secondary issues and so may be left until later. Those which are at the heart of the matter, however, cannot. These will be the issues that are priorities in the case, issues that must be addressed and resolved as a matter of urgency or which take precedence over other peripheral issues.

It is not possible to make a list of priorities in the abstract. Only the individual circumstances of the case and the client will be able to tell you which needs are of greater or lesser importance. It is your responsibility to find out from the client what are the central issues. It is always worth considering to which areas to give priority and which to deal with either later or at another meeting. No one is superhuman so you must make a realistic estimation of your powers of concentration and those of the client before and during the conference.

If you are really pushed for time it may be appropriate to prioritise the issues upon which you intend to give your advice based upon your brief fee. You are only paid for that for which you are instructed and it is legitimate, but not automatically appropriate, to emphasise the legal function of the barrister. In any event non-legal advice, as opposed to consideration of non-legal options, may be more suitably given by another professional. For example, if a client instructs you to represent him or her in a personal injury case you might suggest an application for state benefits and even give an estimation of the likely financial award. However, it would be negligent not to add that the client should seek professional advice from a benefits officer or a financial advisor working for a disability charity if appropriate.

7.11 Helping the Client to Understand Your Advice

The lay client cannot be expected to understand the legal process nor the legal context of their case to the degree of sophistication that you do. It is therefore common to spend a significant amount of time explaining in everyday language the effect of the law on the client's case. Legal terminology and the court procedures that surround the case will also need to be explained. Further, some extra time may have to be spent explaining to the client why court litigation takes a certain route and warning him or her how to avoid delays. There are two objectives when you communicate your advice. You will obviously want the client to make a decision fully informed of all the consequences of that decision. And you will wish to pass on your advice to the client clearly and comprehensibly. In part you will realise these objectives if you ensure that the client appreciates the legal context of the decision. This might include the finality of the decision, its consequences for the future and the financial obligations that surround litigation. It is your responsibility to guide the client through the labyrinth of the law.

7.11.1 HOW TO CHECK COMPREHENSION

You must avoid prejudice and preconceptions when evaluating your client's apparent intelligence, but you should observe and appraise the client's level of comprehension. His or her formal education alone will not be an adequate indicator. Many clients will feel intimidated or overawed by the complexity of their case even though they have a wide experience of life apart from it. Therefore be patient with the client. This does not mean that you need to be condescending or unnecessarily simplistic in your explanations. For example, an illiterate defendant with a long record will not be able to read the charge sheet but he or she may know a lot about bail application procedures. Further, although the client

may appear bewildered to be in a road traffic court, his or her thirty years' experience as a driver has probably given some insight into what is and what is not safe driving. It is easy to belittle clients inadvertently by forgetting that they are capable of contributing their knowledge or experience to assist themselves. Apart from making for poor manners this lapse of common sense can seriously disrupt the rapport established between you and the client. If you treat clients as slow, unintelligent beings, why should they take an active part in the conference? Further, how can you be surprised that they will not trust your judgment or integrity?

An observant stance and a carefully selected vocabulary are the keys to intelligent and considerate explanations. Gauge what you have to say to the client. Avoid clichés and pat phrases; they rarely have a long shelf life. Remember what is comprehensible to one client is not always understood by the next. So try to adapt your approach to suit the individual in front of you after you have learnt something about their personality and level of intelligence.

If asking a question to confirm understanding it is often wise to avoid leading or simple yes/no questions. Attempt to encourage the client to repeat back to you what you have explained or methodically investigate the client's comprehension with a series of open and closed questions. Illustrate to the client why it is in his or her interest to understand what you are explaining. By showing the benefit of this additional knowledge you will facilitate greater powers of concentration and interest. If the client fails to see the benefit, ask yourself whether this information is wholly relevant. There is little point in overburdening the client with material of little relevance or import to his or her case.

7.11.2 EXPLAINING THE LAW

At different stages in the life of the case the relevance of the substantive law to the client's case will be greater than at others. It can be expected that by the time the client comes to see the barrister in chambers he or she has some idea of the legal principles of the case. This is usually formed with the help of the solicitor. However, there can be no guarantee that this will always be so. The initial meeting may have been a brief one; the solicitor might not have explained the law sufficiently clearly or the client might simply have forgotten what he or she has been told.

In some circumstances you will be the first lawyer to discuss the case with the client. For example, at a magistrates' court first appearance hearing after a night in the cells the client may be totally ignorant of the legal basis of the charge. A similar position in a civil setting is an urgent without notice injunction for an ouster, for example. It is always wise to check with the client personally how much they understand with some open questions inviting a statement in simple terms of the case. This knowledge, no matter how rudimentary, can be built upon. If it is wide of the mark then some tactful re-tracking may be called for.

Always concentrate on the specific case and avoid taking a textbook approach to the law. The average lawyer spends three years studying his or her subject at university and the lay client cannot be expected to follow lengthy explanations of the law of evidence or intent. By using the client's case as a starting point you will focus your mind and help him or her to grasp the essentials of the law as it relates to the case. As part of your preparation you should consider what law needs to be explained to the client and how you are going to do this. As well as being relevant and pithy your explanations should avoid legal terminology where possible and always be free of lawyers' jargon and slang. (During your pupillage you will soon discover how barristers derive great delight from using their own dialect and shorthand when discussing a case with one another, but, hopefully, how this argot is dropped once they meet the client and address the court.)

7.11.3 EXPLAINING PROCEDURE

Clients are often unaware of the procedural context of their case. The lack of an appreciation of the need for the numerous stages of litigation is illustrated by the common complaint that the law is oblique and unnecessarily slow. This is hardly surprising as it is the solicitor who prepares the papers in the case and during the initial stages of litigation the client is not always informed of developments that do not have immediate effect upon the conduct of the case. Also there are many stages in the early life of a case at which the client is not personally involved, interlocutory applications or solicitor-to-solicitor correspondence, for example. Lawyers on the other hand are only too aware of the mundane, run-of-the-mill stages through which both civil and criminal cases go. Therefore lawyers can easily overlook the fact that the client will not understand their purpose or indeed the necessity for each step in the litigation process. Your client has a right to a full explanation of what is taking place. There is an advantage for you too: the informed client will more readily take an active role in the case's progress. Thus apart from the tactical advantages of a thorough understanding of the litigation processes, this knowledge is essential so that you can assist your client with clear and accurate explanations of civil and criminal litigation.

When explaining procedure to the client think carefully about how much detail he or she needs at this stage. Your concern is not to protect an arcane system, but rather to keep the client's attention on the issues that are important to the conference. The test is one of relevance: does the client need to know? When the client is being asked to make a choice or take a decision, obviously it will be necessary to a greater or lesser degree to inform him or her of the procedural implications; for example:

(a) what delays might be met?

(b) how long does the client have before he or she must act?

(c) what are the cost or legal aid considerations?

Whilst not advocating the 'you needn't worry yourself about that, leave it to the lawyers' approach, you will need to consider how much time you can allocate to any explanation of

procedure. Further, you must consider how easily the client will comprehend and how long he or she will be able to remember this information. Nonetheless the client who is fully informed will be less anxious about the future and will feel more in control of the destiny of the case. The benefit to you is that you will find that the client is more willing to collaborate with you. Most importantly, once people understand what is happening or likely to happen to their case they are better placed to take decisions for themselves and feel confident about the future. The fear of the unknown can be a great impediment to the successful conclusion of the conference.

7.11.4 EXPLAINING FINANCIAL COSTS OF THE CASE

The question of money and indeed figures generally will arise in most conferences and it is always wise to carry a pocket calculator and have an understanding of rudimentary arithmetic. What follows is merely an outline to assist you to think about the difficulties that you and the client can expect to face. (See the Case Preparation Manual, Chapter 18.)

7.11.4.1 Fees

The barrister never accepts money or other forms of payment from the client personally. The solicitor will deal with the financial affairs of the client and your clerk will negotiate any fee on your behalf. Great circumspection is therefore needed when discussing fees with a client. Nonetheless when advising the client on possible future action the financial costs must be discussed. No precise figures can be offered but a sensible range should be given where possible to give the client an accurate estimate of the financial cost of any legal help they seek. This projection will be based upon your experience as well as your knowledge. It may be some time before you feel confident enough to give this advice to the client without some assistance. If you feel unable to advise yourself it may be appropriate to refer the client to the solicitor. Indeed it is your professional client who has the final responsibility of collecting the fees from your lay client.

7.11.4.2 Costs

In civil cases some costs can be stated with a greater degree of certainty than others, but the vast majority will be liable to taxation. Remember that whilst most costs follow the event there are numerous exceptions particularly at interim hearings. In any post-hearing conference you will have to be prepared to explain the effect of the order as to costs. Following a finding of guilt or a plea of guilty the prosecution may request that the defendant pays some of their costs. Care should be taken to discover from the prosecution what costs they are seeking from the defendant if there is a conviction. Note that these are often in addition to any fine or compensation that the court might impose. Again a range can be given based upon experience and knowledge of similar cases. (See further the Civil Litigation Manual and the Criminal Litigation and Sentencing Manual.)

7.11.4.3 Legal aid

In both civil and criminal cases the Legal Aid Board may require a financial contribution from the client and in these circumstances the cost of litigation can be a real concern for the client. The solicitor should include a copy of the Legal Aid Certificate in the brief which contains information about the level of the contribution and the extent and terms of the certificate. Obviously the longer the case goes on the greater the total sum the client will have to pay. In civil cases there is the added danger that the successful client, whether a claimant or a defendant, may have to repay the total amount of legal aid received through a process of recoupment. (See further the Civil Litigation Manual, Chapter 32.) Indeed civil legal aid has been described as being more in the form of a loan than a grant. All of these implications will need to be explained to the client and he or she will also need to be reminded of them at the appropriate times.

7.11.4.4 Non-legal financial considerations

Clients will often be under financial strain besides the cost of litigation. This may because they are prevented from earning a wage following imprisonment or because the demands that the litigation is making on their time. At the early stages proceedings the client may not appreciate the degree of impact that the case will, on his or her time or purse. You have a duty to keep the client aware of the co litigation and this will include the non-legal costs. Some clients will lose their livelihoods as a result of their involvement with the criminal courts or by becoming embroiled in civil proceedings. You should not only alert the client to these possible consequences but also offer some practical advice. Suggestions of the non-legal options, or references to other professionals who will be able to offer assistance, ought to be made when appropriate. A working knowledge of the social benefits system is essential if practising family or criminal law where the means of the parties are often of interest to the court itself. (See Remedies Manual.) Once again, when dealing with figures, it is best to think in terms of ranges and to admit uncertainty if it is appropriate to do so. Remember that most social benefits are discretionary so there can be few guarantees.

7. 12 Dealing With Conflicting Advice

Occasionally the advice that you believe is appropriate will differ from that already communicated to the client by the solicitor or a counsel who previously held the brief. Two or more lawyers looking at the same case may hold differing, sometimes conflicting opinions. This is not as uncommon as some lay people may expect. Indeed in an adversarial system there is rarely certainty when applying the law to a set of facts identifying the strength or weaknesses of a case. The particular difficulty for the barrister in a situation such as this is that there are two clients and three duties. There is a professional client and a lay client, with separate duties owed to each and a third duty to the court. For the newly qualified lawyer this three-way pull can be the source of great anxiety. This is particularly so when there is the nagging feeling that any upset caused to either of the clients or the court will be reported back to chambers. In this part of the chapter we will look at this dilemma and offer some suggestions to assist you to overcome it.

The Code has set out some clear guidance and rules to assist in such difficult circumstances. The relevant paragraphs are quoted below, but the gist of the rules is that your primary duty is to your lay client.

A practising barrister:

> (a) must promote and protect fearlessly and by all proper and lawful means his lay client's best interests and do so without regard to his own interests or to any consequences to himself or to any other person (including his professional client or fellow members of the legal profession); ...

(Paragraph 203.)

A practising barrister must not:

> (a) permit his absolute independence, integrity and freedom from external pressures to be compromised; ...

(Paragraph 205.)

> A practising barrister is individually and personally responsible for his own conduct and for his professional work: he must exercise his own personal judgment in all his professional activities ...

(Paragraph 206.)

There is also the danger of confusing the client by offering an opinion different from that already indicated by the solicitor. This can be merely irksome to the client or place additional stress on him or her at an already stressful time. In most circumstances the client will only have received a preliminary view of the possibilities from the solicitor. The alert client will appreciate that you are a specialist to whom they have been referred for more certain advice. If the client shows a reluctance to accept your view rather than the solicitor's, you must take control and justify why your views differ. Often the easiest way to support your view is to highlight to the client the additional information that you have gathered at the conference and explain how this affects the legal analysis of their case.

7.12.1 DEALING WITH CONFLICTING ADVICE: HOW TO DO IT

If your view of the case leads you to give advice which, if followed, would alter the litigation to a great degree, you may wish to consider the following suggested approach:

(a) Avoid confusing clients or undermining their faith in their solicitor unless strictly appropriate.

(b) If possible speak with the other lawyer with whom you disagree to discuss his or her views. That lawyer may know something that you do not.

(c) If appropriate and practical recover the process by which you reached your advice to double-check your conclusions.

(d) Highlight to the client your advice and identify its strengths and weaknesses.

(e) Allow clients to make their decision, reminding them if necessary that the final decision remains theirs.

(f) Inform clients of the effect of any change or adjustment that will result, e.g., extra costs, effect on procedure.

(g) Inform the professional client of any changes - be prepared to explain and justify what has taken place.

(h) Ensure that the court is informed of any developments and material changes.

7.13 Expressing Risk to the Client

This section introduces various methods by which you might express the risk involved in litigation to the client and considers the strengths and weaknesses of these methods. It is important to communicate the degree of chance directly to the client who can then make a decision in the full knowledge of the attendant risks of litigation. There are few certainties in law, trials, for example, are not so much investigations of the truth as testing conflicting testimonies to ascertain which is more believable. The verdict is guilty or not guilty rather than guilty or innocent. Likewise the levels of damages to be awarded for personal injury are not scientifically assessed but approximated. They are often only a symbolic sum to reflect what was suffered by the injured party. The client, however, will want to know what is going to happen: what the chances are of success at trial; how will the damages be assessed and at what level? Clearly, it is part of the lawyer's role to give estimations of these risks and chances.

7.13.1 PRELIMINARY CONSIDERATIONS

You should always attempt to be practical and realistic: do not forget the specific problem faced by the client before you. Any expression of risk will have to be effectively communicated to the individual client: will he or she be able to comprehend what you are saying? There are several methods and styles of expressing risk, which one you choose will depend upon your preference and its suitability for the issue in question. It may, of course, be necessary to experiment, particularly in the early stages of practice. Much can be learnt by observing other members of the profession and lessons can help to develop your repertoire.

7.13.2 INTRODUCING RISK ANALYSIS TO THE CLIENT: A SUGGESTED APPROACH

(a) Check that the client is fully satisfied that he or she has sufficient inform about the strengths and weaknesses of the case.

(b) Allow the client to raise any additional concerns if appropriate.

(c) Ask the client to consider how the risk of failure/success is affected by the strengths and weaknesses.

(d) Invite the client to estimate whether the relevant risk is high, nothing.

(e) Ask the client to state explicitly whether he or she is willing to accept that level of risk of failure/success.

7.13. 3 USE OF LANGUAGE

The most common way of expressing a risk is to use everyday expressions: 'x is less risky than y'. Alternatively, phrases such as 'there's a good chance that .. .', or 'such and such is unlikely to succeed' also give a measure of the risks involved. When adopting such expressions the speaker is attempting to pass on his or her judgment as swiftly as possible. Difficulties soon arise, however, once the recipient of this information requests explanation or justification of the estimate, or a clearer statement of what the precise risk is. Sometimes the answer may be that the lawyer runs through the strengths and weaknesses of the case again. For example, the number and quality of witnesses for the prosecution may be used to justify the estimation of the risk of conviction as 'great'. But if the client wants a clearer statement of what is meant by great' problems can arise. This is because the client wishes to know what the risk is not the lawyer's reasons for thinking that there is a risk of conviction in the first place. On occasion the lawyer may be able to side step the issue by using the following: 'by "great" I mean it's more likely than not that you will be convicted'. Although to a la graduate this answer is transparently insufficient and inappropriate, to the lay client it may appear to be an acceptable one. In the worst circumstances it may even be taken as an indication that he or she ought not to question the barrister's advice. Thus there are some shortcomings with this method. However, it also has some advantages. By using everyday language and employing common phrases the level of communication from the lawyer to the client is often high. At a superficial level at least the client will understand what is being said. Further, this style can be utilised several times in the same conference when dealing with the various issues or options, thus maintaining some consistency, e.g., by using a series of comparatives: better than, worse than, etc.

Naturally it is important for the lawyer to keep a tally of which item he or she lists as better than the next and so on. Some review of this list may be necessary as and when changes affect the order of the items on it. In this way the running order can be adjusted in a useful way during the life of the case, for example, if fresh evidence is revealed or a witness does not come up to proof. If this happens the lawyer can then say to the client: ‘The chances of success have been reduced from a reasonably good chance to a poor chance of the judge finding in favour of our case'. A second advantage is that the lawyer will be protected against criticism from the client. Some clients will not have a disinterested memory and may complain that the court has imposed costs on them for an unsuccessful trial when the lawyer said that there was an excellent chance of success. The client's faulty memory can be checked against your record.

A final warning must be given. As was suggested, explanations of what is meant by good or bad and so on are not easy to give. One reason is that everyone has their own innate understanding of these words but few have the ability to articulate precisely their personalised meaning to others when applied to a particular situation. The inevitable vagueness that follows often leads to misunderstanding.

7.13.4 METAPHORS AND SIMILES

One can take everyday experiences and adapt them to the particular dilemma faced by the client. The client can, for example, be invited to compare the risks with a financial investment which might provide a series of bonuses. There is a likelihood that the investment may go down as well as up. If the chances of success are particularly low you might compare them with a lottery. These sorts of comparisons can be useful particularly if talking to a client with little or no experience of the law but able to think in an independent fashion. It goes without saying that a simile or comparison must be within the client's personal experience. You cannot expect everyone to have a working knowledge of gambling terms or of the stock market. Whilst this method of communicating risk is entertaining and readily comprehensible, it merely communicates the degree of risk superficially. There is only the hope that the client will be able to pick up intuitively that which is not being communicated explicitly. Thus an appeal to the client's real or imagined experiences is made in the hope that there will be a process of convergence. In short the lawyer hopes that the client will come to share his or her belief of the estimate of the risk without lengthy reasoning.

7.13.5 NUMBERS, RATIOS, RANGES, FRACTIONS, PERCENTAGES, STATISTICS

Figures carry their own mystique and should be used with caution. Some people will understand that the expressions 'the chances of success are 50:50' and 'the likelihood of us winning is 25%', do not mean that in the first case the chance of success is precisely half or in the second precisely one quarter. However, some people if asked what these two phrases are saying about the risks involved may fall into this trap. Therefore it is necessary to guard against the temptation to believe that what sounds like an accurate statement of the risk is what it appears to be. You therefore have a responsibility to explain to the client clearly and without condescension that you are using the numbers, figures and ratios adverbially; this is to say, not as scientific measurements of the risk but as helpful expressions of your estimation of it.

7.13.6 POUNDS AND PENCE

If discussing monetary figures there are again several ways of expressing them. The most common way of expressing the outcome will be in pounds and pence. The obvious danger here is that the courts do not award monies in a precise fashion. Note should be made of the difference in civil law between liquidated and unliquidated damages (see the Civil Litigation Manual) and in criminal law between fixed and non-fixed fines (see the Criminal

Litigation and Sentencing Manual). Most lawyers favour stating a range within which the final figure can be expected to fall. For example, 'In these sorts of whiplash cases the courts usually award damages from £2,000 to £4,000. With the facts as they are in your case I'd expect the final award to be in the £3,000 to £3,500 range'. A similar approach can be taken to fines and so on. Note should be made of the two ranges given. The first sets the general limits found in cases of the same nature, the second the specific limits that apply to the particular case. In this way the client is informed of the whole picture - it can be of particular use when it comes to advising on appeal. If the court in the whiplash case above only awarded £2,750 the lawyer may wish to point out that whilst it is low, and in his professional opinion appealable, it is not advisable to endure the extra costs and stresses of appeal for only a further £750 at most.

7.14 Non-Verbal Expressions of Your Opinion

The lawyer will be closely scrutinised by the client, especially when passing on vital information such as the length of sentence or the chances of successfully defending a civil case. The client will react to the way you give the information which (for him or her at least) is of vital importance. The client will be sensitive to your posture, eye contact and other indicators of confidence as well as the pitch of your voice. The eli may be able to understand much of your opinion of his or her case and its merits observing you as well as listening to you. You ought to be aware of these facts throughout the advising stage and remember how it might affect the client's appreciation of the issues and merits of the case.

At different times some deference to the client's emotions ought to be given. Before dismissing an appeal against a custodial sentence some moments' reflection will you that no matter how slim the chance is, the client may be willing to take it. This may be the case even if there are some attendant risks. Even so, there is the danger being insufficiently forthright if the risk is particularly slim. Clients will often detect your hesitancy but it is up to you to give the client the benefit of your express an honest opinion. There may be occasions when you think that the client's chances are rightly low or that he or she richly deserves the sentence that he or she has received. You must not sit in judgment and must keep your opinion on this point to yourself. On these occasions it is particularly important to guard against inappropriate non-verb communication: practice itself is the best tutor. This is not merely a question of politeness nor a counsel for empathy. It is a central consideration when deciding ho best to communicate your professional advice clearly and accurately to the client.

7.15 Assisting the Client to Estimate Risk

In some circumstances it is not the barrister who has the necessary knowledge to assess the risk but the client. We have seen in Chapter 6 various methods to collect such information and the present chapter has stressed the importance of allowing the client to make the final decision. Just how far the barrister can assist (or interfere) in this process is a matter of

degree and context. Clearly on occasions clients may require a little more time or some extra information or simply some reassurance that it is their role to make the decision.

As we have already seen, language has its limitations and non-verbal communication can have its own shortcomings. How can you ensure that the client absorbs the information and goes through the process of reflection and assesses the risks involved for himself or herself? There is no easy answer to this problem. However.if you have ensured that you and the client have acted collaboratively and co-operated during the advising process, there ought to be a convergence of estimates. In the best situations there may be perhaps even a shared, mutually understood language in which the different risks can be described and compared freely and clearly.

7. 16 Legal Counselling

7. 16.1 INTRODUCTION

In this section we will look at an approach to client advice that takes a different perspective on the client and his or her problems. This approach is known as legal counselling. This form of advice addresses the client's problems broadly and does not particularly isolate the legal options in order to resolve them. As we have already seen. no matter what approach you take to the client's case you should consider the non-legal options as well as the purely legal ones. However, legal counselling gives special prominence to the specifically non-legal options. The philosophy behind this approach is that the law is the refuge of last resort and anything that can help to avoid or cut short the client's involvement with the legal process is preferable to utilisation of purely legal options. However, this is not to say that the law or legal procedures must or can be avoided. Often the client has no option but to accept that they must continue to take part in the legal process if they are a defendant in a criminal case, for example. Nor does this process of client advice seek to avoid exploiting the procedures that are favourable to his or her cause, for example, using an interlocutory injunction to settle a neighbours' dispute. Nonetheless, the emphasis is on the future beyond the court-room and the lawyer seeks to help the client to resolve the underlying problems he or she is faced with.

Clearly, legal counselling takes you to the limits of your role as a lawyer and stretches your abilities and resources. It can be a demanding but greatly satisfying process for you and the client. But there are dangers, too. It is important to realise the difference between your professional duties and functions and those of other professionals, for example, social workers, marriage guidance counsellors or financial advisors. You are first and foremost a lawyer and the client instructs you because you can fulfil that specialist function. Given the demands and risks involved you may not feel sufficiently confident to use this form of advising the client in the initial stages of practice. However, it is important that you understand how it functions so that you are prepared to observe it being carried out by senior barristers. Finally, with the ever-rising cost of litigation and the increasing importance

of alternative dispute resolution, mediation and conciliation you are likely to have to address this type of conference with your clients regularly in the not too distant future.

7.16.2 THE LEGAL COUNSELLING PROCESS

As with any form of advice, before attempting to engage the client in legal counselling you must gather all the necessary information. It is of particular importance when adopting this method of advising to gather sufficient information from the client to reveal all the relevant legal and non-legal options that are available. As in the advising method you will need to assimilate these new instructions with your existing knowledge of the case. You may need to adjust your preliminary views and opinions of the case if you go ahead with legal counselling.

The next stage is to order the options into logical sets. It may be appropriate to mix legal and non-legal options or to separate contentious from non-contentious options; each case will have to be investigated separately. Then you should analyse and attempt to prioritise the options within each category, or altogether, as is sensible and practical. Finally, before you present these to the client, ensure that the options are appropriate and specifically suited to his or her circumstances.

A brief example should help to clarify that the process is more fluid than it might appear at first sight. Imagine that you are instructed by a client to make a bail application. The client tells you that he wants bail but knows that he is wanted for charges on other offences at another magistrates' court. You gather as much information as is relevant on the current charges and background personal details of the client as far as they are relevant to the application for bail. However, you also go further and invite the client to state why bail is so important to him today. During this process you learn that the client is 27 years old and is planning to marry. However, he also adds that his girlfriend has told him 'to clean up his act' otherwise the engagement will be broken. From your conference and instructions you identify the following factors:

(a) the client values his freedom;

(b) he dislikes custody but is realistic about the danger of being picked up on the warrants for his arrest;

(c) he has a real incentive to put his involvement with the wrong side of the law behind him.

Given the legal and factual circumstances of the case the options of possible action to take today are limited:

(a) You could advise that the client does not make an application for bail as the chances of it being granted are slim.

(b) You could go ahead and make a bail application in the hope that it will be granted and that the client will subsequently leave court before the police inform the prosecutor that there are outstanding warrants for his arrest.

(c) Alternatively you could counsel the client of the advantages of getting bail today and subsequently surrendering to custody on the outstanding warrants. Once he does that, he could request that all the charges are dealt with together and swiftly. This would enable him to begin to put his past behind him and face the future with his fiancée without the risk of his previous criminal career endangering their marriage.

Options (a) and (b) are both viable, but they ignore the client's background and his non-legal aspirations which option (c) puts at the centre of the advice. Only by asking the right sort of questions in the appropriate circumstances can you expect to discover sufficient insight into the client to be able to counsel him or her on the full range of options available.

There are several approaches to counselling that can be utilised but most follow a similar pattern. It is advisable to follow a suggested pattern if you are unfamiliar with this form of advising, this is because there is often a well-intentioned but misplaced temptation to usurp the client's role of decision maker at the same time as fulfilling one's own as counsellor or adviser. As with any form of advice this process follows an investigation of the client as a source of further information and instructions. The lawyer establishes and maintains control of the process by setting before the client the list of options that are suitable to the client's requirements. The client is then invited to add any options not included. This list will be broad and general; the object at this stage is to consider as many options as possible. A short discussion of the options may be appropriate here. However, the lawyer does not pass comment on their suitability, rather the client is encouraged by the lawyer to lead the discussion of the suitability of the full range of options. The lawyer assists the client to express his or her preferences and to investigate the suitability of the various options. In particular the various strengths and weaknesses of each option are identified and evaluated. An arrangement of options in order of suitability often follows from these investigations.

7.16.3 KEY AIMS OF COUNSELLING

- To communicate the full range of options to the client in an order that is easy to follow.
- To allow the client sufficient time to consider the options as presented.
- To invite questions or comment from the client to establish clarity.
- To allow the client to make a choice without inappropriate assistance.
- To check that you have correctly understood the client's response.
- If no response is forthcoming, to investigate why and address the reasons for this.
- If more time is required you must give the client a realistic time estimate or deadline for the final decision.

7.16.4 CLIENT CENTRED COUNSELLING

The primary strength and defining feature of this process is the role of the client who is encouraged to be proactive, co-operative and collaborative. The client should be working as hard as, if not harder than, the lawyer during the counselling stage. Within the bounds of reason and the constraints of the time available a complete range of options ought to be discussed.

An appropriate style to adopt here is that of the experienced or advising friend. Compare this with the common advice-giving process where the most relevant role will often be that of the expert or specialist. Obviously with a little subtlety the same lawyer can exploit both roles in one conference. You might consider adopting one strategy for one issue and another for further issues. The key is to maintain control of the conference and to guide the client.

There are some disadvantages to the counselling process. It can be time consuming and the client is required to have a clear understanding of the whole case for the process to be a successful one. However, there are benefits. Because he or she is fully informed and has participated throughout the procedure, the client is more likely to be satisfied with the decision that is reached. There may be, for example, less uncertainty about the appropriateness and desirability of the next steps in the litigation. Addition ally there may be occasions when the process can be covered in a short time, for example, when there are only limited options to consider.

Because the process does demand a lot from the client as well as the lawyer, the client must be informed about what is taking place at each stage. Simple questions such as 'what do you think?' are often inadequate and so careful preparation is required to get the most out of the client and out of the available time. In the final stage of the process the client makes a decision. The client is now on his or her own -the lawyer should only assist when specifically asked to do so or when the client is in clear difficulty, for example, acting under a misapprehension. The client may need time to consider the options and make the final selection. As this can be of significant length the lawyer ought to manage the available time appropriately. Once a preference is expressed, the lawyer may invite or pose questions to the client or invite comment to establish absolute clarity of his or her understanding of the final decision. Further, it may be wise to recap briefly the strengths and weaknesses of the final choice. It is vital that the client makes the choice independently. It is the client who has to live with the consequences of that decision. In this process the lawyer must be vigilant against assuming the client's role. This may even necessitate gently informing the client that you cannot take on the burden of telling the client what to do.

7.16.5 SUMMARY

The advantage of this method of advising is that the client enjoys the freedom to make an informed choice. This is a result of the presentation of the full range of options that are

open to him or her. Naturally you will need to encourage the client to think and work independently when you investigate possible options. Thus you should use questions that are designed to help the client to select and order the options. A cooperative and collaborative approach at these early stages will assist the process and set the right atmosphere for its later stages. However, the time that is necessary to carry out this process effectively can militate against its use when both client and lawyer are under a lot of pressure.

7.16.6 USING LEGAL COUNSELLING

There is some debate amongst the commentators about the role of the lawyer in counselling, particularly at the decision stage. Lawyers in the USA are said to be less willing to state their preference to the client as it is seen to be important to allow the client to choose the options unaided. However, what happens in practice is hard to say. Among Commonwealth lawyers, for example, those from New Zealand are said to be more willing to share or at least assist in the process of sifting and selection. The English and Welsh Bar does not appear to have a commonly accepted view; little research has taken place in this jurisdiction in any case. There does not appear to be any professional or ethical objection to the British lawyer effectively mixing joint selection of options with some overt expression of opinions based upon professional experience. (You may wish to experiment with a pure counselling process and one with a mixed constitution.)

7.17 Some Specific Advising Situations

In the final section of this chapter we will look at some conferences that follow a court hearing. These can be particularly difficult to plan for. Most court hearings have an element of the unknown: indeed this is why they can be stressful experiences for the client and the source of no little anxiety for the advocate, too.

After a hearing both you and the client will want to discuss its outcome in detail and address the immediate effects of the result. Following your performance in court as an advocate there is often little time for you to do more than to come down and collect your thoughts. During your preparation for the court appearance therefore you should always plan for this very important post-hearing conference. You will have little time to produce a plan for this conference as you leave the body of the court and meet the client in the corridor. It is essential, therefore, to have considered the main objectives of this conference in advance.

The following how-to-do-it guides are neither exhaustive nor prescriptive, but they do offer a general format for advising the client that can be applied in most circumstances. However, the post-hearing conference will make similar demands upon your skills as a barrister as that at which you gave your initial advice about the prospect of the case. Therefore remember to apply all the skills discussed above so as to enable you to advise the client satisfactorily. Finally, to ensure that you meet the high standards of the profession you must be flexible in

your approach to both the unique characteristics of each case and the individual needs of every client. (See generally Chapter 8.)

7.17.1 CONFERENCE AFTER A SUCCESSFUL CIVIL HEARING

• Ensure that the losing party is out of earshot (it may be wise to allow him or her to leave the court building).

• Attend to any urgent post-hearing court business first, e.g., lodging the draft order.

• Explain the judgment or order to the client in plain English, remembering the effect of the costs order and confirm his or her understanding of its effect (note: legal aid recoupment if applicable).

• Consider the need for preliminary advice on entering or enforcing the judgment.

• Check with the solicitor or his representative that all necessary documentation is in order and tell the client that you will telephone the solicitor from chambers, if appropriate.

7.17.2 CONFERENCE FOLLOWING AN UNSUCCESSFUL CIVIL HEARING

• Ensure that the client understands that the hearing has ended unsuccessfully and explain why his or her case was defeated. Allow time for the client to absorb this.

• Explain in plain terms the effect of the judgment or order to the client and confirm that he or she understands this clearly. For example, spell out the danger of being arrested and placed in custody if the client breaches a non-molestation order with a power of arrest attached to it.

• Encourage the client to raise any questions about the effect of the judgment.

• Offer your preliminary advice on routes of appeal and the chances of success. Remember also to discuss the financial, emotional and other non-legal implications of an appeal.

• Offer the client the opportunity to reconsider alternative legal and non-legal options in the face of the defeat if there are any.

• Discuss and confirm the action that the client must take next, e.g., return of property, payment of money, observance of injunctions.

• Explain to the client the likely methods of enforcement of the judgment or order and any financial effects it will have.

• If appropriate explain to the client the sanctions that the court may apply if he or she disobeys its orders.

• Check with the solicitor or representative that all necessary documentation is in order; inform the client that you will telephone the solicitor from chambers, if appropriate.

7.17.3 CONFERENCE FOLLOWING A SUCCESSFUL CRIMINAL TRIAL

• Ensure that all adverse witnesses and the public are out of earshot, or have left the court building.

• Advise the client on the effect of the 'not guilty' verdict, discontinuance, dismissal, etc.

• Advise the client of any further procedural matters that are outstanding, e.g., sentencing of offences pleaded to before the trial.

• Advise the client on the retrieval of any property retained by the prosecution, police or prison authorities.

• Counsel on immediate future arrangements if appropriate, e.g., accommodation, benefits.

7.17.4 CONFERENCE FOLLOWING AN UNSUCCESSFUL CRIMINAL TRIAL

• Ensure that all adverse witnesses, police officers, prosecutors and so on are out of earshot or have left the court building.

• Explain to the client the effect of the finding of guilt and allow time for this to be absorbed.

• If the sentence has not already been passed, inform the client of the process that will lead to sentence: pre-sentence report interviews, procedure at sentence hearing, the plea in mitigation, etc.

• Give your preliminary advice on the likely form of sentence and its duration.

• If the client has been found guilty after a trial: give your preliminary opinion on the likelihood of success and the attendant risks of an appeal against conviction.

• If bail with conditions attached is granted pending sentence, explain that breach of any condition may result in the client being arrested without warrant and his or her bail being withdrawn.

• If sentence has been passed: see below.

• Offer to address any immediate non-legal concerns.

7.17.5 CONFERENCE FOLLOWING CASE LISTED FOR SENTENCE

• If appropriate, ensure that all adverse witnesses and prosecution counsel are out of earshot or have left the court.

• Explain to the client in plain terms what he or she is required to do by the sentence. Allow the client time to absorb this.

• Explain to the client any comments passed by the judge when sentencing including why the court has passed that form of punishment for that period of time.

• Express your preliminary opinion on the likelihood of success of an appeal against sentence and the attendant risks.

• Advise as to any steps that must be taken by the client, e.g., the payment of a fine by installments or the requirement to co-operate with the Probation Service.

• If appropriate, inform the client that you will furnish the solicitor with a written advice on appeal against sentence within 21 days.

• Offer to investigate any non-legal concerns the client has, e.g., by ensuring the solicitor tells his or her family which prison the client has been sent to.

KINDS OF QUESTIONS

Summary prepared by Ved Kumari from Don Peters, The Joy of Lawyering: Readings For Civil Clinic (1996)

Kindsof questions	Advantages	Disadvantages
Open– leave clients free to provide broad range of information	• Permit clients to select responses from their frames of reference and relevance • Allow free recall without interrupting questions from lawyer's agenda • Clients can/do tell information which lawyer may have never thought of asking • Better at rapport building and as communication motivators	• Develop details poorly • No impetus to go back to specific time and search for specific points • Rapport difficulties with ➢ Clients who are uncomfortable narrating due to different role expectation ➢ Clients who may ramble onto ➢ Irrelevant matters due to too much freedom
Closed –seek specific Information about specifictopic	• Excellent for rapport for initially reluctant speakers • Allow navigation past threatening areas surfacing before rapport building • Eliciting details • Generating recall	• Early use may inhibit information • Leave client feeling not heard or allowed to speak/express • Loose opportunities to letoff steam • Lawyers cannot show empathy • Premature intrusion in threatening areas

Leading–completely close the inquiry as clients are expected to agree withthe suggestion	• Useful when eliciting known information which may not be forthcoming due to ego/case threat	• enhance chances of distortion and inaccurate answers • imply lack of confidence in client's ability to give suitable answers

ADVOCACY OBJECTIVES

The objectives of teaching advocacy are to enable students:

1. To understand the social, legal and strategic context of the hearing or presentation (occasion of advocacy).

Content:

role of advocate, standpoint objectives or purpose of hearing alternative resolutions

evaluation of forum (status, implication)

legal significance (precedent, test case etc.)

financial considerations (including costs)

evaluation of success and failure

2. To prepare a suitable plan for the occasion.

Content:

identify witnesses and other evidence identify relevant facts

construct logical factual propositions evidence analysis and fact appraisal

identify legal elements

outline case presentation

identify procedural/evidential issues

3. To effectively present an oral case on behalf of a client.

Content:

prepare client/witnesses/tribunal for occasion introduce parties and advocates

summarise facts/law effectively and accurately organise witnesses and documents

examine witnesses in chief(leading/non-leading)

effectively produce documents/exhibits

re-examine witnesses when appropriate

4. To effectively challenge a witness.

Content:

appreciate methods/opportunities to discredit identify conflicting/prejudicial testimony effectively use questions in witness challenge identify alternative theory

structure challenge to support theory

emphasise significant agreement with own case

manage questioning economically

5. To deliver a persuasive oral argument and summation.

Content:

summarise salient testimony and construct case appreciate evidential quantum/burden

adopt style/demeanour appropriate for audience effectively engage in legal argument

balance commitment to client and objectivity persuasively and assertively pursue case

6. To conclude a hearing or presentation.

Content:

receive and record decision

inform tribunal of client's response/position

address forum on implications of decision

pursue consequential decisions (costs/ orders)

explain implications to client

7. To practise an effective behaviour for advocacy.

Content:

articulate clearly and confidently adopt appropriate stance and bearing employ a variety of oral techniques identify and observe ethical constraints

appreciate significance of advocacy interaction understand professional and legal requirements

8. Reflect upon 1. above and evaluate experience.

Case Analysis, Persuasion, and Storytelling

By Steven Lubet in MODERN TRIAL ADVOCACY ANALYSES AND PRACTICE (1993)

I. THE IDEA OF A PERSUASIVE STORY

A. Trials as Stories

The function of a trial is to resolve factual disputes. In order to hold a trial it is necessary that the parties be in disagreement concerning historical facts. These disagreements commonly involve the existence or occurrence of events or actions, but they may also turn upon questions of sequence, interpretation, characterization, or intent. Thus, trials may be held to answer questions such as these: What happened? What happened first? Why did it happen? Who made it happen?

Did it happen on purpose? Was it justified or fair? All of these questions are resolved by accumulating information about past events; if there is no dispute about past events the case should be resolved on summary judgment.

Trials, then, are held in order to allow the parties to persuade the judge or jury by recounting their versions of the historical facts. Another name for this process is storytelling. Each party to a trial has the opportunity to tell a story, albeit through the fairly stilted devices of jury address, direct and cross examination, and introduction of evidence. The framework for the stories - or their grammar - is set by the rules of procedure and evidence. The conclusion of the stories – the end to which they are directed - is controlled by the elements of the applicable substantive law. The content of the stories -their plot and *mise-en-scene* - is governed, of course, by the truth, or at least by so much of the truth as is available to the advocate. Thereafter, the party who succeeds in telling the most persuasive story should win.

But what is persuasive storytelling in the context of a trial? A persuasive story can establish an affirmative case if it has all, or most, of these characteristics: (1) it is told about people who have reasons for the way they act; (2) it accounts for or explains all of the known or undeniable facts; (3) it is told by credible witnesses; (4) it is supported by details; (5) it accords with common sense and contains no implausible elements; and (6) it is organized in a way that makes each succeeding fact increasingly more likely. On the other hand, defense lawyers must often tell "counter-stories" that negate the above aspects of the other side's case.

In addition to persuasiveness, a story presented at trial must consist of admissible evidence, and it must contain all of the elements of a legally cognizable claim or defense.

An advocate's task when preparing for trial is to conceive of and structure a true story, comprising only admissible evidence and containing all of the elements of a claim or defense, that is most likely to be believed or adopted by the trier of fact. This is a creative process, since seldom will the facts be undisputed or susceptible of but a single

interpretation. To carry through this process the lawyer must "imagine" a series of alternative scenarios, assessing each for its clarity, simplicity, and believability, as well as for its legal consequences.

B. Planning a Sample Story

Assume, for example, that you represent a plaintiff who was injured in an automobile accident. You know from your law school torts class that in order to recover damages you will have to tell a story proving, at a minimum, that the defendant was negligent. You also know from your evidence class that the story will have to be built on admissible evidence, and you know from your ethics class that the story cannot be based on false or perjured testimony. 2 Your client knows only that when traffic slowed down to allow a fire truck to pass, she was hit from behind by the driver of the other automobile.

How can these basic facts be assembled into a persuasive trial story? First, we know that the story must be about people who act for reasons. Your client slowed down for a fire truck, which explains her actions. But why didn't the defendant slow down as well? Your story will be more persuasive if you can establish his reason.

True, a reason is not absolutely essential. Perhaps the defendant was such a poor driver that he simply drove about banging into other automobiles. On the other hand, consider what the absence of a reason implies. The plaintiff claims that traffic slowed for a fire truck, but the defendant - also part of traffic - did not slow down. Could it be that there was no fire truck? Perhaps there was a fire truck, but it was not sounding its siren or alerting traffic to stop. Is it possible that the plaintiff didn't slow down, but rather slammed on her brakes? In other word, the very absence of a reason for the defendant's actions may make the plaintiff's own testimony less believable.

The skilled advocate will therefore look for a reason or cause for the defendant's actions. Was the defendant drunk? In a hurry?Homicidal? Distracted? You can choose from among these potential reasons by "imagining" each' one in the context of your story. Imagine how the story will be told if you claim that the defendant was drunk. Could such a story account for all of the known facts? If the police came to the scene, was the defendant arrested? Did any credible, disinterested witnesses see the defendant drinking or smell liquor on his breath? If not, drunkenness does not provide a persuasive reason for the defendant's actions.

Next, imagine telling your story about a homicidal defendant. Perhaps this wasn't an accident, but a murder attempt. Envision your impassioned plea for punitive damages. But wait, this story is too implausible. How would a murderer know that the plaintiff would be driving on that particular road? How would he know that a fire truck would be attempting to bypass traffic? How could he predict that the plaintiff would slow down enough, or that there would be no other cars in the way? Barring the discovery of additional facts that support such a theory, this story is unpersuasive.

Finally, imagine the story as told about a defendant who was in a hurry. This story accounts for the known facts, since it explains why traffic might slow while the defendant did not. Perhaps the defendant saw the fire truck but was d riving just a little too fast to stop in time; or he migt-.t have been so preoccupied with the importance of getting somewhere on time that he simply failed to notice the fire truck until it was too late. Moreover, there is nothing implausible or unbelievable about this theory. It is in complete harmony with everyone's everyday observations. Furthermore details that support the story should not be hard to come by. Was the defendant going to work in the morning? Did he have an important meeting to attend? Was he headed home after a long day? The trial lawyer can find details in virtually any destination that will support the theory of the hurried defend a nt. Note, however, that while such additional evidence of the defendant's haste will be helpful, the story does not rest upon any external witness's credibility. All of the major elements of the story may be inferred from the defendant's own actions.

How can this last story best be organized? Let us assume that the occurrence of the collision itself is not in issue, and recall that it is important that each fact make every succeeding element increasingly more likely. Which aspect should come first: the presence of the fire truck, or the fact that the defendant was in a hurry? Since the presence of the fire truck does not make it more likely that the defendant was in a hurry, that probably is not the most effective starting point. On the other hand, the defendant's haste does make it more likely that he would fail to notice the fire truck.

Thus, a skeletal version of our story, with some easily obtained details supplied, might go like this: we know there was a collision, but why did it happen? The defendant was driving south on Sheridan Road at 8:35 in the morning. It was the end of rush hour, and he had to be at work downtown. In fact, he had an important meeting that was to begin at 9:00 a.m. sharp. The defendant's parking lot is two blocks from his office. As traffic slowed for a passing fire truck, the defendant didn't notice it. Failing to stop in time, the defendant ran into the plaintiff's car.

Other details might also be available to support this story. Perhaps, immediately following the collision, the defendant ran to a phone booth to call his office. Similarly, there might be "counter-details" for the plaintiff to rebut. The point, however, is to organize your story on the principle of successive supporting detail.

II. THE ETHICS OF PERSUASIVE STORYI'ELLING

In the preceding section we discussed the way in which an advocate imagines a persuasive theory or story. We also noted that lawyers are bound to the truth- we are not free to pick stories simply on the basis of their persuasive value. Within this parameter, exactly how much room is there for creative theory choice?

A. Assuming That You "Know" the Truth

Let us begin with the proposition that in most cases neither the lawyer nor the client will know with certainty what we might call all of the "relevant truth."

As in the scenario above, for example, the plaintiff knows her own actions, but has no special knowledge about the defendant. The lawyer, of course, is not free to persuade or coach the plaintiff to alter her own story simply to make it more effective.

This is not to say, however, that legal ethics permit us to do nothing more than put the plaintiff on the witness stand. The lawyer's duty of zealous representation requires further inquiry into the existence of additional details, not to mention the artful use of sequencing and emphasis. For instance, let us assume that the plaintiff has informed her lawyer with certainty that the fire truck was flashing its lights, but not sounding its siren or bell. There is no doubt that an attorney absolutely may not coach the plaintiff to testify that the siren and bell were sounding. Such testimony will be false, perjurious, and unethical.

On the other hand, there is no requirement that the absence of bell and siren be made the centerpiece of the plaintiff's direct examination. Sequencing and emphasis may be used to minimize the adverse impact of this information. Therefore, the direct examination could be developed as follows: "The fire truck was the largest vehicle on the road. It was the standard fire-engine red. All of its lights were flashing brightly – headlights, taillights, and red dome lights. It could be seen from all directions. All of the traffic, save the defendant, slowed down for the fire truck. It was not necessary to hear a siren in order to notice the fire truck." Thus, the lawyer has held closely to the truth, while establishing the irrelevance of the damaging information.

B. Assuming That You Don't Know the Truth

A different situation arises when the advocate is not able to identify truth so closely, as in the example above concerning the defendant's reasons for failing to notice the fire truck in time. Recall that we considered a variety of possible reasons, Including inattention, drunkenness, and homicide. Some reasons have clear forensic advantages over others. What are ethical limitations on the attorney's ability to choose the best one?

First, it should be clear that we are not bound to accept the defendant's story in the same way that we must give credence to our own client. The duty of zealous representation requires that we resolve doubts in our client's favor. Moreover, we speak to our client within a relationship of confidentiality, which not only protects her communication, but also gives her additional credibility. Without her consent, what our client tells us will go no further, and this knowledge gives her every reason to make a full disclosure. When our client gives us damaging facts (such as the absence of the fire truck's siren), it is even more likely to be true, since she obviously has no reason to inject such information falsely. Conversely, statements that we obtain from the defendant are not necessarily accompanied by comparable indicia of reliability, and we are entitled to mistrust them.

This is not to say that we must always accept information from our clients as revealed wisdom. Clients may mislead us as the result of misperception, forgetfulness, mistake, wishful thinking, reticence, ignorance, and, unfortunately, they occasionally lie. Moreover, opposing parties in litigation usually tell what they perceive as the truth! As a tactical matter, trial lawyers must always examine every statement of every witness for potential error or falsehood. As an ethical matter, however, we should be more ready to assume that our client's words-both helpful and damaging - are likely to be true. It is, after all, the client's case.

Recognizing, then, that we must go beyond the opposite party's version of the facts, we next evaluate the entire universe of possible stories. In our example we determined that the "in a hurry" story would be the most persuasive. Simultaneously, we must also determine whether it is an ethical story to tell.

The key to determining the ethical value of any trial theory is whether it is supported by facts that we know, believe, or have a good faith basis to believe, are true. In other words, the story has to be based on facts that are "not false."

Returning to our fire truck case, assume that the defendant has denied that he was in a hurry. He has the right to make this denial, but as plaintiff's lawyers we have no duty to accept it. Assume also that we have not been able to locate a witness who can give direct evidence that the defendant was in a hurry. We do know where and when the collision occurred, and assume that we have also been able to learn numerous facts about the defendant's home, automobile, occupation, and place of employment. The following story emerges, based strictly on facts that we have no reason to doubt.

> The defendant lives sixteen miles from his office. He usually takes the train to work, but on the day of the accident he drove. The accident occurred on a major thoroughfare approximately eleven miles from the defendant's office. The time of the accident was 8:35 a.m., and the defendant had scheduled an important, and potentially lucrative, meeting with a new client for 9:00 a.m. that day. The parking lot nearest to the defendant's office is over two blocks away. The first thing that the defendant did following the accident was telephone his office to say that he would be late.

Our conclusion is that the defendant was in a hurry. Driving on a familiar stretch of road, he was thinking about his appointment, maybe even starting to count the money, and he failed to pay sufficient attention to the traffic. We are entitled to ask the trier of fact to draw this inference, because we reasonably believe its entire basis to be true. The known facts can also support numerous other stories, or no story at all, but that is not an ethical concern. Perhaps the defendant was being particularly careful that morning, knowing how important it was that he arrive on time for his appointment. Perhaps the appointment had nothing to do with the accident. Those arguments can be made, and they may turn out to be more

persuasive stories than our own. Our ultimate stories might be ineffective, or even foolish, but they are ethical so long as they are not built on a false foundation.

C. The Special Case of the Criminal Law

The analysis above, regarding both persuasion and ethics, applies to civil and criminal cases alike. In the criminal law, however, the prosecutor has additional ethical obligations and the defense lawyer has somewhat greater latitude.

A criminal prosecutor is not only an advocate; she is also a public official. It is her duty to punish the guilty, not merely to win on behalf of a client. Therefore, a public prosecutor may not rely upon the "not false" standard for determining the ethical value of a particular theory. Rather, the prosecutor must personally believe in the legal validity of her case, and must refrain from bringing any prosecution that is not supported by probable cause.

Conversely, a criminal defendant is always entitled to plead not guilty, thereby putting the government to its burden of establishing guilt beyond a reasonable doubt. A plea of not guilty need not in any sense be "true," since its function is only to insist upon the constitutional right to trial. Of course, a criminal defendant has no right to introduce perjury or false evidence. However, a criminal defendant need not present any factual defense, and in most jurisdictions a conviction requires that the prosecution "exclude every reasonable hypothesis that is inconsistent with guilt." Thus, so long as she does not rely upon falsity or perjury, a criminal defense lawyer may argue for acquittal - that is, tell a story - based only upon "a reasonable hypothesis" of innocence.

III. PREPARING A PERSUASIVE TRIAL STORY

Assume that you have decided upon the story that you want to tell. It is persuasive. It is about people who have reasons for the way they act. It accounts for all of the known facts. It is told by credible witnesses. It is supported by details. It accords with common sense. It can be organized in a way that makes each succeeding fact more likely.

How do you put your story in the form of a trial?

A. Developing Your Theory and Your Theme

Your case must have both a theory and a theme.

1. Theory

Your theory is the adaptation of your story to the legal issues in the case. A theory of the case should be expressed in a single paragraph that combines all account of the facts and the law in such a way as to lead to the conclusion that your client must win. A successful theory contains these elements:

-*It is logical.* A winning theory has internal logical force. It is based upon a foundation of undisputed or otherwise provable facts, all of which lead in a single direction.

The facts upon which your theory is based should reinforce (and never contradict) each other. Indeed, they should lead to each other, each fact or premise implying the next, in an orderly and inevitable fashion.

-It speaks to the legal elements of your case. All of your trial persuasion must be in aid of a "legal" conclusion. Your theory must not only establish that your client is good or worthy (or that the other side is bad and unworthy), but also that the law entitles you to relief. Your theory therefore must be directed to prove every legal element that is necessary both to justify a verdict on your behalf and to preserve it on appeal. •

-It is simple. A good theory makes maximum use of undisputed facts. It relies as little as possible on evidence that may be hotly controverted, implausible, inadmissible, or otherwise difficult to prove.

-It is easy to believe. Even "true" theories may be difficult to believe because they contradict everyday experience, or because they require harsh judgments. You must strive to eliminate all implausible elements from your theory. Similarly, you should attempt to avoid arguments that depend upon proof of deception, falsification, ill motive, or personal attack. An airtight theory is able to encompass the entirety of the other side's case, and still result in your victory by sheer logical force.

To develop and express your theory, ask these three questions: What happened? Why did it happen? Why does that mean that my client should win? If your answer is longer than one paragraph, your theory may be logical and true, but it is probably too complicated.

2. Theme

Just as your theory must appeal to logic, your theme must appeal to moral force. A logical theory tells the trier of fact the reason that your verdict must be entered. A moral theme shows why it should be entered. In other words, your theme-best presented in a single sentence-justifies the morality of your theory and appeals to the justice of the case.

A theme is a rhetorical or forensic device. It has no independent legal weight, but rather it gives persuasive force to your legal arguments. The most compelling themes appeal to shared values, civic virtues, or common motivations. They can be succinctly expressed and repeated at virtually every phase of the trial.

In a contracts case, for example, your theory will account for all of the facts surrounding the formation and breach of the contract, as well as the relevant law, say, of specific performance. Your theory will explain why a particular verdict is compelled by the law. Your theme will strengthen your theory by underscoring why entering that verdict is the right thing to do. Perhaps your theme will be, "The defendant would rather try to make money than live up to a promise." Or you might try, "This defendant tried to sell some property, and keep it too." Whatever the theme, you will want to introduce it during your opening

statement, reinforce it during direct and cross examinations, and drive it home during your final argument.

B. Planning Your Final Argument

Good trial preparation begins at the end. It makes great sense to plan your final argument first, because that aspect of the trial is the most similar to storytelling; it is the single element of the trial where it is permissible for you to suggest conclusions, articulate inferences, and otherwise present your theory to the trier of fact as an uninterrupted whole.

In other words, during final argument you are most allowed to say exactly what you want to say, limited only by the requirement that all arguments be supported by evidence contained in the trial record. Thus, by planning your final argument at the beginning of your preparation, you will then be able to plan the balance of your case so as to ensure that the record contains every fact that you will need for summation.

Ask yourself these two questions: What do I want to say at the end of the case? What evidence must I introduce or elicit in order to be able to say it? The answers will give you the broad outline of your entire case.

C. Planning Your Case in Chief

Your goal during your case in chief is to persuade the trier of fact as to the correctness of your theory, constantly invoking the moral leverage of your theme. To accomplish this, you have four basic tools: (1) jury address, which consists of opening statement and final argument; (2) testimony on direct examination, and to a lesser extent on cross examination; (3) introduction of exhibits, including real and documentary evidence; and (4) absolutely everything else that you do in the courtroom, including the way you look, act, react, speak, move, stand, and sit. The skills involved in each of these aspects of a trial will be discussed at length in later chapters. What follows here is an outline of the general steps to take in planning for trial.

1. Consider Your Potential Witnesses and Exhibits

Your first step is to list the legal elements of every claim or defense that you hope to establish. If you represent the plaintiff in a personal injury case, then you must offer evidence on all of the elements of negligence: duty, foreseeability, cause-in-fact, proximate cause, and damages. Next, list the evidence that you have available to support each such element. Most likely the bulk of your evidence will be in the form of witness testimony, but some of it will consist of documents, tangible objects, and other real evidence. For each such exhibit, note the witness through whom you will seek its introduction.

You are now ready to make decisions concerning your potential witnesses, by inverting the informational list that you just created.

2. Evaluate Each Witness Individually

Imagine what you would like to say in final argument about each witness you might call to the stand: What does this witness contribute to my theory? What positive facts may I introduce through this witness? Are other witnesses available for the same facts? Is this witness an effective vehicle for my theme? What can I say about this witness that will be logically and morally persuasive?

Once you have assembled all of the "positive" information about each witness, you must go on to consider all possible problems and weaknesses.

a. Factual Weaknesses

Are there likely to be inconsistencies or gaps in the witness's testimony? Does the witness have damaging information that is likely to be elicited on cross examination? If the answer to either question is affirmative, how can you minimize these problems? Can you resolve the inconsistencies by re-evaluating your theory? Can another witness fill the gaps? Can you defuse the potentially damaging facts by bringing them out on direct examination?

b. Evidentiary Problems

Each witness's testimony must be evaluated for possible evidentiary problems. Do not assume that any item of evidence or testimony is automatically admissible. Instead, you must be able to state a positive theory of admissibility for everything that you intend to offer during your case in chief. To prepare for objections ask yourself, "How would I try to keep this information out of evidence?" Then plan your response. If you are not absolutely confident in your ability to counter any objections, you have to go back to the law library.

c. Credibility Problems

How is the witness likely to be attacked? Is the witness subject to challenge for bias or interest? Will perception be in issue? Is there potential for impeachment by prior inconsistent statements? Can you structure your direct examination so as to avoid or minimize these problems?

3. Decide Which Witness to Call

Having evaluated the contributions, strengths, and weaknesses of all of your potential witnesses, you are now in a position to decide which ones you will call to the stand. Your central concern will be to make sure that all of your necessary evidence is admitted. You must call any witness who is the sole source of a crucial piece of information. Except in rare or compelling circumstances, you will also want to call any witness whose credibility or appearance is central to the internal logic or moral weight of your case.

All non-essential witnesses must be evaluated according to their strengths and weaknesses. You will want to consider eliminating witnesses whose testimony will be cumulative or repetitive of each other, since this will increase the likelihood of eliciting a damaging

contradiction. You must also be willing to dispense with calling witnesses whose credibility is seriously suspect, or whose testimony has the potential to do you more harm than good.

Once you have arrived at your final list of witnesses, arrange them in the order that will be most helpful to your case. While there are no hard and fast rules for determining witness order, the following three principles should help you decide:

*Retention***.** You want your evidence not only to be heard, but also to be retained. Studies have consistently suggested that judges and juries tend to best remember the evidence that they hear at the beginning and the end of the trial. Following this principle, you will want to call your most important witness first, and your next most important witness last. Start fast and end strong.

*Progression***.** The "first and last" principle must occasionally give way to the need for logical progression. Some witnesses provide the foundation for the testimony of others. Thus, it may be necessary to call "predicate" witnesses early in the trial as a matter of both logical development and legal admissibility. To the extent possible, you may also wish to arrange your witnesses so 'that accounts of key events are given in chronological order.

Impact. You may also order your witnesses to maximize their dramatic impact. For example, you might wish to begin a wrongful death case by calling one of the grieving parents of the deceased child. Conversely, a necessary witness who is also somewhat unsavory or impeachable should probably be buried in the middle of your case in chief. A variant on the impact principle is the near-universal practice of calling a criminal defendant as the last witness for the defense. This practice has arisen for two reasons. First, it postpones until the last possible moment that time that the lawyer must decide whether to call the defendant to the stand for exposure to cross examination. Second, and far more cynically, calling defendants last allows them to hear all of the other testimony before testifying. [While all occurrence witnesses are routinely excluded from the courtroom, the defendant has a constitutional right to be present throughout the trial.)

D. Planning Your Cross Examinations

It is inherently more difficult to plan a cross examination than it is to prepare for direct. It is impossible to safeguard yourself against all surprises, but the following four steps will help keep them to a minimum.

First, compile a list of every potential adverse witness. Imagine why the witness is likely to be called. Ask yourself, "How can this witness most hurt my case?" Always prepare for the worst possible alternative.

Second, consider whether there is a basis for keeping the witness off the stand. Is the witness competent to testify? Is it possible to invoke a privilege? Then consider whether any part of the expected testimony might be excludable. For every statement that the witness might make, imagine all reasonable evidentiary objections. Do the same thing concerning all

exhibits that might be offered through the witness. For each objection plan your argument, and prepare for the likely counter-argument. You won't want to make every possible objection, but you will want to be prepared.

Third, consider the factual weaknesses of each opposing witness. Are there inconsistencies that can be exploited or enhanced? Is the witness's character subject to attack? Can the witness be impeached from prior statements? How can the witness be used to amplify your own theme?

Finally, catalog all of the favorable information that you will be able to obtain from each opposing witness.

E. Re-evaluating Everything That You've Done

Now that you have planned your case in chief and cross examinations, it is imperative that you go back and re-evaluate every aspect of your case. Do your direct examinations fully support and establish your theory? Do they leave any logical gaps? Are you satisfied that all of your necessary evidence will be admissible? Will it be credible? Do the potential cross examinations raise issues with which you cannot cope? Will you be able to articulate your moral theme during most or all of the direct and cross examinations? If you are unable to answer these questions satisfactorily, you may need to readjust your theory or theme.

Assuming that you are satisfied with your theory, you should now have an excellent idea of what the evidence at trial will be. With this in mind, go back again and rework your final argument. Make sure that it is completely consistent with the expected evidence, and that it makes maximum use of the uncontroverted facts. Consider eliminating any parts of the argument that rest too heavily on evidence that you anticipate will be severely contested. Be sure that you structure your argument so that you can begin and end with your theme, and invoke it throughout. Finally, outline your opening statement, again beginning and ending with your theme, and raising each of the points to which you will return on final argument.

IV. CONCLUSION

The following chapters discuss all aspects of persuasion at trial, from ther opening statement to the final argument. Trial lawyers must master numerous forensic skills, procedural rules, and examination techniques, but your starting point must always be your theory of the case - the story that you want to tell.

LITIGATION CHART

Elements of Claims	Sources of Proof	Informal Fact Investigation	Formal Discovery
Negligence			
(a) Negligence	Plaintiff	Interview	Deposition?

	Police officers Bystanders Defendant	Interview Interview	Deposition and interrogatories
(b) Causation	Plaintiff Defendant Treating doctors Police officers Police reports	Interview Interview Interview Request letter	Deposition Deposition?
(c) Damages			
a. Lost income	Plaintiff Employer Employment Records	Interview Interview Request letter	Request to admit
b. Med. Expenses	Med. Bills Treating doctors Pharmacy bills	Pl. possession Interview Pl. possession	Deposition? Request to admit
c. Disability	Plaintiff Treating doctors Employment records	Interview Interview Request letter	Deposition?
d. Pain and suffering	Plaintiff Treating doctors	Interview Interview	Deposition?

Questionnaire for Interviewers

Name . ...
(Partner's Name)…….
Date of interview ……. .....

SECTION ONE

(To be completed before you conduct the interview)
Please read the following questions and answer them briefly in the space provided.

1. Before you meet the 'client' describe briefly:

A. What are the objectives of the interview?

B. Describe briefly how you plan to structure the interview (topics, order, time, etc.):

C. What have you learned from your reading about interviewing that you intend to practice or avoid?

D. What is your role in the interview and what standpoint do you wish to adopt?

SECTION TWO

(To be completed after the Interview)

2. In your conduct of the interview how well/poorly do you think that you performed the following?

a.		Very Well	Well	Average	Not well	Poorly
b.	Placing client at ease					
c.	Empathizing with the client					
d.	Eliciting facts					
e.	Checking facts and changes					
f.	Explaining law					
g.	Advising about implications					
h.	Agreeing follow up					
i.	Reassuring client					
j.	Note taking					
k.	Time management					

B. What, if any, ethical or moral issues did you encounter?

3. A. What in brief are the key facts of the client's legal problem?

B. What is / are the legal issue(s) involved?

C. Were there other facts in the case which seriously concerned the client but which were not related to the legal issue(s)?

4. A. List the other possible outcomes in this case:

B. Which in your opinion is the most likely outcome?

C. What is/are the client's desired outcome(s)?

D. What are the main obstacles, if any, to this/these being achieved?

E. How will it / they (client's desired outcome(s)) be achieved?

F. What alternative strategies were available?

5. A. What did you learn from the interview?

B. What did the interview remind you of from your previous reading about interviewing?

C. What could you have done to improve the interview?

D. What do you think the client thought of the interview?

Name.....(Partner's Name) …….Date of interview

CASE PLANNING CHART

Case name:_____

Client Goals / Objectives:

Legal Claim	Elements of Claim	Facts to support Claim	Source of Proof	Informal Discovery	Formal Discovery	Opponent's Defences (Theory, Proof, Discovery)

Body Language (Non-verbal Communication)

Observing yourself and others is non-verbal communication - the way we express ourselves, not by what we say, but by what we do.

Stop for a moment and examine yourself as you read this. If someone were observing you now, what non-verbal clues would they get about how you are feeling? Are you sitting forward or reclining back? Is your posture tense or relaxed? Are your eyes wide open, or do they keep closing? What does your facial expression communicate? Can you make your face expressionless? Don't people with expressionless faces communicate something to you?

Of course, we do not always intend to send non-verbal messages. Consider, for instance, behaviors like blushing, frowning, sweating, or stammering. We rarely try to act in these ways, and often we are not aware when we are doing so. Nonetheless, others recognize signs like these and make interpretations about us based on their observations.

Understanding that you, and everyone around you, are constantly, sending off non-verbal cues is important because it means that you have a constant source of information available about yourself and others. If you can tune into these signals, you will be more aware of how those around you are feeling and thinking, and you will be better able to respond to their behavior

Non-verbal Communication Transmits Feelings

Although feelings are communicated quite well non-verbally, thoughts do not lend themselves to non-verbal channels. Without being able to use words, peoples' bodies generally express how they feel - nervous, embarrassed, playful, friendly, etc. What they think has to be gathered through some verbal medium.

Here is a list that contains both thoughts and feelings. Try to express each item non-verbally, and see which ones come most easily:

You are tired.

You are in favor of capital punishment.

You are attracted to another person in the group. You think marijuana should be legalized.

You are angry with someone in the group.

Non-verbal Communication Serves Many Functions

Verbal and non-verbal communications are interconnected elements in every act of communication. Non-verbal behaviors can operate in several relationships to verbal messages.

a. First, non-verbal behaviors can repeat what is said verbally. If someone asked you for directions to the nearest drugstore, you could say, "North of here about two blocks," and then repeat your instructions non-verbally by pointing north.

b. Non-verbal messages may also substitute for verbal ones. When you see a familiar friend wearing a certain facial expression, you do not need to ask, "How's it going?" In the same way, experience has probably shown you that other kinds of looks, gestures, and other cues say, "I'm angry at you" or "I feel great" far better than words.

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PARALINGUISTICS AS AN EXPRESSION OF COMMUNICATIVE BEHAVIOUR

L. Spasova*

INTRODUCTION

In the process ofth ecommunication can observe some body-movements and some sound phenomenon which attend to the speech like a working language. These body- movements and sound phenomenon are not the part of the language system but they are an isolated system. For that reason they define like a para language. The language is the main system of the communication but the paralanguage is an auxiliary sound system.The science of the paralanguage or the science of the non-verbal singmeans is called paralinguistics.It is a part of the semiotics and researches thesing essence of the non-verbalsing means but like a part of the linguistics researches the links between the verbal and non-verbal communicative means.Like a paralinguistic word defines everything from the paralanguage.For example:the head nodding like a thing of the nod assent; the arch of the eyebrows like as urprise and so on. Inthenon-verbalcommunicationthepresenter takesapartin theorganizationof thestatement or in the definite speech announcement and has the main role in the presentation.

The ability to express the definite information is a way to influence on the people.This is a whole magnetic packet of abilities, strategies and models,which is as ability for a successful communication.

The individual in the personality is united and co-ordinate entity and not one personal manifestation can not go into isolation,but into correlation between individual-past and individual- personality. So as not to destroy the relation personality-society and not to have the individual isolation,we can use the definite communicable behaviour.The communication like personal phenomenon and like interaction always is in thelimelight of every humane activity.The most important emphasizes are not the more the search, the assimilation and the giving of the definite information, the more the ability to analyze the regularities and the components of the communication. The instrument of successful communication is not only the competence but also it is the way which its mechanism developsinto.Thepositive beginning,the confidencein the statements, the provocation to sincere interest in another person, keeping away from the argument can be conductive to removal of barriers to the communication with the partner.The language, the behavior and the appearance are in the base of the humane communication and they define the cognitive,the internal active and the receptive aspect.These indices are determined, predicted and controlled as the individual personal abilities as well the encirclement.

Etiquetteofpresentation

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The first of all the etiquette of every presentation depends on the skills of the presenter. It is presented by the respect for the audience. The etiquette presenter shows tolerance of the listeners, he or she is tolerant to his or her opponents and can make up a constructive,original speech. Every day he or she pays attention to the follow characteristics: hair cut, make-up,and discreet appearance, smile face affability, sympathy, way of dress; timbre of the voice; adequacy of the audience emotions;language expressions;education.

To present the respect to the audience, the public speaker comes on the time in and greets after the coming as well wants to undertake to give the correct information. The contact the individual-society is realized.And now from the presenter depend on if this connection will be successful or it iswill be an unpleasant obligation each other.

The first contact(Tozeva A,2009)determents the beginning of the interaction and provides a possibility in the process of the communication to hold the other people's attention to you. Except for the words which use in the first meeting with acommunicative partner we can use our expression of the face,the appearance, the body position, gestures,with the suitable intonation of the voice.

When someone makes an advent, everybody cannotice ***the sex,the age and the personal appearance.*** The most variable from these componentsis the expression of the face.It can express: strictness, haughtiness, calmness, tolerance, delicacy and go on.The emotion which is presented with facial muscles helps in the **empathy**– the ability to understand another person's feelings and help them.

The association or the communication do not have to understand like one-sided process because in a conversation take part two partners.Thecommunication can be formal or informal, oral or no-oral,directly or indirectly and it is not a single act but it is an active exchange in which take part two persons.It is important that the partners have influence each other,they change there behavior or they have other intentions.

Humanvoice

The one of the components of the non-verbal communication is the **voice**.The human voice has different dimensions and can characterize the person by different qualities or features. Its qualities like height of the voice, the timbre, the ascents or the diction, the rate and the rhythm as well as the phonation or filling the pauses with the determine sounds;maket he definite presenter's characterization.

It is improved by different observations that the height of they voice determines by the number of the vibrations of the vocal chords for one second. If the number of the vibrations increases, it can increase the height of the voice. By the more emotional conversations or like the person gives very important information, the height of the voice exchanges.

The **timbre** or the determinate voice's specifics can have influence on the receptivity, the rationalization, the perception, as well as the recreation of definite information.To avoid the undesired conflict, to keep away from uncomfortable situation, the calmwell- balanced tone directs the attention of the listener to another direction and determinates the result of the meeting.

The **ascents** are the divorce of apart of the word from another and the stronge xpression. The incorrect ascents or the unsuitable pronunciation can be a bad adviser in the business relationships. Between the partners have an invisible barrier,which cannot wipe out differences? In some cases to remove the entire barrier, the partners can use interlinguistics, in which can make different languages as Esperanto, information languages, Global English, but they are not the best alternative in a business meetings.

The **manner of the pronunciation** or the diction must be clean, plain and clear. The speech of the presenter or the speaker exchanges depending on speaking conditions. In the different way it can sound in a public utterance, in a business meeting or in a conversation between some friends. In the Bulgarian literary language have the follow styles of the pronunciation: refined in the public utterance and conversations, colloquialness in the informal conversations. The incorrect diction is a repulsive component in the oral communication and it is not suitable to public expressions.

Speed of the speech

The speed of the speech which consists of the quantity syllables is definite as rate or rhythm of the voice.The speed is changing quickly. By the more emotional conversations the presentercan not make an articulate speech and this emotional state destroy the public relationships between the communicators.This is a moment when we can pass from verbal to non-verbal communication. The speaker uses the **phonation**–e-e-e-e-rrrrrr,ohhhhhhhhhhhh, ahhhhhhhh and etc.Expression and emotion are connected to diction.The emotion has to link with the speaker's thoughts. It is connected with the expressing thoughts.

The components of the voice all definite the non-verbal means in the communication.The most comfortable and effective form of the communication with non-verbal means is the expression of the face. In a normal conversation between two or more communicators 10 % is the effect of the information, 40% is the pronunciation and 60%is the way of the pronunciation. The expression of the face has to be connected with the intentions or the purpose of the speaker. Every movement of the mimic muscle an exchange the business like conversation.The effective communication demands to make a connection with the eyes because the recipient get more information than from the words.

The expression of the face helps us to understand the other speakers when we make a conversation.The face and the eyes arethe most noticeable parts of the body but they are difficult to understand. It is not possible to describe the number of the expressions which we can use in a conversation.The expression of the face is changing very quickly and momentarily in a conversation, but the listener can understand the announcements which he or she get.

Expression of face

From some observations we determine that by the expression of the face can increase or decrease the distance between the lecturer and the audience.There is some variety:

- The severe look of the face:This is very powerful influence in the speaking but it is not very fruitful. In this case the voice is very expressive. The communication is in an informal communicative circle and we use the literary form of the language. If the strong tune and the cold expression of the face are continue very for long, the first effect is lost.The audience draws back and the lecturer cannot control the situation or he or she is not the leader.
- The gentle smile face can make very comfortable atmosphere in which the communication has another dimensions. The distance is short and the relationship: communicator-recipient is in an informal communicative situation.The height of the voice is decreasing and the lecturer can use different laconic jokes without sarcasm or irony.
- The calm but not indifferently expression of the face provoke respect and demand more tolerance and obligation from the listeners.The self-control of the public speaking is very important and the contents of the speech have to be with alot of arguments. There is clear and correct diction which helps in the understanding and the learning.

Contact with Listeners

The realization of the contact with the listeners I sconnected to appearance and construction of the first impression for the lecturer.When the audience is unknown, the speaker must give short information for me.The presentation can make in different way but everyone prefers the short information.The orators prefer to begin with the important information because they want to attract he attention of the listeners.It is important what greeting or appeal the presenter will use in the beginning:‘Ladies and gentlemen’ or ‘Dear ladies and gentlemen’,sometime in the business circles the speaker can begin without appeal or with the words:‘Excuseme’. The most difficult task for the speaker is to predispose the listeners to myself in the beginning and make the grade in the end.This success can achieve withnon-verbal communication. Theposition of the body is also very important.The body has to take up the needed space.Instead of we try to shrink into the corner, we can drop our arms without to stoop.The stand body suggests respect and authority. We can have a sense of self-confidence and self-control which are connected with the personal qualities of the orator. The audience accepts this calm behavior very quickly.If the listenersar every calm,still and listen carefully, this means that the orator wills successes to engage their attention.

The position of the body

The position of the body can definite of other considerations. In a business discussion or in a business meeting the chairperson or the orator sits down on the central seat so that everyone can see him or her. In advance it determines two positions of the behaviour:

- Master of behavior or a man who aspires to control the situation and wants to dominate.
- Subordinate side or a dependent person who is in a state of subordination.

The lecturer can stand up when he or she is in front of a big audience of listeners. He or she is in the limelight and stand behind th edesk.The standing position has some advantages:

- Everyone can see him or her and can form a clear view of the chairman.
- The chairman can observe the other partners of the communication.
- The standing position makes him or her severe with severe look and big exactingness.
- The voice travels everywhere and has an effect on the audience.
- Iti squite possible to change the distance between the participants in a communication.

Lecturer'sappearance

The lecturer's appearance determines the attention of the listeners to him orher. Individual choice of clothing characterizes the person and gives a right idea of the speaker.

The word "Individual" comes from Latin word "individuum" which means indivisible. This is an idea of a person as an individual in the personality is united.The different person's qualities, the sex, the age, the education,the upbringing are very important. The person is a phenomenon which owns these components, but which component will show in a situation dependent on the inside factors.The social belonging of an individual determine the choice of the clothing. The most preferable and most receptive clothing is the formal which means respect and can be conducive to business. It is enough to put on a tie with a suit to pose a bigger obligation, a severity and an official character of a meeting.

It is possible the orator underestimates the situation or according to his or her estimation to come on the meeting with a daily clothing i. e.negligee, which means that the listeners can lose the attention. It is found that the communication is more successful when the lecture's clothing is suitable to the situation. If the clothing is very formal this means that the speaker plays off and the audience may draw back i.e. it does not take a ninterest in him or her.Therefore the clothing is very important thing in the communication and can help to make a right decided.

Non-verbalcomponents

The non-verbal components are also: hands' gestures, head's gestures and body's gestures.The language of the gestures helps to understand, learn and rethink of the correct information. By some gestures may overtake the distance between the speaker and listeners.Their usage is found in definite social group–for example the drivers do not have a chance to communicate face to face and the verbal communication is not possible.The two participants have understood that there is a barrier between them, and they use some suitable gestures, mimics or sings to make a conversation.

The gestures are very important part of the person's behaviour and they can stand for different things in the different nationalities. For example for Bulgarians the nodding with a head means: 'Yes!'This is a positive answer or this is a greeting:'Good afternoon!'In Russian

this gesture means: ‘No!’This variety can explain with the different way of understanding the world.

There are a lot of gestures and mimicswhich are using in different nationalities. The common gestures and mimics get over the barriers between the nationalities and decrease the distance. Also the bow is a very important part of greeting someone in Japanese. The Japanese do not shake hands because bowing the head is a mark of respect. The first bow of theday should be lower than other. In Thailand people clasp their hands together and lower their hands or eyes when they greet someone. It is difficult to accept the more formal manners because there are some nationalities which prefer to be casual and more informal. Americans sometimes signal their feelings of ease and importance in their offices by putting their feet on the desk whilst on the telephone. InJapan, people would be shocked.Showing the soles of your feet is the height of bad manners. It is a social insult only exceeded by blowing your nose in public.

Gestures

Depending on using of different parts ofthe body there are the following gestures: hands’ gestures, head’s gestures andbody’s gestures. The hands’ gestures have used very often because they can help to make a conversation very quickly.Theyalso’help’to express the words exactly and clearly. But the rude, incorrect or arrogant gestures which present in some social group are very unsuitable.There is some linguistics,logical describing movements which can help by understanding thescientific material.

The same gestures can use from different persons in typical situation. Gestures put words together into a sentence or associate some sentences but they are notconnected with emotions. Gestures do not have paralinguistics functions but they can illustrate some information. For example when we point the inside part of the hand it means: ‘Enough!’The movements of the left hand on the left and on the right: ‘Goodbye’ etc.The nonverbal signs have definite aim.We can express politeness as shaking hands, tip on back, smiling,etc.

We can ask: How to use the non-verbal signs to express the sentence? They are connected to understanding of the sentences. The mechanism of their understanding depends on the intuition, the intelligence and the abilities of the communicator. Their analysis in the contest of the whole behaviour, the cultural traditions, and the intelligence is able to understand them.

The one of the components of the non-verbal communicationis the voice. The human voice has different dimensions andcan characterize the person by different qualities or features. Its qualities like height of the voice,the timbre, the ascents or the diction,the rate and the rhythm as well as the phonationor filling the pauses with the determine sounds; make the definite presenter’s characterization.

Conclusion

It is improved by different observations that the height of they voice determines bythe number of the vibrations of the vocal chords for one second. If the number of the vibrations increases, it can increase the height of the voice. By the more emotional conversations or like the person gives very important information, the height of the voice exchanges. The timbre

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The manner of the pronunciation or the diction must be clean, plain and clear.The speech of the presenter or the speaker exchanges depending on speaking conditions. In the different way it can sound in a public utterance, in a business meeting or in a conversation between some friends.

THE TRIAL ADVOCATE

in

Roger Haydock and John Sonsteng, "Trial: Theories, Tactics, Techniques", West Publishing Co. St. Paut, Minn. 1990, pp. 38-60

I – THE TRIAL ATTORNEY

A. The Goal of the Trial Attorney

The goal of the trial attorney is to win. A case is tried because other alternative efforts at resolving the dispute-negotiation, mediation, arbitration, trial by jousting – have been unsuccessful. The client obviously expects to win, and counsel must make every reasonable effort to win. However, this goal of winning must be kept in perspective, for this end does not justify all means. Winning is not everything, and it is not the only thing unless the steps taken to win comply with ethical norms.

B. Roles of the Trial Attorney

The trial lawyer is an advocate. The trial advocate uses all reasonable tactics and techniques to present the case to the judge or jury to secure a favourable outcome. The advocate increases the chances of victory by adopting a winning attitude.

An all-out effort is governed by trial rules, ethics, and common sense. A process that involves acrimony or questionable approaches does not serve the client's interests or the system of justice. The belief that trial lawyers must be dominating, rude, and controlling is incorrect and significantly decreases the chances of winning. The effective trial lawyer must be firm, persistent, and compassionate. These approaches substantially increase the chances of winning.

The trial lawyer also has a number of additional roles during litigation. As a court officer, the attorney must follow the ethical norms of the system. As a counsellor, the attorney provides well reasoned advice to the client. As an investigator, the attorney gathers and preserves information. As a facilitator, the attorney considers alternative dispute resolution approaches to resolve the lawsuit before trial. As a negotiator, the attorney determines the possibilities of settlement and makes good faith efforts to resolve the dispute prior to and during litigation. As a litigator, the attorney drafts pleadings, conducts discovery, and brings and defends motions. As an appellate lawyer, the attorney brings or defends an appeal. As a dreamer, the trial lawyer believes this case is the case.

C. Other Functions of the Trial Lawyer

In addition to the trial lawyer functioning in the role of an advocate, the successful trial attorney also adopts functions performed by other professions. The trial lawyer must also, in part, be an artist, scientist, psychologist, historian, and theatre director employing the various approaches used by these and other professionals. As an artist, the trial lawyer must be creative, imaginative, and intuitive. As a scientist, the trial advocate must be rational, logical, and disciplined. As a psychologist, the trial attorney must understand human behaviour and decision-making and predict how the judges and jurors will react to the case or issues at hand.

Using the methods of the historian, trial advocates recreate the past in the courtroom. The facts are presented in a summary narrative during opening statement and closing argument. The evidence is presented to the judge in a way that will enable them to understand what happened. Although trial advocates are not bound by the historian's need to be objective and impartial, they must still present the truth of their client's story.

As a director, the trial advocate also directs a play complete with actors and props. The courtroom is the theatre in which the trial lawyer directs and acts in this nonfiction play. The witnesses are the actors and the trial exhibits are the props. The judge and jury are the audience.

D. Character Traits

All trial attorneys have specific personality and character traits that influence their professional approach and behaviour. Some traits that all effective trial advocates possess include integrity, honesty, fairness, sensitivity, and respect for others. Successful trial lawyers make certain that these traits are displayed in every trial.

The judge must be able to trust the attorney. They rely upon the attorney's word and explanations. An untrustworthy trial attorney is an ineffective advocate. The attorney must also display a sincere belief in the merits of the client's case. The failure to appear sincere may cause the judge and jury to conclude that if the attorney does not believe in or care about the case, they need not either.

A trial lawyer must also appear fair before the judge and jury. A lawyer who seems to take advantage of the situation or who appears sneaky or underhanded will not establish the integrity needed to maintain an appearance of fairness. The attorney must also treat the judge and jurors with respect. Any other treatment will only insult and alienate these decision makers.

Additionally, trial attorneys encounter a full range of personality temperaments in dealing with opposing attorneys, witnesses, judges, and jurors. These individuals may be courteous or rude, cooperative or hostile, friendly or arrogant, pleasant or intimidating, trustworthy or untrustworthy. The trial attorney must adopt various approaches to deal with this broad spectrum of personalities. Occasionally, however, counting to ten and meditating may be the only viable approach.

E. Balanced Attitude

Trial attorneys suffer stress from one or more of the following sources: the pressure to win, unrealistic expectations, fear of failure money, ego, physical discomfort, fatigue, anxieties, tension, peer pre sure, neglect of personal and family matters, emotional withdrawal, preoccupation with a trial, and law school memories. Attorneys may take cases for financial rewards but may also take them to accept a difficult challenge, work with a specific client, obtain publicity, achieve fame, satisfy a legal fantasy, change the law, protect a client's rights, or promote justice. These motivations may result in added stress.To maintain a properly balanced attitude toward trial work, an attorney must cope with the stress of being an advocate. Suggestion that help lawyers deal with stress include:

- Before accepting a trial, reflect on the reasons why you are taking the case and your expectations.
- Maintain a proper relationship with the client. Involve the client in making decisions and avoid overly controlling the case.
- Do not worry about events or matters that cannot be altered Learn to let go and accept what cannot be changed.
- Expect that relationships with family, friends, and colleague will be disrupted. Advise them that problems may arise.
- Discuss your feelings and attitudes with family members and other caring listeners.
- Monitor the trial workload to avoid becoming overworked. Delegate appropriate responsibility and tasks to support staff. Learn not to interfere unnecessarily and second-guess decisions.
- Exercise your body as well as your mind.
- Avoid tobacco, alcohol, drugs, and other harmful sources of escape.
- Discuss the case with the client and colleagues after its conclusion.
- Celebrate the end of the trial. Enjoy the experience of trying the case, whether you win or lose. Plan a break after the trial.
- Become a law professor instead.

F. Client Relationships

Clients place their fate – or so it seems – in the hands of trial attorneys. This reliance places enormous responsibility on the trial attorney to justify the client's trust. The relationship between the client and the attorney varies depending upon the needs of the client, the client's familiarity with litigation, and the client's and attorney views of the appropriate relationship. Initially, the client and the attorney in consultation with each other should identify the interest and needs of the client that the attorney has to preserve or advance. Potential solutions should then be evaluated to determine how the client's views can best be achieved. Finally, a course of action must be implemented to achieve the goals of the client.

These decisions regarding the client's needs and goals, alternative solutions, and resulting actions involve both the client and the attorney. Clients must decide what their needs are. Clients and lawyers must evaluate alternative solutions. Lawyers must implement the decisions made. The more a decision has a substantial legal or non-legal impact on a client, the more critical it is to have the client involved in making that decision. The more a decision involves professional expertise and skills, the more likely it is that the attorney can make the decision. The key to effective client/attorney relationships is communication and the continuing involvement of the client in the pre-trial preparation and the trial itself.

II – ALTERNATIVES TO TRIAL

A. Settlement and Plea Bargains

Settlement is an important part of the pre-trial litigation process. Over ninety percent of civil and criminal cases are settled or plea bargained. The negotiation process, with its numerous strategies and tactics, comprises a substantial area of practice. One of the most important factors affecting both settlement and the results of negotiation is the attorney's trial skills.

The willingness of the attorney to try a case, the experience of that attorney, and the preparation of the case for trial all significantly influence the results of a negotiated settlement. Many judges take an active role in the settlement process. These judges encourage settlement and are directly involved in settlement conferences or discussions. Judicial approval or consent is not normally required for settlement of civil litigation unless the case involves a class action or an injury to a minor. In most cases, the parties may enter into any settlement they believe will serve their interests.

The type of settlement agreement depends upon the nature and circumstances of the civil case. One universal settlement document is a dismissal with prejudice which disposes of the case. The dismissal may be a stipulation signed by the attorneys to the litigation which dismisses the case, or it may be an order signed by the judge based on a stipulation by the parties. The dismissal should specify whether the costs are to be borne by each of the parties or are to be paid by one of the parties.

In criminal cases, the judge usually needs to approve the plea bargain entered into by the prosecutor, victim, accused, and Investigative Officer (as per Criminal Procedure Code, 1974). The plea bargain may consist of a guilty plea, a plea to a less serious offense, *nolo contendere*, or another plea authorised in the jurisdiction, and may also include conditions of probation and sentencing. Pleas of guilty are taken in open court. The defense counsel, prosecutor, and judge all have an obligation to make sure that the defendant understands what is happening. They must also insure that the plea is complete and legally sufficient to support a conviction.

B. Arbitration

There are two types of arbitration. One is a private, voluntary process where a neutral third person, usually with specialized subject matter expertise, is selected by the parties and renders a binding decision. The other is a compulsory but non-binding process (often called court-annexed arbitration) which is required by some jurisdictions. In this non-binding pre-trial proceeding, the arbitrator, usually an attorney randomly selected from a panel of arbitrators, hears each party present proofs and arguments and renders a decision. If the decision is acceptable to both parties, the lawsuit is dismissed. If the decision is unacceptable, the case goes to trial.

C. Mediation

Mediation is an informal process where a neutral person assists the parties in reaching a mutually acceptable agreement. The mediator's primary role is to facilitate a negotiated settlement between the parties. The mediator does not decide any issues or make any decisions. In some jurisdictions, mediation is compulsory, and the parties must attempt to mediate a settlement in good faith before proceeding to trial.

D. Private Judging

Parties to a dispute may agree or be ordered by the court to submit their dispute to a private (usually former or retired) judge for resolution and the decision by the private judge may be binding or may be reviewable *de novo* by the presiding trial judge.

E. Court Ordered Procedures

A growing number of jurisdictions are using one or more of these alternatives to resolve disputes prior to trial. Judges by statute or rule have discretion to require parties to submit to a dispute resolution procedure. If the procedure is not successful in resolving the case, the trial is held.

F. Trial by Ordeal

Primitive trial methods have been abolished in almost all Indian jurisdictions. For example, trial by water in which a guilty person would float and then be executed while an innocent person would sink and presumably drown made everyone a loser. And, trial by gagging in which, the credibility of a person depended on their not choking on some inedible morsel, such as a hairball, left too many parties with a bad taste in their mouths. Smart trial advocates check local rules for the availability of these alternative dispute proceedings.

III – FUNDAMENTAL APPROACHES OF PERSUASION

This section explains established methods of persuasion that significantly influence the presentation of a case and that apply to all phases of the trial. The trial lawyer should be familiar with and attempt to employ these approaches in trying a case.

A. Primacy and Recency

People remember best that which they hear first and last. The doctrines of primacy what a person hears first – and recency – what a person hears last – may dictate when evidence and statements ought to be made during a trial. These doctrines apply to the trial as a whole as well as to each stage of the trial, including the opening of the case by briefly stating the whole case, witness examinations, and the closing argument.

B. Reasonable Repetition

The more times individuals perceive something the more likely they will believe it and remember it. During trial, evidence can be repeated a reasonable number of times to increase the chances that the fact finders will recall and believe it. An unreasonable number of repetitions may cause the fact finder to tire of the evidence and result in sustained objections. What is reasonable depends on the facts and the circumstances of the case, how long the trial lasts, how much time passes between repetitions, and how the matter is repeated.

C. The Rule of Three

The trial lawyer's approach to a trial is based on the following format: Outline what happened (brief statement of the whole facts), explain what happened through witnesses and documents (evidence), and summarize what happened (summation). This format follows the rule of persuasion: "Tell them what you are going to tell them, tell them, and tell them what you have told them."

D. Visual Senses

Studies indicate that individuals remember a much larger percent of what they both see and hear compared to what they just hear. The use of visual aids and trial exhibits increases the likelihood that the fact finder will recall and understand specific evidence.

E. Impact Words

Individuals react to words that are used to describe an event. Descriptive words emphasizing specific facts of a case create more vivid images of an event than non descriptive words. Descriptive language includes impact words that graphically describe a situation, such as "smashed" instead of "hit," "huge" instead of "large," "shrieked" instead of "yelled." These impact words affect the fact finder's perception of what happened and are usually more easily remembered by the fact finder.

For example, in an automobile accident case, when the accident is described merely as a "collision," this neutral term will not create a specific image of the accident and the extent of liability and significant damages may be less likely. When the accident is described as a "violent crash," there is created a more graphic image of the accident and liability and a greater likelihood of high damages.

Impact words should be selected to accurately convey what happened. Impact words should be factually descriptive, not exaggerated conclusions unsupported by the evidence. Thesauruses, dictionaries, work of literature, and action comic books may serve as sources of such words and phrases.

F. Images

Individuals learn and understand by forming images in their minds. When fact finders hear a word or listen to a description of an event, they visualize images based on what they have heard. The goal of the attorney is to use words and descriptions that create images that accurately and vividly describe the story the attorney is telling.

For example, when an attorney says the word "chair" to a fact finder, the judge draws a mental image of a chair. That image might be of a wooden chair, a padded chair, a rocking chair, a desk chair, or a plastic chair. The trial attorney must make certain that the actual chair involved in the case is the image the fact finders picture in their minds. The more vital the details of this chair are to the case, the more precise the attorney must be in presenting details that give an accurate picture.

As another example, when an attorney asks Jude to assess damages for pain and suffering, the attorney must use words that make the judge feel the pain and suffering. Witnesses should not merely say they had a headache, but that it felt as if someone was inside their head pounding with a hammer. Witnesses should not merely say that their leg was cut by a saw, but that they felt the intense, burning pain of that hot metal slicing through their flesh.

G. Imagination

The images created in the fact finders' minds may be clear or hazy, complete or incomplete. An ideally communicated image should involve the senses, including sight, hearing, touch, and smell, and should focus on all details of an event. This, however, is impossible at trial because everything cannot be completely recreated. The fact finder must use imagination to fill in the details of what happened. The attorney must make the critical images as realistic and complete as possible to enable the fact finder to imagine the event as vividly and accurately as possible.

H. Active Involvement of the Fact Finder

A fact finder who becomes mentally and emotionally involved in a case is more likely to be interested in the case and more likely to remember evidence. The goal of the trial attorney is to present the events in such a way that the fact finders think they are a part of the case, perceive they are observing what actually happened in the past, and feel the emotions of the situation. The more successfully the attorney can meet this goal, the more likely the fact finder will believe and accept what the witnesses tell them.

L. Storytelling Techniques

Effective storytelling techniques are useful to successful trial attorneys. Techniques employed in literature, from fairytales and cartoons to classic plays, may be adapted to the trial setting. One technique is the initial creation of an image to gain attention. Stories often begin with "It was a dark and stormy night" for a reason. Good story tellers immediately draw the reader into the story and maintain the reader's attention throughout. Another storytelling technique frequently used in trials is adapted from the theatre: the playwright first establishes the circumstances of time and place, introduces the protagonists, develops the problem, and then presents solutions to the problem. This technique may be useful in opening statements and final argument, and in deciding the order in which witnesses will testify.

J. Understandable Language

Clarity of expression is critical. The words an attorney chooses help or hinder the understanding of the fact finder. Simple and clear language is preferable to complex legalese. Large words used only to show off vocabulary skills turn off the jury. Overly simplistic words and explanations sound condescending. The attorney must balance the use of simple, understandable language with the depiction of a credible, memorable story. For example, extensive employment of multi-syllabic verbiage merely in an effort to flaunt superior linguistic proficiency serves only to alienate the recipients of such apparent arrogance.

K. Simple Explanations

The more straightforward and less convoluted an explanation, the more likely it will be accepted as true. The trial attorney should provide the fact finder with as simple and credible an explanation of what happened as possible. This type of presentation fulfils the need of many judges looking for a reasonable, straightforward answer to explain a case, even when the case is difficult and complex. A trial attorney who is unable to satisfy these expectations may be unsuccessful. Unfortunately, lawyers are not always trained to develop simple explanations, but are often taught in law school to present complicated explanations of both sides of a case. For example, in analyzing a criminal case, a criminal defense lawyer could argue that the defendant was not present at the armed robbery, or if the defendant was present, the defendant was not holding a gun, or if the defendant was holding a gun, it was used in self-defense. These possible explanations may generate a high grade in a law school exam, but will only convince a fact finder of the defendant's guilt. The selection of a simple and reasonable explanation is usually more effective than the use of complicated, alternative explanations.

L. Avoiding Contradictions

The theory of a case must be explained in a cohesive and integral manner. The trial advocate must avoid presenting contradictory positions. The possible argument that the defendant was not at the scene of the crime, but if he was there he was acting in self-defense is contradictory and ineffective. No fact finder would believe either explanation. Who would? Some situations require a presentation of alternative explanations during the trial. These presentations are most effective if they are not described as contradictory positions. One way of avoiding making contradictory statements is to avoid using the words "but" or "however" or the phrase "even if." These terms may unintentionally concede the validity of the other side's explanation. It is better to affirmatively state a position and then add another explanation, using such terms as "moreover" or "further." For example, in an automobile accident case, the plaintiff may contend that she was hit in the crosswalk while the defendant contends that she was hit outside the crosswalk. There are various ways the plaintiff's attorney could explain this apparent contradiction to the jury. Plaintiff's counsel could argue that plaintiff was in the crosswalk when she was hit, or if she wasn't in the crosswalk, she was hit negligently by the defendant outside the crosswalk. A more effective explanation to avoid this contradictory statement would be: "The defendant negligently struck plaintiff where she was walking; moreover, we will prove that she was walking in the crosswalk."

M. Developing Interest

The presentation of a case must be made interesting by the trial attorney to hold the attention and mould the decision of the judge. Some cases are interesting by their very nature, and interesting facts aid an attorney in maintaining attention. For example, a wrongful death or murder case is usually dramatic. Other cases, such as those involving commercial litigation and real estate are not nearly as exciting. The trial attorney's task in such cases is to make the evidence intriguing. For example, every commercial litigation case is about people making business decisions. The trial advocate must present these people and these decisions in as stimulating a way as possible. As another example, every real estate case involves a unique piece of property. The trial advocate might be able to establish the special value of this property to increase the interest level of the case.

However uninteresting the facts may initially seem, the trial advocate must create and develop as much interest as possible so the fact finder will be more likely to understand and remember the facts and less likely to be bored and unimpressed. Every case involves some matters that can be made interesting. The trial attorney who can develop interest in an otherwise unexciting case greatly increases the chances of winning.

N. Attention Span

Audiences, including judges, as well as the readers of this book, have limited attention spans. A case must be presented in a way to maximize the attention span of the fact finders and must avoid presenting information the fact finder cannot absorb. Attention spans can be increased if the presentation is interesting, dramatic, reasonably paced, and otherwise well presented. Judges and jurors take their duties seriously and attempt to pay close attention to everything that happens in the courtroom. The length of an opening statement, witness examination, or summation must be based not only on what must be said, but on the fact finder's likely attention span. Not all judges have the same attention span. The trial attorney must be

sensitive and observe the judge and make certain that they are paying sufficient attention to what is going on.

0. Developing Emotions and Reactions

A trial attorney may be able to use the emotions inherent in a case as an actor relies on the emotions inherent in a play. An actor does not become the source of an emotional catharsis; it is the re-enactment of an event that creates cathartic reactions in the audience. A good actor leads the audience to the threshold of emotion, and the culmination of that emotion is felt by the audience.

In a trial setting, a good lawyer tries to create an atmosphere in which the judges are affected by emotions at the right time. In a wrongful death case, the plaintiff's lawyer wants the jurors to feel grief in such a way that their compassion favourably affects their judgment during deliberations. A good plaintiff's lawyer wants to see teardrop stains on the verdict form, not just tears in the courtroom.

P. Establishing Realism

A successful play or movie captures the audience so they forget they are at a play or watching a movie. A poorly presented dramatic act makes the audience aware of what they are watching and anxious for the end of the make-believe story. The goal of a trial lawyer parallels that of the playwright and director. The trial lawyer wants the fact finders to forget they are jurors and a judge at a trial, but instead believe they are observers at an event unfolding before them. If they remain aware that the event is only a trial and that the attorneys are acting like lawyers, then they may be more distracted by the process and less involved in the story.

Q. Identification with Fact Finder

Judges and jurors are more likely to believe a witness or favour a party if they can identify with that individual. Perceiving similarities between themselves and the witness or party helps form this identification. Fact finders may not consciously disbelieve a witness because they do not identify with that witness, but usually the more a witness or party has in common with a fact finder, the more likely the fact finder will identify with and believe that person. Background information that establishes similarities between the witness and the fact finders should be emphasized. Specific examples of similarities should be described during the direct examination of the witness. The questions should not be so numerous or obvious, however, that the fact finders perceive that the witness is artificially being portrayed to be like them.

IV – ELEMENTS OF ADVOCACY

There are a variety of approaches to trying a case. These variations reflect the difference in opinions among trial lawyers regarding aspects of the trial process. This section describes some of these approaches regarding important elements of a case presentation. Trial lawyers must form their own individual position regarding these varying approaches and apply them as needed or appropriate in each case.

A. The Persuasive Advocate

Many trial lawyers believe that advocacy requires them to convince the judge or jury of the correctness and righteousness of their client's position by attempting to "sell" the position to

the judge or jury. Typically, these advocates ask the judge or jurors to find "in favour of" or "for" or "on behalf of their client. The underlying premise is that the advocate's client deserves a certain result because the advocate has convinced the judge the client is entitled to win. This approach places a burden on the advocate to convince the fact finders to believe and accept the arguments advanced by the advocate.

Another view of the advocate's role is that the advocate provides the judge and jury with information which would lead reasonable people to come to but one conclusion. This approach does not require that the attorney usurp the judge or jury's function by telling or convincing the judge or jurors how they must decide a case. The burden remains on the judge or jury to reach a decision based on the facts, the law, and justice. Rather than attempt to cajole, sell, or otherwise convince the fact finders, the attorney simply says "here are the facts, here is the law, and the result you should reach is clear."

These two approaches reflect opposing views of the advocate's role. An approach that combines the benefits of both approaches may be most effective. The benefit of the first adversarial approach is that it can result in a very persuasive and compelling presentation. The disadvantage of the first approach is that the trial attorney may appear to be inappropriately biased, partisan, and manipulative. The benefit of the second advocacy approach is that the fact finders reach their own conclusion based on the information the attorney presents to them. The disadvantage is that the attorney may appear to be uncertain and unsure. The trial attorney should assume the most effective approach for each case.

B. Involvement of Advocate

The degree to which advocates should involve themselves in cases is a matter of disagreement among trial lawyers. Some argue that attorneys should not emphasize their professional beliefs during the trial, while others argue that it is critical to establish this professional belief. Trial attorneys who suggest that the display of involvement is necessary say things like "I will prove to you" and "I will introduce evidence to convince you of these facts." Trial lawyers who suggest that their involvement should be diminished use phrases during the trial before the judge, such as "you will hear evidence and you will conclude..."

These two positions do share common principles and may differ only in the emphasis placed upon them. The judge must be given the impression that the advocate believes in the client and the case presented. The judge is unlikely to find in favour of a client whose lawyer expresses doubts about whether that client should win.

How lawyers express their belief in a case may be a matter of approach and style. Some lawyers may need to become more professionally involved in the presentation of the case to demonstrate this appearance. They may say things like: "We believe the evidence will show" and "We will prove." Other attorneys may be able to create this appearance by being less actively involved. They may tell a story which is of itself compelling and persuasive. Whichever approach is taken, trial advocates must be confident and sure of the validity of their clients' positions and not be equivocal or uncertain. Some jurors rely upon the attorney's judgment in deciding a case. These jurors will be adversely influenced by an attorney who does not appear to support the client's position.

C. The Objective Partisan

The trial attorney has a dual nature. A trial lawyer is both a partisan and an objective participant in the trial. The lawyer as a partisan needs to present selective evidence to the fact finder and zealously argue for the client's position. The attorney as an objective participant must appear to present evidence in an objective way and provide reasonable explanations. If the judge perceive that a lawyer is too partisan, they will be less likely to believe that lawyer. Likewise, if the judge and jurors perceive that a lawyer is too objective, then they may be less influenced because the lawyer does not advocate a position. Successful trial lawyers are aware of this dual role and attempt to balance their position and be an "objective partisan" during the trial.

D. The Trusting Appearance of the Advocate

The trial advocate must be perceived by the jurors as being sincere, honest, and trustworthy. Many trial advocates suggest that the attorneys forget they are lawyers during a trial. They advise not to sound or talk like a lawyer lest the jurors focus on the role as a "hired gun." Some jurors view the lawyer as biased from the outset and distrust anything that the lawyer says. But this is true for the lawyers on both sides. The attorney who appears most sincere, honest and trustworthy will have a greater chance for success in the trial.

E. Open-Mindedness of Jurors and Judge

It is difficult, if not impossible, for the judge to have a completely open mind at the beginning of or during a trial. Many trial advocates believe that no judge ever has a completely open mind and present their case based on this premise. All fact finders have some biases and prejudices, and some of the judges will be partial to one side or the other. The decision-making processes of judges and jurors parallel other decision-making processes in life. Many individuals make decisions without complete information. Many people form initial impressions or develop opinions and make decisions based on those initial impressions and opinions. Many people make up their minds early and are reluctant to change positions. The trial advocate must take these dynamics of human decision-making into account.

At the early stages of the trial, each juror and the judge begins forming impressions about the case, about the attorneys, and about the parties. The notion that judges and jurors impartially absorb information during a trial and then wait carefully to decide a case is largely inaccurate. Many fact finders selectively listen for evidence that supports their initial inclination or position. They listen for, believe, and remember evidence that supports their position. Evidence that does not support their position is rejected, disbelieved, rationalized, forgotten, or not even heard. Many judges and jurors make up their minds well before the closing argument and advance reasons during jury deliberations to justify their conclusions.

The degree to which these initial impressions develop into a firm opinion varies among fact finders. The impression may turn into an opinion, which may turn into a firm opinion, which may turn into a final position. The nature of the decision-making process also varies. Each judge forms some impressions, has some inclination, and develops a position; usually well before the end of the trial.

The lack of open-mindedness on the part of the fact finders affects the way a trial advocate presents a case. Because jurors and judges begin to form some impressions early in a case, the trial lawyer must provide them with information early enough in the case to shape

their views and gain their support. It is much more difficult to change someone's mind once it is made up or to alter an opinion once it is formed. If there is any doubt about this truism, read Supreme Court decisions. The longer the time passes in a trial and the surer a judge becomes, the more difficult it is to change that individual's position. The goal of the trial advocate is to provide the information and reasons sufficient for the judge to want to find for the advocate's client early in a case, and then to continue to provide information and reasons to support that decision during the trial.

F. Memories of Witnesses

In preparing a case, a trial attorney must determine the degree to which each witness has an accurate recollection of an event. Regardless of what witnesses say they remember, the attorney must assess the credibility of witnesses and the plausibility of their stories. There exists a range of opinion among trial lawyers regarding people's ability to remember. Some advocates suggest that witnesses remember very little, if anything at all. These advocates suggest that witnesses draw on the few recollections they have, collect evidence from other sources (such as other individuals or documents) and use the law of probability to form a recollection. Other lawyers believe that witnesses are able to draw upon the resources of their memory and accurately recall things that happened in the past. All these advocates may be correct. The answer may depend upon the witness, the ability of that individual to perceive and remember the event, and the impact the event had upon the witness. The degree of accuracy often depends upon whether the witness had any reason or expectation to perceive or recall an event.

Cases which arise from situations that the parties did not expect to be litigated may result in less complete and less accurate recollections by witnesses. For example, in a typical automobile accident case, the parties do not expect or anticipate being involved in an accident and have little reason to focus on the events that occur before an accident. Accordingly, there is no reason for them to concentrate on remembering their speed, distances, or the traffic situation. After the accident, however, witnesses to the event may pay close attention to what is said or how people act because they may expect to be called on to give a statement. Accordingly, it is more likely that the later part of their stories will be more complete and accurate. In a criminal case, the victim of a crime may or may not have good reasons to be able to identify the defendant. Some victims are so scared or frightened during the crime that they are unable to look at the criminal, while other victims may want to get a good look so they can later help catch the criminal. All victims will be asked by the police for a description of the criminal, and the degree of accuracy of this description depends upon how the witness reacted during the crime.

Our adversarial system presumes that witnesses remember significant details and can describe them during their direct examination. The system relies on cross-examination as a means of testing the accuracy and reliability of a story. Psychology studies show that most witnesses add details that they did not perceive and that they do not actually recall. This "filling in the details" phenomenon is often done unconsciously and without the witness intending to exaggerate or lie. Some witnesses, however, intentionally add favourable information without the attorney's knowledge. Regardless of the psychological processes

affecting the perception and recollection of a witness, and the hidden agenda of a witness, trial attorneys must nevertheless present witnesses along with their good faith stories to the fact finder and challenge adverse witnesses on cross-examination.

G. Displaying a Relationship with a Client

The nature of the case and the kind of client dictate what relationship should be displayed between an attorney and client during the trial. If the fact finder is likely to perceive the client as a credible or a good person, the trial advocate should display a close relationship with the client by being seen with the client, talking with the client, and appearing to like the client. In cases in which the fact finder may not identify with or like a client, trial lawyers disagree as to the relationship they should establish in front of the judge. Some lawyers believe that they should distance themselves from this kind of client as much as possible, fearing that the appearance of a close relationship with such a client will hurt the attorney's standing in the eyes of the fact finder. Other lawyers believe that such a client needs visible support from the attorney during a trial. They fear the opposite reaction from the judge, who may not support the client because it appears that the client's own attorney wants nothing to do with the client. An attorney must decide the kind of relationship with the client the attorney wants to display during the trial.

H. Personal Embarrassments

Inevitably, trial lawyers make mistakes and errors of judgment. The attorney's reactions to these situations increases or decreases the chances of winning. When we make mistakes, we are naturally inclined to think about ourselves first and what the judge will think about us and then find a scapegoat for our errors. When we learn about some surprise information at the beginning of a trial, we may want to blame our client for not telling us about this information rather than ourselves for not properly discovering it. When we ask an awkward question during jury selection, we may want to blame the judge for refusing to ask such a question instead of blaming ourselves for not properly asking it. When the witness makes a misstatement on the stand, we may be inclined to shift the blame to the witness rather than have the judge think we did not properly prepare the witness. These reactions are natural and normal, but they must be avoided by the professional trial attorney.

There is no place for a trial attorney to be concerned about personal embarrassments during the trial. The trial advocate should not embarrass the client or undercut the client's position. The trial attorney should usually assume responsibility for the mistake or error, take the blame, and move on as quickly as possible. In other words, *mea culpa*.

V – METHODS OF EFFECTIVE PRESENTATION

Much is written and said about trial advocacy being an art dependent upon an advocate's intuition and talent. Some trial lawyers have substantial natural talent while other lawyers have less talent and need to work harder and rehearse more. All trial lawyers have some talent and capabilities that they can develop and enhance to make them effective advocates. There are techniques which can be employed to make a lawyer more effective and persuasive. Methodical planning, thorough preparation, and intense practice can make most any lawyer a competent and skilled advocate. This section describes some general principles of effective communication skills.

A. A Good Person

A principle of rhetoric is that an effective orator is a "good person who speaks well." Similarly, an effective trial advocate must be a person who displays good sense, good will, and good character and who presents the case well.

B. Confidence

The trial attorney must appear confident, in control of the case, and in command of the courtroom. Thorough preparation develops the necessary confidence, and an effective presentation allows the attorney to remain in control. Successful trial advocates view the courtroom as "their" courtroom, where they present their client's case. They understand the courtroom is a public place and not the provincial territory of either the judge or opposing counsel. Trial advocates must be as comfortable as possible in "their" courtroom surroundings.

C. Speaking

In preparing a speech, effective speakers do not focus on all of the specific words they are to deliver but on the ideas and images they wish to express and evoke. A speech which is simply read from a prepared text is rarely interesting. Similarly, a memorized speech, where the speaker merely recites words rather than explaining ideas or evoking images, is also unpersuasive. The most successful approach is to focus on the ideas that need to be expressed and explained, practice out loud, and then present the ideas using specific words when needed for impact.

D. Eye Contact

Eye contact is critical to establishing credibility and persuasion. Looking judges in the eyes while talking substantially increases the impact of what is being said. The lack of eye contact causes the judge to doubt the attorney's sincerity, or, at best, causes them to lose interest in what the attorney is saying. Although staring at a judge will undoubtedly make that person uncomfortable and adversely affect the attorney's rapport with the individual, the attorney must make periodic eye contact with the decision makers.

Advocates must speak with their heads up and avoid the extensive use of notes which prevent them from maintaining sufficient eye contact. Some advocates get nervous and lose their concentration while looking a judge directly in the eyes. An effective way to look at someone to prevent this reaction is to focus on the bridge of the person's nose rather than the pupils of the person's eyes. The speaker avoids the intensity of eye contact, while the listener perceives that the speaker is looking at the listener.

E. Body Language

Body language is a significant part of the trial attorney's communication process. The key to effective body language is congruence, that is, the body language of the attorney should match what the attorney says or communicates. An attorney whose body language evidences lack of confidence or uncertainty is unable to be persuasive. An attorney who stands in awkward positions or who slouches in a chair or whose posture appears indifferent may display an inattentive and uncaring attitude. Trial attorneys must be constantly conscious of how they stand and how they sit and the position of their bodies because they always are on

view in front of the judge and jurors. Excessive body movement, crossed arms or ankles, or inappropriate movement may interfere with communication. Successful trial lawyers make sure that their body language is consistent with the message they are communicating.

F. Gestures

Good speakers employ gestures to make a presentation more effective. An attorney should incorporate appropriate gestures into a presentation. Steady hands and controlled arm movements help develop an appearance of confidence and make a presentation more interesting. The lack of any gestures, jerky hand movements, or wild waving of the arms need to be avoided. Gestures should be natural, firm, and purposeful.

G. Appearance

The attorney's appearance is an important consideration throughout the trial. A speaker's appearance often affects the listener's perceptions of that person. An attorney who is well-groomed usually appears more professional and credible to the judge. The attorney's appearance should be consistent with the personality and approach of the attorney. Counsel should dress comfortably, in a manner that suits their taste and that conforms that the customs or rules of decorum established or promulgated in a jurisdiction. Many attorneys dress according to a standard they believe is expected of them by the judge. Other attorneys dress according to the view they want the judge to have of them. Some attorneys prefer to wear a distinctive piece of clothing during a trial to help the judge remember and identify the attorney.

The dress of an attorney should not become an issue that detracts attention from the client's case. Attorneys may have to put aside personal tastes and conform their dress to the standards of a community or Judge so as to safeguard and promote the best interests of a client. If the Judge is bothered by or unnecessarily talk about an item of clothing or Jewellery worn by an attorney, then that item may be inappropriate.

H. Vocal Tone and Pace

The tone, volume, modulation, and pace of an attorney's deliver affect the listening capabilities of the judge. A dull, mono tone presentation is as ineffective as a loud, boisterous approach. A balanced and well-modulated approach is usually most effective. Sometimes the best thing an attorney can say is nothing. This technique comes in handy sometimes, especially when the attorney's mind goes blank. Silence can be an effective way to highlight a point, to gain attention, or to create a transition. A trial attorney must learn to tolerate appropriate silence in the courtroom and to use it constructively.

VI – ETHICS

The process of becoming a trial lawyer includes an understanding of and adherence to ethical norms. Trial lawyers must adopt and follow ethical standards. Each trial lawyer must reflect on, wrestle with, and come to an understanding of the values, norms, and ethics that should be preserved and that shape the judgment and conduct of the advocate. All trial advocates are members of a community consisting of clients, colleagues, opponents, judicial officers, and the public. Each trial lawyer is not only a lawyer but also a person, guided not only by professional or legal ethics but also by individual and community concerns and values. This

section specifically describes the shaping of ethical guidelines formed by decision makers within the adversary system, constraints within the system, and professional rules of conduct and behaviour.

A. Sources of Decision-Making Power

Attorneys do not have power to control the fates of parties, but attorneys can influence the source of such power. It is the ability of the attorney to persuade the jury and convince the judge to remedy a wrong that activates the power within the adversary system. A jury's verdict determines a criminal defendant's liberty and determines what money damages a civil plaintiff is entitled to. A judge's decision can enforce constitutionally protected rights, enjoin corporations from in- fringing on contractual rights of individuals, and order the government to spend millions of dollars. These enormous powers are unleashed depending upon an attorney's preparation and presentation of a case.

Attorneys influence the results of a case by selecting the theories to be advanced, the evidence to be introduced, and the law to be explained. Attorneys shape the evidence the jurors see and hear by presenting it in a certain perspective and by explaining its significance. Attorneys also shape the law that applies to the facts by choosing claims and defences to assert and by explaining the effect of these laws on the facts. Trial attorneys must wield such power only for good reasons, not for evil purposes, and, of course, always to protect Gotham City.

B. Constraints

Clients have limited resources. The lack of sufficient funds makes it impossible to do everything that could be done in a case. Many cases do not justify significant monetary expenditures. The client, the case, or both, limit what should be done to completely prepare and present a case. The trial lawyer must work within these limitations to do the best possible job. Lawyers have only limited available time. Even now, imagine what you would rather be doing. Enough of that. The time that an attorney can devote to a case is limited by the fee charged, professional hours available, and the lawyer's life outside the practice of law. Trial attorneys must decide what takes priority in specific cases, in the law practice in general, and in their personal lives.

C. Professional Rules of Conduct

The rules of professional conduct and state ethical rules provide both a set of disciplinary rules and guidelines for advocates. Some of the rules deal with the external, objective conduct of an attorney. Many rules deal with internal, subjective thinking of the lawyer. It is often difficult to apply these rules and guidelines to litigation cases where there are two or more versions of what happened, to opponents who may dislike each other, and to trial advocates who are skilled at creating plausible explanations and portraying questionable behaviour as legitimate. Attorneys must develop an internal code of ethics and constantly monitor their own conduct to determine whether it complies with the norms of the profession and their own ethical norms.

Every state has rules that establish standards and impose restraints on a lawyer's behaviour. The Rules of Professional Conduct (Model Rules) have been adopted by about

half of the states with major modifications in some states. The other states have rules based, to varying degrees, on the Code of Professional Responsibility. These varying rules attempt to codify norms which reflect the collective views and values of lawyers. State rules of procedure, case law, and local customs and traditions also regulate the conduct of trial lawyers. In India, the professional ethics of the Advocates are governed by the Bar Council Acts/ Rules.

Advocacy Notes

D.S. HISLOP'S ADVOCACY TRAINING

Evidence in Chief:

Is the evidence given by your own witness in your case? Experienced trial lawyers recognize that most trials are won on the strengths of your case in chief not on the weaknesses of your opponents' case.

Consequently, effective direct examinations that clearly, logically and forcefully present the facts of your case will usually have a decisive effect on the outcome of the trial.

It is important that the purpose of examination in chief must be kept in mind. It should elicit from the witness in a clear, and logical progression the observations and activities of the witness so that the trier of fact, whether it be a Jury or Judge alone, understands, accepts and remembers his testimony.

How is this done?

Preparation:

Calling your evidence is as much as an art form as the smartest and most skillful cross examination.

How do I Prepare:

1. Decide in your own mind why you want to call the witness -

- what evidence can he give that helps your case.
- if he/she cannot help your case, do not call him/her. Why give your opponent the chance to cross examine without there being a material gain for your case.

2. Once you have made the decision -

- having decided what evidence the witness can give to assist your case

List the key points you want the witness to make

3. Organize that Evidence Logically -

- Usually but not always, this will result in a chronological presentation of testimony. Experience has shown that jurors and judges like other people are best able to comprehend and remember a series of events or other information if they are presented in the same chronological order as they occurred.

Example:

The witness, the plaintiff in an automobile collision case, could testify in the following order:

a. his background

b. description of collision location

c. what occurred just before the collision d. how the collision actually occurred

e. what happened immediately after the collision

f. emergency room and initial treatment

g. continued treatment

h. present physical limitations and handicaps i. financial losses to date

Example:

The witness to an attack on a man in the street could testify in the following order:

a. background of witness
b. location of event
c. location of the witness
d. the incident
e. the quality of the observation - unobscured?
f. what the witness heard before, during and after the incident
g. the state of the victim
h. the flight of the assailant
i. the arrival of the emergency services

Of course as you become more adept as a trial lawyer you will find this not an inflexible rule. Sometimes presenting the most dramatic or important testimony early in chief when the trier of fact is most alert and still listening can sometimes be a better approach.

Example:

Q. Mrs. Jones, do you and your husband have children?

A. No, before the accident we planned to start a family

Q. Why did you change your mind?

A. We did not change our minds. It is just that as a result of the accident I suffered internal injuries that have made me infertile, unable to have children.

Wham! You immediately have not only the attention of the judge or jury but you have their sympathy, then you can go on to elicit the details of the accident (paragraphs b. to i. inclusive.)

So you have organized your material, how do you best effectively present it

4. How do you present it-

The Golden Rule is that your witness is the one who is telling the story not you. You want the trier of fact to hear the evidence from the witness, not you. You want your witness to make an impression and to be believed.

This is best done by the trier of fact hearing from the witness not you. The witness should be the centre of attention not you.

You are there to facilitate the telling of the story by your witness

5. How do you achieve this-

- Short simple questions
- eliciting one point at a time
- choose language carefully
- do not lead the witness, open ended questions only:

-why
-when
-how
-where

- leading questions not only will draw a reprimand from the judge but it is counter-productive to your purpose

6. Listen to answers the witness gives -

- if you do not understand the answer how do you think the judge or jury will

- the answer may only be as half as good as it could be, you may have to probe deeper

7. Holding the interest of the trier of fact -

- appear interested yourself in what the witness is saying
- do not simply introduce the witness and then invite him or her to "tell us all what happened." This is easy and the lazy man's way!
- it will lead to ineffective, boring evidence, where you as counsel have no control whatsoever over the content and is likely to lead to the adducing of irrelevant evidence which will submerge the relevant evidence you want the trier of fact to accept and remember.
- the better way to put your witnesses testimony before the court is I suggest in this way:

8. Build your questions on the preceding answers:

Example:

The witness is being called to say that he was looking out of the first floor front bedroom window of his house at 10.30 am on 2 July when he saw a young boy throw a stone through the window of a toy shop directly across the road, take a toy gun from the window and run off to the right and out of view. A young boy is on trial for the offence and is relying on an alibi.

Having got the witness to give his name, the next answer counsel will want the witness to give is his address. Question: " What is your address?"

The next answer he wants is that there is a toy shop directly across the road: the assumption is that there is no plan. There should be but there is not. This cannot be obtained by a leading question and will take three non-leading questions to obtain it. Thus:

Q: Are there any buildings on the opposite side of the road from your house?

A: Yes

Q: Are any of those buildings directly opposite your house

A: Yes

Q: What building is that? A: A toy shop

- note that each question is built on the previous answer. This technique is sometimes referred to as piggy-backing

Q: Where were you on the morning of the 2 July?

A: In my home

Q: When you were in your home that morning did anything happen outside your home which you were aware?

A: Yes

Q: How did you become aware of it?

A: I saw it

Q: Where were you in your home when you saw this happen?

A: In my bedroom

Q: What were you doing in your bedroom?

A: Just looking out the window

Q: Is your bedroom to the front or the back of your house?

A: The front

Q: What is opposite your house as you look out your bedroom window?

A: The toy shop

Q : What did you see happen?

- The value of piggy-backing is threefold:

-controlling the witness

- allowing you to follow your planned structure

- it provides a memorable picture

9. Pace-

- As you get more adept at adducing evidence in chief you can start using more sophisticated techniques such as the use of pace.
- Pace involves controlling the speed of examination. This is particularly important where the evidence you are wishing to adduce from the witness involves the happening of an incident.
- Remember that the jury, unlike you and the witness has never heard the testimony before. Its ability to receive, digest and comprehend is limited
- The critical part of for instance most murders will take place in a few seconds.

In such a situation pace can be employed by you to control the witness to slow down the action if that indeed suits your purpose. You may wish to slow it down and show the action frame by frame.

Example:

You act for Bill Smith who is charged with the murder of his neighbour Jim Jones. Jones is hard working but rather ill tempered. He works night shift and thus has to sleep during the day. Smith has recently lost his job and is rather enjoying being unemployed. He also likes his new sound system which he bought with his redundancy money. He especially like playing it loudly during the day. It has already been the source of heated arguments between Jones and Smith. On the 4 August at 10.30 am Jones had just got himself to sleep after a hard nights work when he was awoken by the thump, thump of Smiths music. He flew into a rage, picked up a metal bar from his tool bag and stormed next door to Smiths house. He bursts in through the back door into Smiths kitchen to confront Smith. In a complete rage he takes a swing with the bar at Smith, for the most part misses and goes to take another swing at Smith. Meanwhile Smith is preparing his breakfast, slicing up fish with a butcher's knife. Smith is taken completely by surprise, panics and lunges out with the knife and thrusts it through Jones heart. Jones dies immediately.

As Counsel for Smith you have received instructions which make it clear that your defence is self defence. You wish to call your client to give evidence.

You have two particular problems that you must resolve in the planning of your clients evidence in chief. You can resolve each problem by using pace in completely opposite ways.

Your problems are as follows:

Firstly you need to convey to the jury that the incident happened very quickly. Because the very essence of self defence is that it is a spontaneous reaction borne of fear of very serious harm to oneself or another.

Secondly, the need to convey the very real threat the client felt.

- So one of your objectives calls for an examination in chief that conveys the speed and suddenness of the attack and the other calls for the slowing of everything down frame by frame in order that the jury may focus on the feelings of fear felt by your client Smith.
- So how do we achieve this?

We achieve this by breaking our evidence in chief into two parts, using pace to different effect in each part.

First:

Q: Where were you on the morning of the 6th of December 1998?
A: I was at home.
Q: Can you recall what time you got up that day?
A: At about 10 am.
Q: When you got up did you intend to have breakfast.
A: Yes.
Q: What were you going to eat?
A: Fish.
Q: Who was going to cook it? A: Me
Q: Where were you going to cook your breakfast?
A: In my kitchen
Witness shown a knife.
Q: Do you recognize that knife?
A: Yes, its mine I was using it that morning to cut up the fish
Q: Did you end up cooking the fish?
A: No
Q: Why not?
A: Because that mad man Jones from next door came crashing through my back door and attacked me with an iron bar

So here with the use of short sharp sentences you have created the sense of a sudden attack. So once the speed and suddenness of the attack has been conveyed back track and slow the action down to achieve your second purpose.

Example:

Q: When was the first time you realized Jones was in your kitchen?
A: I was at the bench cutting up the fish when I heard a crashing noise
Q: Did that cause you to do anything?
A: I just turned around
Q: And what did you see?
A: I saw Jones coming at me with an iron bar
Q: Was he walking or running?
A: He was launching himself at me

Q: Did you see his face?

A: Yes, it was all contorted with rage

Q: Did he say anything?

A: Yes, he said he was going to kill me.

Q: Did you say anything

A: No, I did not have a chance, I was shocked

Q: How did he appear to you?

A: Completely out of control, raging like a bull

Q: How did you feel?

A: Terrified, I thought I was going to die

Q: What happened then?

A: He struck at my head with a bar but missed because I think he slipped on the old mat on my floor

Q: What did he do next if anything?

A: He recovered his balance and took an enormous swing at me with the bar

Q: Can you demonstrate the motion he used for us with this bar? [Witness Demonstrates]

Q: Had you moved at all from where you were when he first came into your kitchen

A: No, I was in shock, I had no time to move and anyway there was nowhere for me to run to, he was right on to me

Q: How did this make you feel?

A: I was terrified, I thought I was going to die, I just panicked, I had the knife still in my hand and just thrust it at him, he was going to kill me.

- Other techniques
- different types of witnesses

Cross Examination:

Cross examination is a skilled that can be learned by the combination of a careful study of the basic principles of cross examination and trial experience.

Cross examination is very easy to get wrong. Good cross examination technique is usually that which distinguishes the good trial lawyer from the not so good.

Cardinal Rules:

- Prepare
- Before you get to your feet

- ask yourself:

- do I really need to cross examine this witness

- have the points I would like to make from this witness already been made by any other witness

- can I get away with not asking any questions

- was the witness credible

- Purposes of cross examination

There are two basic approaches to cross examination:

a. Elicit favourable testimony. This involves getting the witness to agree with those facts that support your case in chief and are consistent with your theory of the case.

b. Conduct a destructive cross examination. This involves asking the kind of questions which will discredit the witness or his testimony so that the jury will minimize or even disregard it.

It is important to bear in mind these two categories because you will as a matter of good common sense always seek to elicit favourable testimony first before embarking upon destructive cross examination.

Sometimes You will have to determine whether to forgo destructive cross examination.

- Elements of Cross Examination

Successful cross examinations are invariably those that follow a preplanned structure that gives the examination a logical and persuasive order. In relation to your planned structure:

a. Have your cross examination establish as few points as possible.

Keep the points simple. Stick with your strongest points.

b. Make you strongest points at the beginning and at the end.

c. Vary the order of you subject matter. But make it clear to the jury where you are going. Help them!

d. Do not repeat the evidence in chief or allow the witness to do this

Rules of Cross Examination

- Leading questions only, no open ended questions
- Make a statement of fact and have the witness agree with it
- Short sharp questions
- Simple language
- Know the probable answer before you ask it
- Listen to the witnesses answers
- Do not argue with the witness
- Keep control of your witness
- Be courteous but firm
- Be a good actor
- When you have made your points Sit Down

Specific Skills

-the difficult policeman

-the witness who has given a previous inconsistent statement

-the expert witness

GRAY'S INN ADVOCACY COURSE FOR PUPILS: 1993-1994

1 INTRODUCTION

1.1 The theme of these Guidelines can be summarised by the key words which appear precisely or with variations many times:

PREPARATION
PERFORFORMANCE
COMMUNICATION
PERSUASION

1.2 There is more in the Guidelines than you can hope to absorb in one reading: to that extent, they will be useful to you after the Course is completed. In any event, advocacy is not learnt merely by reading or even by just reading and observing. It has to be practised again and again in order to master the

PERFORMANCE SKIILS

which are the tools with which an advocate communicates and persuades.

1.3 That is what, in the end, advocacy is: a performance skill. Looked at in that way, it assumes preparation, but not just that preparation which is involved in mastering the subject--matter of the brief and the relevant law and procedure.

Proper preparation for advocacy involves, also

PREPARING FOR PERFORMANCE

Just as a musician, say , is not content with merely learning the notes of a composition but goes on to think about, practise and rehearse the music to be played, so an advocate must do more than merely learn the facts and the law of the brief.

1.4 The function of advocacy is to communicate and to persuade. To communicate you must know you are communicating

WHY
WHAT

you are communicating. To persuade you must know

HOW

to communicate as an advocate.

1.5 Our objective in the Advocacy Course is to help you master at least the basic performance skills relevant to advocacy. Your objective must be to take advantage of the teaching that you will receive from those who can perform the skills themselves.

1.6 Like all performance skills, advocacy is taught by

EXPLANATION

And

It is learnt by

OBOBSERVATION
and
PRACTICE

1.7 Our target is that, by the end of the Course, you should, have achieved, at least, such a minimum level of competence as an advocate that, when you begin to advocate as a barrister

you will not damage your client by making fundamental mistakes.

If between us, you and we can advance you to a stage beyond that minimum level of competence, the work that we will have done together will be even more satisfactory - for you, for your clients, for the administration of justice and for the Bar.

2 THE BASICS

2.1 Contrary to a popular view, there is only one kind of advocacy. In whatever tribunal a barrister appears, the advocacy in which he/she engages is about communication and persuasion. It involves the appropriate deployment of the performance skills. The WHY?, WHAT? and HOW? questions arise every time you stand on your feet, however minor or major the piece of work, whether or not witnesses are involved. What is different is the way in which you will use your skills. That is why the Gray's Inn Course involves Interlocutory and Trial Exercises.

2.2 The Starting Point

2.2.1 All advocacy starts with reading and mastering the papers, followed by researching the relevant law and procedure. . This is only the first part of preparation. The assumption in both the Interlocutory and Trial Exercises is that you will have done that. If you have not, it will soon become apparent and everything else that you do in the Course will be worthless.

2.2.2 The next and crucial stage of preparation is the working out of the

CASE CONCEPT

2.2.3 What does that involve? It involves thinking through what has been learnt by the first stage and

(a) identifying the

OBJECTIVE

that is, the result which the barrister wants to achieve: and

(b) working out the structure of the

ARGUMENT

to be presented at the end of the trial or hearing to achieve that objective.

2.2.4 Obviously, the Case Concept at which a barrister arrives before the trial or hearing commences may have to be reconsidered as the case develops, particularly in witness actions in which the evidence of the witnesses may differ from what appears in their statements/proofs.

2.2.5 Nonetheless, the Case Concept is the key to all that a barrister does during the trial or hearing. It determines the answers to the WHY? and WHAT? questions. Unless what the barrister does is consistent with the Case Concept, his/her advocacy is flawed and mistakes will be made - many of them so fundamental as to fatally damage the client's cause.

2.3 Handling Witnesses

2.3.1 Human observation is fallible. Human memory is even more fallible.

Almost all witnesses have difficulties in recounting their recollections accurately and chronologically in court. Proofs of evidence or witness statements are reconstructions of memory and are affected to some extent by what the witnesses have learnt from the solicitors or investigators seeking the proofs/statements, are those matters which the latter think are important. That is true even in those instances when the witnesses actually write out their own proofs of statements. When the witnesses come to give evidence, a different kind of reconstruction takes place: there are different influences on memory, with the result that there are frequently significant differences between proofs/statements and testimony.

2.3.2 Whether a witness is being examined in chief or cross-examined, the approach of counsel is determined by those factors. The examiner must accommodate to them in order to obtain the evidence which is required: the cross-examiner needs to do the same, whether the purpose of the cross-examination is frankly destructive or more sophisticated.

2.3.3 Whichever function counsel is performing with regard to a witness the essentials are:

STRUCTURE
PERTINENT AND PRECISE QUESTIONS
CLARITY OF EXPRESSION AND DELIVERY

2.4 Examination in Chief

2.4.1 Decisions to call witnesses are determined by the Case Concept. There must be a purpose consistent with it for calling a witness to give evidence. It is that purpose which answers the WHY? question. The witness must be called because evidence which he can give is essential to the client's case. It is likely that nor all the evidence which the witness can give is essential: it is only the essential parts that should be adduced: that is the answer to the WHAT? question.

2.4.2 The method of calling a witness (the answer to the HOW? question) is governed by a basic rule of evidence and procedure:

NO LEADING QUESTIONS IN EXAMINATION IN CHIEF

Not asking leading questions imposes disciplines which have to be learnt and practised from scratch. During the Trial Exercise, you will get help with this discipline through explanation and demonstration. What follows are some simple tips.

2.4.3 First,

THINK OF THE ANSWER

that you want to obtain and then

WORK OUT THE QUESTION(S)

that is/are necessary to obtain the desired answer. Too often, counsel concentrate on the question before really addressing the answer that is wanted. On most occasions, the form of the question will be determined by identifying the desired answer.

2.4.4 Second

BUILD YOUR QUESTIONS ON THE PRECEDING ANSWERS

2.4.5 Example:

The witness is being called to say that he was looking out of the first floor front bedroom window of his house at l0.30am on 2 February when he saw a young boy throw a stone through the window of a toy shop directly across the road, take a toy gun from the window and run off to the right and our of view. A young boy is on trial for the offence and is relying on an alibi.

Having got the witness to give his name, the next answer:- counsel will want the witness to give is his address. Question: "What is your address?"

The next answer he wants is that there is a toy shop directly across the road: the assumption is that there is not a plan (which there should be). This cannot be obtained by a leading question and will take three non- leading questions to obtain it. Thus:

Question: "Are there any buildings on the opposite side of the road from your house?"

Answer: "Yes."

Question: "Is there any of those buildings on the other side of the road which is directly opposite your house?

Answer: "Yes."

Question: "What building is that?"

Answer: "A toy shop."

Note: there were no assumptions in any of those questions and. n me second question had been omitted, the use of "directly opposite" would have contained an assumption. And note, also, the building of question on preceding answer. This technique is sometimes called

PIGGY-BACKING

Next, counsel will want to get the witness to say that he was at home at 10.30am on 2 February. This may pose a problem, in that the witness may not recall the date, although he recalls the incident, so that the date will have to be established by some other means. But, assuming for the purposes of the example that the witness can recall the date, the examination might proceed as follows:

Question: "Where were you on the morning of 2 February?"

Answer: "In my home."

Question: "When you were in your home that morning, did anything happen outside of which you were aware?"

Answer: "Yes."

Question: "How did you become aware of it?"

Answer: "I saw it."

Question: "Where were you in your home when you saw this thing happen?"

Answer: "In my bedroom."

Question: "What were you doing when you saw this thing happen”?

Answer: "I was just looking out of the window. "

Question: "Where in the house is your bedroom?"

Answer: "At the front."

Question: "How many floors are there in your house?"

Answer: "Two."

Question: "On which floor is your bedroom?"

Answer: "On the first floor."

Question: "What time was it that you saw this thing happen from your first floor front bedroom window?"

Answer: "About 10.30am."

Question: "What did you see happen at about 10.30am when you were looking out of that window?"

Answer: "I saw a young boy throw a stone through the window of the jeweller's across the road."

And so on. Again note that there were no leading questions and no assumptions in any of the questions and that each question was aimed at a specific answer and was built on the preceding answer(s).

2.4.6 The value of piggy-backing is threefold: first, the witness is always under

CONTROL

second, the witness can follow the

STRUCTURE

third, a comprehensive and memorable

PICTURE

is being painted for the tribunal receiving the evidence.

2.4.7 There is a great mystique about examination in chief but it is essentially simple. It is a private, somewhat formalised, conversation between counsel and the witness being conducted for a public audience. About the only difference between an ordinary, if inquisitive, private conversation and a good examination in chief is the avoidance of any leading questions, which is what gives it its formality:otherwise, it is an ordinary conversation.

2.5 Cross-examination

2.5.1 There are only two reasons to cross-examine any witness:

UNDERMINING

the reliability of evidence damaging the cross-examiner's client's case; and

SUPPORTING

cross-examiner's client's case by bringing out evidence which is favourable to it. So sometimes, only one reason applies: sometimes both. Whether either applies and. i f so, which is determined by the cross-examiner's Case Concept.

2.5.2 The answers to the ""WHY? and WHAT? questions are contained in the preceding paragraph.

2:5.3 The answer to the HOW? question is founded on the fundamental rule about cross-examination: maintain control. The basic technique is to:

ASK ONLY LEADING QUESTIONS

There will be circumstances in which it will pay the cross-examiner not to ask leading questions but the basic technique must be mastered first.

2.5.4 Go back to the example of examination in chief and assume that the witness has given a detailed account of what he saw and a description of the young boy which could fit the defendant. Assume, also, that the sole purpose of the cross-examination is to undermine the reliability of the observation and, thus, of the description. The cross-examiner knows (because he has been to the locus in quo) that there are large trees in the front garden of the witness's house, that the road is a double-decker bus route and that, from 9.00 am to ll.00 am, it is usual for there to be cars and vans parked on both sides of the road and for shoppers to be walking up and down pavement on the opposite side of the road from the witness's house. The cross-examination might follow these lines:

Question: "There is a front garden to your house, is there not?"

Answer: "Yes."

Question: "And there are two large trees in front of your garden?"

Answer: "Yes."

Question: "Those two trees rise to a height of about 10 feet, do they not?"

Answer: "Yes."

Question: "Those trees are both at the road end of your garden, aren't they?"

Answer: "Yes."

Question: "And they stand about 10' apart at the road end of your garden, don't they?"

Answer: "Yes."

Question: "You have to look through the branches of those trees to see what is happening on the other side of the road, don't you?"

Answer: "Yes."

Note that there were no "I suggest..." or "I put it you..." questions, that every single question was leading, that each was framed to achieve the desired answer and that each built on the answer(s) that had preceded it. The rest of the cross-examination would proceed in the same way, never asking the witness an open question, never asking him for an expression of opinion. At the end, it would be safe to put the essential point, "You are wrong about the description of the young boy," or "You cannot be sure of the description you have given of the young boy, "both of which call for a statement of opinion/belief but with the answer to which even if the witness maintains the accuracy of his description the cross-examiner can live.

2.5.5 Remember the advice given about examination in chief:

First

THINK OF THE ANSWER

that you want to obtain and then

WORK OUT THE QUESTION(S)

that is/are necessary to obtain the desired answer.

2.6 Re-examination

2.6.1 The basic rule about re-examination is

DON'T RE-EXAMINE

So is the second and the third. Re-examination is the most difficult to structure and control. The rule against leading questions applies and witnesses are prone to try to adjust their recollections to meet the thrust of the cross-examination and not to say what they actually recall.

2.6.2 However, sometimes, it is essential to re-examine. The fundamental purpose of re-examination is to clarify an ambiguity which has arisen in the witness's evidence during cross examination. There may be a supplementary purpose, namely to take appropriate advantage of evidence damaging to the cross-examiner's client's case which has emerged during cross examination. Mere repetition of evidence already given is not an acceptable purpose for Re-examination.

2.6.3 Whether it be the fundamental or the supplementary purpose which leads to the re- examination, the problem facing the re-examiner is to contain the re-examination within the purpose parameter - and to do so without leading.

2.6.4 Suppose, in the example which I have been using to illustrate the basic techniques of examination and cross-examination, the witness has said in cross-examination that he was observing the events for some time, unspecified. The re-examiner might think it necessary to clarify for how long the witness was observing, anticipating that he will say that he was watching for about a minute and assuming that the period of time was not obtained from the witness in chief. The re- examination might proceed thus:

Question: "You told the court that you were watching what that young boy was doing for some time. For how long were you watching him?"

Answer: "For about a minute."

Question: "What was he .doing when you first saw him?"

Answer: "He was actually throwing something at the window of the jeweller's shop."

Question: "What was he doing when you last saw him."

Answer: "He was running to my right and out of my sight."

Question: "What sight of him did you have during that perioci of about a miriute between your first and last sight of him?

Answer: "Well, I never lost sight of him."

2.7 General hints

2.7.1 Questions which begin with, "What...", "When...", "How... ", "Where... " are, usually, non-leading. Questions which begin with, "Did... ", "Was...", "Were..." are, usually, leading.

2.7.2 You will have noticed that the second question in the examination in chief example was apparently a "Did... " question. It was not leading question. Why not? The reason is that it contained the "magic" word, "any... " Posed in this form, it did not assume that some event occurred or was observed and it left the witness free to say that nothing had occurred or been observed.

2.7.3 You will sometimes hear a clumsy (and wrong) variation of the "Was any... ", "Did any..." formulation: something along the lines of, "Did you see something happen or not?" If you think about it, such a question is leading because it assumes that something did happen which the witness should have been in a position to see.

2.7.4 Witnesses' reactions to questions are important to examiner and cross-examiner alike. They may tell the counsel whether the witness is doubtful or certain about the answers being given or embarrassed by the answers or unusually ten.se. Too often counsel bury their heads in their notebooks, whether they be on their feet or listening: they miss valuable signals. So

WITNESSES NEED TO BE OBSERVED

2.8 Opening and Closing Speeches

2.8.1 These are two quite different events.

2.8.2 The purpose of an opening speech is to

OUTLINE THE CASE

Outline the case which counsel intends to present. It is not a vehicle for argument. It is the vehicle for

SKETCHING THE PICTURE

and

SETTING THE AGENDA FOR THE TRIAL

2.8.3 A good opening speech will carefully ration detail. First because, absent the evidence from the Witnesses, the detail is difficult for any tribunal to hold in its memory and, second, because too much detail offers too many hostages to fortune: remember the points made in paragraphs 2.3.1, above.

2.8.4 As with everything else in a trial, an opening speech will reflect the Case Concept.

2.8.5 Note mat defence opening speeches in criminal (and defamation) cases may depart, occasionally, from me stated purpose of an opening. There may be reason for indulging in a review of the detail and quality of the prosecution's or plaintiff's evidence but, even when that is so, the review should be brief and a matter of headlines only. If it is any more detailed than that it is liable (a) to give the prosecution/plaintiff too much warning of the way in which the defence will approach the matter in closing and (b) to make the closing speech boringly repetitious.

2.8.6 The purpose of a closing speech is to

ARGUE THE CASE

to state the points on which counsel is relying and to justify those points. . Note the emphasis on argument. There is a real difference between assertion and argument: too many closing speeches are full of assertions and spare of argument and mere assertions do no more than identify the points without justifying them.

2.8.7 It is important to treat the tribunal with respect: the tribunal (lay or professional) will have a recollection of the evidence, particularly of the

evidence which struck it at the time it was given as being important. The good closing speech builds upon that and does not dismiss it as insignificant.

2.8.8 All speeches must have a

STRUCTURE

There is a strong case for telling the tribunal from the outset what that structure is: it enables the tribunal to follow the significance, in the overall context, of the individual points and arguments. There will be occasions when counsel wants to make a closing speech as though it were a (spoken) detective story but such a course requires a good deal of experience for it to be adopted in the right case and to be effective. Certainly, at the beginning of a barrister's life as an advocate, it is better to announce the structure. Apart from anything else, identifying the structure to the tribunal is a very good discipline on the content of the speech.

2.9 Legal Submissions

2.9.1 I intend this heading to be read as applying to submissions in the course of a trial to interlocutory applications and to appellate work.

2.9.2 The purpose and content of a legal submission will be determined by the Case Concept. By now, that cannot come as any surprise.

2.9.3 Moreover, the WHY? , WHAT? and HOW? questions are as relevant to the aspect of advocacy to all others.

2.9.4 WHY make a legal submission? The answer may be that that is the purpose of the hearing itself - and will be if the context is an interlocutory application or an appeal. In the course of a trial, the answer is to be found, first in the Case Concept. The question translates into such as, "Is it necessary to make this submission in order to assist in attaining the ultimate objective? If the answer to the question posed in that way is, "Yes!", then the submission should be made. If the answer is, "No!" then, unless there is some other imperative for making it, the submission should not be made.

2.9.5 WHAT should be the content of a legal submission? This will depend, obviously, on (a) the context and (b) the purpose as defined by the Case Concept. Assuming that the parameters of the submission have been identified by these means, the content should be:

A SHORT STATETMENT OF THE ISSUES
A STATETMENT OF THE DESIRED RESULT
A SUMMARY OF THE POINTS TO BE ARGUED
THE ARGUMENT, POINT BY POINT

2.9.6 HOW should a legal submission be argued? Arguing a legal submission is as much a performance skill as any other aspect of advocacy: communication and persuasion are still the essence of the exercise. The essentials of handling a witness (see paragraph 2.3.3, above) are, mutatis mutandis, the same for making a legal submission:

STRUCTURE
PERTINENT AND PRECISE POINTS
CLARITY OF EXPRESSION AND DELIVERY

The fact that the tribunal is a judge (or a bench of judges) does not, in any way, diminish the importance of making your advocacy as attractive as you can. Judges can be swayed by well-presented and well-founded arguments, just as a lay tribunal can. Whilst it may be necessary to tell the judge what you say the applicable law is, save in those cases where the law is in doubt or you need to argue that some apparently applicable authority should be distinguished, it is generally unnecessary to read great chunks of authorities or Acts / Regulations. Indeed, one of the most persistent failures of advocacy in this field is the dreary reading of judgments or speeches. Even if great chunks have to be read, the obligation on the advocate is to make the reading interesting. Further, it is good advocacy to tell the judge(s) why you are reading the passage before you start to do so and to summarize the point that you are seeking to make from the passage which you are about to read. The increasing use of skeleton arguments is a development to be applauded. Skeletons perform three functions:

(a) they force the advocates to structure the submissions;

(b) they provide the agenda with which the advocates and the court will work;

(c) they lead to more succinct and precise oral arguments.

Whenever counsel can predict that a legal submission will be made, skeletons ought always to be prepared and submitted (to judge and opponent), at the latest, shortly before the submission is to be made. Whenever the order of events and/or the dates are to be relevant to the submission, a chronology should be provided, whenever possible an agreed chronology. A seamless oral statement of a detailed chronology is a waste of everyone's time and works against persuasion.

3 STYLE

3.1 Styles of advocacy vary and the Course is not designed to teach a standard style.

3.2 However, aspects of style, which apply to all advocacy, can - and will - be taught and learnt during the Course.

3.3 There are a number of basic rules which should be observed:

AUDIBILITY
PRESENTATION
MANNERS

3.4 Audibility

3.4.1 First, the obvious. Mumbling, talking down to the papers, these are bad advocacy. Both inhibitor sometimes, prohibit, communicationand, consequently, persuasion.

3.4.2 Even some who speak directly to the tribunal (or witness) remain inaudible. They have not pitched their voices to the circumstances of the courtroom - or to the tribunal. It is a fundamental that, if an advocate is not being heard clearly, the fault is the advocate's and not the audience's. From time to time, you will see even experienced advocates react with irritation if the judge, jury or witness says that the advocate cannot be heard clearly. If the advocate’s irritation is with him/herself, then it is well-directed, even if it were better not shown. Usually, the irritation is manifestly with those who say they cannot hear: then it is ill-

directed as well as bad manners. It is a useful tip that, if you appear in a courtroom with which you are not familiar, you should try out the acoustics before the court sits and try to discover, from the court staff, whether there are problems with audibility in that room - or with the tribunal.

3.4.3 In addressing this problem, I am not suggesting that everything that an advocate says should be said *fortissimo*: far from it. One of the greatest concert pianists of my time, Solomon, could so hold his audience and judge the acoustics that he could be heard clearly all round the Royal Albert Hall when playing a pianissimo passage. I deal with the use of voice in the next section: for now, the point to be made is that responsibility of being heard is the advocate's.

3.5 Presentation

3.5.1 The Human voice is a musical instrument. Everyone can vary tone, pitch, and shade. Monotonous delivery is bad advocacy: it bores the audience and it usually ends up with boring speaker.

3.5.2 It is not only the ability to vary tone, pitch and shade that the advocate needs to master: pace is equally important. Varying pace is a way of holding attention: it is also a valuable tool in emphasizing particular points. Pauses, not always where they might be expected, add to emphasis.

3.5.3 A useful way of mastering these techniques is to deliver shadow speeches into a tape recorder and then to listen to the recording. The effect is sometimes shocking.

3.5.4 Mannerisms fare frequently an irritant to the audience. Fidgeting, for example, distracts, whether it is done with papers, a pen, the gown or just the hands. The use of padding words or phrases is a constant feature of the performances of many advocates. Some judges become wearily enured to it, others do not and juries most certainly do not. The lingua franca of modern advocacy contains masses of these padding phrases, such as: "in my respectful submission"; 'if your Lordship pleases"; "I am much obliged"; and most irritating of all, the constant repetition my Lord", "your Lordship" almost in every sentence. In examining witnesses, you will hear other counsel start almost every question with, "Can/will you tell the court" and respond to every answer with, "Thank you" or "Right". As with fidgeting, you need to school yourself to avoid padding words and phrases and to make your language interesting.

3.5.5 The English language is a remarkable tool for communication and persuasion if properly used. We are a long way from the (supposedly) flowery language which the great advocates of the 1920s and 1930s used: we believe that we live in a world of commonplace language. In a sense we do, but that is no reason for not using the tool of simple language imaginatively. The use of short, precise sentences is a worthwhile skill to master so long as short precise sentences do not become boring in themselves because they lack (colour in language and delivery. The actual words that are used may be a very important weapon in the advocate's locker. The Americans conducted an experiment which well illustrates this: the subject-matter was the distance between two people. The

question was posed in two different ways: "How far was X from Y?" and "How close was X to Y?" The difference in response was something like 28%. And whilst I am on the use of language, here are two other features which you will see when you go around the courts. At one end of the unacceptable, you will hear counsel deliberately (or. sometimes without thought) use legal professional jargon in addressing witnesses or juries: such as "inter alia" or "locus in quo" or "mutatis mutandis" (!) or "heretofore - or the like. The only effect of using that kind of language is to inhibit communication. At the other end of the unacceptable, you will hear counsel using slang, not for immediate effect, but because they think it will ingratiate them with the witness or jury or simply, because they do not know any better. It is crucial to good advocacy that the advocate commands the

RESPECT
and
TRUST

of witnesses, juries and judges. The first two are liable to regard the advocate as patronizing them if slang is the apparently main feature of the advocate's language: the judges regard it, rightly, as sloppy and unimpressive.

3.5.6 APPEARANCE MATTERS

The advocate who turns up in court looking a mess, untidy, with dirty shirts, collars, bands lacks self-respect and will not command the respect of the witness or the tribunal.

3.5.7 BODY LANGUAGE MATTERS

as well. The advocate who stands like a stuffed dummy will have the impact of a stuffed dummy. The advocate who stands like a coiled predator, ready to pounce on its prey, will hardly create an ambience of calm and sympathy: it may be necessary from time to time to come over as a coiled predator; but if it is not, do not do it. Similarly, the advocate who presents him/herself as tired or laid-back or uninterested will produce the corresponding impact on the audience: unless he or she means to achieve this impact, the self-presentation is counter-productive.

3.5.8 Gestures need to be used for appropriate impact and only appropriate impact. The random use of gestures is, at the least, confusing for the audience: at worst, it is a positive irritant, the constant use of gestures, even more so.

3.6 MANNERS

3.6.1 It should not need to be said that

GOOD MANNERS

Are the sine qua non of good advocacy but, unfortunately, it has to be. There are far too many complaints of rudeness and arrogance to professional and lay tribunals, particularly by the young Bar.

3.6.2 Turning up late in court, assuming that the court will forgive your unannounced absence because you have something else to do, treating witnesses rudely, displaying anger or irritation or contempt for witnesses, tribunals and opponents:

all these are frequent features of advocacy in many of our courts and they are inexcusable, as well as being symptoms of bad advocacy.

3.6.3 Hands are a problem: where to put them. Do not put them in your pockets when advocating, it is bad manners. Try not to think about them and then they will not get in the way.

4 SOME RANDOM POINTS

4.1 *Management of Papers*

Papers are a nuisance in court: life would be much easier if there were some other way of having the essential material available to the advocate when advocating. The trouble is that they are essential. Because they are essential, they must be organized so that what is needed at any time is easily and efficiently available. That may mean nothing more than putting them in appropriate files: it may bean more, like flagging the required pages in clear way: it may mean even more, depending on the volume of paper in the case. Whichever, though must be given to their organization to facilitate the function of advocacy.

4.2 *Notes*

4.2.1 Notes will (almost always) be made in mastering the brief. They are (equally almost always) useless as an aid to advocacy because they are too derailed or too messy or both. If notes are to be used as an aid to the function of advocacy, then they need to be created with that objective in mind. Ease of reading and relevance are the keys. Making notes for court is a particular skill and has to be worked upon and perfected. Making notes in court, during the trial or hearing, demands even more carefully developed skills. It is one thing to sit behind a leader (or Pupil Master) and to take notes for him/her: it is something quite different to make notes for oneself, whether of an opponent's examination or cross-examination or speech or one's own examination or cross-examination. Indeed, apart from ticking off headlines as one deals with the topic, it seems almost impossible to make a detailed note of evidence when one is on one's feet: it is almost impossible, at least to do so without interrupting the flow of examination or cross-examination. There is no easy solution to this problem: each of us has to work out our own solution. Sometimes, you can rely upon your Instructing Solicitor (or his representative) to keep a note for you but, unfortunately, you will find yourself frequently unsupported in court when you start. The solution that most of us have arrived at is to train our memories to carry, at least, the salient points of the evidence as given in our memories and to make a rapid note of those salient points as soon as we sit down, checking the notes whenever possible, with some other source in court, including our opponent.

4.2.2 When making a submission or a speech

DO NOT READ

It is both lazy and boring and it inhibits communication and persuasion. Plan your submission or speech beforehand and, if you need notes, produce them as

headlines which will function as triggers to structure and content. If you have touse notes for a submission or speech or for handling witnesses, do not be bashful about doing so. Let the audience see what you are doing: you do not want themwondering what you are doing and being distracted by their curiosity.

4.3 Addressing Witnesses

There is a tendency amongst young barristers to be unctuous or "matey" withwitnesses. Avoid it. There is no need to say, "Good morning Mr. …" or thesimilar when standing to examine or cross-examine: indeed, it probably works against establishing the correct relationship with the witnesses. They know thatthey have come to a formal environment and frequently do not know how to react if greeted in that way, it embarrasses them and then you have to work hard toovercome that embarrassment. With a female witness, try to find out whether sheprefers to be addressed as "Mrs", "Miss" or "Ms" and then use the preferredmethod of address. If a witness has a title or rank, use that as the method ofaddress. Unless you are dealing with a child, do not address the witness by firstname: you are not friends, not even acquaintances and using first names is apresumption on your part. Never argue with a witness and, unless you want it tohappen for effect, do not encourage the witness to argue with you.

4.4 Addressing Tribunal

Some judges are "My Lord", some are "My Lady", some are "Your Honour", some are "Sir" or "Madam". Find out which is the correct method of address and then use it and only it and, preferably, only once. Remember that the judge is the representative of the Sovereign: you bow to the judge when he/she comes in to court and he/she bows back, not the other way round.

4.5 Getting things wrong

If you do get something wrong - and you will - be prepared to say so and with grace. There is nothing more disarming than a frank apology and correction.

4.6 The court staff

Every experienced advocate knows that it pays to get on with the court staff. You learn more about the foibles (and worse) of your tribunal from the court usherthan from any other source. If you are appearing at a Magistrates' Court, youwill have a far easier life if you make contact with and cultivate the gaoler and the warrant officer.

4.7 Your opponent

Advocacy is a stressful skill. There is no point in making it more stressful by meeting your opponent as if he/she is a personal enemy. Indeed, you probably make your client’s cause more difficult to advance if you do.

5 CONCLUSION

5.1 This Paper is properly entitled Guidelines. It has not been drafted as an absolute Prescription, although some of the points are as near absolutes as one can have in advocacy.

5.2 The approach underlying it is set out clearly in paragraphs 1.3 and 1.4: advocacy is a

Nowhere in the Paper have Italked about the art of advocacy". There is art in advocacy but it is a developed art and, in any event, is only a small part of good advocacy. The key to all good advocacy is the mastering of the techniques which make up a performance skill. Iencourage you to read and retain the lessons contained in the Paper in that light.

Michael Hill QC

February 1994.

Possible Headline Topics

EXAMINATION IN CHIEF

Forms of Questions

1. No leading questions: open but focused. Use of who, what, when, where, why and how, describe, explain, tell...questions.
2. Short, simple questions: One point at a time.
3. Think of desired answer: formulate the questions
4. Use of language: appropriate to witness' understanding.
5. Establish facts not conclusions or opinions.

Sequence of Questions/Structure

1. Help witness to tell the story: focus on witness.
2. Help tribunal to follow account.
3. Use of exhibits, plans, photos etc.
4. Identify issues before asking questions- relevance.
5. Listen to answers.
6. Link question to content of previous answer: "piggy-backing"

Control of Witness

1. Know your material.
2. Form of questions- short and focused (see above).
3. Demonstrate clear direction.
4. Use of voice/ eye contact.
5. Transition questions/ headings to highlight new topics.

General matters

1. Highlighting of important issues: Case Analysis.
2. Uses of notes to assist not distract.
3. Including judge/ jury.
4. Variations in pace/ voice.
5. Timing/ pauses.
6. Use of Language – words that communicate and persuade.
7. Not interrupting witness.

ART OF INTERROGATION

B.K. Somasekhara (*ed.*) *Aiyar & Aiyar's The Principles and Precedents of the Art of Cross-Examination* (Tenth Edition, 2004), pp. 145-182

1. FORMS OF INTERROGATION

Strictly speaking, interrogation is not cross-examination, but cross-examination is a form of interrogation. Literally, interrogation is a process of questioning of or enquiring a person closely, thoroughly or formally.

'Interrogatory' is the questioning of or suggestive enquiring, i.e., a formal set of questioning in law, formally put to an accused person. Grammatically, as an adjective or pronoun it is the interrogative asking of a question. It is put in a wider capsule to mean question, query, inquiry, demand, probe, challenge, controvert, debate, probing, leading, question, cross question, etc. Academically, 'interrogation' includes all forms of questioning to elicit information for the purpose of drawing conclusions to know the truth. Legally, interrogation is not cross-examination. It is not defined in law, but is understood as a part of investigation which includes all the proceedings under the Code of Criminal Procedure (or criminal procedural law) for the collection of evidence, conducted by a police officer or by any person (other than a magistrate) who is authorized by a magistrate in this behalf.

'Trial' is not defined but used in law very frequently, for instance-trial before a court of sessions (Ch. XVIII and Ss. 225 to 237), trial of warrant cases (Ch. XIX, Ss. 238 to 250), trial of summons cases (Ch. XX, Ss. 251 to 259) and summary trials (Ch. XXI, Ss. 260 to 265 of Cr PC). They are all part of judicial proceedings and are included within its definition and include any proceeding in the course of which evidence is or may be legally taken on oath [s 2(i) of Cr PC]. The Indian Evidence Act while dealing with implications of investigations under Ss. 24 to 30 and the effect of a statement to police officers during investigations, distinguished it from evidence given in court (s 3 of the Indian Evidence Act) and examination of witnesses by the court and parties and advocates. The separate Ch. IV is provided in the Indian Evidence Act in this regard and cross-examination is covered by s 137. The totality of all this keeps 'interrogation' beyond the meaning of cross-examination. Categorically stated in the true sense, 'interrogation' is a conversation between the interrogator and the suspect who is accused of involvement in a particular incident or group of incidents. Many companies use the word interview as a substitute for interrogation. For the sake of clarity in this text, interview will be used to indicate a non-accusatory conversation while interrogation will represent the change to an accusatory tone.

Without meaning an investigation into the expression and using it in the sense of questioning during cross-examination in different ways and for different le.g.al results, several components of interrogation could be:

(i) Leading questions.
(ii) Misleading questions.
(iii) Direct questions.

(iv) Indirect questions.
(v) Fishing questions.
(vi) Questions testing credibility.
(vii) Questions that divert the attention.
(viii) Digressive questions.
(ix) Progressive and cumulative questions.
(x) Retrogressive questions.
(xi) Developing questions.
(xii) Conducive questions.
(xiii) Searching questions.
(xiv) Suggestive questions.
(xv) Cross-interrogation.
(xvi) Intimidating questions.
(xvii) Incriminating questions.

2. MEANING OF LEADING QUESTIONS

'A question' says Bentham, is a leading one, when it indicates to the witness the real or supposed fact which the examiner expects and desires to have confirmed by the answer. These include questions like; Is your name not so and so? Do you reside in such a place? Are you not in the service of such and such a person? Have you not lived with him for so many years? It is clear chat under this form every sort of information may be conveyed to the witness in disguise. It may be used to prepare him to give the desired answers to the questions about to be put to him; the examiner while he pretends ignorance and is asking for information is in reality giving instead of receiving it. It has often been declared that a question is objectionable as a leading one which embodies a material fact and admits of an answer by a simple affirmative or negative. While it is true that a question which may be answered by 'Yes' or 'No' is generally leading, there may be such questions which in no way suggest the answer desired and to which there is no real objection. On the other hand, leading questions are by no means limited to those which may be answered by 'Yes' or 'No'. A question proposed to a witness in the form whether or not, that is, in the alternative, is not necessarily leading. However, it may be so when proposed in that form, if it is so framed as to suggest to the witness the answer desired. It would answer no practical purpose to cite the numerous decisions which determine whether particular questions are leading or not, as each case must be determined with reference to its own particular circumstances and to the definition continued in this section, namely, that a question is leading which suggests to the witness the answer which he is to make, or which puts into his mouth words, which he is to echo back. 'Leading' is a relative, not an absolute term. If a question merely suggests a subject which suggests an answer or a specific thing, it is not leading. A question is proper when it merely directs the attention of the subject in respect of which he is questioned. It follows from the broad and flexible character of the controlling principle that its application is to be left to the discretion of the trial court. Evidence which is improperly obtained by leading questions without first declaring the witness hostile should not be considered. It was held by the Kerala High Court in *State of Kerala v Vijayan alias Rajan*, that leading questions relating to undisputed matters or introductory matters or matters already proved are beyond

the purview of the discretionary powers of the court, vide second para of s 142 of the Indian Evidence Act.

Almost invariably, the examiner will know in a general way what his witness is going to say since the witness will earlier have signed a statement, called his 'proof' of what he can depose to, and it will be on the basis of this proof that the counsel will have decided to call him. Nevertheless, the witness must tell his own story in court. This means that he must not be asked leading questions. A leading question is one which suggests the answer. Similarly, one must not ask a question such, 'Did you see John Smith at the scene of the crime?' but rather 'Did you see anyone?' and 'Whom did you see?' A question which admits of a simple 'Yes' or 'No' as an answer is usually a leading one, but not always. It is seriously in dispute. Thus, 'Did you see anyone?' is usually all right, because it is not usually in dispute whether the witness saw anyone or not, but the-question 'Did you see John Smith?' is usually objectionable.

A leading question is one which puts words into the witness's mouth, or suggests directly the answer which the examiner expects of him. It is, however, permissible to lead the witness on the following matters:

a. On preliminary matters, preparatory to questions about the facts in issue. It is usual, for example to lead the witness's name and address.
b. On any matters which are not in dispute.
c. Where a witness is called to deal with some fact already in evidence, he may be asked directly about that fact.
d. Where leave has been granted to treat the witness as hostile.
e. By agreement between all concerned.

It is common and good practice for an advocate to indicate to his opponent over what area the opponent may lead a given witness without objection.

Any question suggesting the answer which the person putting wishes or expects to receive, is called a leading question. It is a question framed in such a manner that it throws a hint as to or suggests directly or indirectly, the answer which the examiner desires to elicit from the witness, e.g., when a witness called to testify to an alleged assault on A by B is asked 'Did you see B take a stick and strike A?' or 'Did you not hear" him say this?' Leading questions, says Taylor, are questions which suggest to the witness the answer desired or which, embodying a material fact, admit of a conclusive answer by a simple negative or affirmative.

Questions may legitimately suggest to the witness, the topic of the answers; they may be necessary for this purpose where the witness is not aware of the next answering topic to be testified about, or where he is aware of it but its terms remain dormant in his memory until by the emotion of some detail the associated details are revived and independently remembered. Questions on the other hand, which so suggest the specific tenor of the reply as desired by counsel that such a reply is likely to be given irrespective of an actual memory, are illegitimate. The following passages indicate the scope of the rule:

> A question is leading which instructs the witness how to answer on material points, or puts into his mouth words to be echoed back, as was here done, or plainly suggests the answer which the party wishes to get from him.

Putting leading questions by the magistrate while recording a confession in the form of questions and answers virtually cross-examining the accused was deprecated and excluded from the evidence.

As a general rule, leading questions must not be asked during the examination-in-chief if objected to by the adverse parry except with the permission of the court.

The rule has a rationale. A witness has a natural or sometimes unconscious bias in favor of the parry calling and he will therefore be too ready to say 'Yes' or 'No', as soon as he realizes from the question that the one or the other answer is desired from him. A hint conveyed by the interrogator as to the sort of answer he would like, would be welcome to a witness who did not know what exactly to say, and in the case of collusion between the witness and the interrogator, the scope of mischief is infinite.

Another reason is that the party calling a witness has an advantage over his adversary, in knowing beforehand what the witness will prove, or at least is 'expected to prove; and that consequently, if he were allowed to lead, he might interrogate in such a manner as to extract only so much of the knowledge of the witness as would be favorable to his side, or even put a false gloss upon the whole. The rule therefore is that on material points. A party will not be allowed to lead his own witnesses but leading questions are allowed during cross-examination (s 143 of the Indian Evidence Act). To an honest or intelligent witness who has come to speak the truth, a leading question may make no difference in his reply; but a witness who is dull or headless or confused, or who has no recollection or who is seeking a hint as to what reply should be given, it is apt to give a reply in the manner suggested, without considering the question properly. When a question is ruled out on the ground that it is suggestive and improper, the same may be allowed to be put in another form but where the mischief created by putting the leading question is irretrievable, there can be no complaint if the court disallows the question even in another shape.

A fair trial and procedural justice is ensured under Ss. 141 to 143 of the Indian Evidence Act which can be read into a constitutional protection of the right to liberty under art 21 of the Constitution. It is a procedure established by law within the meaning of art 21 of the Constitution of India.

The rule is exceptionable, viz.-

a) it cannot be allowed if objected to by the adverse parry,
b) unless permitted by the court, and
c) it is allowed if leading questions are introductory or undisputed or which have already been sufficiently proved.

Though no case for general permission to cross-examination is made out, it may be necessary on particular topics to allow leading questions to be put in order to give the court a clear picture of the reaction of the witness to these questions. The section says, 'If not objected to

by the adverse party'. In practice leading questions are often allowed to pass without objection, sometimes by express and sometimes by tacit consent. This matter occurs where the questions relate to matters which, though strictly speaking in issue, the examiner is aware of, are not meant to object. On the other hand, however, every unfounded objection is constantly taken on this ground. If the objection is not taken at the time, the answer will have been taken down in the judge's notes, and it will be too late to object afterwards on the score of having been elicited by a leading question. Sometimes, the judge himself will interfere to prevent leading questions from being put; but it is the duty of the opposing counsel to take the objection, and except in cases where, as above-mentioned, the objection is advisedly not taken, it is only through want of practical skill that the omission occurs. At the same time it is to be observed that the evidence is elicited by a series of leading questions unobjected to, the effect of evidence so obtained is very much weakened. It is advisable, therefore (except where permissible) not to put too many questions, whether it be likely that objection be taken to them or not. The whole subject of leading questions is left entirely to the discretion of the court. The latter part of the section permits putting questions on introductory or undisputed matters. 'The second part of s 142 goes further than English law and requires the judge to give permission in certain cases.'

3. LEADING QUESTIONS - EXCEPTION

As, however, the rule is merely intended to prevent the examination from being conducted unfairly, the rule is subject to three specific exceptions mentioned in s 142 and in s 154 of the Indian Evidence Act. These exceptions are:

a) Introductory and undisputed or sufficiently established matter.
b) Adverse witness.
c) Leading questions may be asked with the permission of the court at the discretion of the judge.

(i) INTRODUCTORY AND UNDISPUTED OR SUFFICIENTLY ESTABLISHED MATTER

The rule must be enforced in a reasonable sense, and must, therefore, not be applied to that part of the examination which is introductory to that which is material. If indeed it were not allowed to approach the point at issue by leading questions, examinations would be most inconveniently protracted. To abridge the proceedings and bring the witness as soon as possible to the material point on which he is to speak, the examiner may lead him on to that point and may recapitulate to him the acknowledged facts of the case which have already been established.

(ii) ADVERSE WITNESS

A witness who proves to be adverse to the party calling him may in the discretion of the court be led, or rather cross-examined.

(iii) LEADING QUESTIONS MAY BE ASKED WITH PERMISSION OF COURT - DISCRETION OF JUDGE

The court has a wide discretion with reference to this, which is not controllable by the court of appeal, and the judge will always relax the rule whenever he considers it necessary in the interest of justice and it is always relaxed in the following cases:

(a) Identification

For this purpose a witness may be directed to look at a particular person and say whether he is the man. Indeed, whenever from the nature of the case the mind of the witness cannot be directed to the subject of enquiry without a particular specification of it, questions may be put in a leading form.36 Much, however, depends upon the circumstances of each particular case; and it is often advisable not to lead even where permissible. Thus, in a criminal trial, where the question turns to identity, although it would be perfectly regular to point to the accused and ask a witness if that is the person to whom his evidence relates, yet if the witness can unassisted single out the accused, his testimony will have more weight.

(b) Contradiction

Where one witness is called to contradict another as to expressions used by the latter, but which he denies having used, he may be asked directly:

'Did the other witness use such and such expressions?' The authorities are, however, stated to be not quite agreed as to the reason of this exception; and some contend that the memory of the second witness ought first to be exhausted by his being asked what the other said on the occasion in question. Similarly, a leading question may be put when it is necessary to contradict a witness on the other side as to the contents of a paper which has been destroyed. The case last-cited was an action on a policy of insurance of goods on board a ship. The defence was that the goods were not lost, and that the plaintiff himself had written a letter to his son stating that he had disposed of all his goods at a profit of 30 per cent. The son was called and cross-examined as to the contents of the letter. He swore that it was lost, but that it contained no intimation of the kind supposed and only said that the plaintiff might have disposed of his goods at a greater profit as he had been offered 5s for a pair of cotton stockings he then wore. To contradict his testimony, several witnesses were produced to depose that the letter had been read when received in London. One of the witnesses, having stated all that he recollected of it, was asked 'if it contained anything about the plaintiff having been offered 5s, for a pair of cotton stockings.' This being objected to as a leading question, Lord Ellenborough ruled that after exhausting the witness's memory as to the contents of the letter, he might be asked if it contained a particular passage recited to him which has been sworn to on the other side; otherwise it would be impossible ever to come to a direct contradiction.

(c) Defective memory

The rule will be relaxed where the inability of a witness to answer questions put in the regular way obviously arises from defective memory. It is common practice, when a witness cannot recollect a circumstance, to refresh his recollection by a leading question, after the court is satisfied that his memory has been exhausted by questions framed in the ordinary manner.

Similarly when the witness state that he could not remember the names of the members of a firm so as to repeat them without suggestion, but thought that he might recognise them if they are read to him, this was allowed to be done. A question is not objectionable which merely directs the attention of the witness to a particular topic without suggesting the answer required. Thus, to prove a slander imputing that 'A was bankrupt whose name was in the bankruptcy list and would appear in the next Gazette', a witness who only proved the first two expressions was allowed to be asked, 'Was anything said about the Gazette?' Upon a similar principle the court will sometimes allow a pointed or leading question to be put to a witness of tender years whose attention cannot otherwise be called to the matter under investigation.

(d) Complicated matters

The rule will also be relaxed where the inability of a witness to answer questions put in the regular way arises from the complicated nature of the matter as to which he is interrogated.

The above instances are mentioned as those in which the rule is generally and commonly relaxed, but it will be remembered that the court has a wide discretion to allow leading questions, not only in these but in other cases in which justice or convenience requires that they should be put. As already observed, unfounded objections are constantly taken on this ground. In the under mentioned case, in which it was held that prima facie evidence of a partnership having been given, the declaration of one partner is evidence against another partner; a witness, called to prove that A and B were partners was asked whether A had interfered in the business of B and it was held not to be a leading question. Lord Ellenborough observed as follows:

> I wish that objections to questions as leading might be a little better considered before they are made. It is necessary to a certain extent to lead the mind of the witness to the subject of inquiry. In general no objections are more frivolous than those which are made to questions as leading ones.

As soon as the witness has been conducted to the material portion of his examination, as soon as the time and place of the scene of action has been fixed, it is generally the easi.e.st course to desire the witness to give his own account of the matter, making him omit, as he goes along, an account of what he had heard from others, which he always supposes to be quite as material as that which he himself has seen. If a vulgar, ignorant witness is not allowed to tell his story in his own way, he becomes embarrassed and confused, and mixes up distinct branches of his testimony. He always takes it for granted that the court and the jury know as much of the matter as he himself does, because it has been the common topic of conversation in his own neighborhood; and, therefore, his attention cannot easily be drawn to answer particular questions, without putting them in the most direct form. It is difficult, therefore, to extract the important parts of his evidence piecemeal. However, if his attention is first drawn to the transaction by asking him when and where it happened, and he is told to describe it from the beginning, he will generally proceed in his own way to detail all the facts in the order of time. Similarly, Alison says:

> It is often a convenient way of examining to ask a witness whether such a thing was said or done, because a thing mentioned aids his recollection, and brings him to that state of proceedings on which it is desired that he should dilate. However, this is not always fair; and when any subject is approached on which his evidence is expected to be really important, he proper course is to ask him what was done, or what was said, or to tell his own story. In this way, also if the witness is at all intelligent, a more consistent and intelligible statement will generally be got than by putting separate questions, for the witnesses generally think over the subject on which they are to be examined in criminal cases so often, or they have narrated them so frequently to others, that they go on much more fluently and distinctly, when allowed to follow the current of their own ideas, than when they are at every moment interrupted or diverted by the examining counsel.

4. MISLEADING QUESTIONS

Misleading questions are those improper questions which are in reality sever questions combined or in which some assumption is covertly made which the questioner would not dare to put openly or such questions as unfair and perplexing.

Questions which assume facts to have been proved which have not been proved, or that particular answers have been given contrary to the fact are not allowed as a misleading question. A question which assumes a fact that may be in controversy is leading, when put on direct examination, because it affords the willing witness a suggestion of a fact which he might otherwise not have stated to the same effect. Conversely, such a question may become improper on cross-examination, because it may by implication put into the mouth of an unwilling witness, a statement of fact which he never intended to make and thus incorrectly attribute to his testimony, which is not his.

Another inveterate abuse is the grouping of several questions admitting of different answers into one long composite question and a demand of a categorical answer-'Yes' or 'No'. Even a cool witness is puzzled and misled. Such composite or ensnaring questions should never be allowed. The remedy for the trick as proposed by Aristotle is that 'several questions should be at once decomposed into their several parts. Only a single question admits of a single answer'. The following anecdote illustrates the evil:

> Sir Frank Lockwood was once engaged in a case in which Sir Charles Russell (the late Chief Justice of England) was the opposing counsel. Sir Charles was trying to browbeat a witness into giving a direct answer, 'Yes' or 'No'. You can answer any question Yes or No', declared Sir Charles. 'Oh, can you?' retorted Lockwood: 'May I ask if you have left off beating your wife?' To such a composite question: 'Did you throw the born child into the well as the result of which he died of drowning?' - a direct answer for which 'Yes' or 'No' is impossible. From the accused girl's answer 'Yes', it cannot be inferred that she admitted that the child was born alive.

Every witness must be allowed fair play. It is unworthy of an advocate to attempt to corner a witness by putting a question which involves an assumption that he or another witness had

made a statement that has not been made. Very often, witnesses are puzzled by questions in which assumptions of facts are covertly made, lest the trick be detected when questions are direct. Under this head come questions like these: 'When did you cease beating your wife?', 'When did you cease to be an enemy of the plaintiff?', 'When did you stop communicating with him?', 'Do you go there still?', 'Does he bear ill feeling even now?', 'When did you sell your interest in the claim?', 'When did you retire from the conspiracy?' The authors of Port Royal Logic give this example:

> In the same way, if, knowing probity of a judge, any' one should seek me if he sold justice still, I could not reply simply by saying 'no', since the 'no' would signify that he did not sell it now, but leave to be inferred, at the same time, that I allowed that he had formally sold it.

In the context of justice and fair play and a constitutional safeguard under art 21 of the Constitution of India which is inherent in the concept of reasonableness, misleading questions are prohibited.

The rule is equally applicable during the examination-in-chief, cross-examination and re-examination and to all persons including the counsel and authorities in all sorts of proceedings. Whether objected or not to such questions, it is the duty of the court to disallow misleading and improper questions. The sessions court allowing such .questions and not being more watchful was deprecated by the Supreme Court.

In an unfair misleading question and the court's duty to illustrate, the question put to a witness Rani Bala, in all probability, was, 'Can you deny that Ram Prasad was beaten for an illicit connection with you?' She is reported to have said, 'I cannot say if Ram Prasad was beaten for illicit connection with me.' It cannot be inferred from this answer that she admitted having an illicit connection with Ram Prasad. In such cases the court should take down the question in cross-examination and then the answer as enjoined in O VXIII, r 10 of the Code of Civil Procedure.

Questions may be termed direct or indirect only in relation to the particular fact to be elicited. A question may be called direct which, if answered, will either confirm or disprove the fact interrogated; on the other hand, it may be styled indirectly when its answer will neither confirm nor prove the fact directly, but will tend to establish it only inferentially, either by itself or when taken along with other facts.

In direct questioning it is necessary to put the questions in such a form as to answer which either in the affirmative or negative, may either suggest the fact aimed at only inferentially or tend to cast a partial reflection upon it, without doing any harm to the cause.

A cross-examiner in general ought not to ask questions, the answers to which, if unfavorable, will be conclusive against him.

The plain direct questions which best elicit the truth from the witness desiro.us of telling the whole truth and nothing but the truth, would, to a witness who desires to suppress some of the truth, operate as a signal for silence. The surest course is, by almost imperceptible degrees, to conduct him to the end. Elicit one small fact which is remotely connected with the main

object of your enquiry. He may not see the chain of connection, and will answer that question freely, or deem it not worth evading. A very small admission usually requires another to confirm or explain it. Having said so much, the witness cannot stop there; he must go on in self-defense, and thus by judicious approach, you bring him to the main point. Even if then he should turn upon you and say no more, you have done enough to satisfy the judge or jury that his silence is as significant as would have been his confession.

5. DIRECT AND INDIRECT QUESTIONS

There are several divisions of evidence which, although in some degree are arbitrary, will be found useful to bear in mind. In the first place, evidence is either direct or indirect accordingly as the principle fact follows from the evidentiary-the *factum probandum* from the *factum probans*- immediately or by inference. In jurisprudence, however, direct evidence is commonly used in a secondary sense, viz. as limited to cases where the principle fact, or *factum probandum*, is attested directly by witnesses, things or documents.

Indirect evidence known in forensic procedure by the name of circumstantial evidence, is either conclusive or presumptive. It is conclusive, where the connection between the principle and evidentiary facts i.e. the *factum probandum,* and the *factum probans* are a necessary consequence of the laws of nature. It is presumptive, where it is only on a greater or lesser degree of probability.

Direct evidence is to be contrasted with 'indirect' evidence in the sense of either hearsay (i.e., that which the witness heard from another) or circumstantial evidence (i.e., evidence from which inferences may be drawn). Indirect evidence is as much evidence as direct evidence. Direct evidence may, however, have more or less weight according to the judgment of the tribunal on fact. Its only virtue may be that there is only an area of possible doubt about it, namely, the truth and accuracy of the witness; whereas, in the case of indirect evidence the problems of judging the weight of hearsay or deciding on proper inference arise.

Direct evidence is contrasted with circumstantial evidence. Direct evidence consists either of the testimony of a witness who perceived the act to be proved or the production of a document or thing which constitutes the fact to be proved. Circumstantial evidence of a fact to be proved is the testimony of a witness who perceived the fact to be proved, by another fact from which the existence or non-existence of the fact can be deduced, or the production of a document or thing from which the fact to be proved can be deduced. The fact to be proved can be either a fact in issue or a fact relevant to the issue. Suppose a fact in issue is whether A used a certain knife. A fact relevant to this fact in issue is whether A had the knife in his possession, for if we find he had it in his possession, we may go on and find he used it. If T says he saw the knife in A's hand, he is giving direct evidence of a relevant fact (possession), but only circumstantial evidence of A's using the knife. If he says he saw the knife in A's possession it is a relevant fact and circumstantial evidence of A's using the knife is a fact in issue. Of course, all witnesses necessarily give direct evidence of whatever it was they perceived, and here Tis giving direct evidence of the possession of the knife, from which we may deduce A's possession of it, and the A's use of it.

Circumstantial evidence is also used, not in contrast to direct, i.e., not in describing the quality of the testimony given, but as a description of the fact proved, if they are not directly in issue, but only logically related to a fact in issue. Relevant facts constitute circumstantial evidence, e.g., 'Possession of recently stolen goods is circumstantial evidence of guilty knowledge'.

Direct and indirect evidence are sometimes equated with hearsay and non-hearsay evidence. The terminology is generally employed to distinguish these uses of prior statements even if confusing. Traditionally, prior statement tended as relevant for a purpose other than that of proving the truth of a fact stated have been described as 'direct evidence, and for this purpose 'direct' means only the opposite of 'circumstantial'. Admissible evidence of prior statements may either be 'direct' (non-circumstantial} or circumstantial evidence of a fact. For example, the making of a statement may be 'direct' evidence that the statement was in fact made, and may be admissible to prove both facts. To describe evidence as 'direct' in the sense of not being simply to describe the statement which are not hearsay as 'non-hearsay', adapting slightly the helpful usage of the American Federal Rules of Evidence.

The term 'direct evidence' has a second meaning in the usage of many writers. The alternative term 'percipient evidence' not only avoids any possibility of confusion, but it is also more appropriate to describe the opposite of hearsay evidence. Hearsay is a complex subject, occupying in its own right chapters of this book, and only a brief distinction can be made here. Percipient evidence is evidence of facts which a witness personally perceives using any of his senses. Hearsay evidence is given when a witness recounts a statement made (orally, in a document or otherwise) by another person and where the proponent of the evidence asserts that what the person, who made the statement said, was true. Thus, the evidence of W that he saw D rob the bank is percipient evidence, whereas the evidence of H (who was not present at the scene of the robbery) that W told H that D robbed the bank is hearsay, if tendered to prove that D robbed the bank. Hearsay is inadmissible unless it falls under an exception recognized by law.

6. FISHING QUESTIONS

Point blank questions by the cross-examiner intended to bring out some answer useful in any manner and for any purpose are fishing questions. They are tricky questions, the answers to which may provide material to develop theories during cross-examination. They may be prejudicial to the party or witness or the case, and even to the fairness in the proceeding and the 'result. Sometimes, fishing questions are worse than misleading questions which can be controlled by the courts.

A fishing question has no legal definition or meaning except as an art and a part of the interrogatory form of cross-examination. If we see fishing Concise Oxford Dictionary) as a noun is the activity of catching the fish for food or sport, and as a fishing line (Concise Oxford Dictionary), a long thread of silk with a boiled hook attached to a fishing rod, a fishing question could be a question during cross-examination in the hands of the skilled cross-examiner (killer fisher person) with a tricky form of relevancy (as per the law of evidence) to act as a bait to get attracted and caught by obliging an answer upon which a

theory can be developed to destroy the testimony or to strengthen the weak theories of the cross-examiner.

Like misleading questions are to be controlled or prevented by the courts akin to or more misleading (as a fishy-dubious question) fishing questions should be allowed as a matter of duty. Whether objected to or not the court shall record the fishing question and allow or disallow with a ruling supported by reasons. The judge can put questions under s 138 of the Indian Evidence Act or use his own power to control such cross-examination. The courts have full power to prevent an abuse of the right to cross-examine in any manner appropriate to the circumstance of the case. The cross-examiner can be kept within proper bounds in the examination and cross-examination of the witness and conduct their cases with due regard to their responsibility to the public and the court.

7. QUESTIONS TESTING CREDIT

Where interrogation is carried out only to test the memory or credit of the witness, it is a cross-examination testing credit. The phrase to discredit a witness does not necessarily convey the notion of discrediting by making him appear to be perjured. What is meant is that the cross-examiner must by that method, attempt to show that the witness' evidence is not to be implicitly believed; that it is mistaken in the whole or a part of it.

Cox says:

> By adopting this manner of dealing, you not only act in strict accordance with justice, truth and charity, but you are far more likely to attain your object that by charging willful falsehood and perjury; by which course if you fail to impress the jury, you endanger your cause. It does not infrequently happen that a charge of perjury against the witness on the other side induces the jury to make the trial a question of the honour of the witnesses instead of the issue on the record'. They say, 'If we find for the defendant, after what had been said by this counsel against the plaintiff's witnesses, we shall be confirming his assertion that they are perjured, which we do not beli.e.ve' - and so to save the characters of their neighbours whom they beli.e.ve to be unjustly impugned they give a verdict against the assailant. Such a result of browbeating and of imputation, perjury and falsehood is by no means rare, and while it affords another instance of the truth of the remark we have already made more than once, that honesty is wisdom as well as virtue, it should be treasured in your wise memory as a warning against a style of cross-examination once popular, but now daily falling more and more into disrepute and which is really as bad in policy as it is discreditable in practice. In truth without imputing perjury you will find an ample field for trying the testimony of a witness by cross-examination and of showing to the jury its weakness or worthlessness by bringing into play all that knowledge of the physiology of mind and of the value of the evidence which it is presumed that you have acquired in your training for the office of an advocate.

> Thus armed, you will experience no difficulty in applying the various tests by which the truth is tried with much more of a command over the witness and vastly more of influence with the jury who will always acknowledge the probability or mistake in a witness when they will not beli.e.ve him to be perjured.

A cross-examiner's questions testing the credit of a witness is lawful. The credit can be shaken by injuring his character, although the answer to such questions might tend directly or indirectly to incriminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

The cross-examiner has wider power in doing it which exceeds its scope given under s 138 of the Indian Evidence Act. All that is permissible under Ss. 146 to 153 of the Indian Evidence Act cannot be made punishable under s 500 of the Indian Penal Code. Questions may be put to test the veracity and to impeach the credit of the witness.

The questions in cross-examination could adopt four modes of impeaching credit:

a) by cross-examination as to his knowledge of the facts deposed to, opportunities of observation, powers of memory and perception, disinterestedness (s 138); his character (s 140); his veracity, position in life, injury to character by criminating questions (ss 146, 147 and 132); his errors, omissions, antecedents, mode of life, etc. (ss 146 and 148);
b) by written (s 145) or oral (s 155 cl3) statements;
c) by evidence of persons showing that the witness bears a general bad reputation confronting him with his previous inconsistent statements, reputation for untruthfulness (s 155 ell), or by proof that the witness has been bribed, or has accepted the offer of a bribe (s 155 cl 2};
d) by calling witnesses or offering other evidence (e.g. under s 145 or s 155 cl 3) to contradict the witness on all relevant matters, but not on irrelevant matters.

When the questions put to a witness in cross-examination for discrediting him relate to facts directly relevant to the matters in issue, his answers may always be contradicted by any evidence. If the question in cross-examination is relevant only in so far as it affects the credit of a witness, but is otherwise irrelevant, the answer cannot be contradicted except in the case of (a) previous conviction, or (b) bias.

When the witness is not speaking the truth on a particular point, the attention should be drawn to the fact in the cross-examination for providing an opportunity to explain. This may be applicable to all the cases in which it is proposed to impeach the witness's credit. Former contradictory or inconsistent statement of a witness can be used under s 146 of the Indian Evidence Act to shake the credit or test the veracity of the witness.

8. DIGRESSIVE QUESTIONS

In order to use this method effectively, it is necessary to find out some collateral means tending to contradict the facts deposed to by the witness, not in an open manner by eliciting an inconsistent statement from the mouth of the witness, but by extracting something that in

effect can be associated with the matter sought for.79 Digressive questions are not unlawful but may be lawful for several purposes permitted in law.

9. PROGRESSIVE AND CUMULATIVE QUESTIONS

When the circumstances of the case do not permit a point being made out by direct questions, it becomes necessary to lead the witness on and extract from him bit by bit that which you require as a whole.

This is always the safest course to adopt in dealing with unwilling witnesses, who, though not liars, are found inclined to avoid or suppress the truth, if possible. You must begin with some unimportant and remotely connected fact, with the fact that you are aiming at. The witness is likely to relate to it, not realizing perhaps exactly its bearing, and not seeing the chain of connection and will answer question the uncautiously. Having admitted that much, you can lead him gradually nearer and nearer by successive approaches to the gist of the matter and having secured him thus far you can, if necessary, put the fact clearly to him.

Such questions are lawful so long as they conform to the rules of evidence under Ch. II, Ss. 5 to 55 of the Indian Evidence Act and other prohibitive provision and particularly s 146 of the Indian Evidence Act. However, it should not be misleading.

10. RETROGRESSIVE QUESTIONS

The retrogressive questions involve a process which is just the reverse of the progressive. When a witness has deposed to any fact in his examination-in-chief in a positive manner, naturally he would not like to realize from his position if asked directly in opposition to it. He will not, however, object to yield to slight and imperceptible modifications of his statement, if he is asked about surrounding facts tending to tone down or minimize his statement, but not intended to contradict it totally. There is nothing which witnesses of every grade or rank or intellect are so sensitive to as self-contradiction. The dread of being made to appear as lying often arms the resolution of the witness to adhere to his original statement without qualification. Get little answers to little questions, and you will find as a rule that answers are strung together like a row of beads within the man, and if you draw gently, so as not to break the thread, they will come with the utmost ease, and without causing the patient the slightest pain.

11. DEVELOPING QUESTIONS

The process of developing questions often improves into a very successful one in dealing with witnesses who do not depose to facts from their own perception, but testify to them in an indirect manner. They are mostly experts who make assertions from their professional experience or special study of any subject upon which their aid is sought in the way of testimony. As they do not speak about any direct perception, they cannot be led to state any fact forming a component part of the transaction itself. However, they would yield to suggestions tending to disaffirm their opinion based upon their experience, if the modifications suggested may not tend to upset their views or contradict their opinion. Cross-examination of expert witnesses and witnesses for opinion may be adopted to them (Ss. 45 to 51 of the Indian Evidence Act).

12. CONDUCIVE QUESTIONS

The greatest difficulty often felt is with regard to negative testimony, i.e., when the witness' statement consists of a simple denial of something which is asserted on your side to have taken place. A pure negative of some occurrence, or a simple quotation of some statement made by others to the witness himself or which forms parts of a conversation that took place within the hearing of the witness, admits of very little scope for cross-examination. The witness ought to be first made to assume some affirmative form with regard to any of the elements laid down in those rules (that is, rules showing connection of cause and effect), and then proceed with regard to which the relation of cause and effect are quite apparent. If one is established or admitted, the other could be inferred as a matter of course and if questions are addressed relating to such facts, they may induce certain answers which may obviously lead to certain irresistible conclusions. You may pick certain facts from the affirmative made which forms a link of the facts or events in question, and ask the witness about it. If he happens to affirm it, then proceed with other facts affirmative of such facts in the sequence of cause and effect. When you find the witness sufficiently advanced, throw round him some other facts, observing their chain of causal relation. If you succeed in laying round him a chain of facts, press the facts all round by eliciting facts, adding fresh links to the chain till you compel him to give some answer which either throws him away from his negative position and draws him into some answer which will compel him to admit what you desire or render his denial of the fact highly improbable and not worthy of credence. When you are satisfied that you have extracted sufficient proof for causes from the witness to justify you in assuming that the court will presume the effect you desire, it is better to leave the matter and proceed to another. For if you only proceed far enough, you will enable the witness to understand how you have been approaching him on all sides, and he may by one single answer recover all his lost ground, by giving some explanation made upon the spur of the moment, or by alleging that he misunderstood his questions or by putting an artistic test to all your fine questions and his answers, by adding a point-blank denial to what you have been trying to establish.

13. SEARCHING QUESTIONS

Questions tending to show that the cross-examiner is in possession of certain facts which, if divulged, will put the witness to disgrace or humble him before the public, are known as searching questions. The cross-examiner may, by putting a few questions, give the witness to understand that the examiner knows the weakness of the witness, and if the witness will not proceed in a proper mariner, his disgrace is certain.

14. SUGGESTIVE QUESTIONS

In cross-examining witnesses, we may sometimes obtain answers more accurate and extensive, or suitable to our purpose, by putting suggestive questions that if we leave them free to answer spontaneously. There is a tendency in the human mind to yield to outward suggestions, and, if an idea or image is positively suggested to the witness and impressed upon his mind, he may under special circumstances be induced to adopt it. Everybody is aware that we perceive, that is, we really see much more than is really taken cognizance of by

our organs of sense. In such cases if the cross-examiner presses upon the mind of the witness questions positively suggestive of the true idea or image, it tends to evolve in the witness, the idea or image of the events foreseen and calls them to his recollection in their true or original form by a sort of reaction. It dispels the gloom crowding upon his recollection from other morbid states of mind; and the original impressions are revived, and represented to his mind in their original light or vividness. In case of a suggestive question put by the cross-examiner to the witness (under cross-examination) the impression which is directly produced by the suggestion can arouse "the original image, owing to the association of ideas. The suggestion of an idea or image offered in a positive form, sets in action a mental association previously existing in the witness's mind, which had become vague or confused on account of the morbid state of his memory. Put to him your own suggestions as to those circumstances (on which he is being cross-examined) and he may find relief in accepting your suggestions instead of straining his imagination to invent a suitable answer. It is always easier to give your assent to any suggestion answering a purpose than to invent an ingenious answer by exerting your imaginative faculty. Besides, your suggestions may prevent him from getting an opportunity to reflect. It will engage his attention and he will not have the leisure to conduct his answers, or to see how they share with the story he has already told. However, then your skill ought to be to throw out such designed suggestions as may apparently suit the occasion, and, tempt the witness to adopt it though in reality it may prove destructive of his narration and involve him into further difficulties.

Leading, suggestive, progressive, cumulative and developing questions are illustrated by the following:

From the cross-examination of WA Cadbury by Sir Edward Carson KC:

1. Is it a fact that San Thomecocoa has been a slave grown to your knowledge for eight years-Yes.
2. Was it slavery of a very atrocious character?-Yes.
3. Men, women and children taken forcibly from their homes against their will?-Yes.
4. & (5) Were they marched like cattle? ...I cannot answer that, quite.
6. Were they labeled when they went on board the ship?-Yes.
7. How far had they to march?-Various distances. Some carne from more than a thousand miles, some from quite near the coast.
8. Never to return again?- Never to return.
9. From the information which you procured did they go down in shackles?- It is the usual custom, I believe, to shackle them at night on the march.
10. Those who could not keep up with the march were murdered?-I have seen a statement to that effect.
11. You do not doubt it?-1 do not doubt that it has been so in some cases.
12. The men, women, and children are freely bought and sold?- I do not believe, so far as I knew, that there has been anything that corresponded to the open slave market of fifty years ago. It is done now more by subtle trickery and arrangements of that kind.
13. You do not suggest that it is better because done by subtle trickery?- No.

14. The children born to the women who are taken out as slaves become the property of the owners of the slaves?- I believe that the children born on the estate do.
15. Was it not the most cruel and atrocious form of slavery that ever existed?- I cannot distinguish between slavery and slavery. All slavery is atrocious.
16. Knowing it was atrocious; you took the main portion of your supply of cocoa for the profit of your business from the islands conducted under this system?-Yes, for a period of some years.
17. You do not look upon that as anything unusual?-Not under the circumstances.
18. (Sir E Carson quoted from a report of the board of Messrs. Cadbury: 'There seems little doubt that public opinion would condemn the existing conditions of labour if the facts could be made known.')
19. Does that represent your view?-Yes.
20. Would there be difficulty about making the facts known?- There would be no difficulty.
21. If you had made public the facts, public opinion would have condemned the conditions of labour and you would not have gone on?- I think so.

Comments- Question Nos 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12 etc., are leading questions.

Question Nos 3, 9, 12, 14 are suggestive questions.

All questions adopt the manner of progressive and developing interrogation.

15. CROSS-INTERROGATIONS

When a witness refuses to admit a certain point, or denies it, or as is so common in this country, takes refuge in a general evasive reply, the only remedy is to take him in the opposite way, and this is a plan which rarely fails in the end. The matter can be best explained with an illustration. A, on being asked if a certain signature is his, and being unwilling to admit it, says ' 'It looks like mine,' he is then asked: 'Is it your signature?' He replies, 'I don't know,' or 'it looks something like mine.' It would be very unsatisfactory if one could not carry the matter any further for the witness attempts to hedge himself within these evasions. He should then be asked questions as to the points wherein he draws the distinction between the signature shown to him, and his own, as to the formation of the letters, the curves and the style. Should no satisfactory result be obtained from these replies, he should be asked: 'Are you prepared to swear that this signature is not yours?' It will be found that, as a rule, he will refuse to swear it is his. One's object will be obtained for one can then satisfactorily urge that he was not prepared to swear it was not his signature. When the question of signature is important, it will also be found very effectual to submit to the witness, several of his signatures, both those which are admitted to be genuine and those which you wish to prove is his in such a way that he cannot gain the least inkling as to the document to which they are subscribed, and one may even get the signature, one wishes to prove, admitted to be genuine.

A. 'I cannot swear it, but I do not recollect ever saying it,'
Q. 'Or representing it?'
A. 'I do not recollect it.

Q. 'Will you swear that you have not?'

A. 'I will not swear it, but I do not recollect it.'

Q. 'You were applied to by some person or other, very soon after you were discharged from the princess, were you not?'

A. 'Not very soon after'.

Q. 'For example, within half a year?'

A. 'Not six months; it was more than six months. It was nearly one year after I had left her service.'

Q. 'You are understood to say, you were applied to, to know what you had to say with respect to the Princess, is not that so?'

A. 'One year after I had left her service.'

Q. 'Did or did not somebody apply to you in order to know what you had to say with respect to the Princess, about a year after you left the service of her Royal Highness or at whatever period?'

A. 'One year after.'

This manner of cross-interrogation continued for days. Here is an example of what later followed relating to the proper introduction, or cross-questioning upon an instrument written by the witness:

From the cross-examination of Louisa Demont, in Queen Caroline's trial-

Q. 'Is that your writing?' (A letter being shown to witness, folded so that she might see the last line and a half).

A. 'It is not exactly like my writing.'

Q. 'Do not believe it to be your writing or not?'

A. 'It is not exactly like my handwriting?'

Q. 'Do you believe it to be your handwriting?'

A. 'I do not recollect having written it, nor do I think that it is exactly like my character.'

Q. 'Do you believe it to be your handwriting, yes or no?'

A. 'I Do not think it is exactly my handwriting : I do not recollect having written it.'

Q. 'Do you believe it to be your handwriting, yes or no?'

A. 'I cannot decide whether it is my handwriting; it is not quite like it; and I do not recollect having written it.' Q. 'Do you believe it to be your writing?'

A. 'It is not exactly like my handwriting?'

Q. 'Do you believe it to be your writing?'

A. 'I cannot tell what else to answer; I cannot answer a thing of which I am not sure.'

The witness, while within her rights, was not asserting something when she was not sure of it, nevertheless Demont has resorted too frequently to the tune of the damaging answer, 'I do not recollect.'

The manner of questioning, however, was somewhat improper as will be shown.

By a Lord: 'You are not asked whether you know it to be yours, but whether you believe it to be yours?'

A. 'I cannot say positively that it is not my handwriting, but I do not believe it is.'
Mr. Williams: 'How much of that paper that has been before you so long, was submitted to your eye during the time you have given the answers you have given?'
A. 'A line and a half.'
Q. 'Before it was folded down, as it now is, did you not see higher up in the paper several lines more than that line and a half?'
A. 'When they presented it to me, there I saw something more, but I do not recollect how many lines, nor what it was.'
Q. 'Do you mean to say, that when the counsel showed you the paper, before it was in the hands of the Interpreter, it was not near enough for you to see the writing?' -…

16. INTIMIDATING QUESTIONS

Questions which cause shame or anger in the witness and are put by coercive and confusing manner are intimidating questions.

17. INCRIMINATING QUESTIONS

The questions, the tendency of which expose the witness or the wife or the husband of the witness, to any criminal charge, penalty or forfeiture, I are incriminating questions.

18. METHODS OF NARRATION AND THEIR ADVANTAGES AND DISADVANTAGES

A witness may be examined either by allowing him to narrate the facts in this own way or by making him answer questions one by one. A witness about to narrate facts may be left to tell his story in his own way; or it may be drawn from him by questions put to him. The former method of telling the story is open to these objections where the witness may not think enough to call to mind all he can relate; from carelessness or oversight he may omit to mention some circumstances; he may think or fancy the circumstances he withholds is not material to a proper understanding of the story; indeed, he may think or fancy that his story will be best understood if it is not headed with matters which he vi.e.ws as redundant but which nevertheless is essential to see the facts in their proportions and color.

(a) MERITS AND DEFECTS OF THE FORMER METHOD

Another danger is that the witness will confine himself to things, which he himself saw, heard, or did, but will diverge into hearsay that which he has heard someone else say, were seen, heard or done. Supposing, besides, the witness does not wish to speak the whole truth, it is obvious his wish will be promoted, by leaving him to tell his tale in his own way.

(b) MERITS AND DEFECTS OF THE TTER METHOD

In the other method of obtaining a relation of facts, the one by question and answer, the object of the interrogator is to get from the witness all he, himself saw, heard, said and did, excluding hearsay, and other irrelevant matter. And the questions being framed with a view to this excision, if the witness confines himself strictly to the questions addressed to him, his answers will contain hearsay or their irrelevant matter. However, according to this method, the witness' narrative consists solely of his answers to the questions put to him, the obvious

inconvenience is that if all the questions required to bring out the witness's whole story are not put to him, may in this evidence leave out circumstances important to be known.

19. DO NOT ASK A QUESTION TOO BROADLY

Carefully avoid asking for much at the time. Get little answers to little questions, and you will find as a rule that answers are strung together like a row of beads within the man; and if you draw gently, so as not to break the thread, they will come with the utmost ease and without causing the patient the slightest pain. In fact, till he hears you sum up his evidence, he will have no idea of what he has been delivered.

Let him see that your questions are of the simplest possible kind, even so simple and so easily answered, that it seems almost stupid to ask or answer them. 'Of course', he will say to one; 'Certainly', to another; 'no doubt about that', to a third and so on. Presently you slip one in, that is neither 'of course' nor 'certainly', and get your answer. Look upon him as a lump of human nature in the witness-box, out of which you may by ingenuity and skill extract something, be it even so small, which you can find nowhere else in the case.

20. DO NOT PLACE WHOLE POINT BEFORE WITNESS IN ONE QUESTION

Whenever your question is too large, the answer will be worthless.

> Q. 'Were you present at the meeting of the trustees when an agreement was entered into between them and the plaintiff?'
> A. 'Yes.'
> Q. 'Will you be kind enough to tell us what took place between the parties with reference to the agreement that was then entered into between them?'
> A. This is instance of verbosity, which shows that in putting questions, long drawn sentences should be avoided. The more neatly a question is put the better, as it has to be understood not only by the witness but also by the jury. All that was necessary to be asked might have been put in the following words:
> Q. 'Was an agreement entered into between the trustees and the plaintiff?'
> A. 'What was it?'

21. DO NOT PUT QUESTION TOO DIRECTLY

The probability is that the witness will know your difficulty and avoid giving you exactly what you wish. If not altogether straightforward (and for such witnesses you should always be prepared) he will be on the alert, and unless you circumvent him, will evade your question.

Rule explained-On this point Harris in his work 'Hints on Advocacy' says:

> A series of questions, not one of them indicative of, but each leading up to the point, will accomplish the work. If the fact be there, you can draw it out, or if you do not so far succeed, you can put the witness in such a position that from his very silence the inference will be obvious.

One of the greatest cross-examiners of our day advised a pupil while cross-examining a hostile witness upon a point that was material, to put ten unimportant questions to one that was important, and when he put the important one he put it as though it were the most

unimportant of all. And when you have once got the answer you want leave it. Divert the mind of the witness by some other question of no relevancy at all.

There is no occasion to emphasize an answer while the witness is in the box, if the question is properly put. The time for that will come when you sum up or reply. If the witness sees from your manner that he has said something which is detrimental to the party for whom he gives evidence, unless he is an honest witness he will endeavor to qualify it, and, perhaps, succeed in neutralizing its effect. If you leave it alone, it may be that your opponent may not perceive its full effect until it has passed into the region of comment.

In a case of murder, to which the defense of insanity was set up, a medical witness was called on the part of the accused who swore that in his judgment the accused at the time he killed the deceased was affected with homicidal mania, and was urged to the act by an irresistible impulse. The judge then asked him, 'Do you think accused would have acted as he did, if a policeman had been present?' to which the witness at once answered in the negative on which the judge remarked, 'Your definition of irresistible impulse then must be an impulse irresistible at all times except when a policeman is present'.

No doubt there is some degree of fascination in solving a mystery but when you find that the explanation of it is immensely to your disadvantage, you will not really enjoy the qui.e.t smile of your opponent when he finds that you have cleared up something which he could not, and which had been purposely left for the exercise of your ingenuity and inquiry. 'If you don't know whether the ice will bear, you had better not venture on it.'

The following was the cross-examination of an intelligent police constable: That was the straightforward way of putting it. The judge liked straightforwardness. Jury admits the young counsel's jaunty manner, and the police constable likes to be dealt with without any attempt to circumvent him. However, that is a very dangerous question for the accused. It would cost him his liberty.

Q. 'Why did you suspect him?' asked counsel.

A. 'I know he was one of the worst thieves we got.'

Mark the impression that the question and the answer would have made upon the jury. How any answer to such 'a question would benefit the accused, it is impossible to know.

The following is an alibi which was set up in a charge of murder:

It was alleged that the prisoner had slept on the night of the murder, in a cottage a great many miles away from the scene, and that he was in bed by a certain hour. The tenant of the cottage with whom the prisoner was lodged was called by the Crown and said that the prisoner was not at home on the particular night. It was considered advisable to break her down during cross-examination, which was to this effect:

Q. 'How do you say he did not come home that night?'

A. 'Because I sat up.'

Q. 'But might he not have come in and you not have heard him?'

A. 'He could not.'

Q. 'You might have been asleep?' A. 'I was not asleep.'

Q. 'How long did you sit up without going to sleep?'
A. 'Until four o'clock in the morning.'
Q. 'How do you know he did not come in while you were asleep?'
A. 'Because I looked in his bedroom to see if he had been in and his bed had not been slept in.'

22. NEVER ASK A QUESTION UNLESS SURE OF THE ANSWER

'There is the old theory, never ask a question unless you are sure of the answer, but that would destroy a good deal of cross-examination. No counsel should ever risk an important question unless he knows and feels the question is proper and right in its form, having regard to form only. I will tell you why this is a dangerous thing. Counsels on the other side are waiting for an opportunity at every turn to pass of their client if he is in the hands of a skillful cross-examiner. Counsel gets up very often and objects; he is asked, what is your objection? 'Well, I object to the form of the question.' It may or may not be a good objection but you have defeated by your objectionable form of question, that which you have been laboring to obtain for 15 minutes or half an hour. How did you do it? The witness has stopped, but has heard the question and he is given a moment or two of thought, and he knows what you are driving at, no matter how cleverly you have put it. And by the time you get back to the question, the witness has got his 'mind', and you get your answer favorable of course to the opposing party.

In a criminal case, especially in a capital case, so long as your cause stands well, ask few questions; and be certain never to ask any the answer to which, if against you, may destroy your client, unless you know the witness perfectly well, and know his answer will be favourable, or unless you will be prepared with testimony to destroy him if he plays traitor to the truth and your expectations.

23. AVOID EQUIVOCAL QUESTIONS

An equivocal question is almost as much to be avoided and condemned as an equivocal answer; and it always leads to, or excuses an equivocal answer. Singleness of purpose clearly expressed is the best trait in the examination of witnesses, whether they be honest or the reverse. Falsehood is not detected by cunningness but by the light of truth, or if by cunningness it is the cunningness of the witness and not of the counsel.

24. Do NOT REPEAT QUESTIONS

During cross-examination, though sometimes by sheer repetition you may be able to unnerve a witness and get the truth out from him. Let your questions be couched in simple and homely phrases. Avoid verbosity which verges on the ludicrous. While conducting a cross-examination do not put your questions with eyes fixed on the ceiling. You may feel that that it is a very stylish thing to do, possibly because you have seen some senior advocate effecting that pose. However, what may be posed as stylish for a senior may be childish for a junior.

25. TRY TO ELICIT 'YEs' REPLIES

Arrange your questions in such a way that the witness cannot but answer 'yes'. This is not so simple as it seems and is practically the sum and substance of all the rules given above and to

follow later for the conduct of an effective cross-examination. I should prefer to call this technique of cross-examination the Socratic approach to cross-examination.

26. ART OF PUTTING ILLUSTRATED QUESTIONS

Mrs. Bartlett was tried for the murder of her husband by poisoning. Rev Dyson was also suspected to be *particep criminis* and the cross-examination of Dyson by Clarke ranks as a forensic feat. The cross-examination is reproduced here to give an idea of the forms of questions which may safely be termed as insured.

The following is the cross-examination of Dyson:

Clarke began his questioning in a quiet, even tone. The spectators and perhaps the Rev Dyson too waited for the storm that never was to break.

> 'Whatever your relations were with regard to Mrs. Bartlett, they were relations that were known to her husband.'
> 'Oh yes.'
> 'And did you down to the last day of his life endeavour to reciprocate his friendship and to deserve his confidence.'
> 'I did.'
> 'Were you sincerely solicitous for his welfare?'
> 'I was.'
> 'And do you beli.e.ve that every day of that illness you and his wife were both anxious for his welfare and tried to save him?'
> 'I do.'
> 'You became aware -at a very early period of your acquaintance that Mr. Bartlett had peculiar views on the subject of marriage?'
> 'Yes.'
> 'Did he ask you whether you thought the teaching of the Bible was distinctly in favour of having one wife?'
> 'He did.'
> 'Did he suggest you that his idea was that there might be a wife for companionship and a wife for household duties?'
> 'He did.'
> 'He suggested to you that a man should have two wives?'
> 'Yes.'
> 'That would have struck you as a most outrageous suggestion, would it not?'
> ‘A very remarkable suggestion.'

The scandalized judge could not restrain himself.

> 'Did it not strike you', he asked 'as an unwholesome sort of talk in the family circle?'
> 'Not coming from him, my lord', 'the Reverend Dyson answered. 'He was a man who has some strange ideas.'

This answer to the Bench was of immense value to Clarke. It furnished the support for the extraordinary story which Mrs. Bartlett has told to Dr. Leach. Before anyone could make his

mind, he would have to be independently and thoroughly convinced that Edvin Bartlett had some very strange ideas indeed.

'Did he ever make reference,' Clarke asked the Reverend Dyson, 'to marriage between you and Mrs. Bartlett after he should be dead?'

'He made statements which left no doubt in my mind but that he contemplated Mrs. Bartlett and myself being ultimately married.'

In strict accordance with his policy of steering dear of any head on dash, Clarke made a studiously indirect approach to a dangerous part of the Reverend Dyson's evidence - his assertion that he had been told by Mrs. Bartlett of an internal ailment which caused her husband spasms and was shortening his life. Clarke neither contested nor admitted his assertion. He simply took steps to demonstrate that such statements might have been made innocently.

'You told my learned friend that you have seen Mr. Bartlett put his hand to his side and complain of some convulsive pain?'

'Yes.'

'One more than one occasion?'

'Yes.'

'When his wife has been there?'

'Yes.'

The first point was made. Clarke moved swiftly on.

'Did he ever mention the possible duration of his life?'

'I think he did.'

'When?'

'I cannot say.'

'Was it not when you were on holiday at Dover?'

'I cannot swear that.'

On matters which did not implicate him personally, the Reverend Dyson was scrupulous to a fault.

At Dover did he mention something about his condition?'

'I think so.'

'What was it?'

'He said he was not the strong man he once was.'

'Did he say what was the cause? '.

'He attributed it,' the Reverend Dyson said, 'to over work.'

The second point was made. If the prisoner had indeed talked of an internal disease, there has been signs that might excuse such a conclusion; if she had indeed talked of it shortening his life, he himself had been disturbed about his health.

Her remarks if ever made no longer seemed so damning.

Clarke now struck the preliminary notes of what has been previously catalogued among his major themes. He began to set the stage for his theory of suicide.

'You were with Mr. Bartlett, were you not, at the very beginning of his illness?'

'I was.'
'Before this time, had he appeared to you to be getting into an ailing and low condition?'
'He seemed very much worn out at night when he returned.'
'Very weary, very depressed, complaining of sleeplessness?'
'During the actual sickness?'
'Yes.'
As that sickness were on, did he become more depressed?'
'He varied', the Reverend Dyson said.
'You have seen him crying, have you not?'
'Once.'
'When was that?'
'The Monday in Christmas week.'
At that time was he talking about not recovering?'
'He spoke very little.' I
Clarke tried another way round.
'Is it not the impression on your mind that at that time he thought he would not recover?'
'Yes, I have that impression.'
'When you went on the following Sunday, was he not even worse?' The Reverend Dyson demurred.
'No, I thought he was brighter. But...'
'But?'
'He contradicted himself.'
'How?'
Then it came out: the perfect answer for Clarke's purpose.
'Well, he asked me whether anyone could be lower than he was without passing away altogether.'
In print, the author can italicise or underline. In court, counsel must use other means for emphasis.
'He asked you whether it was possible for a man to be lower than that without passing away altogether?
'Yes.'
'According to that expression, he was thinking of himself as one actually on the edge between life and death?'
'Yes.'

Thrice had the Reverend Dyson said it: threefold had been its impact on the jury.

Very grave, very firm, but still without heat or rancour, Clarke now drew the witness to the central point of all. His questions on his subject were deliberately few and heavily insured against an unexpected answer.

'Did you mention to Mr. Bartlett that you had got the chloroform?'
'Mr. Bartlett? No.'

'You understood that Mrs. Bartlett did not desire it to be mentioned to him?'
'Not specifically the chloroform', replied the Reverend Dyson, 'But the affliction for which she wanted it.'
The opening was no larger than a crack, but the able cross-examiner needs no more.
'Then she never asked you not to mention you had got the chloroform?'
'No, But I think', the minister characteristically added, 'I ought to state, in justice to myself, that there was a visitor there and I could not give it to her in his presence.'
The Reverend Dyson urge to clear himself and intervened again. Now the trick was on the table for the taking.
At all events, she had not asked you to keep it secret?'
'No.'
Although he would have hardly dared to hope so at the time, the Reverend Dyson's ordeal was drawing to a close. On further matters Edward Clarke was done.
'You said, did you not, that you threw away the bottles you had bought from the chemists' shops on Tooting Commer as you were going to church on January 3rd?'
'I did.'
'Were you then in great anxiety and distress about your position?'
'I was.'
'You were afraid the effect of your having bought the bottles might get you into trouble?'
'Precisely.'
'You had in your mind what might happen to yourself?'
'What might have been the cause of Mr. Bartlett's death?'
'What might happen to yourself?' Clarke quietly insisted.
'The thought was in my mind, 'the Reverend Dyson said, 'that possibly the chloroform I had bought had been the cause of Mr. Bartlett's death.
'And you thought you would be ruined if the matter came out.'
'I thought I would be ruined if my fears were true.'
'That is, if you were associated with the matter?'
'Yes 'said the Reverend Dyson, 'I saw that danger.'
Here was another solid gain for the defense.

Witness Handling

CASE 1: STATE V. MONTY KHANNA

Prepared By Dr Aman Hingorani

Note for Participants

You will find attached:

1. Statement of Offence

2. Witness Statements (three prosecution witnesses and three defence witnesses)

3. Relevant Sections of the Indian Penal Code, 1860

4. Ethical Exercise

5. Prior Inconsistent Statement exercise

The instructions given might not conform to actual practice. For instance, one may have to cross examine the accused in the exercise while in actual practice, an accused in a criminal case is not cross examined but is required to give his or her statement under Section 313 Code of Criminal Procedure. We make these assumptions purely for the purpose of the exercise, so as to run the exercise within a particular methodology.

STATE* v. *MONTY KHANNA

CHARGE

Monty Khanna, son of RadheyShyam Khanna, is charged as follows: STATEMENT OF OFFENCE

ASSAULT AND CRIMINAL FORCE WITH INTENT TO OUTRAGE AND INSULT MODESTY OF WOMAN, contrary to Sections 354 and 509, Indian Penal Code, 1860

PARTICULARS OF OFFENCE

You, Monty Khanna, assaulted and used criminal force with the intention to outrage and insult the modesty of Ms. Kashish, daughter of Mr. Zorawar Singh, and intruded upon her privacy on 31 December Yr-1 at the Happy Hotel, New Delhi

STATEMENT OF KASHISH

1. My name is Kashish Singh. My father's name Zorawar Singh. I am 19 years old and my residential address is Flat No. 5B, Janakpuri, Delhi.

2. I have two sisters, both younger to me. One is aged 16 years and the other is aged 14 years. My father died one year ago. My mother and my paternal grandmother stay with us. I am the sole earning member of the family.

3. I have been working in a travel agency known as Honeymoon Travels Ltd. since December 15, Yr -1. I am the personal secretary to the Director of the company. I was given to understand at the time of my appointment that in this line, we employees are expected to stay back late at work if required.

4. I know Monty Khanna who is the personal secretary to the Managing Director of the company. He is about 40 years old. He is married and has a daughter my age. He has been with the company for the last 15 years. Monty Khanna was very friendly when he met me. Rather, he was over friendly. He used to always compliment me when he saw me. He told me how nice my hair looks and how smooth and fair my complexion was. He always wanted to take me out for coffee. On my birthday on December 21, Yr- 1, he even tried to hug me. I was surprised at such familiarity. He just laughed at my awkwardness and said that I should consider myself lucky as it was not every girl who could get helped by an influential person like him. I did not say anything or complain about him as I thought that maybe he is like that by nature. Also, I had just joined the job and he could have me thrown out of job as he had been there for 15 years. Nobody would believe me as he was married and had a good reputation.

5. On December 31, Yr- 1, we all employees were asked to attend the office party organised to celebrate New Year's eve at Happy Hotel. Monty Khanna told me in the afternoon that he would pick me up by 7 pm so that we could reach the Hotel by 8 pm, as required. I was hesitant to go with him but had no option as I do not have a car and did not want to travel alone at night using public transport. Also, he had his driver with him.

6. As soon as I got in his car, Monty Khanna told me that I was looking gorgeous in my saree. He had that funny look in his eye. I tried to maintain a normal conversation. We reached the hotel at about 8.15 pm.

7. The party was organised in the Easy Life restaurant in the top floor of the hotel. As soon as we got into the lift to go to the top floor, Monty Khanna tried to hold my hand. I pushed it away and told him to control himself. He pulled me towards him and tried to kiss me. He said we should enjoy ourselves and that nobody would find out. I started crying for my mother. I told him that I would scream if he came near me. He then calmed down. l was too shocked and upset at his conduct to say anything.

8. On reaching the top floor, I rushed out of the lift, scared and terrified. The manager of the restaurant was surprised to see my fallen face. He asked me what the matter was but I kept quiet as I was so embarrassed.

9. Throughout the party, Monty Khanna was eyeing me. I felt uneasy about it. I left the party early and went home. I was too ashamed and worried to tell my mother about the incident. What she might think. I could hardly concentrate at work. I wanted to kill myself because I would have to see Monty Khanna at work every day.

10. Next day at work, I did not meet Monty Khanna. I was tense the whole day and broke down when my colleague, Poornima, asked me what was the problem? I told her about it. She was very angry and told me to complain to the Managing Director immediately about Monty Khanna.

11. After a week, I told my mother about it. After all, if I kept quiet, he would behave like that with someone else. My mother talked to my uncle, with whom I went to the police and lodged my complaint.

Signed ..... Dated ....

STATEMENT OF POORNIMA

1. I, Poornima, w/o Rajesh Roshan, r/o 565, Rohini, Delhi, work in Honeymoon Travels Pvt Ltd as the receptionist. I have been working there for two years now.

2. I know Kashish and Monty Khanna as we work in the same company. Kashish joined the company very recently, only in December Yr - 1. Monty Khanna was working years before I joined the company.

3. I am friendly with Kashish, just like I am with other colleagues. We have often had lunch together. Once, we went out shopping as well. Ever since Kashish joined the company, she seemed disturbed about Monty Khanna's behaviour towards her. They had to often stay back late in office for work. Monty Khanna was trying to be too friendly with her, and even flirt with her. He often asked her out. One day, when he gave her lift home in her car, he even tried to touch her cheek and held her hand. She did not tell anyone about Monty Khanna's misconduct as she did not want to loose her job. Kashish also found out on Christmas Eve of Yr - 1 that Monty Khanna was married and had children.

4. On January 1, Yr 0, Kashish came to the office, very nervous and tense. She obviously had not slept the entire night. I tried to talk to her several times. Eventually, during coffee break at about 4 pm, she started crying and told me, in a disjointed manner, that Monty Khanna had tried to misbehave with her the previous evening in the lift of Happy Hotel. I did not go to that party as I was celebrating with my husband. I consoled her and told herto report the matter to the higher officials in writing. She did not want to tell her family as she felt too embarrassed about it.

Signed .....Dated . ...

STATEMENT OF RAJIV KAPOOR, MANAGER, HAPPY HOTEL

1. I, Rajiv Kapoor, son of. Ramesh Kapoor, resident of 55 Patel Nagar, Delhi, work as Manager, Easy Life restaurant in Happy Hotel, New Delhi. I have been working there for about 5 years now.

2. I know Monty Khanna. He is personal secretary to the Managing Director of Honeymoon Travels Pvt Ltd. Monty Khanna often comes to the restaurant. Each time he comes to the restaurant, he is accompanied by a different young lady. He is a lively man and often gets intimate with the lady accompanying him. Such behaviour is normally considered objectionable by the hotel management but as Honeymoon Travels Pvt Ltd. is a good client of the hotel, I don't think it is my business to intervene.

3. On New Year eve, a party was organised by Honeymoon Travels Ltd at the restaurant. Monty Khanna came to the party accompanied by a young lady who I had not seen earlier. She stepped out of the lift, nervous, harassed and upset. I asked her whether I could help her. She looked away and joined the party. I saw her leave shortly. Monty Khanna left with her.

STATEMENT OF MONTY KHANNA

1.I, Monty Khanna, son of RadheyShyam Khanna, resident of 44, Greater Kailash I, New Delhi work in Honeymoon Travels Pvt Ltd for the past 15 years. I am the personal secretary of the Managing Director of the company. I am of good character and reputation in the community. My employers can vouch for me that I have been an exemplary employee and enjoy a good professional relationship with all the staff.

2. That I am 40 years old and am married. I have a 20 year old daughter. I know Kashish who just joined the company in December Yr - 1 as personal secretary of the Director of the company. As she is so young and inexperienced, I tried to encourage her and help her. After all, she is of the same age as my daughter. I have always had fatherly feelings for her. She too always looked up to me for encouragement.

3. I became familiar with Kashish because I often used to invite her for a cup of coffee or a cup of tea. Sometimes we have to stay late in the office but she never objected to anything. Since she does not have a car, I usually gave her a lift home in my car. She was always grateful for that. We had such a warm, affectionate relationship. In fact on her birthday on 21 December, she gave me a hug to express her attachment to me.

4. During my interaction with Kashish, I discovered that she was keen for promotion in the company. She is an intelligent and able young lady. I encouraged her to improve her position by showing willingness and doing extra work from time to time. That would impress her managers and might even get attention of the Managing Director. She jokingly said to me that she might even get promoted to my job soon. I replied that the company would have to fire me first. Again I was joking with her but I realise now that she was not joking - she is a very ambitious woman who will stop at nothing to achieve her goal.

5. A day before Christmas, we got late at work. Kashish asked me to give her a lift home. On the way in my car she began to talk to me about her private life. She started talking to me about her intimate thoughts. She was depressed because she had no man in her life. She was emotional and had tears on her cheeks. I reached across and wiped them from her face. I felt sorry for her and my actions were instinctive in a fatherly fashion. She held my hand for a long while and said how she would like to have a man like me and she had dreamt of being with me. I was taken aback by this. I told her that I was married and had a daughter. She got very upset and disturbed on learning this.

6. Since that day I have tried to be kind to her. I realise that she is going through a difficult emotional time. I have spent time with her and encouraged her. Her behaviour towards me, however, has become very odd. She often sits and day dreams at her desk. She looks at me differently.

7. The office organised a New Year Eve party at Happy Hotel on 31 December Yr - 1. I offered Kashish that I would pick her up as I knew she had no car. She happily agreed. We had lighthearted exchanges in the car. My driver, Sanjay, was driving the car. We reached the hotel about 8.15 pm and took the lift to Easy Life restaurant on the top floor of the hotel. Suddenly in the lift, Kashish came into my arms and tried to kiss me. I firmly pushed her

away saying that I do not appreciate such conduct. Kashish got very upset at my firm stand. She began crying saying I was uncaring for her feelings. She threatened me by saying that I would regret my actions and then stormed out of the lift. I followed her.

8. Kashish was quiet and subdued in the party. Though I had rebuked her, I was keeping a watch on her as I did not want her to do anything drastic. I tried to calm her by telling her that I did have feelings for her, she was an attractive woman, sometimes one has to be patient - the future would bring emotional satisfaction and we could continue our good relationship. She was still upset and angry when she left the party. I followed her and suggested that I would drop her somewhere near to her house. She did not say anything but walked in the direction of my car. My driver, Sanjay, opened the door for her and I joined her on the back seat. During the journey back she had calmed down and we spoke about our day and the work in a normal manner. We said our goodbyes in our normal familiar way.

9. I only found out about her allegations about 10 days later when the Managing Director called me in and introduced me to the police officers. I said straightaway that there was a mistake here - and the Managing Director agreed. He said he would be speaking to the company's lawyers to sort this out.

10. The allegations against me are false. Although I accept that there were some mutual warm feelings of affection between us I deny that I molested Kashish or intruded upon her privacy. I believe Kashish has her own personal emotional problems and, being ambitious, she is after my job. This is one way in which she can get me out of the way.

STATEMENT OF SANJIV BHATIA, MANAGING DIRECTOR

1. I, Sanjiv Bhatia, S/o Sunil Bhatia, R/o 1/8, Karol Bagh, Delhi - 5, am the Managing Director of H6neymoon Travels Pvt. Ltd. for past ten years. I know both Ms. Kashish and Mr. Monty who are working in my company.

2. I state that the working environment in my company is very good and no complaint about sexual harassment has been received in this company before the incident under dispute.

3. That on receiving the complaint, I decided to try to resolve the matter amicably. As Ms.Kashish was very agitated and disturbed at the time of making complaint against Mr. Monty, we decided to talk to her after some time and sort out the matter.

4. On making further enquiries in the company it seems that Ms. Kashish had a soft spot for Mr. Monty. The two had got on very well. Ms. Kashish seems to have made her intentions clear to fellow staff that she would like to know Mr. Monty better as she felt he was the ideal man for her. I too had noticed that whenever I needed someone to stay back late in office, Mr. Monty used to suggest Ms. Kashish. As far as I was concerned the two worked very well together. I always saw them together at one or other's desk often sitting side by side. I have noticed when leaving the office late at night that they were often the last of my employees to leave.

5. That I have never received any complaint of this nature against Mr. Monty, who has been with the company for the last 15 years. He has very good relations with other employees of the company.

STATEMENT OF SANJAY, DRIVER

1. I, Sanjay, S/o Ajay Singh, R/o 21, Pitampura, Delhi, am driver of Mr. Monty Khanna for the last two years.

2. On 31 December Yr -1, I had taken Mr. Monty Khanna to the Happy Hotel. Before going to the Happy Hotel, we drove first to Ms. Kashish's house to pick her up. During the journey to Happy Hotel, they were talking to each other in the pleasant manner. After they went inside the Hotel, I waited for them in the parking.

3. Mr. Monty and Ms. Kashish came out of the Hotel around 11 p.m. I was waiting for them. Ms. Kashish came straight to the car. I opened the door for her. She looked tired and did not acknowledge or smile at me as she normally does when Mr. Monty Khanna gives her a lift home. She is a very attractive lady and was looking very pretty that night.

4. Mr. Monty Khanna got into the back with her. And the conversation between them was the usual chirpy talk. I hear that kind of talk between them but it is not my business to listen in and so I cannot say what they talk about. I just notice that they are always very happy together. They often joke that they should live with each other since they spend so much time together and it would mean I could finish my driving in the evening.

RELEVANT SECTIONS OF THE INDIAN PENAL CODE, 1860

350. Criminal force -Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to. be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.

351 Assault - Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.

354. Assault or criminal force to woman with intent to outrage her modesty - Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to five years, and shall also be liable to fine."

'354A. Sexual harassment and punishment for sexual harassment:-

(1) A man committing any of the following acts-

(i) physical contact and advances involving unwelcome and explicit sexual overtures; or

(ii) a demand or request for sexual favours; or

(iii) showing pornography against the will of a woman; or

(iv) making sexually coloured remarks, shall be guilty of the offence of sexual harassment.

(2) Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.

(3) Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

509. Word, gesture or act intended to insult the modesty of a woman - Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to three years, and also with fine

Witness Handling

CASE 2: STATE V. MUKESH

Prepared By Dr Aman Hingorani

State v Mukesh

NOTE FOR PARTICIPANTS

You will find attached:

1. Statement of Offence

2. Witness Statements (two prosecution witnesses and two defense witnesses)

3. Extracts of Relevant Sections of Indian Penal Code, 1860

There is no dispute that the accused has injured the complainant's eye which has caused her to be in severe bodily pain for twenty days.

The instructions given might not conform to actual practice. For instance, one may have to cross examine the accused in the exercise while in actual practice, an accused in a criminal case is not cross examined but is required to give his or her statement under Section 313 Code of Criminal Procedure. We make these assumptions purely for the purpose of the exercise, so as to run the exercise within a particular methodology.

State v Mukesh

CHARGE

Mukesh, son of Rajesh, is charged as follows:

STATEMENT OF OFFENCE

VOLUNTARILY CAUSING GREVIOUS HURT, contrary to Section 322 read with Section 325, Indian Penal Code, 1860

PARTICULARS OF OFFENCE

Mukesh, on the 1st January Yr …. outside 345 Green Park, New Delhi, voluntarily caused Monika grievous hurt by damaging her right eye and thereby caused her to be in severe bodily pain for a period of twenty days.

STATEMENT OF MONIKA

I am aged 35 and mother of two children, Sanjay and Sonia. The children's father is Mukesh, aged 38. We were married for about 10 years, and the children are aged 8 and 5. We divorced in March of Yr… 1. The marriage used to be OK, although Mukesh has assaulted me many times before. There have been fiveoccasions in Yr - 3 when I reported violence to the police but refused to make astatement. On each occasion he had punched me once in the stomach,

usually after a fight about money. A policeman called Satinder always attended to my complaints. I never had a visible injury.

In July of Yr…2, I discovered Mukesh was having an affair when he told me he was leaving me for Roshni, a wealthy divorcee who runs a health club. I have no doubt she set her sights on him and carefully stole him from me. I was very angry, and broke all the windows at the club. I am sorry that I did this, and pleaded guilty to criminal damage and was fined by the local magistrate. I have no other convictions for violence. However, I have three convictions for shoplifting in Yr…2, Yr…3 and Yr…4. I stole for the children at a time Mukesh was unemployed and we had no money. On each occasion, I pleaded not guilty and Mukesh came to court to lie for me that I had not known what I was doing because I was on medication for depression. Neither of us were believed, and I was rightly convicted, and fined.

On Christmas Day ofYr…1, the children were with me. This had annoyed Mukesh. He had wanted to see them, but I promised him that he could take them on New Year's Eve.On New Year's Eve, I phoned him at 8 a.m. to say the children were tired from a party the previous night and, so, instead of having them from 10 a.m. on 31st December Yr…1 to 10 am on 1st January Yr…0 he could have them only from 2 pm to 5 pm on 31st December Yr…1. He was really angry and hung up. He did not come to the door to collect the children, which he normally does, but beeped his horn, and they went to him.

He deliberately did not return the children until 10 a.m. on 1st January Yr 0. I was terribly worried. He would not answer his phone. When they arrived, I ran out the door. Sanjay was hugging Roshni goodbye and was tearful. Sonia was hugging Mukesh, carried in arms. Both had expensive presents to bribe the children against me: Sanjay had brand new cricket bat and Sonia was wearing a designer dress.I stood near Mukesh. He would not look at me, nor release Sonia who was singing a Hindi film song for him. I asked Mukesh to put her down. He ignored me. I reached to take Sonia, extending my arms. Without warning and in front of the children, with his left hand, he punched me straight in the right eye. The car keys, which he had in his hand, went into my eye. I was knocked to the ground. I saw him put Sonia down. Dazed, I got up and tried to smack Mukesh across the face, but missed, and ended up pulling his hair. Roshni pulled me off him, and generally roughed me up. I became hysterical, the children were crying, and Mukesh and Roshni guiltily got in the car and fled. I called the police immediately. Sub Inspector Satinder attended. My right eye is hurt very badly and I want Mukesh prosecuted and want sole custody of the children.

STATEMENT OF SUB INSPECTOR SATINDER OF P. S. GREEN PARK

On 1st January Yr… at 10.36 am I was on duty alone at the Police Station when I received a call from Mrs. Monika reporting that her former husband, Mr. Mukesh had threatened to kidnap her children and had struck her in the face. I know Ms. Monika as I have previously attended her home Yr…3 years ago in relation to five allegations domesticviolence to her by

Mr. Mukesh. It was always alleged he had punched her in the stomach, which he would never comment on, saying wait and see if she makes a statement, which she never did.

On arriving at her home, 345 Green Park, she was angry and tearful. Her right eye was badly damaged. Her children were crying, pleading to be allowed to keep some presents. She explained Mr. Mukesh had kept the children later than agreed, on returning them had been offensive to her, and as she was leading her daughter away from him, she had been poked in her eye by him with his car keys and he had to be restrained by his new girlfriend.

I drove to Mr. Mukesh home at 678 HauzKhas and arrested him for voluntarily causing grievous hurt and cautioned him. He said "Look, whatever you think about the other times we've met, this time even you can see what has happened. She's mad. I had to hit her. I'm sorry for it, but you would have done the same." He was taken to Green Park Police Station where he was charged at 2 p.m.Ms. Roshni, Mr. Mukesh's girlfriend, came to the police station and at 1 pm while Mr. Mukesh was in custody, spoke to me at the front desk. She told me she knew he should not have hit Mrs. Monika, but he had a temper and found Christmas without the children difficult. She asked if Mr. Mukesh could simply be released on bail. I explained he would have to go to Court.

STATEMENT OF MUKESH, SON OF RAJESH

I live at 678 HauzKhas with Roshni. I used to live with Monika at 345 Green Park. We were married for ten years, from when she was 25 and I was 28. We have two children together; Sanjay and Sonia aged 8 and 5. I am charged with voluntarily causing grievous hurt to Monika on 1st January Yr…0 I deny the charge. I admit I struck her, but it was in self-defense and defense of Roshni. I only struck her once to calm her down.Feelings were running high as this was the first Christmas I had been separated from my children. Monika had refused to let me see them on Christmas Day. This upset me, but I made a great effort to remain friendly and negotiated for New Year's Eve. Overnight stay was agreed. However, early on New Year's Eve, Monika rang to say I could only have them from 2 pm for the afternoon. She said they did not really want to see me. This upset me. It was a lie. I got rather angry on the phone, said I would collect them at 2 pm and hung up.

Monika did not tell me the children were to go home for 5 pm another lie. At my home, we played together and I gave Sanjay a cricket bat and Sonia a dress. They were very happy and told me they wanted to live with me and Roshni. I did not take any calls as I did not want our short time together interrupted. I accept the phone probably did ring at 5 pm. but I did not know it was Monika.I brought the children to Monika at 10 a.m. on 1st January. She stormed out of the house and was at the car, shouting the children were late, as I pulled Sonia into my arms from the back seat. Sonia began crying. Monika was pulling at my jacket to put Sonia down. Sonia said "Daddy, Please tell mummy to be nice to us and let us live at your house".

Monika clearly heard this, and the effect was immediate and shocking. She flew at me while Sonia was still in my arms. She pulled my hair and I was losing my balance.

Fearing I would fall and hurt Sonia, and in an effort to calm Monika, I instinctively struck at Monika with my left hand. My car keys just happened to be in my hands. I was not even conscious that I had the car keys in my hand. It was not an aimed punch, more of a vigorous slap or flailing. I deny that I deliberately poked the keys into her eye. I do not deny that I injured her eye. It was only one blow. It knocked her down and calmed her down. Roshni run around the car and placed herself between us to be sure Monika's madness did not start again.

When the officer arrested me, he said he understood there had been a bit of scuffle over the kids and things seemed to have got out of hand, he reckoned on both sides knowing us both. It was in that context I said what the officer recordedbut I said Monika was acting madly, meaning violently, not that she is mad.

Monika is lying when she says I struck her. She attacked me. She is angry that the children want to live with me and wants to prevent my access. These are calculated lies to assist her scheme. I have never struck her, even three years ago. She can be quite dishonest if she wants, as you can see from her previous convictions. I have one conviction for a fight in a bar in Yr…6, to which I pleaded guilty and received one month's detention. I do not hit women. I do not lose my temper. I did not lie for Monika at her trials, but simply gave evidence she was on medication.

STATEMENT OF ROSHNI

I am the proprietor of the health club Healthy Smile and live at 678 HauzKhas with Mukesh. I have no previous convictions.

On 31 December Yr… 0, Mukesh picked up his children at 2 pm. He had been a little irritated he could not have them for the day. They spent the afternoon with us playing with the presents. He did not answer the phone in case Monika rang to complain and disturb us.On returning the children at 10 am on 1st January, Monika was hysterical. I think she was angry at the presents and the tearful hug I received from Sanjay. She complained loudly the children were late – but what did it matter, they were safe and they had a really good time. I said to Monika not to be as spiteful as she was upsetting Sanjay. Monika called me a man-eater. Mukesh said she should calm down and apologise. And she just leapt at him. She tried to scratch his face and pull his hair. I wrestled her off Mukesh who lashed out at her to get away as Sonia was still in his arms. He hit her in the head somewhere. I am sure he did not mean it. It was instinctive, an accident. He was certainly sorry for what happened in the car when we drove away.

I asked Sub Inspector Satinder to release Mukesh on bail. I said tempers had frayed, which was not surprising as I had seen Mukesh upset over the children before. I did not say he had a temper. I was careful not to blame Monika, although I should have done, as I was trying to persuade the officer not to detain Mukesh, and though it would be more helpful to talk about generally how unfortunate the incident was, rather than blame anyone.

[EXTRACTS OF RELEVANT SECTIONS OF THE INDIAN PENAL CODE, 1860]

Section 96: Things done in private defense - Nothing is an offence which is done in the exercise of the right of private defense.

Section 97: Right of private defense of the body and of property-Every person has a right.....to defend

First - His own body and the body of any other person, against any offence affecting the human body.....

Section 319: Hurt - Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt.

Section 320: Grievous hurt - The following kinds of hurt only are designated as"grievous":

.....Eightly - Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

Section 322: Voluntarily causing grievous hurt - Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said " voluntarily to cause grievous hurt".

Explanation - A person is not said voluntarily to cause grievous hurt except where he both causes grievous hurt and intends or knows himself to be likely to cause grievous hurt. But he is said voluntarily to cause grievous hurt if, intending or knowing himself to be likely to cause grievous hurt of one kind, he actually causes grievous hurt of another kind.

Section 325: Punishment for voluntarily causing grievous hurt - Whoever..... voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Interlocutory Arguments

CASE 3: RAJ MALHOTRA V. SHIVANI MALHOTRA

Prepared by Dr Aman Hingorani

RAJ MALHOTRA v SHIVANI MALHOTRA

Note for participants

This is an exercise in presenting and resisting an interlocutory application for a restraint order forbidding the removal of two minor children from the custody of the Petitioner-husband by the Respondent-wife.

You will find attached:

1. Instructions to Counsel for Petitioner
2. Instructions to Counsel for Respondent
3. Statements of the children recorded by Guardian Judge, Delhi
4. Extracts of relevant sections of Guardian and Wards Act 1890
5. Elizabeth Dinshaw v Arvand M Dinshaw: (1987) 1 S.C.R. 175
6. Ethical Exercise

Assume the hearing is taking place on the same date as the exercise.

In the Court of the Guardian Judge, Delhi

Raj Malhotra

PETITIONER Versus

Shivani Malhotra **RESPONDENT**

Instructions to Counsel for Petitioner

The Petitioner is an Indian citizen, Punjabi by origin, and presently resident of New Delhi. The Respondent is a British citizen, Gujarati by origin, and resident of London. The Petitioner met the Respondent during their MBA course in London. They fell in love with each other and their marriage was solemnised according to Hindu rites and ceremonies in London on January 15, Yr…9. The parties were blessed with a son, Rohan, on March 26, Yr…8 and a daughter, Muskaan, on April 2, Yr...6.

Differences had arisen between the parties right from the beginning of the marriage, primarily due to incompatibility. The friction between the parties grew, particularly after the birth of the two children. Fed up with frequent arguments and fights at home, the parties got their marriage dissolved by a decree of divorce on January 10, Yr…2. It had been agreed between the parties that the minor children would remain in the custody of the Respondent, with the Petitioner having temporary custody of the children on the weekends from 10 am on Saturday to 8 pm on Sunday. The decree of divorce had been passed in terms of the said agreement. The decree further directed that the party seeking to take the children out of United Kingdom would have to apply for such permission from the London Court, which might grant the same on such terms so as to ensure the return of the children. The parties were directed to contribute equally for the maintenance and education of the children.

The Petitioner states that on January 3 Yr…0, his 65 year old father in New Delhi fell seriously ill and was hospitalised. Around the same time, he learnt that the Respondent had started a live-in relationship with a divorcee, Ajay Khanna, and had, since the previous week, taken the children to reside with her in Ajay Khanna's house. The Petitioner decided that he would leave London for good and return to New Delhi. He, however, did not want to leave his children behind with the Respondent and her partner; particularly since he believed that it would not be in their welfare, morally and emotionally, to witness their mother have a live-in relationship with another man. The Petitioner knew perfectly well that the Respondent would not give him the custody of the children either. So taking advantage of the weekend custody of the children, the Petitioner took the flight from London to New Delhi on Saturday, January 10 Yr…0, along with the children. The Petitioner states that given the urgency of reaching New Delhi to be with to his ailing father, he brought the children to New Delhi without applying for permission to do so from the London Court.

The Petitioner has learnt that the Respondent had then moved the London Court complaining of the violation of the Court's decree by the Petitioner. The London Court has even issued a warrant of arrest against the Petitioner on the ground of unlawful taking and restraining the children outside United Kingdom. The warrant, however, has not been executed as the Petitioner is in India. The Petitioner states that thereafter the Respondent

came to New Delhi and visited the parental home of the Petitioner on January 24 Yr…0, where the Petitioner let her meet the children for several hours. The Respondent demanded that the children be returned to her. The Petitioner refused to do so.

Apprehensive the Respondent would take the children out of his custody, the Petitioner has filed custody and guardianship proceedings before the Guardian Judge, Delhi, under the Guardian and Wards Act 1890 pleading that he is the natural guardian of the children and that the children are now in his custody, and within the jurisdiction of the Indian Courts. He maintains that given the fact that the Respondent started a live-in relationship with another man in London subsequent to the passing of the decree by the London Court, it is in the welfare of the children that they should now remain in his custody. He offers that the Respondent could meet the children whenever she visited New Delhi. The Petitioner undertakes to provide for the maintenance and education of the children. In fact, the children have already been admitted to a reputed school in New Delhi and have even made friends. The Petitioner points out that his mother is a housewife and stays at home and is quite competent to look after both the children. The Petitioner express his regret for having to violate the consent decree of the London Court but contends that in such cases, the matter has to be decided not on consideration of the legal rights of the parties but on the sole criteria of what would best serve the interest and welfare of the minor children. The Petitioner prays that it would be in the interest of the children if they are directed to remain in his custody and the Respondent be restrained from taking the children out of his custody. The Petitioner has also filed an interlocutory application under Section 12 of the Guardian and Wards Act 1890 seeking a restraint order forbidding the Respondent from removing the children from his custody pending the disposal of the matter.

The Guardian Judge has granted ex-parte the interim restraint order against the Respondent till further orders. Summons was sent to the Respondent two weeks ago for last Friday, on which day the Respondent filed her Written Statement to the Petition and Reply to the interlocutory application. The Petitioner had also been directed to produce the children before the Court on that date, which he duly did. The statements of the children were recorded by the Guardian Judge in Chambers on the same date. The matter is now listed today for arguments on the interlocutory application of the Petitioner.

In the Court of the Guardian Judge, Delhi

Raj Malhotra
PETITIONER

Versus

Shivani Malhotra
RESPONDENT

Instructions to counsel for Respondent

The Respondent has received last week summons from the Court of the Guardian Judge, Delhi enclosing a copy of the application of the Petitioner seeking custody and guardianship of the two minor children, Master Rohan and Baby Muskaan, and a copy of the interlocutory application seeking a restraint order forbidding the Respondent from removing the children from the custody of the Petitioner. The summons were accompanied by an order passed by the Guardian Judge, granting such restraint order ex-parte till further orders. It was indicated in the said order that the interlocutory application of the Petitioner would be taken up for hearing on the coming Friday on which date the Petitioner also had been directed to produce the children in Court.

The Respondent immediately filed her Written Statement and her Reply to the said interlocutory application of the Petitioner under Section 12 of the Guardian and Wards Act, 1890.

The Respondent has pleaded in her Written Statement that as per the decree of divorce of January 10, Yr…2 passed by the London Court, the minor children would remain in her custody, with the Petitioner having temporary custody of the children on the weekends from 10 am on Saturday to 8 pm on Sunday. The decree further directed that the party seeking to take the children out of United Kingdom would have to apply for such permission from the London Court, which might grant the same on such terms so as to ensure the return of the children. The parties were directed to contribute equally for the maintenance and education of the children.

The Respondent states that in terms of the said decree, the Petitioner duly returned the children to the Respondent when he took them for weekend custody. The children had gone to stay with the respondent on January 10 Yr…0 and were to be returned to her on January 11 Yr…0 at 8 pm. When the children did not return, she frantically tried to contact the Petitioner, only to learn from his neighbours that he had left for India with the children. Accordingly on January 19 Yr…0, the Respondent applied to the London Court for the warrant of arrest against the Petitioner on the ground of unlawful taking and restraining the children outside United Kingdom. The said warrant still stands outstanding against the Petitioner.

The Respondent pleads that like the Petitioner, she too is the natural guardian of the children, and more important, she is the person entitled to their custody under the order of a

competent foreign Court, the certified copies of which she annexed to her Written Statement. She contends that she has reason to believe that the Petitioner's father was not unwell as stated by the Petitioner in his application and that he had cooked up the story about his father's illness merely to justify his sudden flight from London. She adds that the Petitioner has shown scant respect for the decree of the London Court and that his conduct of abducting the children does not inspire confidence that he is a fit and suitable person to be entrusted with the custody and guardianship of the children. The Respondent states that the children were born, brought up and educated in London and are still accustomed and acclimatized to the place of their birth. The children were going to school in London and are presently losing out on their studies on account of the reprehensible conduct of the Petitioner.

The Respondent admits that she is living with Ajay Khanna, but states that she ensures that the children do not witness any inappropriate or embarrassing situations. She points out that it does not necessarily outrage sensibilities in London for a divorcee to have a partner, nor does she consider it to be morally depraved. Rather, Ajay Khanna is very fond of the children and tries to give them fatherly love. Moreover, the minor daughter, Muskaan, is a growing up girl and needs the constant attention of the Respondent. It would be cruel to separate Rohan and Muskaan from each other at such tender age, more so, because they are each other's best friend.

The Respondent states that she has to report back to her job in London next week and cannot stay in New Delhi to contest the custody and guardianship case filed by the Petitioner. She further submits that if she is restrained from taking the children back to London, the Petitioner would gain an advantage by his wrongdoing and that it would encourage the tendency of sudden and unauthorised removal of children from one country to another. The Respondent offers that should the Petitioner withdraw the instant matter and let her take the children back to London, she would co-operate with the Petitioner for the withdrawal of the warrants of arrest outstanding against the Petitioner and that she would raise no objection to the restoration of his weekend custody rights which have since been terminated by the London Court.

In the Court of the Guardian Judge, Delhi

Raj Malhotra
PETITIONER

Versus

Shivani Malhotra
RESPONDENT

Statement of Master Rohan, son of Mr Raj Malhotra, aged about 8 years, recorded in Chambers

Q. I am told that you have joined a new school
A. Yes

Q. Do you like your school?
A. Yes

Q. Don't you find everything strange around you?
A. No. I like being here.

Q. Have you made any friends so far?
A. Yes. Akrit and Kashish.

Q. Who else is staying with you?
A. My Daddy's parents and my sister.

Q. Do your grandparents look after you?
A. Yes. They are always around me.

Q. But is not your grandfather unwell?
A. No. He came to the airport to receive us.

Q. Does not your grandfather go to the doctor?
A. No.

Q. Who gets you ready for school?
A. My grandmother.

Q. Who cooks your food?
A. My grandmother.

Q. Has your Daddy ever hit you?
A. No. He loves me a lot.

Q. Has your Mummy ever hit you?
A. Once, when I told a lie about having done my homework.

Q. What are your hobbies?
A. I play cricket. I do painting and swimming.

Q. Who plays cricket with you?
A. My Daddy. Ever since we came here, my grandfather also plays cricket with me.

Q. Do you know any one by the name of Ajay Khanna?
A. Yes, Ajay Uncle.

Q. Who is he?
A. He is Ajay Uncle. He is Mummy's friend in London.

Q. Is Ajay Uncle nice to you?
A. Yes. He loves me a lot and gives me chocolates.

Q. Do you spend much time with your sister, Muskaan?
A. She is my best friend. We are always together.

Q. Who do you love more- Mummy or Daddy?
A. Both.

Q. Choose one.
A. (silence)

Q. Your Mummy and Daddy are living separately?
A. Yes.

Q. Who do you want to stay with?
A. Both.

Q. No, if you have to choose one?
A. (silence)

Q. If you have to choose one?
A. Daddy always plays cricket with me. I miss that.

Note: The child is visibly distressed at being asked his preference.

Sd/-

Guardian Judge, Delhi

In the Court of the Guardian Judge, Delhi

Raj Malhotra **PETITIONER**

Versus

Shivani Malhotra
RESPONDENT

Statement of Baby Muskaan, daughter of Mr Raj Malhotra, aged about 6 years, recorded in chambers

Q. You are a very pretty girl
A. (smiles)

Q. You go to the same school as your brother?
A. Yes

Q. Do you like your school?
A. Yes

Q. Have you made any friends so far?
A. Yes. Radhika

Q. Do you like to stay here, in India?
A. Yes. But I also miss home.

Q. Which home, here or in London?
A. In London.

Q. Who else is staying with you here?
A. My brother. Daddy and Daddy's parents.

Q. Do your grandparents look after you?
A. Yes.

Q. Are not your grandparents keeping bad health?
A. No.

Q. Who gets you ready for school?
A. My grandmother.

Q. Who cooks your food?
A. My grandmother.

Q. Has your Daddy ever taught you?
A. No. But he helps me to paint.

Q. What are your hobbies?
A. Painting and dancing.

Q. Do you know any one by the name of Ajay Khanna?
A. Yes, Ajay Uncle.

Q. Is he nice to you?
A. Yes, he has got me two dresses and a doll.

Q. Do you spend a lot of time with your brother?
A. Yes

Q. Who loves you more – Mummy or Daddy?
A. Both.

Q. Who do you love more – Mummy or Daddy?
A. Both.

Q. Choose one.
A. (silence)

Q. Your Mummy and Daddy are living separately?
A. Yes.

Q. Who do you want to stay with?
A. Both.

Q. No, if you have to choose one?
A. (silence)

Q. If you have to choose one?
A. (silence)

Note: The children were present in the Courtroom for about 30 minutes prior to being taken to the Chambers. It was noticed that Baby Muskaan sat throughout clutching the hand of the Respondent, who was constantly comforting her.

Sd/-
Guardian Judge, Delhi

Extracts of relevant sections of Guardian and Wards Act 1890

7. Power of Court to make order as to guardianship-

(1) Where the Court is satisfied that it is for the welfare of the minor that order should be made -

(a) appointing a guardian of his person or property, or both, or

(b) declaring a person to be such a guardian, the Court may make an order accordingly....

8. Person entitled to apply for order -

An order shall not be made under the last foregoing section except on the application of-

(a) the person desirous of being or claiming to be the guardian of the minor, or

(b) any relative or friend of the minor....

12. Power to make interlocutory order for production of minor and interim protection of person and property-

(1) The Court may direct the person, if any, having the custody of the minor shall produce him or cause him to be produced at such place and time and before such person as it appoints, and may make such order for the temporary custody and protection of the person or property of the minor as it thinks proper....

19. Guardian not to be appointed by the Court in certain cases -

Nothing in this Chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards or to appoint and declare a guardian of the person -

(a) of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of her person, or

(b) ‘ [***] of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the minor, or

(c) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor.

MRS ELIZABETH DINSHAW v. ARVAND M. DINSHAWAND ANR.

NOVEMBER 11, 1986

(V. BALAKRISHNA ERADI AND G.L. OZA, JJ)

The petitioner, a citizen of the United States of America residing in Michigan, was married to the first respondent, an Indian citizen, who after marriage settled down in the United States and secured employment. A male child was born to the couple in America. Differences arose between them and the petitioner along with her son took up separate residence. She filed a petition for divorce in the Circuit Court for the country of Saginaw, Michigan, which granted a decree holding that there had been a breakdown in the marriage relationship and declared the marriage as dissolved. The decree also directed that the petitioner shall have the care, custody and control of the minor child until he reaches the age of 18 years. The first respondent, the father was given visitation rights by the decree. On the subject of travel with the minor child to any place outside the United States, it was directed that only on a petition the Court shall make a determination as to whether such travel is in the best interest of the minor child, and what conditions shall be set forth to ensure the child's return. The Court also directed that the first respondent shall notify the Office of the Friend of the Court promptly concerning any changes in his address.

Taking advantage of the weekend visitation rights granted by the said decree, the first respondent picked up the child from his school and secretly left America for India on January 11th 1986. He had not intimated the Court about his intention to take the child out of its jurisdiction and outside the country nor had he given the slightest indication to the petitioner about his intention to leave America permanently for India. Immediately before leaving for India, the first respondent sold away his immovable property and it was only from the Airport that he posted a letter tendering his resignation from his job.

Coming to know that the minor child had not been returned to the day care centre by the first respondent, the petitioner moved the Circuit Court complaining against his violation by the first respondent of the terms of the Court's decree. The Court issued a warrant of arrest against the first respondent on the ground of unlawful taking and retaining the child outside the State, followed by the issue of a Federal warrant of arrest on the ground of unlawful flight to avoid prosecution. Since the first respondent had already come over to India with the minor child these warrants could not be executed in the United States. The Consular Officer, American Consulate General, Bombay, visited the residence of the first respondent's parents in Pune but the minor child was not present there and the grandparents reported that the child and his father had gone North, possibly to Kashmir and that they were not aware of their exact whereabouts. Thereafter, the petitioner filed a petition in this Court seeking the issuance of a writ of Habeas Corpus directing the respondents to produce in Court her minor child and to hand over custody to her as the person entitled to it under the order of a competent foreign Court.

In response to the notice issued by this Court, the first respondent appeared and produced the child in Court and filed a counter-affidavit explaining his conduct the

explanation tendered by him was that his father was seriously ill and wanted his father to see the child. It was further submitted that the child prefers to stay with him in Pune and hence he was admitted in a School there and that it will be in the interest of the child that he should be allowed to reside with him in India.

Disposing of the petition,

HELD: 1. Whenever a question arises before Court pertaining to the custody of a minor child, the matter is to be decided not on consideration of the legal rights of parties but on the sole and predominant criterion of what would best serve the interest and welfare of the minor. (181F].

2. It is the duty of all Courts in all countries to do all they can to ensure that the wrongdoer does not gain an advantage by his wrongdoing. The Courts in all countries out to be careful not to do anything, to encourage the tendency of sudden and unauthorised removal of children from one country to another. This substitution of self-help for due process of law in this field can only harm the interests of the wards generally, and a judge should pay due regard to the orders of the proper foreign Court unless he is satisfied beyond reasonable doubt that to do so would inflict serious harm on the child. (183B-D].Re H. (infants) 1966 ALL E.R. 886 relied upon

3. The conduct of the first respondent in taking the child from the custody of the person to whom it had been entrusted by the Court was undoubtedly most reprehensible. The explanation sought to be given, namely his father's illness, is far from convincing and does not in any way justify such gross violation and contempt of the order of the Circuit Court in Michigan. [181 E)

4. The child's presence in India is the result of an illegal act of abduction and the father who is guilty of the said act cannot claim any advantage by stating that he has already put the child in some school. The conduct of the father has not been such as to inspire confidence in the Court that he is a fit and suitable person to be entrusted with the custody and guardianship of the child.

5. It will be in the best interest and welfare of the child that he should go back to the United States of America and continue his education there under the custody and guardianship of the mother to whom such custody and guardianship have been entrusted by a competent Court in that country. The petitioner, who is the mother, is full of genuine love and affection for the child and she can safely trusted to look after him, educate him, and attends in every possible way to his proper up-bringing. The child has not taken root in this country and he is still accustomed and acclimatized to the place of his origin in the United States of America. [181H-182A, B]

6. The first respondent has tendered before this Court an unconditional apology. The proper step to be taken by him is to tender such an apology to the Court whose order he has violated. He has been found to be in contempt of the Circuit Court, Saginshaw, Michigan for violation of its order and that Court has consequently terminated the visitation rights conferred on the first respondent. He may prove that Court for modification of its order on tendering his

unconditional apology to that Court. The petitioner should cooperate with the respondent in the matter of enabling him to have restricted visitation rights in America and should also extend her co-operation for the withdrawal of the warrants of arrest outstanding against the first respondent. [183 F- 184C]

Original Jurisdiction: Writ petition (Crl.) No. 270 of 1986

Under Article 32 of the Constitution of India

Mrs K Hingorani for the petitioner

Kapil Sibal, Karanjawala, MrsKaranjwala and CV Subba Rao for the Respondents

The Judgment of the Court was delivered by

BALAKRISHNA ERADI, J. Immediately on conclusion of the hearing of arguments in the above Writ Petition on June 11, 1986, having regard to the urgency of the matter, we passed the following order: –

"We allow the Writ Petition and direct that the minor boy, Dustan be restored forthwith to the custody of the petitioner i.e. the mother with liberty to the petitioner to take him to the United States. The child will be a ward of the concerned Court in Michigan and it will be open to the father, first respondent herein to move that Court for a review of the custody of the child, if he is so advised. Detailed reasons will follow. The passport of the child which is in deposit with the Registrar of this Court will be returned to the petitioner i.e. the mother of the child today itself. The concerned authorities of the Govt. of India will afford all facilities to the mother to take the child back to the United States pursuant to the order passed by this Court."

We now proceed to state in this judgment our reasons in support of the order.

The petitioner, Mrs. Elizabeth Dinshaw is a citizen of the United States of America residing in the State of Michigan. She is employed as a case worker for the State of Michigan in Genesee County Department of Social Services, Flint Michigan. The first respondent, Mr. Arvand M. Dinshaw, who is an Indian citizen, was a student at Northern Michigan University in 1971. During that period the petitioner was also studying there. What started as a friendship between them on the campus later developed into love and the petitioner was married to the first respondent in a civil marriage before a legal magistrate in Negaunee, Michigan on February 26, 1972. The first respondent thereafter settled down in the United States more or less on a permanent basis having secured employment as an Accountant for the Controller's Office in Genesee County, and having obtained a permanent immigration Visa. A male child, Dustan, was born to the couple on August 30, 1978 in Rochester, Michigan, United States of America where they were having their marital home.

Unfortunately, differences arose between the two spouses late in the year 1980 and on December 23, 1980, the petitioner along with her son took up separate residence in a women's shelter in Saginaw, Michigan. She filed a petition for divorce on January 2, 1981 in the Circuit Court for the County of Saginaw, Michigan. By a decree dated April 23, 1982, the Circuit Court held that it had been established that there had been a breakdown in the marriage relationship to the extent that the objects of matrimony had been destroyed and

there remained no reasonable likelihood that the marriage could be preserved and hence it declared the marriage as dissolved and granted a divorce to the petitioner as prayed for. By the same decree, it was directed that the petitioner shall have the care, custody and control of the minor child of the parties until he reaches the age of 18 years or until the further orders of that Court. The first respondent, the father was given visitation rights by the decree and it was provided that he shall have visitation with the minor child from approximately 5 P.M. to 8 P.M. on the Wednesday of every week during which he does not have a weekend visitation. It was further ordered that the father shall have visitation with the minor child on alternate weekends from 5 P.M. on Friday until the following Monday morning when he should return the child to his day care centre. On the subject of travel with the minor child to any place outside the United States, it was specifically directed in the decree as follows: –

"IT IS FURTHER ORDERED AND ADJUDGED THAT should the Defendant ARVAND M. DINSHAW wish to travel with the minor child outside the territorial limits of the United States. He shall bring a petition before this Court setting forth the conditions under which he intends to leave the country with the minor child. The court shall then make a determination as to whether such travel is in the best interests of the minor child and what conditions shall be set forth to ensure the child's return."

Taking advantage of the weekend visitation rights granted to him by the above decree, the first respondent picked up Dustan from his school on January 10, 1986 and secretly left the United States of America for India on January 11, 1986 at about 8.30 in the night. He had not intimated the Court about his intention to take the child out of its jurisdiction and outside country nor had he given the slightest indication to the petitioner about his intention to leave the United States of America permanently for India. It may be stated that immediately before leaving for India, the first respondent had sold away the immovable property consisting of a house and its premises owned by him in Seymour, Lindan, Michigan, where he had been residing and it was only from the Airport that he posted a letter tendering his resignation from his job as Accountant in the Country. In this context it is significant to recall that the decree of the Circuit Court contained the following directions:

"IT IS FURTHER ORDERED AND ADJUDGED that the Defendant shall notify the Office of the Friend of the Court promptly concerning any changes in his address. The Court further finds that the Defendant is presently residing at 14155 Seymour, Lindan, Michigan."

It was only late in the day on Monday, January 13, 1986 that the petitioner came to know that the minor child, Dustan had not been returned to the day care centre by the first respondent. She immediately moved the Michigan Circuit Court complaining against the violation by the first respondent of the terms of its decree. A warrant of arrest was issued by the Michigan Circuit Court against the first respondent on January 16, 1986 on the ground of unlawful taking and retaining the child outside the State. This was later followed by the issue of a Federal warrant of arrest against the first respondent on the January 28, 1986 on the ground of unlawful flight to avoid prosecution. Since the first respondent had already come over to India with the minor child, these warrants could not be executed in the United States. The first respondent has his ancestral home in Pune where his parents are residing. The petitioner

made frantic efforts through American Consulate General at Bombay to trace out the whereabouts of Dustan. She received a reply that the Consular Officer, American Consulate General, Bombay travelled to Pune on Friday, March 7, 1986 and though she was able to visit the residence of the first respondent's parents and she spoke with them, the minor child, Dustan was not present there and the grand-parents reported that Dustan and his father had gone North, possible, to Kashmir and that they were not aware of the exact whereabouts of Dustan and the first respondent. The petitioner finding herself totally helpless to recover back the custody of her minor child, whom she had brought up for more than 7 years, thereafter arranged to have this petition filed in this Court seeking the issuance of writ of Habeas Corpus directing the respondents to produce in Court her minor child, Dustan and to hand over his custody to her as the person entitled to his custody under the order of a competent foreign Court.

In response to the notice issued by this Court directing production of the child before the Court, the first respondent appeared and produced the child in Court. He has filed a counter-affidavit but significantly there is absolutely no satisfactory explanation given there for his conduct in abducting the child from America without seeking permission of the Court in that country of which the minor child, was ward. His only explanation is that his father was seriously ill and he wanted that his father in his ailing condition to see Dustan. He has further stated that his son Dustan has told him on an enquiry that he would prefer to stay with him in Pune and hence he had got Dustan admitted in St. Helena's School in Standard III. According to him he had not deliberately done anything wrong in bringing Dustan with him from the United States and that now the minor child is well settled here in India and it will be in the interest of the child that he should be allowed to reside with him in India as per the child's desire.

The conduct of the first respondent in taking the child from the custody of the person to whom it had been entrusted by the Court was undoubtedly most reprehensible. The explanation sought to be given by him namely, his father's illness, is far from convincing and does not in any way justify such gross violation and contempt of the order of the Circuit Court in Michigan.

Whenever a question arises before Court pertaining to the custody of a minor child, the matter is to be decided not on considerations of the legal rights of parties but on the sole and predominant criterion of what would best serve the interest and welfare of the minor. We have twice interviewed Dustan in our Chambers and talked with him. We found him to be too tender in age and totally immature to be able to form any independent opinion of his own as to which parent he should stay with. The child is an American citizen. Excepting for the last few months that have elapsed since his being brought to India by the process of illegal abduction by the father, he has spent the rest of his life in the United States of America and he was doing well in school there. In our considered opinion it will be in the best interests and welfare of Dustan that he should go back to the United States of America and continue his education there under the custody and guardianship of the mother to whom such custody and guardianship have been entrusted by a competent Court in that country. We are also satisfied that the petitioner who is the mother, is full of genuine love and affection for the child and

she can be safely trusted to look after him, educate him and attend in every possible way to his proper upbringing. The child has not taken root in this country and he is still accustomed and acclimatized to the conditions and environments obtaining in the place of his origin in the United States of America. The child's presence in India is the result of an illegal act of abduction and the father who is guilty of the said act cannot claim any advantage by stating that he has already put the child to some school in Pune. The conduct of the father has not been such as to inspire confidence in us that he is a fit and suitable person to be entrusted with the custody and guardianship of the child for the present.

In Re. H. (infants) [1966] 1 All E.R. 886, the Court of Appeal in England had occasion to consider a somewhat similar question. That case concerned the abduction to England of two minor boys who were American citizens. The father was a natural-born American citizen and the mother, though of Scottish origin, had been resident for 20 years in the United States of America. They were divorced in 1953 by a decree in Mexico, which embodied provisions entrusting the custody of the two boys to the mother with liberal access to the father. By an amendment made in that order in December, 1964, a provisions was incorporated that the boys should reside at all times in the State of New York and should at all times be under the control and jurisdiction of the State of New York. In March, 1965, the mother removed the boys to England, without having obtained the approval of the New York court, and without having consulted the father; she purchased a house in England with the intention of remaining there permanently and of cutting off all contacts with the father. She ignored an order made in June, 1965, by the Supreme Court of New York State to return the boys there. On a motion on notice given by the father in the Chancery Division of the Court in England, the trial judge Cross, J. directed that since the children were American children and the American Court was the proper Court to decide the issue of custody, and as it was the duty of courts in all countries to see that a parent doing wrong by removing children out of their country did not gain any advantage by his or her wrongdoing, the Court without going into the merits of the question as to where and with whom the children should live, would order that the children should go back to America. In the appeal filed against the said Judgment in the Court of Appeal, Willmer L.J. while dismissing the appeal extracted with approval the following passage from the judgment of Cross, J.: –

"The sudden and unauthorised removal of children from one country to another is far too frequent nowadays, and as it seems to me, it is the duty of all courts in all countries to do all they can to ensure that the wrongdoer does not gain an advantage by his wrongdoing. The Courts in all countries ought, as I see it, to be careful not to do anything to encourage this tendency. This substitution of self-help for due process of law in this field can only harm the interests of wards generally, and a judge should, as I see it, pay regard to the orders of the proper foreign Court unless he is satisfied beyond reasonable doubt that to do so would inflict serious harm on the child."

With respect we are in complete agreement with the aforesaid enunciation of the principles of law to be applied by the Courts in situations such as this.

As already observed by us, quite independently of this consideration we have come to the firm conclusion that it will be in the best interests of the minor child that he should go back with his mother to the: United States of America and continue there as a ward of the concerned Court having jurisdiction in the State of Michigan. The first respondent has tendered before this Court in an affidavit filed by him an unconditional apology for having illegally brought Dustan over to India from the United States in violation of the order of the competent Court in that country. The proper step to be taken by him is to tender such an apology to the Court whose order he has violated. It was brought to our notice that by an order passed by the Circuit Court, Saginaw, Michigan on February 11, 1986, the first respondent has been found to be in contempt of that Court for violation of its order and the Court has consequently terminated the visitation rights which had been conferred on the first respondent by the decree dated April 23, 1982. It will be open to the first respondent, if he is so advised, to move the Saginaw County Circuit Court in the State of Michigan for modification of this order on tendering his unconditional apology to that Court, and if he is able to satisfy that Court that there is genuine contrition and regret on his part for the wrong that he has done, we have no doubt that the Circuit Court will take a lenient view and pass appropriate orders working out justice between the parties keeping in mind the important aspect that it will not be in the interest of the minor child to completely alienate him from his father for-whom the child has developed genuine affection. We have also no doubt that the petitioner will not take a vindictive attitude but would forget and forgive what has happened in the past and cooperate with the father in the matter of enabling him to have restricted visitation rights in America with all necessary, proper and adequate safeguards and that the petitioner would also extend her co-operation for the withdrawal of the warrants of arrest outstanding against the first respondent in case he approaches her with such a request.

For the reasons stated above, the Writ Petition is disposed of with the directions issued by our order dated June 11, 1986.Petition disposed of.

Ethical Exercise

Raj Malhotra has just learnt that Shivani Malhotra's visa is to expire in two days and she will have to leave India by then, with or without the children. The children are already in the custody of Raj Malhotra, and should the matter be adjourned, Shivani Malhotra will have to leave India without the children. Raj Malhotra knows that the Court normally adjourns the matter on the ground of personal difficulty of Counsel. He, therefore, instructs you, his Counsel, to get an adjournment of just two days in the case on the false pretext of your being unwell. He is offering to pay you a handsome amount as additional Fee for arranging just this one adjournment through a proxy Counsel. Would you secure the adjournment for Raj Malhotra?

Would your answer change, if your sympathies lay with Raj Malhotra, as you have a genuine personal conviction that the welfare of the children lies in remaining him, rather than with Shivani Malhotra who admittedly is having a live in relationship.

CASE 4: SINGER CONSULTANTS PVT. LTD. V. WINSOFT TELECOMMUNICATIONS PVT.LTD.

Prepared by Dr. Aman Hingorani

Note for Participants

Please note that Yr-0 denotes the current year, Y-1 the previous year, Yr-2 two years ago and so on so forth.

STATEMENT OF VARUN SINGER

1. I am Varun Singer, Managing Director of Singer Consultants Pvt. Ltd. having registered office at 34 New Complex, Delhi. The company is the owner of Jubilee Plaza, 14 Old Road, Delhi, the property in question. It is one of our most expensive and exquisitely designed properties.

2. In June Yr - 4, I received a call from Ms. Neena Elizabeth who desired to take Jubilee Plaza on rent for her office. She introduced herself as the Managing Director of WinSoft Telecommunications Pvt. Ltd.and wanted to sign the lease deed as soon as possible without even visiting the property. I insisted that she views the property as per our company's policy, and she reluctantly agreed. She visited the property on or around 15 July Yr – 4 with her manager, Mr. Sooraj Krishan. They found the property to be suitable for their purposes.

3. We signed the lease deed on 12 September Yr-4, after a few rounds of negotiations, and the property was leased out to WinSoft Telecommunications Pvt. Ltd.at a monthly rental of INR 2 lakhs to be paid in advance by the 7th of every month for which the payment was due. Ms. Elizabeth also wanted parking space for two cars which was leased out to WinSoft Telecommunications Pvt. Ltd. at the monthly rent of INR 8,000/-. The lease deed contained the standard clauses of payment of security deposit equivalent to three months which was liable to be forfeited in case of breach of contract, and a lock-in period of three years during which WinSoft Telecommunications Pvt. Ltd. could not terminate the lease. We assured WinSoft Telecommunications Pvt. Ltd that the property would be maintained by my company in the same habitable condition in which it was let out.

4. WinSoft Telecommunications Pvt. Ltd. shifted to the property by 15 September Yr - 4. On 20 September Yr - 4, I went to the property to introduce Sunny Singh, my manager, to Ms. Elizabeth. She seemed quite pleased with her new office and gave positive feedback.

5. I was shocked when, on 25 March Yr - 2, my company received three month notice from WinSoft Telecommunications Pvt. Ltd. terminating the lease with effect from

30 June Yr - 2. They cited limitation of space as the reason for the said termination and stated that the place was too small to cater to their current and future requirements. Further, they wanted us to adjust the rent for the months of April to June Yr -2 against the three months security amount deposited with us. This is totally unacceptable as WinSoft Telecommunications Pvt. Ltd had illegally terminated the lease within the lock-in period and, therefore, was required to pay rent for the three months.

6. Further, my company received a legal notice on 26 April Yr – 2, where WinSoft Telecommunications Pvt. Ltd raised grievances regarding maintenance of the property and alleging breach of contract by us. However, this was for the first time that I had heard of these issues at the property. The allegation is absolutely false and baseless as the property was repaired and maintained at regular intervals.

7. WinSoft Telecommunications Pvt. Ltd just left the property on 30 March Yr – 2. At their request, we had a joint inspection on 1 September Yr – 2. The premises were in good condition, just as when it was given to WinSoft Telecommunications Pvt. Ltd. The property remained unutilized and unproductive of rent right upto 1 February Yr – 1, when a new tenant approached us.

8. WinSoft Telecommunications Pvt. Ltd has unlawfully terminated the lease deed and should duly pay all the liabilities arising out of the default. It is true that there is no provision of penalty or liquidated damages in the lease deed should WinSoft Telecommunications Pvt. Ltd. terminate the lease prior to the expiry of the lock-in period. There was no need for any such provision since should WinSoft Telecommunications Pvt. Ltd. terminate the lease prior to the expiry of the lock-in period, it would assume the pre-existing liability to pay the rent for the unexpired lock-in period. That would be its debt, regardless of whether my company sufferred any actual or real loss. The very purpose of a lock-in period is to ensure that the tenant stays in the property during that period or make good all losses incurred by the landlord in case it wants to vacate earlier. Otherwise, why have a lock-in period.

9. Our claim against WinSoft Telecommunications Pvt. Ltd is, therefore, for rent from April Yr – 2 onwards for the unexpired lock-in period, along with interest @ 18 % p.a. till date of payment. Moreover, as WinSoft Telecommunications Pvt. Ltd breached the contract, we have forfeited their security deposit.

STATEMENT OF SUNNY SINGH

1. I am Sunny Singh, aged about 35 years, resident of Flat No. 12, Medium Apartments, Delhi. I am an employee of Singer Consultants Pvt. Ltd. for the last 8 years, working as manager of their properties.

2. Presently, I am placed as the manager of their property at Jubilee Plaza, 14 Old Road, Delhi. I have been working there since August Yr - 4. Generally, I manage around 2 properties at one time. However, as Jubilee Plaza is a huge complex, I am responsible for only one property at the moment. Jubilee Plaza is one of the high-end properties of Singer Consultants.

3. In September Yr - 4, the property was leased out to WinSoft Telecommunications Pvt. Ltd.and they shifted to the property by the middle of the month. I met Ms. Neena Elizabeth, the Managing Director of the company, and Mr. Sooraj Krishan, her manager, on 20 September Yr -4. Ms. Elizabeth was very stressed though excited about her new office. Mr. Krishan seemed like a trouble maker to me as he went on complaining about everyone to Ms. Elizabeth.

4. Around the month of December Yr - 4, Mr. Krishan told me that their business was running very well and they had decided to employ more staff. He never made any complaints regarding maintenance of the property. I also did not receive any intimation from Ms. Elizabeth about any problem. I, in fact, always received positive feedback from everyone and duly communicated the same to Mr. Singer.

5. I was astonished to hear about the termination of the lease deed from Mr. Singer. I have seen the notice and can confirm that all the allegations therein are false. There have not been any issues of water logging or poor lightning in the common area. We have not received any such complaints from any of the occupants of the property. They only want to shift to an alternative place as they have employed more staff whom they cannot accommodate at this property.

STATEMENT OF NEENA ELIZABETH

1. I am Neena Elizabeth, Managing Director of WinSoft Telecommunications Pvt. Ltd.having registered office at 202 Sea Lane, Mumbai.

2. I was looking at the prospects of expanding the business of my company and wanted a spacious property to start my office in Delhi. After a long search and on strong recommendation of ABZ Property Consultants, I met Mr. Varun Singer, the Managing Director of Singer Consultants Pvt. Ltd. and owner of Jubilee Plaza, 14 Old Road, Delhi in June Yr - 4 to discuss the prospects of leasing the said premises for my office. I visited the property in July Yr – 4 and instantly had a liking for it. It had all the required facilities which I wanted and also parking space, as a bonus. We signed the lease deed on 12 September Yr - 4.

3. The monthly rent of the property was INR 2 lakhs. We also agreed to pay INR 4,000/- per car for parking space for two cars. The rent was to be paid in advance by the 7th day of every month. WinSoft Telecommunications Pvt. Ltd. paid INR 6 lakhs, the equivalent of monthly rent for three months as security deposit to Singer

Consultants Pvt. Ltd. It was the responsibility of Singer Consultants Pvt. Ltd to maintain the property, for which they billed us the maintenance charges, and WinSoft Telecommunications Pvt. Ltd. has duly paid all the charges s billed. The lease deed contained a lock-in period of 3 years. The lock-in period clause did not provide for any penalty or liquidated damages in case WinSoft Telecommunications Pvt. Ltd. Terminated the lease within the lock-in period. This was done deliberately after negotiations, and with the consent of Mr. Singer and his company.

4. I was personally present for setting up the new office, after which I left for Mumbai leaving behind my employee, Mr. Sooraj Krishan, to manage and run the new office in Delhi. Within few days of my return, I received calls from Sooraj about the problem with the central air conditioning of the premises, which was not working properly. He also informed me about the poor state of the maintenance of the property which was having issues of water logging and bad lighting in the common areas. He further informed me that the maintenance department of Singer Consultants Pvt Ltd. was not sorting out the issues, even after repeated requests.

5. Our clients frequently visit the office and such poor maintenance was creating embarrassment to our company and was damaging the reputation of the business. We could not hold business meetings at the premises or accommodate employees due to these maintenance issues. So, my company decided to spend money out of its own pocket to install air conditioning unit and to carry out other repair works, which were the responsibilities of Mr. Singer and his company.

6. Being fed up with all these issues, WinSoft Telecommunications Pvt. Ltd. sent a three month notice through courier on 25 March Yr-2 to Singer Consultants Pvt. Ltd. terminating the lease deed with effect from 30 June Yr – 2. We requested Singer Consultants Pvt. Ltd. to adjust the rent for the months of April – June Yr - 2 against the security amount deposited in the beginning. The lease deed did not contain any provision of penalty or liquidated damages for terminating the lease within the lock-in period and, therefore, we are not required to pay anything to Singer Consultants Pvt. Ltd.. Moreover, when it is they who committed breach of contract by not maintaining the property as detailed in our legal notice of 26 April Yr - 2.

7. We handed over possession of the property to Singer Consultants Pvt. Ltd. on 30 March Yr – 2, followed by a joint inspection on 1 September Yr -2. We returned the premises in the same condition in which we got it. Singer Consultants Pvt. Ltd. has not given us any proof that it has suffered any loss by the premature termination of the lease. It is true that they had no tenant upto 1 February Yr – 1, but that was because they did not even try to look for a tenant or take steps to mitigate the loss of rent. The very purpose of the three months notice was for them to find a new tenant. We paid the rent till June 30 Yr-4 though we had vacated the property on 30 March Y-4 itself.

8. I have undergone immense mental trauma and financial loss during this time while dealing with Singer Consultants Pvt. Ltd. We have already spent a lot of money on this property with negative results and do not wish to spend anything more. Since it is they who committed breach of contract by not maintaining the property, they have no right to forfeit the security amount equivalent to three months rent. This amount constitutes the rent for the months of April – June Yr -2. So, we do not owe them any money. Rather, they should consider themselves lucky that we have not sued them for breach of contract.

STATEMENT OF SOORAJ KRISHAN

1. I am Sooraj Krishan, aged about 50 years. I am resident of 3 New Apartments, Delhi. I have worked with WinSoft Telecommunications Pvt. Ltd.since its inception.

2. I was the manger of the Mumbai office of the company before coming to Delhi in August Yr – 4 to manage our youngest branch. We took the property on rent from Singer Consultants Pvt. Ltd. Before leasing out, I visited the property along with Ms. Elizabeth. The property was too small for our purposes and the rent was too high. I told this to Ms. Elizabeth, but she was in a hurry to start the Delhi branch and she got carried away with the parking space.

3. After we shifted to the property, Ms. Elizabeth realized that the property was too small to cater to our present and future requirements. Also, there was negligible maintenance of the property. The common areas of the property always remained water logged. In fact, water entered into the office in the first week of March Yr – 4. Moreover, the problem was aggravated due to absence of proper lighting in those areas. I repeatedly made complaints to the maintenance department of Singer Consultants Pvt. Ltd. and to Mr. Sunny Singh, but to no avail. Moreover, the central air conditioning of the property did not work which added to our woes. I also spoke to other occupants and they shared similar concerns.

4. Due to maintenance issues, we received negative feedback from our clients and some of them even refused to come to the office again for meetings. I communicated this to Ms. Elizabeth and told her to get the problem sorted or else we would be forced to shut the office. We had to get the air conditioning re-installed by paying out of our own pocket. But the other maintenance issues continued.

5. It was becoming increasingly impossible to work from that office and I requested Ms. Elizabeth to send notice to Singer Consultants Pvt. Ltd. to terminate the lease and to look for alternate office.

6. We vacated the property on 30 March Yr - 2 and shifted to a new office. Singer Consultants is raising bogus claims only to extort money from us. Mr. Sunny Singh even taunted me by saying that they don't need to even look for a tenant as we would be forced to pay the rent upto September Yr – 1.

DEVELOPING A RESEARCH PLAN

Adopted from Kunz, et al, The Process of Legal Research (4th ed. 1996)

Preliminary Questions

Is this a civil or criminal Problem?

State or Federal?

Research terms

- Think through the situation from various angles.
- Consider both factual and legal dimensions
- Generate as many search terms as possible
- Think of alternative terms for each of the search words you listed

Factual categories

Who is involved?

What is involved?

When did the events occur?

Where did the events occur?

Why did the events occur?

Why did (ur will) the participants act in this way?

Legal Categories

What legal theory is applicable to the situation?

What relief might the wronged party seek through the legal system?

What is the procedural posture of the situation?

WHERE WILL YOU START

General information

What area of law is this problem about? Do you know anything about the general area of law? If not, what sources would you use to find out general information about this area?

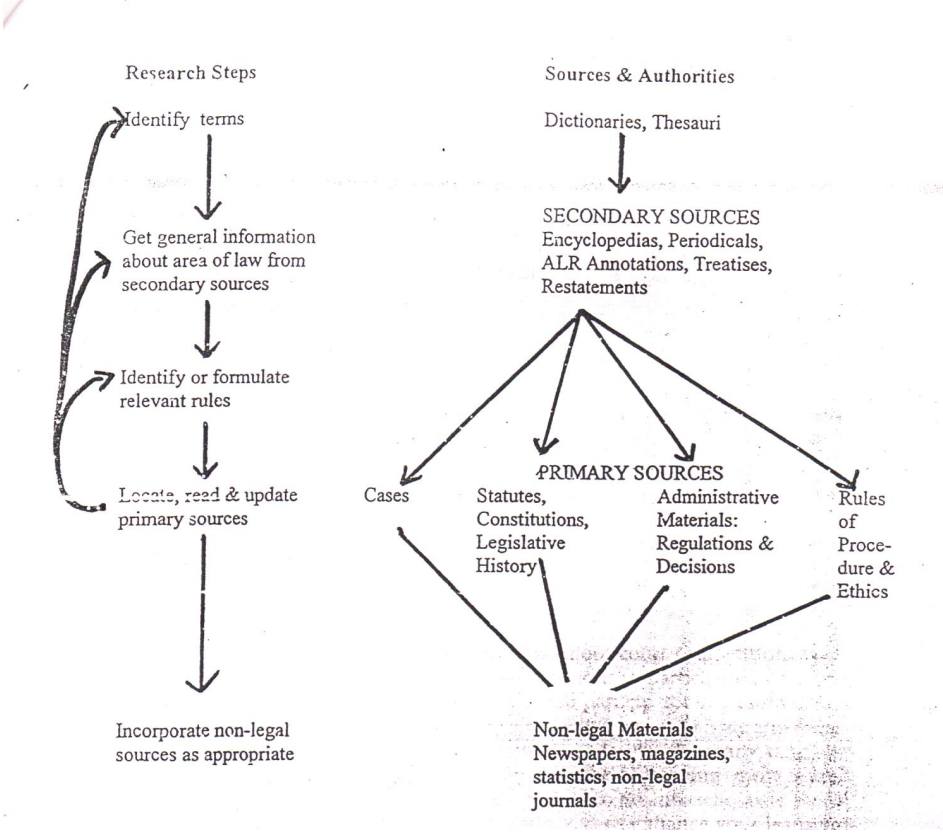
Primary Authority

Is there likely to be a statute?State or federal?Administrative regulations?What sources will you check to find out??

What sources will you check to find cases on this topic?

What sources will you use to update the authorities you find?

LEGAL RESEARCH



[Adopted from Kunz, et al. The Process of Legal Research (4th ed. 1996)]

RESEARCHING FOR A LEGAL PROBLEM

Prof. Ved Kumari

Law Centre-I

University of Delhi

Preliminary Steps:

1. Identification of issues after reading the given problem thoroughly. What is in question? What is it that the parties are in disagreement and what is needed to be decided by the court?

2. **Think-** What area of law / subject does it deal with? Which legislation may have answer to these questions?

3: **Go to the library** – take out a text book on the subject and read the relevant pages which you may think may have an answer to the questions in the problem. Note down the cases mentioned or other books and articles referred in the text or in the footnotes.

Materials that may be used in legal research may be divided primarily as legal materials and non-legal materials. Legal materials are further classified in Primary and Secondary legal materials.

Primary legal research materials include the Constitution, Statutes, and Judicial decisions.

Secondary legal research materials include books, commentaries, encyclopaedia, yearbooks, journals, Reports etc.

Locating a relevant statutory provision / judicial decision and other relevant legal material in a Library:

1. Gazette of India / Gazette of State: Contain Official notifications of Bills, Statutes, Joint Committee/ Select Committee Reports, subordinate legislation (i.e., Rules framed under various Acts) You need to know the date of notification for locating relevant document and you may consult the librarian to know which section of the gazette contains what information. Gazette of India is now available online also.
2. Acts of Parliament – Yearly publication contains Acts of Parliament passed in a given year.
3. General Statutory Rules and Orders
4. Lok Sabha Debates / Rajya Sabha Debates
5. Manuals, e.g., AIR Manual: Central statutes in force are listed alphabetically in various volumes. The text of provisions is given in the main body and the footnotes under each section give summary in a couple of lines of cases decided under it.
6. Local Laws: There are compilations of local laws (State legislations) available – take the local laws of the relevant state.

7. Reporters – e.g., AIR (for Supreme Court and High Court judgements), SCC / SCR/ SCJ / SCALE / Judgement Today, etc for SC decisions. Each Reporter contains a nominal table of cases as well as a subject index. Consult the former if you know the name and year a case and the court that decided it. If you do not know that, consult the subject index that is arranged alphabetically statute wise as well as contain some key words. These may be freely accessed online also from the websites of Supreme Court of India, various High Courts and Indiakanoon. Decisions of district courts are also now uploaded on their respective websites under the name of the concerned judicial officers.
8. Digests: 50 Years Digest (for cases from 1900-1950), Ten year Digest, QuinquennialDigest, Criminal Law Digest, Yearly Supreme Court Digest, etc. Contain summary of cases in the given period according to Subject/ Statute list arranged alphabetically.
9. Indexes: Index to Indian Legal Periodicals, Index to Legal Periodicals, Index to Foreign Legal Periodicals, etc. Contain lists of books / articles in journals published in a period – arranged author-wise or subject-wise.
10. Words and Phrases – contains meaning of various phrases used in legal language.
11. Law Dictionaries: e.g., Black's Law Dictionary. Contains meaning of specific legal words.
12. Reports of various Expert bodies like Reports of the Law Commission of India, National Human Rights Commission, Minorities Commission, Women's Commission, etc. Useful for arguing for different interpretation of law or for striking down laws etc.
13. Annual Survey of Indian Law: Contains summary and critique of important cases on main areas of law in a given year.
14. Journals –general journal, e.g., Journal of Indian Law Institute. Specialised journals, e.g., Family Law journals. Indian and Foreign.
15. Encyclopaedia : Britannica
16. Year Books
17. British Humanities Index- for articles in newspapers and other popular journals
18. Social Science Index – for criminology, sociology and political science articles etc.
19. Monographs, etc.

Computer Research:

Use materials only from AUTHENTIC websites, i.e., where the information upload is controlled by experts on the field like Universities, government, Commissions, NGOs, etc. You may find links to various websites by entering your research phrase on google and other search engines but beware that they will give you links to both authentic and non-authentic

websites and you must collect the required information only from the authentic site. For example, many a times the first reference is from Wikipedia but remember that anybody may upload information on this site and hence, it may or may not be correct and authenticated information. While it is may be a starting point to gather some basic knowledge on a topic, it is not a website to be quoted and relied on any authoritative fora like courts or legal writing.

It is important to learn to phrase your query appropriately. Too general or too narrow phrases may give you access to hundred thousands of web links or no results. Some search engines gives the option of searching within results and you may filter your research through narrowing down your search within a wider category.

University of Delhi has subscribed to many IP based data bases and law journals and these may be searched from the website of Law Library on the University of Delhi website. Paid databases may be accessed from any computer on the University of Delhi premises and others may be accessed from a computer at home or other place having internet connection. CD based legal databases may be accessed from specified computers in the libraries of Faculty of Law and Law Centre-I. SCC ONLINE, MANUPATRA, Legal Punditsare good databases for accessing decided Indian Cases of higher judiciary and legal articles. INDIAKANOON gives free access to the decisions of the Supreme Court and High Courts and has an easy search engine. Jstor, Westlaw, and LexisNexis contain judicial decisions and legal articles from different parts of the world.

INTERNET Resources: Some good starters depending on the field of research can be the following:

Indian:

A Gateway to Government of India: http://indiaimage.nic.in/

Indian Supreme Court Judgments: http://judis.nic.in/supremecourt/chejudis.asp

National Human Rights Commission of India: http://nhrc.nic.in/

National Commission For Women: www.ncw.nic.in

Women's Studies Network: http://www.britishcouncil.org/india-governance-networks-wsn.htm

International:

American Association of Law Schools: http://www.aals.org

Amnesty International: www.amnesty.org

Asian Centre for Human Rights: http://www.achrweb.org/theme/child.htm

Child Rights Information Network: http://www.crin.org

Clinical Legal Education Association: http://www.cleaweb.org/resources/index.html

Human Rights Watch: http://www.hrw.org

International Humanitarian Law: http://www.ihlresearch.org

International Juvenile Justice Observatory: http://www.oijj.org/home.php?pag=000000
American Bar Association: http://www.abanet.org

Library Access system: www.copac.ac.uk

Public Interest Law Initiative: www.pili.org

SanfordEncyclopedia of Philosophy: http://plato.stanford.edu/contents

The Internet Encyclopedia of Philosophy: http://www.utm.edu/research/iep

UN Crime Prevention & Criminal Justice: http://www.undcp.org/odccp/crime_cicp.html

UN Human Right http://www.unhchr.ch/html/menu2/6/crc/

World Legal Information Institute: http://www.worldlii.org

Footnotes and mode of citation: There were two kinds of footnotes - Speaking and Citation. Speaking footnotes explain and elaborate a theme in themain text that is not considered absolutely essential to the main argument but might be of interest to thereader. The citation footnotes should lead the reader to the primary material from which the data had beentaken. There were three ground rules in giving citation. (1) The footnotes should use a uniform style forreferring to authors, books, articles, etc.; (2) It should contain *all* the information necessary for leading thereader to the cited source; and (3) It should be precise.The actual style for footnoting for a particular journal or publisher was prescribed by them andneeded to be followed. For a standard style of footnote for publication in India, the footnote patternfollowed by INDIAN JOURNAL OF INDIAN LAW INSTITUTE was recommended while for internationalstandards THE BLUEBOOK64 published by HarvardLawSchool was useful. The easiest way to getintroduced to legal footnoting was to visit the Website of Cornell Law School:**http://www.law.cornell.edu/citation/**

LEGAL DRAFTING SKILLS

By

Dr. Aman Hingorani

1. **Aim** - to make sure that the document serves the purpose or fulfils the function it is intended to
2. **Making a Legal Draft- You must know**
    - the purpose the document is to serve
    - for whose benefit it is being written
    - exactly what you want to say
    - pitfalls that you want to avoid
3. **Parameters of a Good Legal Draft**
    - Should be consistent with law
    - Should be structured
    - Should be complete
    - Should contain appropriate language
    - Should be readable
4. **Drafting by relying on set formatsfrom books and internet**

Advantages

- helps in identifying the legal requirements
- helps in identifying gaps inyourdraft,therebypreventingerrorbyomission
- gives a suitable structure to organize material
- offers apt phrases tested over time, helping in choice ofwords

Disadvantages

- tends to include irrelevant mattersthat you did notfeel the needto remove
- could land you up with odd details remaining unchangeddue to poorediting of electronic templates
- might omit vital matters that were absent in format
- may be based on outdated law
- may be badly drafted or inappropriate, forcing you to spend more time tinkering with it than making a draft one afresh
- prevents you from gaining confidence to draft

5. **Drafting as a Performance Skill**

Step 1: Do Case Analysis

- Research and analyse the case
- Formulate case theory to dictate presentation of draft

Step 2: Determine essential content of the draft

- Make a list of everything you want to include in your draft
- Some paras couldbe mandated
    - by rules
        - Statutoryrules,likethosecontainedinOrders6and7Civil Procedure Code
        - Court framed rules, like the SupremeCourt Rules
    - by practice directions
    - by needs of your client
    - by your own logic
    - by what is needed to be proved in a case

Step 3: Create Your Skeleton Plan

- Plan your draft first in form of a skeleton
- Your skeleton plan should indicate
    - the number paras
    - the contents of each para
    - the order in which the paras will come (factsto be stated chronologically)
- First para should introduce your case
- Number the paras consecutively
- Try to give each para a name
- Each para should consist of only one idea,with sub parasfor different parts of that idea. This helps
    - in focusing on the content of each para
    - to keep to the point
    - to stop you from mixing up in one para what belongsto another
- Note in fairly full everything you want to put in that para, but concisely

Step 4: Check your Skeleton Plan against Your List

- Go back to the List created at Step 2
- Check it off ensuringthat everynecessary itemof contenthasbeen slotted into your skeleton at an appropriate point
- Look at the completed skeleton to check that
    - every para hangs together and is in right sequence
    - that a para does not contain anything that shouldnot really be there or which belongssomewhereelse

Step 5: Draft one Para at a time

- Concentratenowonlyonthelanguageratherthanthecontentor structure
- Use plenty of space on the page

- Rememberthe nameyou have givento the para- the parashouldbe about that topic
- Number sub parasdealingwith differentpartsof the one ideacaptured in the para
- Every word counts
- Every phrase must be apt
- Languagemustbeclear, precise,unambiguous,complete andnon repetitive
- Use plain English
- Maintain simplicitywhile framing a sentence
- Ensurethattherearеno errorsofspelling,punctuation. grammar or tense
- Drafting involvestrial and error,choppingand changinguntil whatyou have is right - rearrange words,alter the punctuation, divide or join sentences,add or discard brackets

Step 6: Look Back Over Your Draft

- Never assume you have finished when you reach the last para
- Youmustreaditoverandoveragain – youwillwanttomake improvements/alterations or correct mistakes
- Test your drafting by readingit out aloud
- If reading is disjointed, check
    - language
    - sequenceof paras
- Edit, re-edit

6. Additional Drafting Points

- Adapt draft accordingto its nature
    - Plaint- plead particularsrelating,for instance, to jurisdiction, causeof action,limitation,valuation,description of immovable property
    - Writ- pleadgroundsas also clauses relatingto, for instance, lack of alternativeand efficaciousremedy,absence of laches
    - Petition under specific statute - plead particulars required by that statute
- Plead legal defences,for instance,estoppel and res judicata
- State the effectof the document,ratherthansettingoutthewholeof the documentor any part thereof in the draft
- Write sums and numbersin figures as well as in words
- Make the prayer clauseself-contained and comprehensive, numbering each relief separately

APPELLATE ARGUMENTS DEMONSTRATION EXERCISE

NARCOTICS CONTROL BUREAU V ELIZABETH BROWN

Prepared by Dr Aman Hingorani

NOTE FOR PARTICIPANTS

This is an exercise in making oral arguments on a Criminal Appeal in theSupreme Court

You will find attached:

1. Statement of facts
2. Instructions to Counsel for Petitioner
3. Instructions to Counsel for Respondent
4. Extract of the Judgment of the Special Judge, Delhi
5. Extract of the Judgment of the Delhi High Court
6. Grounds of Appeal
7. Relevant provisions of the Narcotics Drugs and Pyschotropic Substances Act and the Constitution of India
8. Relevant Extract of Emma Charlotte Eve v Narcotics Control Bureau : 2000 (54) DRJ 610

STATEMENT OF FACTS

On 3.1.2000, Mr. Frank, Chief Customs Officer at Frankfurt Airport, Germany, seized the postal parcel No. 007 which had arrived at Frankfurt Airport with flight 2231 from Bogota, Columbia and which was destined for G.P.O., Delhi and addressed to "Elizabeth". The said postal parcel contained 125 gms of cocaine in small sachets. The cocaine was confiscated by the Custom authorities, Government of Germany and the criminal case was registered against "Elizabeth" (untraced).

On receiving instructions that the German Government had obtained the consent of the Government of India for controlled delivery of the seized cocaine in India, Mr. Frank sent it for forward transmission to G.P.O., Delhi on 9.1.2000. This was done through Lufthansa flight 008 manned by Captain Peter, who, on landing at I.G.I. Airport in New Delhi, handed it over to Mr. Premchand of the Narcotics Control Bureau, Delhi. The controlled delivery was done with the knowledge and the supervision of the Governments of Germany and India with a view to identify the persons involved in the commission of the offence.

Mr. Premchand accordingly contacted the Chief Post Master. G.P.O., Delhi and informed him about their plan to nab the claimant of the parcel. The plan was that as soon as the claimant for the parcel would come to the post office, the Chief Post Master would telephone the NCB and its officers would rush to the post office and hand over the parcel to the postal assistant at the counter. Under the surveillance of the NCB officers and in the presence of public witnesses, the claimant would be permitted to collect the parcel from the postal assistant. The NCB officers would then arrest the claimant.

On 15.1.2000 at about 11 am, Mr. Premchand received a telephone call from the Chief Post Master, G.P.O., Delhi that a foreign lady had arrived to collect the postal parcel No. 007. Mr. Premchand with his officers acted upon their aforesaid plan and observed, in the presence of public witnesses, the handing over of the parcel by the postal assistant to the accused. The NCB officers caught the accused red-handed in possession of the cocaine and arrested her after following the procedure under the NDPS Act.

The accused, in her statement under section 313 Cr. P.C, stated that she expected a postal parcel containing some papers from her aged father in Essex. He was to send it to G.P.O., Delhi. She regularly enquired from the post office about the parcel but was told that it had not come. On 15.1.2000, she went to the G.P.O. at about 11 am. She went to the pigeon-hole where she found an intimation slip indicating that a parcel for "Elizabeth" had arrived. She took the slip to the person attending to the counter who asked her to wait for few minutes so that he could locate the parcel. After making her wait for about 15 minutes, he gave her a parcel No. 007 addressed to "Elizabeth". She took the parcel, and on opening it just outside the doorway of the post office, she saw that it contained several small sachets of white powder, and not the papers from her father. As it was not her parcel, the accused turned to go back to the counter to return it. But as she turned, few persons surrounded her, who disclosed their identity as NCB officers and, after following certain procedural requirements, arrested her. The accused repeatedly and tearfully told the NCB officers that while her name was indeed Elizabeth Brown, as reflected in her passport, she knew nothing about the postal parcel addressed to "Elizabeth" which was as common an English name as a name can be. She told them that this was obviously a case of mistaken identity and that they had arrested a wrong "Elizabeth".

Instructions for the Counsel for the Appellant

You represent the Appellant, Narcotics Control Bureau, which had lodged the complaint against the Respondent, Elizabeth Brown, before the Special Judge, Delhi for illegally importing 125 gms of cocaine into India through postal parcel No. 007, and for being in possession of 125 gms of cocaine at G.P.O. Delhi on 15th January 2000 in contravention of the provisions of Section 21 and 23 of the Narcotic Drugs and Psychotropic Substances Act, 1985, as amended.

The Special Judge, Delhi convicted and sentenced the Respondent to ten years rigorous imprisonment with Rupees one Lakh as fine. The Delhi High Court acquitted her. The Supreme Court granted the Appellant Special Leave to Appeal against the Judgment of the Delhi High Court. The Criminal Appeal is now listed for hearing before the Supreme Court.

The postal parcel containing the cocaine had been seized and confiscated at Frankfurt Airport. The Governments of Germany and India undertook the controlled delivery of the parcel addressed to "Elizabeth", c/o G.P.O., Delhi in order to apprehend the consignee. The Respondent was caught red-handed after she claimed the postal parcel at G.P.O., Delhi and was found in possession of cocaine. The Appellant had led evidence before the Special Judge

to establish that all the mandatory requirements and procedural safeguards contained in the N.D.P.S. Act 1985, as amended, stand satisfied in the case. The Appellant's case is duly corroborated by all the prosecution witnesses.

The defense of the Respondent before the Special Judge was that the very prosecution of the Respondent under the N.D.P.S. Act 1985 was legally misconceived as the said Act does not even contemplate controlled delivery offences nor does it empower the Government of India to undertake controlled delivery operations. The Special Judge found no merit in the said defense. However, the Delhi High Court accepted it. The Appellant is seeking the setting aside of the Judgment of the Delhi High Court.

With the assistance of the documents in this case file, you are instructed to address the Hon'ble Supreme Court confined to the Grounds of Appeal listed herein after.

Instructions for the Counsel for the Respondent

You represent the Respondent. Elizabeth Brown, the accused, against whom the Appellant had lodged the complaint before the Special Judge, Delhi alleging that she had illegally imported 125 gms of cocaine into India through postal parcel No. 007, and that she was in possession of 125 gms of cocaine at G.P.O. Delhi on 15 January 2000 in contravention of the provisions of Section 21 and 23 of the Narcotic Drugs and Psychotropic Substances Act, 1985, as amended.

The Special Judge, Delhi convicted and sentenced the Respondent to ten years rigorous imprisonment with Rupees one lakh as fine. The Delhi High Court acquitted her. The Supreme Court granted the Appellant Special Leave to Appeal against the Judgment of the Delhi High Court. The Criminal Appeal is now listed for hearing before the Supreme Court.

It is the Appellant's case that the postal parcel containing the cocaine had been seized and confiscated at Frankfurt Airport. The Governments of Germany and India undertook the controlled delivery of the parcel addressed to "Elizabeth", c/o G.P.O., Delhi in order to apprehend the consignee. However, instead of apprehending the actual consignee, the Appellant arrested the Respondent on account of mistaken identity. The primary defense of the Respondent before the Special Judge, however, was that the very prosecution of the Respondent under the N.D.P.S. Act 1985 was legally misconceived as the Act does not even contemplate controlled delivery offences nor does it empower the Government of India to undertake controlled delivery operations.

The Special Judge found no merit in the said defense. However, the Delhi High Court accepted it. The Appellant is seeking the setting aside of the Judgment of the Delhi High Court.

With the assistance of the documents in this case file, you are instructed to address the Hon'ble Supreme Court to resist the Criminal Appeal.

Extract of the Judgment of the Special Judge, Delhi

IN THE COURT OF THE SPECIAL JUDGE, DELHI

Sessions Case No. abc/2000

In the matter of:

Narcotics Control Bureau
...COMPLAINANT

Versus

Elizabeth Brown
…ACCUSED

JUDGMENT

…

4. The learned Counsel for the Accused then submitted that the very prosecution of the Accused under the N.D.P.S. Act 1985 is legally misconceived as the Act does not even contemplate controlled delivery offences nor does it empower the Government of India to undertake controlled delivery operations.
5. According to the learned Counsel, the concept of controlled delivery crystallized in the United Nations Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances held in 1988 in Vienna, Austria. "Controlled delivery" means the technique of allowing illicit or suspect consignments of narcotic drugs, psychotropic substances, controlled substances or substances substituted for them to pass out of, or through or into the territory of a state with the knowledge and under the supervision of the competent authority with a view to identifying the persons involved in the commission of the offence of drug trafficking and trading. The Government of India has ratified this Convention. However, according to the learned Counsel for the Accused, this Convention does not automatically form part of Indian domestic law but has to be transformed into domestic law by Parliamentary legislation before it can be enforced. The learned Counsel has referred to the provisions of Bill No. XIV of 1998 which seeks to amend the N.D.P.S. Act 1985 so as to incorporate provisions relating to controlled delivery. My attention is drawn to the proposed amendments in Section 2 (viib), 8-A , 50 A, 54 and 76 (ca) of the said Bill. It is the argument of the accused that the very fact that the N.D.P.S. Act 1985 is sought to be amended to incorporate controlled delivery offences and to empower the Central Government to undertake controlled delivery operations, implies that the existing N.D.P.S. Act 1985 does not contemplate controlled delivery offences nor does it confer power upon the Government of India to undertake controlled delivery operations. Hence, according to the learned Counsel, even assuming the Accused did what the prosecution says she did, that act is yet to become an offence. Unless there is an existing law to penalise the commission or omission of an act, there is no question of that act being made punishable. In fact, Article 20 of the Constitution

mandates that no person shall be convicted of any offence except for violation of law in force at the time of the commission of the act charged as an offence.

6. The learned Counsel for the Accused further submitted that in any case, the cocaine was admittedly seized and confiscated at Frankfurt and the offence came to an end there. The cocaine did not leave Germany at the instance of the Accused but at the instance of the German and Indian Governments, and was brought to India by the German airline, Lufthansa, and was in the possession of the Lufthansa pilot Captain Peter, and the NCB officer, Mr. Premchand. In such circumstances, the question of the Accused importing cocaine into India does not arise. Nor can the Accused be said to be in possession in India of cocaine which stands confiscated in Germany and is the subject matter of the offence there. The learned Counsel has referred to the decision in Bostan v Emperor, 1911 Crl. L.J. 116 in support of his contention.
7. I find no merit in the submissions of the Accused. A bare perusal of Section 21 of the N.D.P.S. Act indicates that it penalises the possession of cocaine in contravention of the Act. The Accused is found to have been in possession of the cocaine. Sections 35 and 54 raise presumptions against the Accused as to the culpable mental state of the accused and the commission of the offence from the possession of the illicit articles. The Accused has failed to rebut these presumptions. It is indeed an audacious argument to suggest that it is the Government, and not the Accused, which sought to import the cocaine into India. In any case, Section 28 of the Act provides that attempt to commit an offence punishable under Sections 21 and 23 attract the same punishment as the commission of the offence. The Accused at least attempted to import cocaine into India.
8. The learned Counsel has relied on Bill No. XIV of 1998. It is well settled that a Bill is not a permissible aid to construe a clear statutory provision. In the instant case, the language of Sections 21 and 23 of the existing N.D.P.S. Act 1985 is unambiguous and clear, and warrants no limitation being read into them in order to exclude controlled delivery offences from the purview of these Sections. It is significant that the Preamble to the Act declares that the Act implements the provisions of the International Convention on Narcotic Drugs and Psychotropic Substances, and Section 2 (ix) of the Act defines “International Convention” to include “any other international convention or protocol or other instrument amending an international convention, relating to narcotic drugs or psychotropic substances which may be ratified or acceded to by India after the commencement of this Act”. Admittedly, India has ratified the aforesaid 1988 UN Convention which provided for “controlled delivery”. It is, therefore, not correct to contend that the existing N.D.P.S. Act 1985 does not contemplate controlled delivery offences or does not empower the Central Government to undertake controlled delivery operations. The existing Act is very much a law in force, and therefore, the question of there being a violation of Article 20 of the Constitution does not arise. The proposed Bill, if and when it becomes law, would at best be clarificatory in nature to expressly provide in the N.D.P.S. Act 1985 the powers that already exist.

…

1. I, therefore, find the Accused guilty of the offences under Section 21 and 23 of the N.D.P.S. Act 1985 having illegally imported into India and being in illegal possession in India of 125 gms of cocaine.

   Put up on 28 March 2001 for hearing on the sentence.

Special Judge

26.3.2001

Extract of the Judgment of the Single Judge, Delhi High Court

IN THE DELHI HIGH COURT AT NEW DELHI

Criminal Appeal No. def/2001

In the matter of:

Narcotics Control Bureau

...COMPLAINANT Verus

Elizabeth Brown

…ACCUSED

JUDGMENT

…

3. The learned Sessions Judge did not accept the contention of the Appellant that the very prosecution of the Appellant under the N.D.P.S. Act 1985, as it then stood (that is, pre-2001 amendment) , is legally misconceived as the Act then did not even contemplate controlled delivery offences nor did it empower the Government of India to undertake controlled delivery operations.
4. This Court, in its decision in *Emma Charlotte Eve v Narcotics Control Bureau (2000 (.54) DRJ 610)* took the view that the United Nations Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances 1988 does not become a law in force in India without legislative action. That was a case prior to the 2001 amendment of the N.D.P.S. Act 1985. This Court held that in the absence of there being a specific provision in the Act for dealing with an operation relating to controlled delivery, controlled delivery operations are not permissible in India. This Court further held on similar facts that the contraband in that case was sent to India not at the instance of the accused therein but at the instance of the Government of Germany.
5. I am in respectful agreement with the view taken by this Court in Emma Charlotte Eve (supra), more so, in view of the amendment of the N.D.P.S. Act 1985 vide the Amendment Act of 2001. The provisions of the Bill No. XIV of 1998 have been incorporated into the N.D.P.S. Act 1985 by this amendment. The provisions of the Amendment Act of 2001, when contrasted with the provisions of the N.D.P.S. Act 1985 prior to amendment, confirms that prior to the 2001 amendment, it was not permissible for the Central Government to undertake controlled delivery operation in India nor was it an offence to do an act which is now penalised under Section 8A of the Act. In the instant case, even if it is assumed that the Appellant did the act as alleged by the prosecution, the conviction of the Appellant would be hit by Article 20 of the Constitution inasmuch as there was no Jaw at the time of the commission of such act to penalise that act as an offence.

6. I accordingly allow the appeal and quash the conviction of the Appellant. The Appellant is acquitted of the offences punishable under Sections 21 and 23 of the Act. The Appellant, who is in custody, shall be set at liberty forthwith, if not wanted in any other case. Fine, if paid, shall be refunded to the Appellant. The Appellant's passport shall also be returned to her.

Judge 27.3.2003

In the Supreme Court of India

Criminal Appeal No. ghi/2003

In the matter of:

Narcotics Control Bureau
...COMPLAINANT Versus

Elizabeth Brown
…ACCUSED

GROUNDS OF APPEAL

I. That the Hon'ble High Court failed to appreciate that Sections 21 and 23 of the Act are in such wide terms that they take within their ambit the controlled delivery offences.

II. That the Hon'ble High Court failed to appreciate that the Preamble to the Act declares that the Act is to implement the provisions of the International Convention on Narcotic Drugs and Psychotropic Substances, and Section 2 (ix) of the Act defines "International Convention" to include "any other international convention or protocol or other instrument amending an international convention, relating to narcotic drugs or psychotropic substances which may be ratified or acceded to by India after the commencement of this Act". Admittedly, India has ratified the United Nations Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances 1988 which defined "controlled delivery". It follows that even prior to the 2001 amendment; the N.D.P.S. Act 1985 contemplated controlled delivery offences and empowered the Central Government to undertake controlled delivery operations. The Amendment Act of 2001 is at bestclarificatory in nature to expressly provide in the N.D.P.S. Act 1985 the powers that already exist.

III. That in view of the Preamble read with Section 2 (ix) of the Act, the Hon'ble High Court erred in holding that prior to the Amendment Act of 2001, the United Nations Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances 1988 did not have the force of law in India. As the N.D.P.S. Act 1985 was the law in force, there is no question of invoking Article 20 of the Constitution.

IV. That the Hon'ble High Court, therefore, erred in holding that the very prosecution of the Respondent under the N.D.P.S. Act 1985 is legally misconceived.

V. That the Hon'ble High Court failed to appreciate that the Respondent had failed to rebut the presumptions against her raised by Sections 35 and 54 of the Act as to the culpable mental state of the Respondent and the commission of the offence from the possession of the illicit articles.

VI. That the Hon'ble High Court erred in overlooking the provisions of Section 28 of the Act in terms of which attempt to commit an offence punishable under

Sections 21 and 23 attract the same punishment as the commission of the offence. The Respondent at least attempted to import cocaine into India.

NARCOTIC DRUGS & PSYCHOTROPIC SUBSTANCES ACT, 1985

as amended by Act No.2 of 1989w.e.f. 29th May 1989:

An Act to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances, to provide for the forfeiture of property, derived from, or used in illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Convention on Narcotic Drugs and Psychotropic Substances and for matters connected therewith.

Section 2. Definitions,

In this Act , unless the context otherwise requires - (ix) " International Convention" means-

(a) …

(b) …

(c) …

(d) any other international convention or protocol or other instrument amending an international convention, relating to narcotic drugs or psychotropic substances which may be ratified or acceded to by India after the commencement of this Act;

Section 8. Prohibition of certain operations

No person shall-

(c) produce, manufacture, possess, sell, purchase, transport, ware house, use, consume, import inter-State, export inter-State, import into India, export from India, or transship any narcotic drug or psychotropic substance.

except for medical or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made thereunder and in a case where any such provision imposes any requirement by way of licence, permit or authorisation also in accordance with the terms and conditions of such licence, permit or authorisation;

Provided .....

Section 21. Punishment for contravention in relation to manufactured drugs and

preparations.

Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufactures, sells, purchases, transports, imports inter-State, exports inter-State or uses any manufactured drug or any preparation containing any manufactured drugs shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years, and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.

Section 23. Punishment for illegal import into India, export from India or transhipment of narcotic drugs and psychotropic substances.

Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence or permit granted or certificate or authorisation issued thereunder, imports into India or exports from India or transhipsany narcotic drug or psychotropic substance shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years, and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.

Section 28. Punishment for attempt to commit offences

Whoever attempts to commit any offence punishable under this Chapter or to cause such offence to be committed and in such attempt does any act towards the commission of the offence shall be punishable with the punishment provided for the offence.

Section 35. Presumption of culpable mental state

(1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the court shall presume the existence of such mental state but it shall be a defense for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation: In this section ‘culpable mental state” includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.

Section 54. Presumption from possession of illicit articles

In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under Chapter IV in respect’ of, -

(a) any narcotic drug or psychotropic substance;

…

for the possession of which he fails to account satisfactorily.

BILL NO. XIV OF 1998

NARCOTIC DRUGS & PSYCHOTROPIC SUBSTANCES (AMENDMENT) ACT, 2001

w.e.f. 9th May 2001

An Act to further amend the Narcotic Drugs and Psychotropic Substances Act,1985

Section 2. Definitions,

In this Act, unless the context otherwise requires –

…

(viib) "controlled delivery" means the technique of allowing illicit or suspect consignments of narcotic drugs, psychotropic substances, controlled substances or substances substituted for them to pass out of, or through or into the territory of India with the knowledge and under the supervision of an officer empowered in this behalf or duly authorised under section 50A with a view to identifying the persons involved in the commission of an offence under this Act

Section 8. Prohibition of certain operations

No person shall-

…

(c) produce, manufacture, possess, sell, purchase,transport, ware house,use, consume, import inter-State. export inter-State, import into India, export from India, or transship any narcotic drug or psychotropic substance.

except for medical or scientific purposes and in the manner and to the extentprovided by the provisions of this Act or the rules or orders made there under and in a case where any such provision, imposes any requirement by way of licence, permit or authorisation also in accordance with the terms and conditions of such licence, permit or authorisation;

Provided . ....

Section 8A. Prohibition of certain activities relating to property derived from offence

No person shall

(a) ...

(b) ....

(c) knowingly acquire, possess or use any property which was derived from an offence committed under this Act or under any other corresponding law of any other country.

Section 21. Punishment for contraventionin relation to manufactured drugs and preparations. I

Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufactures,sells, purchases, transports, imports inter-State or uses any manufactured drug or any preparation containing any manufactured drugs shall be punishable, -

(c) where the contraventioninvolves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years, and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.

Section 23. Punishment for illegal import into India, export from India ortranshipment of narcotic drugs and psychotropic substances.

Whoever, in contravention of any provision of this Act or any rule or order made or condition of licenceor permit granted or certificate or authorisation issuedthereunder, imports into India or exports from India or transships any narcoticdrug or psychotropic substance shall be punishable. –

…

(c) where the contravention involves commercial quantity, with rigorous, imprisonment for a term which shall not be less than ten years but which mayextend to twenty years. and shall also be liable to fine which shall not be lessthan one lakh rupees but which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.

Section 50A. Power to undertake controlled delivery

The Director General of Narcotics Control Bureau constituted under sub-section (3) of section 4 or any other officer authorised by him in this behalf, may, notwithstanding anything contained in this Act, undertake controlled delivery ofany consignment to-

(a) any destination in India; I

(b) foreign country, in consultation with the competent authority of such foreigncountry to

which such consignment is destined, in such manner as may be prescribed.

Section 54. Presumption from possession of illicit articles

In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of,

(a) any narcotic drug or psychotropic substance or controlled substance;

…

for the possession of which he fails to account satisfactorily.

Section 76. Power of Central Government to make rules

(1) Subject to the other provisions of this Act, the Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) Without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely: -

…

(ca) the manner in which "controlled delivery" under Section 50A is to beundertaken.

CONSTITUTION OF INDIA

Article 20. Protection in respect of conviction for offences (1) No person shall be convicted of any offence except for violation of law in forceat the time of the commission of the act charged as an offence.....

Relevant Extract for purposes of Exercise

DELHI REPORTED JUDGMENTS 2000 (54) DRJ

2000 (54) DRJ

HIGH COURT OF DELHI Crl. A.No. 87/99

Emma Charlotte Eve.....Appellant

Versus

Narcotic Control Bureau..... Respondent

M.S.A. Siddiqui, J

Decided on April 5, 2000

Narcotic Drugs and Psychotropic Substances Act 1985

Section 21 & 23 -Application of obligations under UN Convention against Illicit Traffic Narcotic Drugs & Psychotropic Substances, 1998 – The accord does not become a law in force in India without legislative action.

Section 21 & 23 – Dispatch of the parcel containing contraband by post- Similarity of handwriting on the parcel and the admitted handwriting of accused not proved by handwriting expert Possibility of tempering with sealed sample not ruled out Conviction, set aside.

Emma Charles Eve v. Narcotic Control Bureau

Mr. AmanHingorani, Adv. For the Appellant

Mr. Satish Aggarwala, Adv. For the Respondent

M.S.A. Siddique, J.

This appeal is directed against the judgment and the order of conviction dated 11.12.1998 passed by the Additional Sessions Judge in Sessions Case No. 74/96 convicting the Appellant under Sections 21/23 of the Narcotic Drugs and Psychotropic Substances Act (for short the Act) and sentencing her to undergo rigorous imprisonment for ten years and to pay a fine ofRs.1.00, 000/- or in default to suffer further rigorous imprisonment for a period of six months.Briefly stated the prosecution case is that on 3.4.1996, two postal parcels bearing Nos. R-250012 and R-250013 arrived at Frankfurt Airport, Germany, with flight No. AV018 from Bogota, Columbia destined for further transport to India. At Frankfurt Airport, both the parcels were intercepted by the Custom Officer MrRabolt, who had handed over them to the Chief Inspector Customs Mr Prior. Both the parcels, when opened in the presence of the Custom Officer, MrHilder Brand, tested positive for cocaine. Consequently, a criminal case was registered vide Reference No. 89Js 141520/96 and both the parcels containing contraband were seized and confiscated by the Custom authorities, Government of Germany. After obtaining sanction from the Chief Public Prosecutor, Government of Germany, DrLeistner, the Narcotics Control Bureau, Govt. of India (for short "the NCB") was requested for a controlled delivery. By the order dated 4.4.1996 (Ex. PW-16/A), the Government of India empowered the NCB to undertake controlled delivery of the said consignment. On 9.4.1996, the aforesaid parcels were handed over to the Captain of the Lufthansa Airlines Mr Manfred Montjoge for their delivery to MrBerned Engel, German Drug Liaison Officer posted in India. On10.4.1996, the said consignment arrived at I.G.I. Airport, New Delhi by themorning flight. MrMontjoge delivered the parcels to MrBerned Engel, who in turn handed over them to MrShailendra Sharma (PW-12) at the airport. The parcel No. 251002 destined for Goa had been handed over to the officers of the NCB, Bombay Zonal Unit and the parcel No. 251003 destined for Delhi remained in the custody of Shri Shailendra Sharma. The further case of the prosecution is that Deputy chiefPost Master, Mr R P Sharma was contacted by the Zonal Director NCB, MrMukeshKhullar and a plan was chalked out to nab the claimant of the parcel bearing No. 251003. According to the plan, the intimation slip (Ex. PW-1/D) was prepared and kept in the post restante counter under surveillance of the Officers of the NCB.

On 19.4.1996, at about 10 am, the Appellant came to the post restante counter. She picked up the intimation slip (Ex. PW-1/D) and requested Postal Assistant MrVasudev (PW-7) to deliver the said parcel to her. The intimation slip (Ex.PW-1/D) was in the name of 'Elizabeth Evans' and the appellant's passport was issued in the name of Emma Charlotte Eve. The appellant, therefore, addressed an application (Ex. PW-1/F) to the Chief Post Master, GPO explaining the discrepancy in her name and that of on the parcel. Being satisfied with the explanation offered by the appellant Deputy Chief Post Master Mr R P Sharma (PW-14) allowed the Appellant to take delivery of the parcel in question. Thereafter , the parcel, which was in the custody of Mr.Shailender Sharma (PW-12) was delivered to the Appellant by Mr. Vasudev (PW-7) in the presence of SmtSuman Kumari Yadav (PW-11), who had disguised herself as the Postal Assistant.

The appellant, after taking delivery of the parcel, proceeded to the Shiva Guest House on a three wheeler driven by Rakesh Sharma (PW-10). The officers of the NCB followed the Appellant from the post office to her guest house and accosted her to her room. On being asked by the officers of the NCB, the Appellant handed over the said parcel to them, which was found to contain 122 grams of cocaine. The said parcel was seized vide seizure memo (Ex. PW-1/H). Two representative samples of 5 gms each were drawn and kept in two separate polythene bags. The samples as well as the remaining cocaine were converted into separate parcels and they were duly sealed on the spot. The sampled powder along with the test memo (Ex.PW-9/B) was sent to the Chemical Examiner, which on examination, was found to contain cocaine vide report dated 28.5.1996. The Appellant was charged with the offences punishable under Sections 2l/23 of the Act and tried.

The Appellant abjured her guilt and alleged that false case has been foisted on her. According to the appellant, on 19.4.1996, she had gone to the post office to enquire about the parcel which she was expecting from her father

(d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, for the possession of which he fails to account satisfactorily."

In section 76(2) of the Act, substitution of the following clause has been proposed: -

'(ca) the manner in which "controlled delivery" under Section SOA is to be undertaken."

However, there is no provision in the Act relating to the concept of the "controlled delivery". The learned Additional Sessions Judge rejected the applicant's contention that controlled delivery operation is not permitted in India and in the absence of there being any specific provision in the Act for dealing with an operation relating to controlled delivery, the provisions of the United Nations Convention of 1988 relating to the concept of controlled delivery cannot be made applicable. Learned Additional Sessions Judge wasof the opinion that since the Govt. of India has ratified the UN Convention against Illicit Traffic in Narcotic

Drugs and Psychotropic Substances, 1988, the provisions of the Convention are binding on India and controlled delivery is permissible in this country. I am unable to subscribe to the view taken by learned Additional Sessions Judge. Section 3 (37) of the General Clauses Act defines an "offence" to mean an act of omission made punishable by any law for the time being in force. Punishment is the mode by which the State enforces its laws forbidding the doing of something, or omission to do something. Punishment is always co related to the law of the State forbidding the doing or omission to do something. Unless such a law exists, there is no question of any act or omission being made punishable (Jwala Ram vs State of Pepsu, AIR 1962 SC 1246).

Thus, the question which arises for consideration is whether the obligations of the Government of India under the accord and obligations attached to the UN Conventions against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 has the force or authority of law? Article 245(1) read with the entry 14 in List-1 of Schedule-7 of the Constitution and Article 253 empower the Parliament to make laws for implementing treaties and agreements entered into by the Government of India with foreign countries. The provisions in Part IV of the Constitution contain the directive principles of State Policy. The Provision in Article 51, occurring in that part, provides, inter alia, that the State shall endeavour to foster respect for international law and treaty obligations in the dealings of organised peoples with one another. The provision in Article 37 occurring in the same part, though it declares that the directive principles in part-IV are fundamental in the governance of the country and it shall be the duty of the State to apply thoseprinciples in making the laws, states that the provisions in that part shall notbe enforceable by any court. From this it follows that in the absence of any law, court cannot also enforce obedience of the Govt. of India to its treaty, agreement or convention with foreign countries or the United Nations.

From U K and was wrongly handed over a parcel, which was addressed to one Elizabeth Evans and she, therefore, refused to take delivery and immediately returned it back to the postal officer. Thereafter, she came to Paharganj and when she was about to enter the restaurant, three men grabbed her and forcibly took her to the guest house where she was staying and there she was subjected to a humiliating search, during the course of which, officials of the Narcotic Control Bureau wrongfully forced a parcel upon her. She has not examined any witness in support of her defense.The learned Additional Sessions Judge, on an assessment of evidence adduced by the prosecution, accepted the prosecution case and convicted and sentenced the Appellant as indicated above.

At the outset, I must make it clear that the present case pertains to the controlled delivery. As per prosecution case, two postal parcels bearing Nos. R-250012 and 250013 arrived at the Frankfurt Airport, Germany with flight No. AVO18 from Bogota, Columbia, destined for further transport to India. On suspicion, both the parcels containing cocaine were intercepted at the airport by the customs officer Mr. Rabolt, who handed over them to the Chief Inspector Customs Mr Prior. Consequently, a criminal case in respect of thesaid parcels was registered at Frankfurt (Germany) and the said parcels were seized and confiscated by the Customs Authorities. After obtaining the requisite sanction from the Chief Public Prosecutor, Govt. of Germany, DrLeistner, the NCB was requested to undertake a controlled

delivery. By the order dated 4.4.1996. (Ex.PW-16/A), the Govt. of India empowered the NCB to undertake the 'controlled delivery' and pursuant thereto, the said parcels were dispatched from Germany and received on 10.4.1996 at the I.G.I. Airport by MrShailendra Sharma (PW-12).

It may be mentioned here that drug trafficking, trading and its use which is a global phenomenon and has acquired the dimensions of an epidemic, is detrimental to the future of a country. Therefore, the Act was enacted with a view to combat the evil of drug trafficking and to suppress the abuse of dangerous drugs and psychotropic substances in the manner envisaged by the International Convention of Psychotropic substances, 1971. The United Nations Conventions against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances was held in 1988 in Vienna, Austria to tackle the menace of drug trafficking throughout the comity of Nations. The Government of India has ratified this convention. Therefore, the Act wasamended in 1989, inter alia to provide for tracing, seizing and forfeiture of illegally acquired property. The experience gained over the years revealed that the provisions of the Act have certain inadequacies due to which the implementation of the provisions has been tardy. Certain other inadequacies in the various provisions of the Act have been noticed by the Government. The need to remove those inadequacies and rationalisation of the sentence structure was, therefore, felt. Certain obligations, especially in respect of the concept of "controlled delivery" arising from the United Nations Conventionagainst Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, to which the Govt. of India acceded, also required to be addressed by incorporating suitable amendments in the Act. With a view to achieve the said object, the Bill No.XIV of 1998 further to amend the Act was introduced in the Parliament. Learned counsel for the Appellant submitted that sincethe Parliament was dissolved in 1999, the said Bill could not be passed by the Parliament.Sections 2 (viib), 8-A, 50-A, 54 and Section 76(CA) of the 'said Bill' are relevant for purposes of the present case.

Section 2 (viib) defined "controlled delivery" as under: -"(viib) "controlled delivery" means the technique of allowing illicit or suspect consignments of narcotic drugs, psychotropic substance, controlled substances or substances substituted for them to pass out of, or through or into the territory of India with the knowledge and under the supervision with a view to identifying the persons involved in the commission of an offence under this Act."

Section 8-A has been proposed to prohibit certain activities relating to property derived from offence. The Section reads as under: -

"8A. No person shall –

(a) convert or transfer any property knowing that such property is derived from on offence committed under this Act or under any other corresponding law of any country or from an act of participation in such offence, for the purpose of concealing or disguising the illicit origin of the property or to assist any person in the commission of an offence or to evade the legal consequences or

(b) conceal or disguise the true nature, source, location, disposition of any property knowing that such property is derived from an offence committed under this Act or under any other corresponding law of any other country or
(c) knowingly acquire, possess or use any property which was derived from an offence committed under this Act or under any other corresponding law of any other country."

After Section 50 of the Act, a new Section 50-A has been proposed to confer power on the Director General of Narcotics Control Bureau or any other person authorised by him in this behalf to undertake controlled delivery of any consignment to any destination in India or a foreign country, in consultation with the competent authority of such foreign country to which such consignment is destined, in such manner as may be prescribed. For Section 54 of the Act, substitution of the following Section has been proposed:

> "54. In trials under this Act, if may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of, -

(a) any narcotic drug or psychotropic substance or controlled substance;
(b) any opium poppy, cannabis plant or coca plant growing on any landwhich has cultivated;
(c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or

In Encyclopedia Britannica (Vol.12) at pages 424 and 425, under the heading Relationship with the Internal Law of States, it is stated thus:

"Relationship with the Internal Law of States: –

> To understand international law it is necessary to appreciate its close relationship to the internal law of States, or as lawyers say, the municipal law of States, for its increasingly penetrating that sphere. Even the traditional international law, at a time when it was supposedto be a law only between States, had many rules which required the cooperation of municipal courts for their realization: for example, the very ancient rules where by foreign sovereigns and their diplomatic representatives enjoy certain immunities from the municipal jurisdiction. But a very large part of modern international law isdirectly concerned with the activities of individuals which come before municipal courts. So that is in municipal courts that a large and increasing part of international law is enforced.
>
> One school of thought accepts that international law may be per se a part of the law of the land and that the municipal court therefore, in the appropriate case, applies international law directly. Another insists that a municipal court can only apply and enforce its own municipal law, and that the international law rule is binding only on the State itself, which must be legislation, transform the precept into one of municipal law.The two approaches can on occasions lead to different results, e.g., in acase involving a treaty which the government has omitted to transform into a municipal

statute. But the second, or dualist, theory can hardly be applied in any case in those many countries (e.g., the Republic of Ireland, France and the German Federal Republic) where it is by the constitution provided that international law is part of the law of the land.

There are broadly, two different methods by which precepts of international law are applied in the domestic Courts of a State. By the first method it is accepted that international law is per sea part of the law of the land and that the domestic court, therefore, in an appropriate case, applied international law directly. According to the second method a domestic court can only apply and enforce its own internal law, and the international law rule is binding only on the State itself, whichmust be legislation transform the precept into one of domestic law. The first method is employed in those countries (e.g. the Republic of Ireland, France and German Federal Republic) where it is by the constitution provided that international law is part of the law of the land.The position before English Courts is something of a compromise between the two methods. There can be no doubt that they regard customary international law as part ofthe law of the land, for they take'judicial notice" of it; that is to say they assume that the court knowsthe law and does not require it to be proved by calling expert evidence, as in cases involving foreign and external systems of law. The courts regard any relevant rule of customary international law as being incorporated into the domestic law."

In the case of *Xavier v Canara Bank Ltd (1.969 Ker LT 921)*, it was held that the remedy for breaches of International law in general is not to be found in the law courts of the State because of International law *per se* or *propriovigore* has not the force or authority of civil law, till under its inspirational impact actual legislation is undertaken.

In *Jolly George Varghese v. Bank of Cochin (AIR 1980 SC 410)*, while dealing with the effect of international law and the enforceability of such law at the instance of individuals within this country, the Supreme Court having quoted with approval the above observations of the Kerala High Court in *Xavier v Canara Bank Ltd (1969 Ker LT 927)*, has enunciated the law on the point thus:

"The positive commitment of the States parties ignites legislative action at home but does not automatically make the covenant an enforceable part of the *corpus juris* of India."

As noticed earlier, the bill No. XV of 1998 further to amend the Act has not been passed by the Parliament. In the absence of there being any specific provisions in the Act for dealing with an operation relating to controlled delivery, the provisions of 1998 UN Conventions relating to the concept of controlled delivery cannot have the force of law.

In the instant case, there is not an iota of legal evidence on record to show that on 28th March 1996, the parcel in question was posted by the appellant. Admittedly, the addressee of the parcel in question was one Elizabeth Evans and on 3.4.1996, the parcel in question was intercepted at the Frankfurt Airport, Germany. It is also undisputed that a criminal case was

registered at Frankfurt, Germany in respect of the parcel in question and the same was seized and confiscated by the Customs Authorities, Government of Germany. As per prosecution case, on 9.4.1996, the parcel in question was dispatched to India by the German Authorities. That being so, the parcel in question is the property of the criminal case registered at the Frankfurt (Germany) and it was sent to India with a view to identifying the person involved in the commission of the offence. It follows that the contraband in question was sent to India at the instance of the Govt. of Germany and not at the instance of the appellant. Reference may, in this context be made to the decision of the Punjab Chief Court in *Boston v. Emperor, 1911 CrJLJ (Vol.12) 116*.

In that case, the accused tendered a parcel of opium at the Post Office for dispatch to Burma but the parcel was opened by the Postmaster at the place of dispatch on account of information received and sent on to Burma by the Postal authorities marked "doubtful" with a view to the identification of the consignee. It was held:-

> "that the accused did not commit the offence of exporting opium under Section 9(e) of the Opium Act, as the parcel was seized by the authorities before dispatch and it ceased to be in the Post Office on accused's account before it left India for Burma."

Thus, in the instant case, it cannot be held that the Appellant had imported or attempted to import the contraband into India. Consequently, the charge under Section 23 of the Act leveled against the Appellant must fall to the ground.

MOOT PROBLEM – 1

Mool Chand was elected as a Ward Member of Ward No. 9 of Rajpura town. (A Ward Member is a member of an elected body of a Municipality headed by a Chairperson.) Mool Chand belonged to a Scheduled Caste (SC) and the seat to which he was elected was reserved for SC. The body was chaired by Baldev who belonged to General Category. Once, Baldev wanted to meet Mool Chand to discuss issues relating to cleanliness in Ward No. 9. Therefore, on December 4, 2019 Baldev sent him a message through WhatsApp, inviting him for a personal meeting in his chamber at 11 AM. Mool Chand was busy that day and, therefore, he read the message at 11.30 AM. He immediately called Baldev to inform him that he would reach shortly. However, Baldev started shouting at him for getting late. He made casteist remarks and humiliated him. At that time, a clerk was also sitting in the chamber. Despite the insult and humiliation, Mool Chand went to the Municipality to attend the meeting. As soon as he entered into the chamber, Baldev got angry and abused him on the name of his caste. He shouted at him saying: "Get lost from my office, otherwise I will make you clean the streets." At that time, there was no third person inside the chamber. Mool Chand left the chamber as Baldev was not listening to him. He rushed to the Police Station to register an FIR against Baldev. At the initial stage of the case, the trial court found that a *prima facie* case had been made out against Baldev. Therefore, on February 4, 2020, the court framed charges under Sections 3(1)(r) and 3(1)(s) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989. The provisions read as below:

> *Punishments for offences of atrocities: Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,-*
> *.....*
> *(r) intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view;*
> *(s) abuses any member of a Scheduled Caste or a Scheduled Tribe by caste name in any place within public view;*

Accused Baldev challenged the order of framing of charges before the Allahabad High Court. The High Court held that the casteist aspersions made telephonically or in the absence of a third person did not constitute an offence within the meaning of Sections 3(1)(r) and 3(1)(s) of the Act, because the alleged remarks were not made "at a place within public view" as required under these provisions. The court also said that the Act is a penal statute which must be strictly construed. Thus, the High Court quashed the order of framing the charges on April 6, 2020. The court also denied to provide the certificate to appeal before the Supreme Court under Article 134A of the Constitution of India. Aggrieved by the order of the High Court, Mool Chand filed a Special Leave to Appeal before the Supreme Court under Article 136 of the Constitution and the same was admitted for hearing by the court.

Memorial is required to be filed for only one party.

MOOT PROBLEM - 2

Hummingwayy and Tumblrr Pvt Ltd, based in Norway is the proprietor of the trademark 'HumTum' [written in a stylised manner with the device of daisies(flowers) in the background], since 1966. It has set up a subsidiary in New Delhi for the purpose of carrying on business under the trademark 'HuMTuM', on behalf of the parent company. The company is yet to formally start its operations in India, but has applied for registration in India. The status of the application in May 2020 is that it is sent to Vienna Codification. The company secured its earliest registration for the mark in the year 1970 in the United Kingdom.

Hummingwayy and Tumblrr Pvt Ltd is a huge conglomerete primarily engaged in designing, marketing and selling a wide variety of premium segment fashionable clothing and ancillary products for women, men, teenagers and children. It has more than 4500 outlets in more than 190 countries of the world and its outreach is growing by the day. With the boost in e-commerce, products of the company are available in India through Amazon/ Myntra and other similar online shopping service providers.

Hiralal Megabrands Pvt. Ltd, an Indian company (based in Gujarat but having presence throughout India and the Middle-East) is engaged in the business of marketing, supplying, selling garments and ancillary products under the trademark 'Hum Tum', written in Hindi, Gujarati and English since the year 2011. It is registered in India since 2014. 'Hum Tum' is quite a familiar brand amongst the lovers of affordable clothing in India. Hiralal Megabrands Pvt. Ltd believes that the meaning of the Hindi expression 'Hum Tum' has a lot to do with the 'connect' that the mark has managed to forge with the end users. Its biggest outlet is in Saket, Delhi.

Hummingwayy and Tumblrr Pvt Ltd maintains that though its operations in India are yet to kickstart, news pertaining to its famous mark 'HuMTuM' is readily available and frequently accessed through search engines such as www.google.com, www.yahoo.com and www.msn.com; that fashion apparel and accessories bearing the trade mark HuMTuM are extensively supplied in India through e-commerce global stores with the result that the said mark has achieved extensive recognition amongst relevant section of the public

Hummingwayy and Tumblrr Pvt Ltd came across the goods of Hiralal Megabrands recently and found out that the latter was using a confusingly similar TM 'Hum Tum' for products / goods similar to his. Hiralal Megabrands was also offering goods bearing the mark 'Hum Tum' through online shopping portals such as www.jabong.com, www.amazon.com, www.myntra.com etc.

Hummingwayy and Tumblrr Pvt Ltd filed a suit for passing off, against Hiralal Megabrands after a cease and desist notice was not complied with by the latter. The district court at Delhi held that there was no passing-off made out as the TMs were quite different in appearance and that both the brands operated in two very different territories; that the defendant honestly and bonafidely conceived and adopted the trademark 'Hum Tum', being a popular expression of Hindi language; that the defendant has been continuously, extensively and uninterruptedly

using the same since the year 2011; that the plaintiffs were not entitled to any relief on the ground of acquiescence and waiver.

The aggrieved party, Hummingwayy and Tumblrr Pvt Ltd has filed an appeal against the order of the District court maintaining that the judge failed to properly appreciate a few grounds like the defendants being in the same line of business as the plaintiffs and ignored a number of (other) parameters while deciding the case.

Memorial is required to be filed for only one party.

MOOT PROBLEM – 3

The land in dispute (7000 hectares) is situated in Uttar Pradesh and it is stated by Anjali, the married daughter of the Coparcener, that this is an ancestral property coming from the time of her grandfather, Ram singh. After the death of her grandfather, the land was inherited by his two sons , Malik Singh and Roshan singh (her father) and their sons as well. All of them at that time formed the Hindu Joint Family governed by Mitakshara law of Hindu coparcenary of which Roshan Singh was the "Karta" and acted in such capacity till 1989. Roshan singh executed a sale deed dated 16/11/2005, of some portions of disputed land in favour of one "Kundan Singh" and his name is mutated on revenue record along with other co- sharers.

All the members of the Joint Hindu Family consented to the sale deed executed in favour of 'Kundan Singh' except the daughter of the Karta. Moreover the consent of the daughter has not been even obtained due to the reason that she is neither a part of Joint Hindu Family nor a Coparcener to this context. For the same, she filed an objection dated 4/4/2013 under sec. 9(2) of the UP consolidation of Holdings Act,1953 for the direction to effect a partition of her ¼ th share in the property and to delete the name of 'Kundan Singh' from revenue record, instead add her name along with other co sharers. She does not contest the shares of other co sharers but she is pleading for her share in the disputed Agricultural Land on the basis of the Hindu Succession (Amendment) Act, 2005 as sec 4(2) was deleted and sec 6 (1)(c),created same liability on the daughter as of a son as such the provisions of HSA, 1956 will apply to agricultural lands also.

However, the sale deed was executed on 16/11/2005 in favour of Kundan Singh and on its basis, his name is mutated in the revenue records by an order dated 20/12/2005 but as per the aggrieved daughter, Roshan Singh had no right to execute the sale deed dated 16/11/2005 and the deed is void. As the name in revenue record was mutated on the basis of void sale deed and as such the name was liable to be deleted. Hence the case is contested by Kundan Singh as well on the basis that the disputed land is an agricultural land and would be governed by the UP Zamindari Abolition and Land Reforms Act, 1950 and the provisions of Hindu Succession Act, 1956 are not applicable to it. The petitioner had no right in the disputed land during the lifetime of her father, Roshan Singh and the petition of the daughter is not maintainable.

The Consolidation officer after hearing the preliminary objections raised by Kundan Singh regarding the non maintainability of the claim by the petitioner, held that the Civil Procedure Code, 1908 is not applicable except the land for which declaration has been made under sec 143 of the UP Act, and the provisions of Hindu Succession Act, 1956 are not applicable to the agricultural land. Furthermore, Roshan Singh, the father of the petitioner is still alive ,so no question of inheritance of his Bhumidari holdings arose otherwise also, the petitioner being a married daughter is not an heir under sec 171 of the UP Act, as Roshan Singh was having two sons, hence the objection filed by the petitioner was not maintainable and upon

such findings, the objection of the petitioner was dismissed and the land was divided amongst the on record recorded holders of the land.

The petitioner filed an appeal from the aforesaid order, Settlement Officer Consolidation affirmed the findings of Consolidation Officer and dismissed the appeal by order dated 15/3/2014, the petitioner filed a revision against the aforesaid order, Deputy Director of Consolidation, by order dated 15/6/2014 dismissed the revision. Hence this writ petition has been filed in the High Court of Allahabad challenging the order dated 15/6/2014 by the Deputy Director of Consolidation. The writ filed in the family matter is to be argued before the High Court. The matter is listed for arguments at the admission stage. Present arguments for either side

Arguments have to be advanced from only one side.

MOOT PROBLEM – 4

Plaintiff Abhishek, an acclaimed scriptwriter, conceived a plot for a reality TV programme that required competitors to survive in adverse geographical terrains for a period of three months. The first month was to be spent in a mountain, the next month in a forest and lastly, in a desert. The reality TV programme would centre around knowledge and skills required to survive in adverse climatic conditions, quick decision making and action in case of any approaching danger, food hunt, use of natural herbs for ailments *etc*. Abhishek, titled the work as 'Back to Nature'. He was sure that if the plot could be adapted into a reality television series, it would be a major hit amongst audience. Abhishek, with no previous experience in the TV industry sought assistance from his college friend Biju, who had experience in the TV industry to discuss the possibility of meeting producers for adaptation of the work.

The meeting with Biju turned out to be a disappointment as Biju suggested that although the plot was exciting but it was unrealistic for the modern human to fend all alone in adverse geographical terrain. Biju suggested that the plot needs major changes and that he would help him make these changes. After the meeting, Abhishek, emailed the outline of the plot to Biju and waited for his response. Biju, called after a few days and said that the plot was more unrealistic than it sounded in their meeting and that Abhishek should drop the idea and work on something else. Abhishek did not pursue the matter further with Biju after this response. He decided to further the story himself and approach other producers.

After about eight weeks, Abhishek, came across a trailer on a popular TV channel 'X TV' about a new programme titled 'Man and Nature' produced by a famous production company 'ABC Ltd.' that would be broadcast soon thereafter. The show would be a reality TV series and the auditions would be held for couples who would be challenged to spend three months in two adverse geographical terrains, forty-five days in a jungle and forty-five days in a mountain with no human habitation close-by. The uncanny similarity to his work forced Abhishek to enquire about the show and his investigation revealed that ABC Ltd. bought the script from Biju. Feeling aggrieved, he tried to contact Biju but to no avail.

The district court did not grant any relief to Abhishek stating that there can be no copyright in a plot as much as there can be no copyright in an idea. Abhishek then made an appeal to the High Court citing that it was not merely an idea as an idea is something vague. His plot was real, and he even emailed the outline of the plot to Biju.

Memorial is required to be filed for only one party.

MOOT PROBLEM – 5

This case involves a human tragedy of Shakespearean proportions: a young man overcomes huge physical disabilities to reach Olympian heights as an athlete; in doing so he becomes an international celebrity; he meets a young woman of great natural beauty and a successful model; romance blossoms; and then, ironically on Valentine's Day, all is destroyed when he takes her life. In the early hours of 14 February 2013 the respondent, Mr. Jerome (at times the accused hereafter), shot and killed the 29 year old Miss Maria (at times the deceased hereafter) at his home in a secured complex known as Silver Woods Estate in Mumbai, Maharashtra.

The accused was born with deformed legs, consequently before his first birthday, both of his legs were surgically amputated below the knee and, since then, he has had to rely on prosthetics. Despite such a severe physical handicap, he made his way bravely into the world and, had a spectacular athletic career. He competed by using prosthetic legs at the international level in both disabled and able-bodied athletic events. He won numerous international medals, including gold medals at the Paralympics. The accused represented India in both the Olympic and the Paralympic Games of 2012. His athletic achievements not only brought him international fame but also into contact with charities, and he was awarded an honorary doctorate for his humanitarian work in the world of prosthetic.

The accused met the deceased, who was a successful model on 4th November, 2012. Romance quickly blossomed and they became intimate. As so often happens with romantic relationships, they had petty conflict and tensions as evidenced by a transcript of text messages that had passed between them. But despite these hiccups, the deceased at times slept over at the accused's home. She did so on the night of 13 February 2013. In the early hours of the following morning, screams, gunshots, loud noises and cries for help were heard, emanating from the accused's house. Within minutes, a Mr. Raj and a Dr. Dilip, the latter a medical practitioner, arrived at the accused's home. There they found the accused in a highly emotional state, kneeling alongside the deceased who was lying on the floor at the foot of the stairs leading to the sleeping quarters of the house. She had been carried there by the accused from an upstairs bathroom where the shooting had taken place. She had been shot several times and was mortally wounded. The severity of her injuries was such that she was not breathing and Dr Dilip was unable to find a pulse. In due course FIR was registered against the accused under section 302 of the Indian Penal Code for murder. The State's prosecutor attempted to persuade the trial court that the accused had threatened the deceased during the course of an argument, that she had locked herself into the toilet cubicle in the bathroom to escape from him, and that he had thereupon fired the four fatal shots with a 9mm pistol through the door of a toilet cubicle in the bathroom adjacent to his bedroom and killed her.

The accused, on the other hand, alleged that he had awoken from his sleep in the early hours of the morning. It was very warm and so he sat up, although it was dark in the room, he was aware that the deceased was awake in the bed next to him as she rolled over and spoke to him. He got out of bed, brought the two fans from the balcony into the room, closed and

locked the sliding doors, and drew the curtains. It was very dark in the room, the only light being from a small LED on an amplifier at the TV cabinet. He then heard the sound of a window opening in the bathroom. The bathroom is situated not directly adjacent to the bedroom but down a short passage lined with cupboards. He immediately thought that there was an intruder who had entered the house through the bathroom window, possibly by climbing up a ladder. He quickly moved back to his bed and grabbed his 9mm pistol from where he kept it under the bed. As he did so, he whispered to Maria to 'get down and phone the police' before proceeding to the passage leading to the bathroom. He was not wearing his prosthetic legs at that stage and, overcome with fear, he started screaming and shouting both for the intruder to get out of his house and for Maria to get down on the floor and to phone the police. When he reached the entrance to the bathroom, he stopped shouting as he was worried that the intruder would know exactly where he was. As he neared the bathroom he heard the toilet door slam. Peering around the wall at the end of the passage, he saw that there was no one in the bathroom itself but that the toilet door was closed. He alleged that at that point he started screaming again, telling Maria, who he presumed was in the bedroom, to phone the police. He then heard a noise coming from inside the toilet and promptly fired four shots at the door. After that he retreated to the bedroom where he found that Maria was no longer there. It then dawned on him that it could be her in the toilet. In panic he went back to the bathroom and tried to open the door, but found it to be locked. He then started screaming for help and put on his prosthetic legs. He unsuccessfully tried to kick open the door but on seeing the key lying on the toilet floor, he unlocked the door and found Maria slumped with her weight on the toilet bowl. She was not breathing. He held her and pulled her out of the bathroom before telephoning the other two resident of the estate, Mr Raj and Dr Dilip, followed by the calls made to the paramedic organizations for ambulance and the estate's security by the accused.

The accused pleaded in the trial that he cannot be held guilty of murdering Maria because he had no subjective intention to cause her death as he had not known Maria was in the toilet. On the contrary the accused believed that, at the time he fired shots into the toilet door, the deceased was in the bedroom while the intruders were in the toilet. This belief was communicated to a number of people shortly after the incident. The counsel for the accused emphasized the accused's physical disabilities, the fact that he had not been wearing his prostheses at the time and that he had thus been particularly vulnerable to any aggression directed at him by an intruder. His counsel argued that it had to be inferred that he must have viewed whoever was in the toilet as a danger hence there was a genuine belief of an imminent attack upon him.

The Court of Session convicted him for culpable homicide not amounting to murder holding that there was no intention to kill the person behind the door. He had shot the deceased believing that she was an intruder. The accused's had erroneous belief that his life was in danger therefore cannot be found guilty of murder. Aggrieved by the decision of the trial court the State has made an appeal to the High court.

Memorial is required to be filed only for one party.

MOOT PROBLEM - 6

People's Republic of TULIP and *Republic of DAFFODIL* are two countries in the existing international legal order. For years, the *People's Republic of TULIP* was colonised by the *Republic of DAFFODIL* before it got its independence in 1955. While *DAFFODIL* is the founding member of the United Nations, *TULIP* became a member state in 1956. The historical episode of colonialism and the ethnic demography of the *People's Republic of TULIP* significantly influence its municipal and international policies.

Post decolonization, the incidents of violence between the majority ethnic community, comprising 75% of the total population and the non-ethnic community, comprising 25% of the total population of the *People's Republic of TULIP* became frequent. Often the violence against the non-ethnic community was projected as a peripheral issue by the government. According to a report prepared by a civil society organization the incidents of violence in the *People's Republic of TULIP* have proliferated after people from the non-ethnic community took up arms to resist the atrocities being committed against them. Over the years the resistance got organized in a group named, '*armed group V*'.

Frequent reports of conflict and the growing number of casualties attracted international attention. The situation was discussed at the United Nations Security Council (UNSC) in 2010. In its statement at UNSC, the government of the *People's Republic of TULIP* blamed the *Republic of DAFFODIL* for assisting the '*armed group V*'. In response, the representative of the *Republic of DAFFODIL* stated that they have not interfered in the internal matters of the *People's Republic of TULIP* and are committed to follow the principles of the United Nations Charter.

In light of the growing concerns, UNSC established an International Commission of Inquiry with a mandate to investigate the situation. International Commission submitted its report on 12 March 2011. In its report, the International Commission pointed out that murder, extermination, torture, enslavement and sexual violence against members of the non-ethnic community is rampant. The report further stated that while the members of the '*armed group V*' were trained, funded and armed by the *Republic of DAFFODIL,* '*armed group V*' did not act on the 'instructions, direction or control' of the *Republic of DAFFODIL.*

In a press conference on 13 March 2011, the Foreign Minister of the *Republic of DAFFODIL* rejected the findings of the report. He also stated that since '*armed group V*' was not acting under the 'direction or control' of the *DAFFODIL,* it cannot be held responsible for the acts of '*armed group V*' under international law. Responding to a question during the press conference, the Foreign Minister said that unless the official armed personnel of the *Republic of DAFFODIL* is directly involved in any attack, the question of breach of Article 2(4) of the UN Charter does not arise. In a press conference on the same day, the official spokesperson of the *People's Republic of TULIP* noted that any attack by the '*armed group V*' would be

attributable to the *Republic of DAFFODIL* as the members of the group are being trained, funded and armed by it.

On 11 August 2011, an armed attack on a government building in *People's Republic of TULIP* killed 200 people. The '*armed group V*' took responsibility for the attack.

In a public statement on 12 August 2011, the President of the *People's Republic of TULIP* referred to the report of the International Commission of Inquiry and noted that the *Republic of DAFFODIL* is responsible for the acts of the '*armed group V*'. He also noted that the incident of 11 August 2011 amounts to use of force under international law by the *Republic of DAFFODIL,* and violates the sovereignty and territorial integrity of *TULIP.*

On 20 August 2011, the *People's Republic of TULIP* filed in the Registry of the International Court of Justice (ICJ) an application instituting proceedings against the *Republic of DAFFODIL* seeking reparations for the damages caused by the violation of international law. Subsequently, as per the rules of the ICJ the Registrar entered the case into the Court's General List as, *Case Concerning Armed Activities in TULIP (People's Republic of TULIP v. Republic of DAFFODIL)*. The proceedings before the ICJ have begun.

Note: Both, *People's Republic of TULIP* and *Republic of DAFFODIL*, have made declarations under Article 36(2) of the Statute of the International Court of Justice accepting the jurisdiction on the condition of reciprocity over all international disputes.

Memorial is required to be filed for only one party.

Annexure-II

Alternative Dispute Resolution

LL.B. VI Term

LB-602: Alternative Dispute Resolution

Reading Materials Prepared by

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May 2022

LB-602 – Alternative Dispute Resolution

Objectives of the Course

With the introduction of Section 89, CPC and amendment in the Arbitration and Conciliation Act 1996 in 2015, alternative dispute resolution methods have been given a primary role in reducing arrears and promoting fast and affordable settlement of disputes. This course has two primary objectives. First is to provide the students with the theoretical understanding of the concepts and the legal provisions relating to ADR. Secondly, the course is geared to train the students in the practical skills required to effectively participate in the ADR processes. The course has been designed for a class of not more than 30 students. It is desirable that the course is delivered by a team of teachers together for individualized learning and supervision.

The teaching methods to be employed by teachers include lectures, use of multi-media, simulation exercises, role plays, field visits, feedback and other CLE methods of teaching and learning. The course focuses on instilling the following practical skills among the students: Communication including verbal, non-verbal, body language and para-linguistic; Case and Dispute Analyses and Strategy; Distinguishing interests from rights; Persuasion; Skills of mediators; Drawing agreements; Negotiation skills; Ethical dilemmas.

Learning Outcomes: At the end of the Semester, the students will be able to

- Describe, analyse and apply the substantive rules of ADR
- Choose appropriate ADR
- Communicate effectively
- Draw settlement agreements
- Choose appropriate negotiation strategy
- Practice Mediator's skills
- Solve the ethical dilemmas

Required Readings: (Material which has not been supplied but is nonetheless important for the course, and should be read)

1. The Draft Mediation Bill 2021
2. The Arbitration and Conciliation Act 1996 as amended in 2015
3. Section 89, Code of Civil Procedure
4. Legal Services Authorities Act, 1987
5. Mediation and Conciliation Rules 2004 of Delhi High Court
6. P.C. Markanda, LAW RELATING TO ARBITRATION AND CONCILIATION, pp.1-8, (8th Edn. 2013) LexisNexis
7. 222nd Report of the Law Commission of India on NEED FOR JUSTICE-DISPENSATION THROUGH ADR, etc. (2009)
8. 246th Report of the Law Commission of India on AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT 1996 (2014)
9. Justice Manju Goel, 'Successful Mediation in Matrimonial Disputes' available at http://www.delhimediationcentre.gov.in/articles.htm

Suggested Readings: (Material which has not been supplied but will improve overall understanding of the course)

1. 'Concept & Techniques of Mediation', Mediation Training Module: Delhi Mediation Centre.
2. Thomas P Valenti and Tanima Tandon, Mediation in India-Practical Tips and Techniques, in Shashank Garg (ed.) Alternative Dispute Resolution, The Indian Perspective 187-248 (OUP 2018).
3. Relevant Excerpts from the Mediation Training Manual of India by Mediation and Conciliation Project Committee of Supreme Court of India. Full text available at:http://supremecourtofindia.nic.in/mediation.
4. *Dayawati v. Yogesh Kumar Gosain,* 243 (2017) Delhi Law Times 117 (DB), Full text available at:http://lobis.nic.in/ddir/dhc/GMI/judgement/17-10-2017/GMI17102017CRLRF12016.pdf
5. Vikramajit Sen and Satyajit Gupta, The Concept of Seat in International Arbitration-Developments in India, in Shashank Garg (ed.) Alternative Dispute Resolution, The Indian Perspective 187-248 (OUP 2018).
6. Sheila Ahuja, International Arbitration with an Indian Connection, in Shashank Garg (ed.) Alternative Dispute Resolution, The Indian Perspective 249-388 (OUP 2018).
7. Tameem Zainulbhai, Justice for All: Improving the Lok Adalat System in India, 35(1) Fordham International Law Journal (2016) pp. 248-278. Full text available at: https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2422&context=ilj

A) Introduction to Alternate Dispute Resolution: Differences between Litigation, Arbitration, Conciliation, Mediation and Negotiation (2 lectures)

Supplied Readings:

B) Communication – Introduction, verbal, non-verbal communication, para linguistics (2 lectures)

Supplied Readings:

Simulation Exercises (2 classes)

C) Negotiation- Introduction, Style and Strategies (2 lectures)

Supplied Readings:

1. **Negotiation** ……... 47
   Exercise: The negotiating style profile
   Predominant Negotiation Styles
   Development of conflict
   Negotiating techniques/Strategies
   Eight critical mistakes
   Being assertive in negotiation
   Exercise: Questionnaire: opinions and attitudes
   Negotiation: the art of negotiating
2. **The Seven Elements of Negotiation** ……... 70

Simulation Exercises (6 Classes)

D) Conciliation/ Mediation: Difference between mediation/ conciliation and other ADRs, Mediator's Skills and Roles, Stages of Mediation: Mediator's Opening Statement; Parties' Opening Statement: Joint Session; Caucus or Separate Session; Final Negotiation/Deal-Making Round; Closure, Strategies and Techniques, Role of Silence/Apology, Handling Emotions/Impasse, Drafting Agreement, Ethical Dilemmas in Mediation (4 lectures)

Supplied Readings:

1. Concept & Techniques of Mediation', Mediation Training Module ……. 72
2. Delhi Mediation Centre. Shriram Panchu**,** Mediation Practice Law - The Path to Successful Dispute Resolution Pages 90-111, 2nd Edition, LexisNexis 2015.(on the 'How to'of conducting Mediation and essentials of a mediation settlement agreement)
3. *Dayawati* v. *Yogesh Kumar Gosain*, 243 (2017) Delhi Law Times 117 (DB) ... 92
4. United Nations Convention on International Settlement Agreements Resulting from Mediation, 2018 (Singapore Convention on Mediation) ……. . 100
5. Points of Discussion on Mediation Bill 2021…… 105

Simulation Exercises (8 classes)

E) Arbitration

NOTE: The Arbitration Module is just for conceptual introduction/understanding of the process of Arbitration, drafting of arbitration clause, getting to know the recent changes in the Indian Arbitration Act, 1996 and knowing the differentiation of Arbitration with other form of ADR. The lecture formulation is indicative.

(a) Overview of A & C Act, 1996 (4 lectures)
(b) Overview of International Rules (2 lectures)
(c) Drafting Arbitration Clause (2 lectures)

Supplied Readings:

1. Aman Hingorani, "Alternative Dispute Resolution, including Arbitration, Mediation and Conciliation", All India Bar Examination Preparatory Materials …… 105
2. Duties of Arbitrator by P.C. Markanda, Naresh Markanda & Rajesh Markanda, Advocates, Supreme Court of India. …….. 128
3. 2015 Amendment to the Arbitration and Conciliation Act, 1996. …… 135
4. 2019 Amendment to the Arbitration and Conciliation Act, 1996. …… 139
5. Excerpts from Drafting Dispute Resolution Clauses A Practical Guide, American Arbitration Association. …… 145

Simulation Exercise (4 classes)- Drafting Arbitration Clause

F) Visit to Delhi Mediation Centre/ Lok Adalat/ Arbitration Centre.

Discussion on Legal Services Authorities Act, 1987

The students shall have to prepare the reports according to the experience gained during field visit-whether it is to Mediation Centre/ Lok Adalat/ Arbitration Centre.

EXAMINATION

End-semester written examination--- 50 marks (2 Hours)

Oral/practical exercises- 50 marks

• Mediation (10 marks) • Negotiation (10 marks) • Arbitration (10 marks) • Field Visit Report (10 marks)	• Attendance 96 – 100%=10 marks 91 – 95% = 8 marks 86 - 90% = 6 marks 81- 85% = 4 marks 76 – 80 % = 2 marks 70%-75%= 1 marks

Need for Alternatives to the Formal Legal System

[Special Address by Dr. S.Muralidhar, Part-time Member, Law Commission of India in an International Conference on ADR, Conciliation, Mediation and Case Management Organised By the Law Commission of India at New Delhi on May 3-4, 2003.]

The need for alternatives to the formal legal system has engaged the attention of the legal fraternity, comprising judges, lawyers and law researchers for several decades now. This has for long been seen as integral to the process of judicial reform and as signifying the `access-to justice' approach. In their monumental comparative work on civil justice systems, Mario Cappelletti and Bryant Garth point out that the emergence of the right of access to justice as "the most basic human right" was in recognition of the fact that possession of rights without effective mechanisms for their vindication would be meaningless.[1] It was not enough that the state proclaimed a *formal* right of equal access to justice. The state was required to guarantee, by affirmative action, *effective* access to justice. Beginning about 1965, in the U.S.A, the U.K. and certain European countries, there were three practical approaches to the notion of access to justice. The 'first wave' in this new movement was legal aid*;* the second concerned the reforms aimed at providing legal representation for 'diffuse' interests, especially in the areas of consumer and environmental protection; and the third, "the `access–to–justice approach,' which includes, but goes much beyond, the earlier approaches, thus representing an attempt to attack access barriers in a more articulate and comprehensive manner."[2] The last mentioned approach "encourages the exploration of a wide variety of reforms, including changes in the structure of courts or the creation of new courts, the use of lay persons and paraprofessionals both on the bench and in the bar, modifications in the substantive law designed to avoid disputes or to facilitate their resolution, and the use of private and informal dispute resolution mechanisms. This approach, in short, is not afraid of comprehensive, radical innovations, which go beyond the sphere of legal representation."[3]

In India too the need to evolve alternative mechanisms simultaneous with the revival and strengthening of traditional systems of dispute resolution have been reiterated in reports of expert bodies. Reference in this context may be made to the Report of the Committee on Legal Aid constituted by the State of Gujarat in 1971 and chaired by Justice P.N. Bhagwati (as he then was) which *inter alia* recommended

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[1] M. Cappelletti and B. Garth, "Access to Justice - the worldwide movement to make rights effective: a general report" in M. Cappelletti and B. Garth (eds.), Access to Justice–A World Survey, Volume I, Sijthoff & Noordhoff – Alphanaanderijan (1978), 5 at 8-9. This shift occurred, according to the authors, simultaneous with the emergence in the twentieth century of the "welfare state".

[2] *Id*. at 21. The authors explain (at 49): "We call it the `access-to-justice' approach because of its overall scope; its method is not to abandon the techniques of the first two waves of reform, but rather to treat those reforms as but several of a number of possibilities for improving access."

[3] *Id.* at 52

adaptation of the `neighbourhood law network' then in vogue in the U.S.A; the *Report of the Expert Committee on Legal Aid: Processual Justice to the People*, Government of India, Ministry of Law, Justice and Company Affairs (1973) (*1973 Report*) which was authored primarily by its Chairman Justice V.R.Krishna Iyer (as he then was) which while urging ADR (*lok nyayalayas*) in identified groups of cases exhorted the preservation and strengthening of gram nyayalayas; and the Report of two-member Committee of Justices Bhagwati and Krishna Iyer appointed to examine the existing legal aid schemes and suggest a framework of a legal services programme that would help achieve social objectives [*Report on National Juridicare Equal Justice – Social Justice*, Ministry of Law, Justice and Company Affairs (1977) (*1977 Report*)]. The last mentioned report formulated a draft legislation institutionalising the delivery of legal services and identifying ADR, conciliation and mediation as a key activity of the legal services committees. Each of these reports saw the process of improving access to justice through legal aid mechanisms and ADR as a part of the systemic reform of the institution of the judiciary coupled with substantive reforms of laws and processes. The present have of legal reforms have only partly acknowledged and internalised the recommendations in these reports. Still, the implementation of the reforms pose other kinds of challenges. The attempt through the introduction of S.89 of the Code of Civil Procedure 1908 (CPC) is perhaps a major step in meeting this challenge.

The reasons for the need for a transformation are not much in dispute. The inability of the formal legal system to cope with the insurmountable challenge of arrears argues itself.

The Parliamentary Standing Committee on Home Affairs found that as of 2001, there were in 21 High Courts in the country, 35.4 lakh cases pending.[4] Of the 618 posts of High Court judges there were 156 vacancies as on January 1, 2000.[5] The position in the subordinate courts was even more alarming. There was a backlog of over 2 crore (20 million) cases for as long as 25 to 30 years.[6] Of these, there were over 1.32 crore (13.2 million) criminal cases and around 70 lakhs (7 million) civil cases.[7] The total

[4] J. Venkatesan, "Panel concern over backlog in courts", *The Hindu*, New Delhi, March 10, 2002, 12: "The Committee was particularly disturbed by the fact that cases were pending for over 50, 40 and 30 years in the High Courts of Madhya Pradesh, Patna, Rajasthan and Calcutta. And more than 5 lakh cases were pending for over 10 years – 2 lakhs in Allahabad, 1,46,476 in Calcutta 28,404 in Bombay and 5,050 in Madras."

[5] Indian Law Institute, Judicial System and Reforms in Asian Countries: The Case of India, Institute of Developing Economies, Japan External Trade Organisation (IDE-JETRO), (March 2001) 39.

[6] *Ibid*.

[7] *Id.* at 35.

number of subordinate judges[8]in all the states and union territories in the country, as of September 1999 was 12,177.[9]

Despite this severe strain on resources, the performance of the subordinate judiciary has been remarkable. A joint study by the Indian Law Institute and the Institute of Developing Economies, Japan in March 2001, revealed that in a single year (1998) the number of cases disposed of by the district and subordinate courts was 1.36 crores (13.6 million).[10] At the end of every year, however, the pendency of cases remains at the figure of around 20 million, which means the subordinate judiciary is running hard to remain at the same place.[11]

In its 120th Report in 1988, the Law Commission of India had recommended that "the state should immediately increase the ratio from 10.5 judges per million of Indian

population to at least 50 judges per million within the period of next five years."[12] In 2001, the ratio remains at 12 or 13 judges per million population.[13] While it is debateable whether this relating of the number of judges should be to the population as a whole or to the number of cases in the various courts, there is no gainsaying that judicial officers are not paid very well and work in deplorable conditions where basic infrastructure is unsatisfactory or inadequate.[14]

All of the above should in fact persuade prospective and present litigants, as well as those engaging with the formal legal system as judges and lawyers, to reservedly embrace the notion of ADR, conciliation and mediation. However, it does appear there are many more factors that ail the formal legal system which, if not adequately

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[8] *Id.* at 6: This would include district and sessions judges, additional district and sessions judges, subordinate/assistant sessions judges, chief judicial magistrates, metropolitan magistrates and judicial magistrates.

[9] *First National Judicial Pay Commission Report* (1999) 1229. The judge strength rose from 9232 in 1985 to 12771 in September 1995.

[10] Indian Law Institute, Judicial System and Reforms in Asian Countries: The Case of India, Institute of Developing Economies, Japan External Trade Organisation (IDE-JETRO), (March 2001) 37.

[11]The same study (*id.* at 36) points out that at the end of 1998, there were 1.93 crore cases (19.3 million) which were pending in the subordinate courts for less than ten years.

[12] *120th Report of the Law Commission of India on Manpower Planning in the Judiciary: A Blueprint*¸ Ministry of Law, Justice and Company Affairs, Government of India (1987), 3.

[13] Recently, the Chief Justice of India said: "The reason why we do not have more judges across the board is because the States are simply not willing to provide the finances that are required…The expenditure on the judiciary in terms of the GNP is only 0.2 per cent; and, of this, half is recovered by the states through court fees and fines. Given the attitude of the states, is it any wonder that the jails of our country are filled to the brim, largely with undertrials.?": "Speech by Hon'ble Mr.S.P.Bharucha, Chief Justice of India on 26th November 2001 (Law Day) at the Supreme Court" (2001) 8 SCALE J-13 at J-14.

[14] This led to a public interest litigation by the All India Judges Association in the Supreme Court claiming better conditions of work as well as an increased and uniform pay structure. See orders in *All India Judges Association v. Union of India* (1992) 1 SCC 119; (1993) 4 SCC 288; (2000) 1 SCALE 136 and (2002) 3 SCALE 291.

addressed in the proposed alternative system, may hinder the move for transformation. This assumes particular significance in the context of suggestions that the ADR, mediation or conciliation processes should be court-annexed and institutionalised. I propose to highlight here a few of these factors.

`Hidden' and other costs

One disincentive for a person to engage with the legal system is the problem of uncompensated costs that have to be incurred. Apart from court fees, cost of legal representation, obtaining certified copies and the like, the system fails to acknowledge, and therefore compensate, bribes paid to the court staff,[15] the extra `fees' to the legal aid lawyer,[16] the cost of transport to the court, the bribes paid (in criminal cases) to the policemen for obtaining documents, copies of depositions and the like or to prison officials for small favours.[17] In some instances, even legal aid beneficiaries may not get services for `free' after all.[18] It is important to acknowledge the existence of a general distrust of the legal system including it processes and institutions which are mystifying, alienating and intimidating; distaste of lawyers and courts as they seem imposing and authoritarian; seeing the whole legal process as of nuisance value resulting in irreversible consequences, an uninvited `trouble' that has to be got rid of. Unless frontally addressed, a court annexed or an institutionalised ADR, mediation or conciliation system may soon be undermined by the same problems that afflict the formal legal system. The attraction of the alternative system would then lie in the promise of not only reduced costs and uncertainties but importantly a liberation from the stranglehold of the `court annexed bureaucracy'.

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[15] For a study pointing to corruption prevalent in the district and subordinate courts in Delhi see, V.N.Rajan and M.Z.Khan, Delay in Disposal of Criminal Cases in the Sessions and Lower Courts in Delhi, Institute of Criminology and Forensic Science, (1982). The authors point out (at 42) "It was seen that those who greased the palm of the readers and peons were able to get adjournments readily while others waited outside the court helplessly. To those who were unwilling to part with money, these court officials were not prepared even to tell whether the presiding officer would come and the cases would be heard or not."

[16] Siraj Sait, "Save the legal aid movement", *The Hindu*, June 29, 1997, V: "What is galling is that many sleazy lawyers who get legal aid cases tell the poor victims that if they want result they must pay them extra over what the Tamil Nadu Legal Aid Board pays them."

[17] Chadha, The Indian Jail: A Contemporary Document, Vikas Publishing Pvt. Ltd., 31 where she talks of the system of a `setting' for various tasks involving the prisoner having to depend on the jail official in Tihar Jail in Delhi: "A minimum `setting' even for the official to *consider* the request is Rs.500."(emphasis in original) William Chambliss, "Epilogue- Notes on Law, Justice and Society", in William Chambliss (ed.), Crime and the Legal Process, McGraw Hill Book Co. (1969) points out (at 421): "When a police force or an entire legal system is found to be engaged in a symbiotic relationship with professional criminals, the cause of this unfortunate circumstance is seen as residing in the inherent corruptibility of the individuals involved."

[18] An empirical study of the working of legal aid schemes in Punjab showed that beneficiaries of legal aid complained that "they were provided only the services of a counsel and nothing beyond" and that they "had to spend amounts varying between Rs.100 to 900 for their cases in lower courts": Sujan Singh, Legal Aid: Human right to Equality, Deep and Deep, (1998), 272.

The Law and Poverty Dimension

There is an imperative need to acknowledge that those who are economically and socially disadvantaged see the entire legal system as irrelevant to them as a tool of empowerment and survival. The economically disadvantaged litigant is, notwithstanding the present concerted moves to reach legal aid through a geographically wide network of legal aid institutions,[19] unable to effectively access the system as they encounter barriers in the form of expenses, lawyers and delays. The formal system, as presently ordered, tends to operate to the greater disadvantage of this class of society which then looks to devising ways of avoiding it rather than engaging with it. Without fundamental systemic changes, any alternative system, however promising the results may seem, is bound to be viewed with suspicion. The participatory nature of an ADR mechanism, which offers a level playing field that encourages a just result and where the control of the result is in the hands of the parties, and not the lawyers or the judges, would act as a definite incentive to get parties to embrace it.

The Parallel System

The noted economist Hernando de Soto, in a path-breaking study of encroachments in Lima in Peru, points out that although the parallel system began as a by-product of the formal system, it has for long been the only system with which the police, the lawyers, the judiciary and the litigant are prepared to readily engage.[20] A similar systematic study in several areas of disputes in India might well reveal the same position. For many a litigant, the engagement with the parallel system is not a matter of choice. For the others it becomes a source of additional means of livelihood. On the other hand, the formal legal system also appears to be in the stranglehold of those for whom the economic stakes in working the system to suit their ends is too high to permit any meaningful change that can threaten their source of living. The attitude towards maintaining the status quo therefore gets firmly entrenched. The resultant cynicism that has set into the system, coupled with a skepticism of all reform requires to be rooted out gradually but firmly if the reform agenda has to be implemented progressively. This would require building in deterrent disincentives for engaging with the parallel system that presently poses a serious threat to the legitimacy of the formal system. This may have to be coupled with an audit of the formal system, both financial and social, to pinpoint those areas that require immediate attention and correction. Since the legitimacy of the ADR mechanism is premised on parties consenting to the process, the costs of engaging with either the parallel system or benefiting from the ills

[19] The Legal Services Authorities Act 1987 mandates the setting up o legal aid committees at the state, district and taluka levels. These are apart from committees annexed to each of the High Courts and the Supreme Court.

[20] Hernando de Soto, The Other Path, Harper & Row (1989). This seminal work could form a model for initiating a study of the working of the criminal justice system. This might reveal the actual costs involved in several stages of the system.

of the formal system have to be raised considerably high to drive the parties to consent to the ADR processes.

From an economic point of view, it should be possible to argue that those litigants who as a class or group burden the court system the most should either bear the proportionate `carrying' costs of the litigation load or mandatorily be driven to an ADR process. For instance, if the government is the major litigant in the courts, it should not be open for the government to both avoid the costs of the litigation it generates and also resist attempts at being driven to ADR processes. On the other hand it might well take the lead in offering to participate in such processes in all prospective and current litigation which involves the government as a party.

Audit of Lok Adalat Mechanisms

It is a fact that a large number of civil disputes pending in the courts, and to a small extent petty criminal matters, have been `disposed of' through the *lok adalats* that are a permanent `embedded' feature of the functioning of legal services authorities. While one point of view sees this as a success, another questions whether the *lok adalat* as presently institutionalised is really a tool of `case management' which essentially addresses the problems of an over-burdened judiciary and not so much as an instrument of justice delivery for the litigant. If the `success' of the *lok adalat* stems from negative reasons attributable to the failures of the formal legal system, the utility of this mechanism may also be short-lived. In other words if the incentive for litigants to accept *lok adalat* decisions is that if they didn't they would be faced with the prospect of further delays, uncertainties and costs, it constitutes a confirmation for them that the formal legal system is unable to provide an acceptable quality of legal services or justice. This in turn would not augur well for the legitimacy of the system in the long run. What this then means is that there has to be a gradual but conscious effort to offering positive reasons, and not negative ones, for litigants to be willing consumers of the ADR processes. An audit of the existing ADR mechanisms from the point of view of `customer satisfaction' would help shape the programmes for the future in order to maximise the `success'.

An ADR system that is both transparent and accountable is in the circumstances imperative in order to make the crucial difference to those presently engaged in the formal legal system which is largely perceived as lacking in this area. As has been pointed out by several speakers, a successful implementation of ADR processes will have to be preceded by an identification of categories of cases or specific dispute areas that are most amenable to their introduction.

Despite the challenges that face the ADR processes today, the benefits in the long run that they are capable of generating appear to outweigh the factors that may in the short run deter their enforcement. We have listened to many positive experiences of ADR in the past two days and this should encourage us to move forward with the reform process. The diverse nature of the country's population defies any uniform approach or set pattern and this is perhaps the biggest strength of the ADR mechanisms. Their flexibility and informality, the scope they offer for innovation and

creativity, hold out the promise of a great degree of acceptability lending them the required legitimacy. Their utility as a case management tool cannot be overemphasised. ADR processes provide the bypasses to handle large chunks of disputes thus leaving the formal legal system to handle the more complex litigation. Even while they do not offer to be a panacea for all the ills of the formal legal system, ADR processes offer the best hope yet of complementing and helping to fortify the formal legal system.

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Comparison Between Judicial Process and Various ADR Processes

[Material Extracted from Chapter IV, *Mediation Training Manual of India*, designed by Mediation and Conciliation Project Committee, Supreme Court of India]

JUDICIAL PROCESS	ARBITRATION	MEDIATION
Judicial process is an adjudicatory process where a third party (judge/ Other authority) decides the outcome.	Arbitration is a quasi-judicial adjudicatory process where the arbitrator(s) appointed by the Court or by the parties decide the dispute between the parties.	Mediation is a negotiation process and not an adjudicatory process. The mediator facilitates the process. Parties participate directly in the resolution of their dispute and decide the terms of settlement.
Procedure and decision are governed, restricted, and controlled by the provisions of the relevant statutes.	Procedure and decision are governed, restricted and controlled by the provisions of the Arbitration & Conciliation Act, 1996.	Procedure and settlement are not controlled, governed or restricted by statutory provisions thereby allowing freedom and flexibility.
The decision is binding on the parties.	The award in an arbitration is binding on the parties.	A binding settlement is reached only if parties arrive at a mutually acceptable agreement.
Adversarial in nature, as focus is on past events and determination of rights and liabilities of parties.	Adversarial in nature as focus is on determination of rights and liabilities of parties.	Collaborative in nature as focus is on the present and the future and resolution of disputes is by mutual agreement of parties irrespective of rights and liabilities.
Personal appearance or active participation of parties is not always required.	Personal appearance or active participation of parties is not always required.	Personal appearance and active participation of the parties are required.
A formal proceeding held in public and follows strict procedural stages.	A formal proceeding held in private following strict procedural stages.	A non-judicial and informal proceeding held in private with flexible procedural stages.
Decision is appealable.	Award is subject to challenge on specified grounds.	Decree/Order in terms of the settlement is final and is not appealable.
No opportunity for parties to communicate directly with each other.	No opportunity for parties to communicate directly with each other.	Optimal opportunity for parties to communicate directly with each other in the presence of the mediator.
Involves payment of court fees.	Does not involve payment of court fees.	In case of settlement, in a court annexed mediation the court fee already paid is refundable as per the Rules.

MEDIATION	**CONCILIATION**	**LOK-ADALAT**
Mediation is a non-adjudicatory process.	Conciliation is a non-adjudicatory process.	Lok Adalat is non-adjudicatory if it is established under Section 19 of the Legal Services Authorities Act, 1987. Lok Adalat is conciliatory and adjudicatory if it is established under Section 22B of the Legal Services Authorities Act, 1987.
Voluntary process.	Voluntary process.	Voluntary process.
Mediator is a neutral third party.	Conciliator is a neutral third party.	Presiding officer is a neutral third party.
Service of lawyer is available.	Service of lawyer is available.	Service of lawyer is available.
Mediation is party centred negotiation.	Conciliation is party centred negotiation.	In Lok Adalat, the scope of negotiation is limited.
The function of the Mediator is mainly facilitative.	The function of the conciliator is more active than the facilitative function of the mediator.	The function of the Presiding Officer is persuasive.
The consent of the parties is not mandatory for referring a case to mediation.	The consent of the parties is mandatory for referring a case to conciliation.	The consent of the parties is not mandatory for referring a case to Lok Adalat.
The referral court applies the principles of Order XXIII Rule 3, CPC for passing decree/order in terms of the agreement.	In conciliation, the agreement is enforceable as it is a decree of the court as per Section 74 of the Arbitration and Conciliation Act, 1996.	The award of Lok Adalat is deemed to be a decree of the Civil Court and is executable as per Section 21 of the Legal Services Authorities Act, 1987.
Not appealable.	Decree/order not appealable.	Award not appealable.
The focus in mediation is on the present and the future.	The focus in conciliation is on the present and the future.	The focus in Lok Adalat is on the past and the present.
Mediation is a structured process having different stages.	Conciliation also is a structured process having different stages.	The process of Lok Adalat involves only discussion and persuasion.
In mediation, parties are actively and directly involved.	In conciliation, parties are actively and directly involved.	In Lok Adalat, parties are not actively and directly involved so much.
Confidentiality is the essence of mediation.	Confidentiality is the essence of conciliation.	Confidentiality is not observed in Lok Adalat.

A Role Play to Demonstrate the Differences Between Adjudication and Mediation

"*The Family Portrait*"

FACTS: Their father died recently, leaving the family property to the two sons. Their mother died earlier, so both parties are the sole surviving heirs. Their father's will is clear regarding the family home and his other personal property - everything has been divided fifty-fifty. However, the will mentions that the family portrait, an original painting by a famous Indian Painter, of their parents and grandparents, and which is a cherished family possession is to go to the father's "favourite child". The will does not name his favourite child. The two brothers cannot agree on who the father's favourite child is.

Exercise: Resolve the dispute using (i) arbitration (adjudication) and (ii) mediation.

Exercise (i) Arbitration (Adjudication)

- The arbitrator has to first decide upon what the "issue" in dispute is : Which child fits the definition of the "favourite child"?
- Each party (child) presents reasons to the arbitrator as to why they believe that they were the favourite child.
- The arbitrator evaluates the evidence and decides who fits in the definition of "favourite child"
- the painting is awarded to that child.
- No compromise is permitted. The arbitrator must make a decision as to who is right and who is wrong depending on (i) the meaning of "favourite child" and (ii) an appraisal and comparison of each party's evidence as to why they were the "favourite child".

Exercise (ii) Mediation
Here, the mediator facilitates the negotiation of the same issue. The parties will try and work out a solution between themselves, rather than relinquishing control over the resolution of the dispute to an arbitrator or any other neutral. The parties are free to choose creative compromises - there is no right and wrong, and consequently, there need not be only one winner.
Mediator is to demonstrate

- Identifying need
- Creating options
- Controlling process
- Restoring relationship

Development of ADR / Mediation in India

[Material Extracted from Chapter I, Mediation Training Manual of India, designed by Mediation and Conciliation Project Committee, Supreme Court of India]

INTRODUCTION

Though documentation is scant, it is believed that nearly every community, country, and culture has a lengthy history of using various methods of informal dispute resolution. Many of these ancient methods shared procedural features with the process that has coalesced in the form of contemporary mediation. In India, as in other countries, the origin of mediation is obscured by the lack of a clear historical record. In addition, there is a lack of official records of indigenous processes of dispute resolution due to colonization in India over the past 250 years. There is scattered information, set forth below, that can be gathered by tracing mediation in a very elementary form back to ancient times in the post-Vedic period in India. Tribal communities practiced diverse kinds of dispute resolution techniques for centuries in different parts of the world, including India. In China government- sponsored mediation has been used on a widespread basis to resolve disputes based on aged societal principles of peaceful co-existence. Native Americans are known to have adopted their own dispute resolution procedures long before the American settlement.

HISTORICAL PERSPECTIVE

As recorded in Mulla's Hindu Law, ancient India began its search for laws since Vedic times approximately 4000 to 1000 years B.C. and it is possible that some of the Vedic hymns were composed at a period earlier than 4000 B.C. The early Aryans were very vigorous and unsophisticated people full of joy for life and had behind them ages of civilized existence and thought. They primarily invoked the unwritten law of divine wisdom, reason and prudence, which according to them governed heaven and earth. This was one of the first originating philosophies of mediation - Wisdom, Reason and Prudence, which originating philosophy is even now practiced in western countries.

The scarcely available ancient Indian literature reflects the cultural co-existence of people for many centuries. This reality necessitated many of the collaborative dispute resolution methods adopted in the modern mediation process. Towards the end of the Vedic epoch, philosophical and legal debates were carried on for the purpose of eliciting truth, in assemblies and parishads, which are now described as conferences. India has one of the oldest cultural histories of over 5000 years and a recent history of about 1000 years during which it was invaded by the Iranian plateau, Central Asia, Arabia, Afghanistan and the West Indian culture has absorbed the changes and influences of these aggressions to produce remarkable racial and cultural synthesis. The 29 Indian States have different and varying social and culture traditions, customs and religions. The era of Dharma Shashtras [code of conduct] followed the Vedic epoch, during which period scholastic jurists developed the philosophy of basic laws. Their learned discourses recognized existing usages and customs of different communities, which included resolution of disputes by non-adversarial indigenous methods. One example is the tribunal propounded and set up by a brilliant scholar Yagnavalkya, known as KULA, which dealt with the disputes between members of the family, community, tribes, castes or races. Another tribunal known as SHRENI, a corporation of artisans following the same business,

dealt with their internal disputes. PUGA was a similar association of traders in any branch of commerce. During the days of Yagnavalkya there was an unprecedented growth and progress of trade, industry and commerce and the Indian merchants are said to have sailed the seven seas, sowing the seeds of International Commerce. Another scholar Parashar opined that certain questions should be determined by the decisions of a parishad or association or an assembly of the learned. These associations were invested with the power to decide cases based on principles of justice, equity and good conscience. These different mechanisms of dispute resolution were given considerable autonomy in matters of local and village administration and in matters solely affecting traders' guilds, bankers and artisans. The modern legislative theory of arbitrage by domestic forums for deciding cases of members of commercial bodies and associations of merchants finds its origin in ancient customary law in India. Cases were decided according to the usages and customs as were approved by the conscience of the virtuous and followed by the people in general. The parishad recognized the modern concept of participatory methods of dispute resolution with a strong element of voluntariness, which another founding principle of modern mediation. Buddhism propounded mediation as the wisest method of resolving problems. Buddha said, "Meditation brings wisdom; lack of mediation leaves ignorance. Know well what leads you forward and what holds you back; choose that which leads to wisdom". This Buddhist aphorism reflects acceptance of the principle that mediation focuses on the future instead of dwelling in the past. Ancient Indian Jurist Patanjali said, "Progress comes swiftly in mediation for those who try hardest, instead of deciding who was right and who was wrong". It is a recorded fact that complicated cases were resolved not in the King's courts but by King's mediator. Even during the Mughal rule, Emperor Akbar depended upon his mediator minister Birbal. The most famous case was when two women claimed motherhood of a child, the Mediator suggested cutting the child into two and dividing its body and giving one-half to each woman. The real mother gave up her claim to save the child's life whereas the fake mother agreed to the division. The child was then given to the real mother. Though this was not a fully-developed example of modern mediation, it is an example of interest-based negotiation where the neutral third party seeks to identify the underlying needs and concerns of the parties. It is widely accepted that a village panchayat, meaning five wise men, used to be recognized and accepted as a conciliatory and / or decision- making body. Like many of the ancient dispute resolution methods, the panchayat shared some of the characteristics of mediation and some of the characteristics of arbitration.

As societies grew in size and complexity, informal decision-making processes became more structured and they gradually took the shape of a formal justice delivery system. In fact, societies could not grow larger in size and complexity without first evolving a system of resolving disputes that could keep the peace and harmony in the society and keep trade and commerce growing efficiently.

Mediation in the United States has developed in several distinct directions. Community mediation emerged in the 1960's in response to racial tensions and integration issues. Neighbourhood Justice Centers were established to address those issues. Later, community mediation expanded in application to neighbourhood disputes, family disputes, and other disputes where the issues were predominantly interpersonal. This view held that mediation should be community-based and independent of the legal system, opining that

mediation could deliver a high rate of satisfying settlement results if it were separate from the legal bureaucracy. In the 1980's, private mediation caught on when insurance companies realized the cost benefits of resolving insurance claims informally and expeditiously. Private mediation took hold in a variety of ways, including the emergence of private/independent mediators, non-profit mediation programs and agencies, and for-profit mediation providers. Private mediation was applied to pre-litigation disputes, litigated disputes, and, more recently, commercial and international disputes. Court-annexed mediation, which was the subject of experimental usage in the 1970's and 1980's, began to expand significantly in the 1990's. This school of thought concluded that mediation should be an extension of the legal system, even seeing mediation as an effective means of narrowing issues for litigation in courts. Currently, court-annexed mediation is offered by most courts at the trial and appellate levels. All three forms of mediation, community mediation, private mediation, and court-annexed mediation continue to co-exist, thrive, and to meet the needs of disputing parties in the United States.

A turning point in the use of alternative dispute resolution in the United States occurred in 1976, at a nationwide conference of lawyers, jurists, and educators called the Pound Conference. The conference was convened to address the urgent problems of over-crowding in the jails, lengthy delays in the courts, and the lack of access to justice due to the prohibitive costs of litigation. The need for alternatives to litigation generated in the new concept of a "Multi-door Court-house," and reinforced the importance of "Neighbourhood Justice Centers". The Multi-door Court-house concept, originated by Harvard professor Frank Sander, envisioned a scenario in which an aggrieved party could simply go to a kiosk at the entrance of a courthouse where a facilitative attendant would direct the disputant to one of the doors providing alternative or traditional dispute resolution processes. Prof. Sander described it as fitting the forum to the fuss. In this manner, the legal system could help the litigants achieve the most satisfactory result, in effect placing responsibility for providing alternative processes, including mediation, in the hands of the judicial system. The idea of a neutral assisting the disputants in arriving at their own solution instead of imposing his solution was introduced. Professors Ury, Brett and Goldberg opined that reconciling interests was less costly and probing for deep-seated concerns, devising creative solutions and making trade-offs was more satisfying to the disputants than the adjudicatory process.

MEDIATION IN INDIA

Mediation, Conciliation and Arbitration, in their earlier forms are historically more ancient than the present day Anglo-Saxon adversarial system of law. Various forms of mediation and arbitration gained a great popularity amongst businessmen during pre-British Rule in India. The Mahajans were respected, impartial and prudent businessmen who used to resolve the disputes between merchants through mediation. They were readily available at business centres to mediate the disputes between the members of a business association. The rule in the constitution of the Association made a provision to dismember a merchant if he resorted to court before referring the case to mediation. This was a unifying business sanction. This informal procedure in vogue in Gujarat, the western province of India, was a combination of Mediation and Arbitration, now known in the western world, as Med-Arb. This type of mediation had no legal sanction in spite of its wide common acceptance in the business world. The

East India Company from England gained control over the divided Indian Rulers and developed its apparent commercial motives into political aggression. By 1753 India was converted into a British Colony and the British style courts were established in India by 1775. The British ignored local indigenous adjudication procedures and modeled the process in the courts on that of British law courts of the period. However, there was a conflict between British values, which required a clear-cut decision, and Indian values, which encouraged the parties to work out their differences through some form of compromise.

The British system of justice gradually became the primary justice delivery system in India during the British regime of about 250 years. Even in England it was formed during a feudal era when an agrarian economy was dominant. While India remained a colony, the system thrived, prospered and deepened its roots as the prestigious and only justice symbol. Indigenous local customs and community-based mediation and conciliation procedures successfully adopted by business associations in western India were held to be discriminatory, depriving the litigants of their right to go to courts.

The British Courts gradually came to be recognized for its integrity and gained peoples' confidence. Even after India's independence in 1947, the Indian Judiciary has been proclaimed world over as the pride of the nation.

Until commerce, trade and industry started expanding dramatically in the 21st century, the British system delivered justice quicker, while maintaining respect and dignity. Independence brought with it the Constitution, awareness for fundamental and individual rights, governmental participation in growth of the nation's business, commerce and industry, establishment of the Parliament and State legislatures, government corporations, financial institutions, fast growing international commerce and public sector participation in business. The Government became a major litigant. Tremendous employment opportunities were created. An explosion in litigation resulted from multiparty complex civil litigation, expansion of business opportunities beyond local limits, increase in population, numerous new enactments creating new rights and new remedies and increasing popular reliance on the only judicial forum of the courts. The inadequate infrastructure facilities to meet with the challenge exposed the inability of the system to handle the sheer volume of caseloads efficiently and effectively. Instead of waiting in queues for years and passing on litigation by inheritance, people are often inclined either to avoid litigation or to start resorting to extra-judicial remedies.

Almost all the democratic countries of the world have faced similar problems with court congestion and access to justice. The United States was the first to introduce drastic law reforms about 30 years back and Australia followed suit. The United Kingdom has also adopted alternative dispute resolution as part of its legal system. The European Union also endorses mediation for the resolution of commercial disputes between member states.

LEGAL RECOGNITION OF MEDIATION IN INDIA

The concept of mediation received legislative recognition in India for the first time in the Industrial Disputes Act, 1947. The conciliators appointed under Section 4 of the Act are "charged with the duty of mediating in and promoting the settlement of Industrial disputes."

Detailed procedures were prescribed for conciliation proceedings under the Act.

Arbitration, as a dispute resolution process was recognized as early as 1879 and also found a place in the Civil Procedure Code of 1908. When the Arbitration Act was enacted in 1940 the provision for arbitration originally contained in Section 89 of the Civil Procedure Code was repealed. The Indian Legislature made headway by enacting The Legal Services Authorities Act, 1987 by constituting the National Legal Services Authority as a Central Authority with the Chief Justice of India as its Patron-in-Chief. The Central Authority has been vested with duties to perform, inter alia, the following functions: -

- To encourage the settlement of disputes by way of negotiations, arbitration and conciliation.
- To lay down policies and principles for making legal services available in the conduct of any case before the court, any authority or tribunal.
- To frame most effective and economical schemes for the purpose.
- To utilize funds at its disposal and allocate them to the State and District Authorities appointed under the Act.
- To undertake research in the field of legal services.
- To recommend to the Government grant-in-aid for specific schemes to voluntary institutions for implementation of legal services schemes.
- To develop legal training and educational programmes with the Bar Councils and establish legal services clinics in universities, Law Colleges and other institutions.
- To act in co-ordination with governmental and non-governmental agencies engaged in the work of promoting legal services.

The Indian parliament enacted the Arbitration and Conciliation Act in 1996, making elaborate provisions for conciliation of disputes arising out of legal relationship, whether contractual or not, and to all proceedings relating thereto. The Act provided for the commencement of conciliation proceedings, appointment of conciliators and assistance of suitable institution for the purpose of recommending the names of the conciliators or even appointment of the conciliators by such institution, submission of statements to the conciliator and the role of conciliator in assisting the parties in negotiating settlement of disputes between the parties.

In 1999, the Indian Parliament passed the CPC Amendment Act of 1999 inserting Sec.89 in the Code of Civil Procedure 1908, providing for reference of cases pending in the Courts to ADR which included mediation. The Amendment was brought into force with effect from 1st July, 2002.

Since the inception of the economic liberalization policies in India and the acceptance of law reforms the world over, the legal opinion leaders have concluded that mediation should be a critical part of the solution to the profound problem of arrears of cases in the civil courts. In 1995-96 the Supreme Court of India under the leadership of the then Chief Justice, Mr. A. M.

Ahmadi, undertook an Indo-U.S. joint study for finding solutions to the problem of delays in the Indian Civil Justice System and every High Court was asked to appoint a study team which worked with the delegates of The Institute for Study and Development of Legal Systems [ISDLS], a San Francisco based institution. After gathering information from every State, a central study team analyzed the information gathered and made some further concrete suggestions and presented a proposal for introducing amendments relating to case management to the Civil Procedure Code with special reference to the Indian scenario.

EVOLUTION OF MEDIATION IN INDIA

The first elaborate training for mediators was conducted in Ahmedabad in the year 2000 by American trainers sent by Institute for the Study and Development of Legal Systems (ISDLS). It was followed by a few repeated advance training workshops conducted by Institute for Arbitration Mediation Legal Education and Development (AMLEAD) a Public Charitable Trust settled by two senior lawyers of Ahmedabad. On 27th July 2002, the Chief Justice of India, formally inaugurated the Ahmedabad Mediation Centre, reportedly the first lawyer-managed mediation centre in India. The Chief Justice of India called a meeting of the Chief Justices of all the High Courts of the Indian States in November, 2002 at New Delhi to impress upon them the importance of mediation and the need to implement Sec. 89 of Civil Procedure Code. Institute for Arbitration Mediation Legal Education and Development (AMLEAD) and the Gujarat Law Society introduced, in January 2003, a thirty-two hours Certificate Course for "Intensive training in Theory and Practice of Mediation". The U.S. Educational Foundation in India (USEFI) organized training workshops at Jodhpur, Hyderabad and Bombay in June 2003. The Chennai Mediation Centre was inaugurated on 9th April, 2005 and it started functioning in the premises of the Madras High Court. This became the first Court-Annexed Mediation centre in India. The Delhi Judicial Academy organized a series of mediation training workshops and opened a mediation centre in the Academy's campus appointing its Deputy Director as the mediator. Delhi High Court Mediation and Conciliation Centre has been regularly organizing mediation awareness workshops and Advanced Mediation Training workshops.

The Mediation and Conciliation Project Committee (MCPC) was constituted by the then Chief Justice of India Hon'ble Mr. Justice R.C. Lahoti by order dt. 9th April, 2005. Hon'ble Mr. Justice N. Santosh Hegde was its first Chairman. It consisted of other judges of the Supreme Court and High Court, Senior Advocates and Member Secretary of NALSA. The Committee in its meeting held on 11th July, 2005 decided to initiate a pilot project of judicial mediation in Tis Hazari Courts. The success of it led to the setting up of a mediation centre at Karkardooma in 2006, and another in Rohini in 2009. Four regional Conferences were held by the MCPC in 2008 at Banglore, Ranchi, Indore and Chandigarh.

MCPC has been taking the lead in evolving policy matters relating to the mediation. The committee has decided that 40 hours training and 10 actual mediation was essential for a mediator. The committee was sanctioned a grant-in-aid by the department of Legal Affairs for undertaking mediation training programme, referral judges training programme, awareness programme and training of trainers programme. With the above grant-in-aid, the committee has conducted till March, 2010, 52 awareness programmes/ referral judges training programmes and 52

Mediation training programmes in various parts of country. About 869 persons have undergone 40 hours training. The committee is in the process of finalizing a National Mediation Programme. Efforts are also made to institutionalize its functions and to convert it as the apex body of all the training programmes in the country.

The Supreme Court of India upheld the constitutional validity of the new law reforms in the case filed by Salem Bar Association and appointed a committee chaired by Justice Mr. Jagannadha Rao, the chairman of the Law Commission of India, to suggest and frame rules for ironing out the creases, if any, in the new law and for implementation of mediation procedures in civil courts. The Law Commission prepared consultation papers on Mediation and Case Management and framed and circulated model Rules. The Supreme Court approved the model rules and directed every High Court to frame them. The Law Commission of India organized an International conference on Case Management, Conciliation and Mediation at New Delhi on 3rd and 4th May 2003, which was a great success. Delhi District Courts invited ISDLS to train their Judges as mediators and help in establishing court annexed mediation centre. Delhi High Court started its own lawyers managed mediation and conciliation centre. Karnataka High Court also started a court-annexed mediation and conciliation centre and trained their mediators with the help of ISDLS. Now court-annexed mediation centres have been started in trial courts at Allahabad, Lucknow, Chandigarh, Ahmedabad, Rajkot, Jamnagar, Surat and many more Districts in India.

Mandatory mediation through courts has now a legal sanction. Court-Annexed Mediation and Conciliation Centres are now established at several courts in India and the courts have started referring cases to such centres. In Court-Annexed Mediation the mediation services are provided by the court as a part and parcel of the same judicial system as against Court-Referred Mediation, wherein the court merely refers the matter to a mediator. One feature of court-annexed mediation is that the judges, lawyers and litigants become participants therein, thereby giving them a feeling that negotiated settlement is achieved by all the three actors in the justice delivery system. When a judge refers a case to the court-annexed mediation service, keeping overall supervision on the process, no one feels that the system abandons the case. The Judge refers the case to a mediator within the system. The same lawyers who appear in a case retain their briefs and continue to represent their clients before the mediators within the same set-up. The litigants are given an opportunity to play their own participatory role in the resolution of disputes. This also creates public acceptance for the process as the same time-tested court system, which has acquired public confidence because of integrity and impartiality, retains its control and provides an additional service. In court-annexed mediation, the court is the central institution for resolution of disputes. Where ADR procedures are overseen by the court, at least in those cases which are referred through courts, the effort of dispensing justice can become well-coordinated.

ADR services, under the control, guidance and supervision of the court would have more authenticity and smooth acceptance. It would ensure the feeling that mediation is complementary and not competitive with the court system. The system will get a positive and willing support from the judges who will accept mediators as an integral part of the system. If reference to mediation is made by the judge to the court annexed mediation services, the mediation process will become more expeditious and harmonized. It will also facilitate the

movement of the case between the court and the mediator faster and purposeful. Again, it will facilitate reference of some issues to mediation leaving others for trial in appropriate cases. Court annexed mediation will give a feeling that court's own interest in reducing its caseload to manageable level is furthered by mediation and therefore reference to mediation will be a willing reference. Court annexed mediation will thus provide an additional tool by the same system providing continuity to the process, and above all, the court will remain a central institution for the system. This will also establish a public-private partnership between the court and the community. A popular feeling that the court works hand-in-hand with mediation facility will produce satisfactory and faster settlements.

* * * * *

Legal Framework

Civil Procedure Mediation Rules formulated by *Supreme Court in Salem Advocate Bar Association v Union of India* : (2005) 6 SCC 344.

Rule 11: Procedure of Mediation

(iv) Each party shall, ten days before a session, provide to the mediator a brief memorandum setting forth the issues, which according to it, need to be resolved, and its position in respect to those issues and all information reasonably required for the mediator to understand the issue; such memoranda shall also be mutually exchanged between the parties.

(v) Each party shall furnish to the mediator, copies of the pleadings or documents or such other information as may be required by him in connection with the issues to be resolved…

(vi) Each party shall furnish to the mediator such information as may be required by him in connection with the issues to be resolved.

Arbitration and Conciliation Act 1996

Section 65: Submission of statements to conciliator.

(1) The conciliator, upon his appointment, may request each party to submit to him a brief written statement of his position and the facts and grounds in support thereof, supplement by any documents and other evidence that such party deems appropriate. The party shall send a copy of such statement, documents and other evidence to the other party.

(2) The Conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party shall send a copy of such statement, documents and other evidence to the other party.

(3) At any stage of the conciliation proceedings, the conciliator may request a party to submit to him such additional information as he deems appropriate.

Afcons Infrastructure Ltd. v. *Cherian Varkey Construction Company Pvt. Ltd.*

(2010) 8 SCC 24

(Process of referral to different modes of ADR under Section 89 of CPC, 1908)

R.V.RAVEENDRAN, J. Leave granted. The general scope of Section 89 of the Code of Civil Procedure (`Code' for short) and the question whether the said section empowers the court to refer the parties to a suit to arbitration without the consent of both parties, arise for consideration in this appeal.

2. The second respondent (Cochin Port Trust) entrusted the work of construction of certain bridges and roads to the appellants under an agreement dated 20.4.2001. The appellants sub-contracted a part of the said work to the first respondent under an agreement dated 1.8.2001. It is not in dispute that the agreement between the appellants and the first respondent did not contain any provision for reference of the disputes to arbitration.

3. The first respondent filed a suit against the appellants for recovery of Rs.210,70,881 from the appellants and their assets and/or the amounts due to the appellants from the employer, with interest at 18% per annum. In the said suit an order of attachment was made on 15.9.2004 in regard to a sum of Rs.2.25 crores. Thereafter in March 2005, the first respondent filed an application under section 89 of the Code before the trial court praying that the court may formulate the terms of settlement and refer the matter to arbitration. The appellants filed a counter dated 24.10.2005 to the application submitting that they were not agreeable for referring the matter to arbitration or any of the other ADR processes under section 89 of the Code. In the meanwhile, the High Court of Kerala by order dated 8.9.2005, allowed the appeal filed by the appellants against the order of attachment and raised the attachment granted by the trial court subject to certain conditions. While doing so, the High Court also directed the trial court to consider and dispose of the application filed by the first respondent under section 89 of the Code.

4. The trial court heard the said application under section 89. It recorded the fact that first respondent (plaintiff) was agreeable for arbitration and appellants (defendants 1 and 2) were not agreeable for arbitration. The trial court allowed the said application under section 89 by a reasoned order dated 26.10.2005 and held that as the claim of the plaintiff in the suit related to a work contract, it was appropriate that the dispute should be settled by arbitration. It formulated sixteen issues and referred the matter to arbitration. The appellants filed a revision against the order of the trial court. The High Court by the impugned order dated 11.10.2006 dismissed the revision petition holding that the apparent tenor of section 89 of the Code permitted the court, in appropriate cases, to refer even unwilling parties to arbitration. The High Court also held that the concept of pre existing arbitration agreement which was necessary for reference to arbitration under the provisions of the Arbitration & Conciliation Act, 1996 (`AC Act' for short) was inapplicable to references under section 89 of the Code, having regard to the decision in Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya & Anr. [2003 (5) SCC 531]. The said order is challenged in this appeal.

5. On the contentions urged, two questions arise for consideration :

- What is the procedure to be followed by a court in implementing section 89 and Order 10 Rule 1A of the Code?

- Whether consent of all parties to the suit is necessary for reference to arbitration under section 89 of the Code?

6. To find answers to the said questions, we have to analyse the object, purpose, scope and tenor of the said provisions. The said provisions are extracted below :

"89. Settlement of disputes outside the court. –

(1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for -

a. arbitration;

b. conciliation;

c. judicial settlement including settlement through Lok Adalat; or

d. mediation.

(2) Where a dispute has been referred –

a. for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

b. to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act,and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

c. for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

d. for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed."

Other relevant provisions under CPC may be extracted as follows:

Order 10 Rule 1A. Direction of the Court to opt for any one mode of alternative dispute resolution.--After recording the admissions and denials, the Court shall direct the parties to the suit to opt either mode of the settlement outside the Court as specified in sub-section (1) of section 89. On the option of the parties, the Court shall fix the date of appearance before such forum or authority as may be opted by the parties.

Order 10 Rule 1B. Appearance before the conciliatory forum or authority.--Where a suit is referred under rule 1A, the parties shall appear before such forum or authority for conciliation of the suit.

Order 10 Rule 1C. Appearance before the Court consequent to the failure of efforts of conciliation.--Where a suit is referred under rule 1A and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then, it shall refer the matter again to the Court and direct the parties to appear before the Court on the date fixed by it."

7. If section 89 is to be read and required to be implemented in its literal sense, it will be a Trial Judge's nightmare. It puts the cart before the horse and lays down an impractical, if not impossible, procedure in sub-section (1). It has mixed up the definitions in sub-section (2). In spite of these defects, the object behind section 89 is laudable and sound. Resort to alternative disputes resolution (for short `ADR') processes is necessary to give speedy and effective relief to the litigants and to reduce the pendency in and burden upon the courts. As ADR processes were not being resorted to with the desired frequency, Parliament thought it fit to introduce Section 89 and Rules 1-A to 1-C in Order X in the Code, to ensure that ADR process was resorted to before the commencement of trial in suits. In view of its laudable object, the validity of section 89, with all its imperfections, was upheld in Salem Advocate Bar Association v. Union of India reported in [2003 (1) SCC 49 - for short, Salem Bar - (I)] but referred to a Committee, as it was hoped that section 89 could be implemented by ironing the creases. In Salem Advocate Bar Association v. Union of India [2005 (6) SCC 344 - for short, Salem Bar-(II)], this Court applied the principle of purposive construction in an attempt to make it workable.

What is wrong with section 89 of the Code?

8. The first anomaly is the mixing up of the definitions of `mediation' and `judicial settlement' under clauses (c) and (d) of sub-section (2) of section 89 of the Code. Clause (c) says that for "judicial settlement", the court shall refer the same to a suitable institution or person who shall be deemed to be a Lok Adalat. Clause (d) provides that where the reference is to "mediation", the court shall effect a compromise between the parties by following such procedure as may be prescribed. It makes no sense to call a compromise effected by a court, as "mediation", as is done in clause (d). Nor does it make any sense to describe a reference made by a court to a suitable institution or person for arriving at a settlement as "judicial settlement", as is done in clause (c). "Judicial settlement" is a term in vogue in USA referring to a settlement of a civil case with the help of a judge who is not assigned to adjudicate upon the dispute. "Mediation" is also a well known term and it refers to a method of non-binding dispute resolution with the assistance of a neutral third party who tries to help the disputing parties to arrive at a negotiated settlement. It is also synonym of the term `conciliation'. (See : Black's Law Dictionary, 7th Edition, Pages 1377 and 996). When words are universally understood in a particular sense, and assigned a particular meaning in common parlance, the definitions of those words in section 89 with interchanged meanings has led to confusion, complications and difficulties in implementation. The mix-up of definitions of the terms "judicial settlement" and "mediation" in Section 89 is apparently due to a clerical or typographical error in drafting, resulting in the two words being interchanged in clauses (c) and (d) of Section 89(2). If the word "mediation" in clause (d) and the words "judicial settlement" in clause (c) are interchanged, we find that the said clauses make perfect sense.

9. The second anomaly is that sub-section (1) of section 89 imports the final stage of conciliation referred to in section 73(1) of the AC Act into the pre-ADR reference stage under section 89 of the Code. Sub-section (1) of section 89 requires the court to formulate the terms of settlement and give them to the parties for their observation and then reformulate the terms of a possible settlement and then refer the same for any one of the ADR processes. If sub-section (1) of Section 89 is to be literally followed, every Trial Judge before framing issues, is required to ascertain whether there exists any elements of settlement which may be acceptable to the parties, formulate the terms of settlement, give them to parties for observations and then reformulate the terms of a possible settlement before referring it to arbitration, conciliation, judicial settlement, Lok Adalat or mediation. There is nothing that is left to be done by the alternative dispute resolution forum. If all these have to be done by the trial court before referring the parties to alternative dispute resolution processes, the court itself may as well proceed to record the settlement as nothing more is required to be done, as a Judge cannot do these unless he acts as a conciliator or mediator and holds detailed discussions and negotiations running into hours.

10. Section 73 of AC Act shows that formulation and reformulation of terms of settlement is a process carried out at the final stage of a conciliation process, when the settlement is being arrived at. What is required to be done at the final stage of conciliation by a conciliator is borrowed lock, stock and barrel into section 89 and the court is wrongly required to formulate the terms of settlement and reformulate them at a stage prior to reference to an ADR process. This becomes evident by a comparison of the wording of the two provisions.

Section 73(1) of A&C Act, 1996: When it appears to the conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

Section 89 (1) CPC: (1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may re-formulate the terms of a possible settlement and refer the same for- (a) arbitration; (b) conciliation;

(c) judicial settlement including settlement through Lok Adalat; or (d) mediation.

Formulation and re-formulation of terms of settlement by the court is therefore wholly out of place at the stage of pre ADR reference. It is not possible for courts to perform these acts at a preliminary hearing to decide whether a case should be referred to an ADR process and, if so, which ADR process.

11. If the reference is to be made to arbitration, the terms of settlement formulated by the court will be of no use, as what is referred to arbitration is the dispute and not the terms of settlement; and the Arbitrator will adjudicate upon the dispute and give his decision by way of award. If the reference is to conciliation/mediation/Lok Adalat, then drawing up the terms of the settlement or reformulating them is the job of the conciliator or the mediator or the Lok

Adalat, after going through the entire process of conciliation/ mediation. Thus, the terms of settlement drawn up by the court will be totally useless in any subsequent ADR process. Why then the courts should be burdened with the onerous and virtually impossible, but redundant, task of formulating terms of settlement at pre-reference stage?

12. It will not be possible for a court to formulate the terms of the settlement, unless the judge discusses the matter in detail with both parties. The court formulating the terms of settlement merely on the basis of pleadings is neither feasible nor possible. The requirement that the court should formulate the terms of settlement is therefore a great hindrance to courts in implementing section 89 of the Code. This Court therefore diluted this anomaly in Salem Bar (II) by equating "terms of settlement" to a "summary of disputes" meaning thereby that the court is only required to formulate a `summary of disputes' and not 'terms of settlement'. How should section 89 be interpreted?

13. The principles of statutory interpretation are well settled. Where the words of the statute are clear and unambiguous, the provision should be given its plain and normal meaning, without adding or rejecting any words. Departure from the literal rule, by making structural changes or substituting words in a clear statutory provision, under the guise of interpretation will pose a great risk as the changes may not be what the Legislature intended or desired. Legislative wisdom cannot be replaced by the Judge's views. As observed by this Court in somewhat different context : "When a procedure is prescribed by the Legislature, it is not for the court to substitute a different one according to its notion of justice. When the Legislature has spoken, the Judges cannot afford to be wiser." (See : *Shri Mandir Sita Ramji* v. *Lt. Governor of Delhi* - (1975) 4 SCC 298). There is however an exception to this general rule. Where the words used in the statutory provision are vague and ambiguous or where the plain and normal meaning of its words or grammatical construction thereof would lead to confusion, absurdity, repugnancy with other provisions, the courts may, instead of adopting the plain and grammatical construction, use the interpretative tools to set right the situation, by adding or omitting or substituting the words in the Statute. When faced with an apparently defective provision in a statute, courts prefer to assume that the draftsman had committed a mistake rather than concluding that the Legislature has deliberately introduced an absurd or irrational statutory provision. Departure from the literal rule of plain and straight reading can however be only in exceptional cases, where the anomalies make the literal compliance of a provision impossible, or absurd or so impractical as to defeat the very object of the provision. We may also mention purposive interpretation to avoid absurdity and irrationality is more readily and easily employed in relation to procedural provisions than with reference to substantive provisions.

13 (6) Justice G.P. Singh extracts four conditions that should be present to justify departure from the plain words of the Statute, in his treatise "Principles of Statutory Interpretation" (12th Edn. - 2010, Lexis Nexis - page 144) from the decision of the House of Lords in *Stock* v. *Frank Jones (Tipton) Ltd*., [1978 (1) All ER 948] :

".....a court would only be justified in departing from the plain words of the statute when it is satisfied that (1) there is clear and gross balance of anomaly; (2) Parliament, the legislative promoters and the draftsman could not have envisaged such anomaly and could not have been prepared to accept it in the interest of a supervening legislative objective; (3) the

anomaly can be obviated without detriment to such a legislative objective; and (4) the language of the statute is susceptible of the modification required to obviate the anomaly."

14. All the aforesaid four conditions justifying departure from the literal rule, exist with reference to section 89 of the Code. Therefore, in *Salem Bar*-II, by judicial interpretation the entire process of formulating the terms of settlement, giving them to the parties for their observation and reformulating the terms of possible settlement after receiving the observations, contained in sub-section (1) of section 89, is excluded or done away with by stating that the said provision merely requires formulating a summary of disputes. Further, this Court in Salem Bar-II, adopted the following definition of `mediation' suggested in the model mediation rules, in spite of a different definition in section 89(2)(d) :

"Settlement by `mediation' means the process by which a mediator appointed by parties or by the Court, as the case may be, mediates the dispute between the parties to the suit by the application of the provisions of the Mediation Rules, 2003 in Part II, and in particular, by facilitating discussion between parties directly or by communicating with each other through the mediator, by assisting parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute and emphasizing that it is the parties' own responsibility for making decisions which affect them."

All over the country the courts have been referring cases under section 89 to mediation by assuming and understanding `mediation' to mean a dispute resolution process by negotiated settlement with the assistance of a neutral third party. Judicial settlement is understood as referring to a compromise entered by the parties with the assistance of the court adjudicating the matter, or another Judge to whom the court had referred the dispute.

15. Section 89 has to be read with Rule 1-A of Order 10 which requires the court to direct the parties to opt for any of the five modes of alternative dispute resolution processes and on their option refer the matter. The said rule does not require the court to either formulate the terms of settlement or make available such terms of settlement to the parties to reformulate the terms of possible settlement after receiving the observations of the parties. Therefore the only practical way of reading Section 89 and Order 10, Rule 1-A is that after the pleadings are complete and after seeking admission/denials wherever required, and before framing issues, the court will have recourse to section 89 of the Code. Such recourse requires the court to consider and record the nature of the dispute, inform the parties about the five options available and take note of their preferences and then refer them to one of the alternative dispute resolution processes.

16. In view of the foregoing, it has to be concluded that proper interpretation of section 89 of the Code requires two changes from a plain and literal reading of the section. Firstly, it is not necessary for the court, before referring the parties to an ADR process to formulate or re-formulate the terms of a possible settlement. It is sufficient if the court merely describes the nature of dispute (in a sentence or two) and makes the reference. Secondly, the definitions of `judicial settlement' and `mediation' in clauses (c) and (d) of section 89(2) shall have to be interchanged to correct the draftsman's error. Clauses (c) and (d) of section 89(2) of the Code will read as under when the two terms are interchanged:

(c) for "mediation", the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for "judicial settlement", the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed. The above changes made by interpretative process shall remain in force till the legislature corrects the mistakes, so that section 89 is not rendered meaningless and infructuous.

Whether the reference to ADR Process is mandatory?

17. Section 89 starts with the words "where it appears to the court that there exist elements of a settlement". This clearly shows that cases which are not suited for ADR process should not be referred under section 89 of the Code. The court has to form an opinion that a case is one that is capable of being referred to and settled through ADR process. Having regard to the tenor of the provisions of Rule 1A of Order 10 of the Code, the civil court should invariably refer cases to ADR process. Only in certain recognized excluded categories of cases, it may choose not to refer to an ADR process. Where the case is unsuited for reference to any of the ADR process, the court will have to briefly record the reasons for not resorting to any of the settlement procedures prescribed under section 89 of the Code. Therefore, having a hearing after completion of pleadings, to consider recourse to ADR process under section 89 of the Code, is mandatory. But actual reference to an ADR process in all cases is not mandatory. Where the case falls under an excluded category there need not be reference to ADR process. In all other case reference to ADR process is a must.

18. 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.

19. 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
- 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.

The above enumeration of `suitable' and `unsuitable' categorization of cases is not intended to be exhaustive or rigid. They are illustrative, which can be subjected to just exceptions or additions by the court/Tribunal exercising its jurisdiction/discretion in referring a dispute/case to an ADR process.

How to decide the appropriate ADR process under section 89?

20. Section 89 refers to five types of ADR procedures, made up of one adjudicatory process (arbitration) and four negotiatory (non adjudicatory) processes - conciliation, mediation, judicial settlement and Lok Adalat settlement. The object of section 89 of the Code is that settlement should be attempted by adopting an appropriate ADR process before the case proceeds to trial. Neither section 89 nor Rule 1A of Order 10 of the Code is intended to supersede or modify the provisions of the Arbitration and Conciliation Act, 1996 or the Legal Services Authorities Act, 1987. On the other hand, section 89 of the Code makes it clear that

two of the ADR processes - Arbitration and Conciliation, will be governed by the provisions of the AC Act and two other ADR Processes - Lok Adalat Settlement and Mediation (See : amended definition in para 18 above), will be governed by the Legal Services Authorities Act. As for the last of the ADR processes - judicial settlement (See : amended definition in para 18 above), section 89 makes it clear that it is not governed by any enactment and the court will follow such procedure as may be prescribed (by appropriate rules).

21. Rule 1A of Order 10 requires the court to give the option to the parties, to choose any of the ADR processes. This does not mean an individual option, but a joint option or consensus about the choice of the ADR process. On the other hand, section 89 vests the choice of reference to the court. There is of course no inconsistency. Section 89 of the Code gives the jurisdiction to refer to ADR process and Rules 1A to IC of Order 10 lay down the manner in which the said jurisdiction is to be exercised. The scheme is that the court explains the choices available regarding ADR process to the parties, permits them to opt for a process by consensus, and if there is no consensus, proceeds to choose the process.

22. Let us next consider which of the ADR processes require mutual consent of the parties and which of them do not require the consent of parties.

Arbitration

23. Arbitration is an adjudicatory dispute resolution process by a private forum, governed by the provisions of the AC Act. The said Act makes it clear that there can be reference to arbitration only if there is an `arbitration agreement' between the parties. If there was a pre-existing arbitration agreement between the parties, in all probability, even before the suit reaches the stage governed by Order 10 of the Code, the matter would have stood referred to arbitration either by invoking section 8 or section 11 of the AC Act, and there would be no need to have recourse to arbitration under section 89 of the Code. Section 89 therefore pre-supposes that there is no pre-existing arbitration agreement. Even if there was no pre-existing arbitration agreement, the parties to the suit can agree for arbitration when the choice of ADR processes is offered to them by the court under section 89 of the Code. Such agreement can be by means of a joint memo or joint application or a joint affidavit before the court, or by record of the agreement by the court in the ordersheet signed by the parties. Once there is such an agreement in writing signed by parties, the matter can be referred to arbitration under section 89 of the Code; and on such reference, the provisions of AC Act will apply to the arbitration, and as noticed in Salem Bar-I, the case will go outside the stream of the court permanently and will not come back to the court.

24. If there is no agreement between the parties for reference to arbitration, the court cannot refer the matter to arbitration under section 89 of the Code. This is evident from the provisions of AC Act. A court has no power, authority or jurisdiction to refer unwilling parties to arbitration, if there is no arbitration agreement. This Court has consistently held that though section 89 of the Code mandates reference to ADR processes, reference to arbitration under section 89 of the Code could only be with the consent of both sides and not otherwise.

24.1) In *Salem Bar* (I) [*Salem Advocate Bar Association* v. *Union of India*, (2003) 1 SCC 49], this Court held :

"It is quite obvious that the reason why Section 89 has been inserted is to try and see that all the cases which are filed in court need not necessarily be decided by the court itself. Keeping in mind the law's delays and the limited number of Judges which are available, it has now become imperative that resort should be had to alternative dispute resolution mechanism with a view to bring to an end litigation between the parties at an early date. The alternative dispute resolution (ADR) mechanism as contemplated by Section 89 is arbitration or conciliation or judicial settlement including settlement through Lok Adalat or mediation. If the parties agree to arbitration, then the provisions of the Arbitration and Conciliation Act, 1996 will apply and that case will go outside the stream of the court but resorting to conciliation or judicial settlement or mediation with a view to settle the dispute would not ipso facto take the case outside the judicial system. All that this means is that effort has to be made to bring about an amicable settlement between the parties but if conciliation or mediation or judicial settlement is not possible, despite efforts being made, the case will ultimately go to trial."

In *Salem Bar* - (II) [*Salem Advocate Bar Association* v. *Union of India*, (2005) 6 SCC 344], this Court held :

"Some doubt as to a possible conflict has been expressed in view of used of the word "may" in Section 89 when it stipulates that "the court may reformulate the terms of a possible settlement and refer the same for" and use of the word "shall" in Order 10 Rule 1-A when it states that "the court shall direct the parties to the suit to opt either mode of the settlement outside the court as specified in sub-section (1) of Section 89".

The intention of the legislature behind enacting Section 89 is that where it appears to the court that there exists an element of a settlement which may be acceptable to the parties, they, at the instance of the court, shall be made to apply their mind so as to opt for one or the other of the four ADR methods mentioned in the section and if the parties do not agree, the court shall refer them to one or the other of the said modes. Section 89 uses both the words "shall" and "may" whereas Order 10 Rule 1-A uses the word "shall" but on harmonious reading of these provisions it becomes clear that the use of the word "may" in Section 89 only governs the aspect of reformulation of the terms of a possible settlement and its reference to one of ADR methods. There is no conflict. It is evident that what is referred to one of the ADR modes is the dispute which is summarized in the terms of settlement formulated or reformulated in terms of Section 89.

One of the modes to which the dispute can be referred is "arbitration". Section 89(2) provides that where a dispute has been referred for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of the 1996 Act. Section 8 of the 1996 Act deals with the power to refer parties to arbitration where there is arbitration agreement. As held in *P. Anand Gajapathi Raju* v. *P.V.G. Raju* [2000 (4) SCC 539] the 1996 Act governs a case where arbitration is agreed upon before or pending a suit by all the parties. The 1996 Act, however, does not contemplate a situation as in Section 89 of the Code where the court asks the parties to choose one or other ADRs including arbitration and the parties choose arbitration as their option. Of course, the parties have to agree for arbitration."

The position was reiterated by this Court in *Jagdish Chander* v. *Ramesh Chander* [2007 (5) SCC 719] thus :

"It should not also be overlooked that even though Section 89 mandates courts to refer pending suits to any of the several alternative dispute resolution processes mentioned therein, there cannot be a reference to arbitration even under Section 89 CPC, unless there is a mutual consent of all parties, for such reference."

Therefore, where there is no pre-existing arbitration agreement between the parties, the consent of all the parties to the suit will be necessary, for referring the subject matter of the suit to arbitration under section 89 of the Code.

Conciliation

25. Conciliation is a non-adjudicatory ADR process, which is also governed by the provisions of AC Act. There can be a valid reference to conciliation only if both parties to the dispute agree to have negotiations with the help of a third party or third parties either by an agreement or by the process of invitation and acceptance provided in section 62 of AC Act followed by appointment of conciliator/s as provided in section 64 of AC Act. If both parties do not agree for conciliation, there can be no `conciliation'. As a consequence, as in the case of arbitration, the court cannot refer the parties to conciliation under section 89, in the absence of consent by all parties. As contrasted from arbitration, when a matter is referred to conciliation, the matter does not go out of the stream of court process permanently. If there is no settlement, the matter is returned to the court for framing issues and proceeding with the trial. The other three ADR Processes

26. If the parties are not agreeable for either arbitration or conciliation, both of which require consent of all parties, the court has to consider which of the other three ADR processes (Lok Adalat, Mediation and Judicial Settlement) which do not require the consent of parties for reference, is suitable and appropriate and refer the parties to such ADR process. If mediation process is not available (for want of a mediation centre or qualified mediators), necessarily the court will have to choose between reference to Lok Adalat or judicial settlement. If facility of mediation is available, then the choice becomes wider. It the suit is complicated or lengthy, mediation will be the recognized choice. If the suit is not complicated and the disputes are easily sortable or could be settled by applying clear cut legal principles, Lok Adalat will be the preferred choice. If the court feels that a suggestion or guidance by a Judge would be appropriate, it can refer it to another Judge for dispute resolution. The court has used its discretion in choosing the ADR process judiciously, keeping in view the nature of disputes, interests of parties and expedition in dispute resolution.

Whether the settlement in an ADR process is binding in itself ?

27. When the court refers the matter to arbitration under Section 89 of the Act, as already noticed, the case goes out of the stream of the court and becomes an independent proceeding before the arbitral tribunal. Arbitration being an adjudicatory process, it always ends in a decision. There is also no question of failure of ADR process or the matter being returned to the court with a failure report. The award of the arbitrators is binding on the parties and is executable/enforceable as if a decree of a court, having regard to Section 36 of the AC Act. If any settlement is reached in the arbitration proceedings, then the award passed by the Arbitral

Tribunal on such settlement, will also be binding and executable/enforceable as if a decree of a court, under Section 30 of the AC Act.

28. The other four ADR processes are non-adjudicatory and the case does not go out of the stream of the court when a reference is made to such a non- adjudicatory ADR forum. The court retains its control and jurisdiction over the case, even when the matter is before the ADR forum. When a matter is settled through conciliation, the Settlement Agreement is enforceable as if it is a decree of the court having regard to Section 74 read with Section 30 of the AC Act. Similarly, when a settlement takes place before the Lok Adalat, the Lok Adalat award is also deemed to be a decree of the civil court and executable as such under Section 21 of the Legal Services Authorities Act, 1987. Though the settlement agreement in a conciliation or a settlement award of a Lok Adalat may not require the seal of approval of the court for its enforcement when they are made in a direct reference by parties without the intervention of court, the position will be different if they are made on a reference by a court in a pending suit/proceedings. As the court continues to retain control and jurisdiction over the cases which it refers to conciliations, or Lok Adalats, the settlement agreement in conciliation or the Lok Adalat award will have to be placed before the court for recording it and disposal in its terms. Where the reference is to a neutral third party (`mediation' as defined above) on a court reference, though it will be deemed to be reference to Lok Adalat, as court retains its control and jurisdiction over the matter, the mediation settlement will have to be placed before the court for recording the settlement and disposal. Where the matter is referred to another Judge and settlement is arrived at before him, such settlement agreement will also have to be placed before the court which referred the matter and that court will make a decree in terms of it. Whenever such settlements reached before non-adjudicatory ADR Fora are placed before the court, the court should apply the principles of Order 23 Rule 3 of the Code and make a decree/order in terms of the settlement, in regard to the subject matter of the suit/proceeding. In regard to matters/disputes which are not the subject matter of the suit/proceedings, the court will have to direct that the settlement shall be governed by Section 74 of AC Act (in respect of conciliation settlements) or Section 21 of the Legal Services Authorities Act, 1987 (in respect of settlements by a Lok Adalat or a Mediator). Only then such settlements will be effective.

Summation

29. Having regard to the provisions of Section 89 and Rule 1-A of Order 10, the stage at which the court should explore whether the matter should be referred to ADR processes, is after the pleadings are complete, and before framing the issues, when the matter is taken up for preliminary hearing for examination of parties under Order 10 of the Code. However, if for any reason, the court had missed the opportunity to consider and refer the matter to ADR processes under Section 89 before framing issues, nothing prevents the court from resorting to Section 89 even after framing issues. But once evidence is commenced, the court will be reluctant to refer the matter to the ADR processes lest it becomes a tool for protracting the trial.

30. Though in civil suits, the appropriate stage for considering reference to ADR processes is after the completion of pleadings, in family disputes or matrimonial cases, the position can be slightly different. In those cases, the relationship becomes hostile on account

of the various allegations in the petition against the spouse. The hostility will be further aggravated by the counter-allegations made by the respondent in his or her written statement or objections. Therefore, as far as Family Courts are concerned, the ideal stage for mediation will be immediately after service of respondent and before the respondent files objections/written statements. Be that as it may.

31. We may summarize the procedure to be adopted by a court under section 89 of the Code as under :

(a) When the pleadings are complete, before framing issues, the court shall fix a preliminary hearing for appearance of parties. The court should acquaint itself with the facts of the case and the nature of the dispute between the parties.

(b) The court should first consider whether the case falls under any of the category of the cases which are required to be tried by courts and not fit to be referred to any ADR processes. If it finds the case falls under any excluded category, it should record a brief order referring to the nature of the case and why it is not fit for reference to ADR processes. It will then proceed with the framing of issues and trial.

(c) In other cases (that is, in cases which can be referred to ADR processes) the court should explain the choice of five ADR processes to the parties to enable them to exercise their option.

(d) The court should first ascertain whether the parties are willing for arbitration. The court should inform the parties that arbitration is an adjudicatory process by a chosen private forum and reference to arbitration will permanently take the suit outside the ambit of the court. The parties should also be informed that the cost of arbitration will have to be borne by them. Only if both parties agree for arbitration, and also agree upon the arbitrator, the matter should be referred to arbitration.

(e) If the parties are not agreeable for arbitration, the court should ascertain whether the parties are agreeble for reference to conciliation which will be governed by the provisions of the AC Act. If all the parties agree for reference to conciliation and agree upon the conciliator/s, the court can refer the matter to conciliation in accordance with section 64 of the AC Act.

(f) If parties are not agreeable for arbitration and conciliation, which is likely to happen in most of the cases for want of consensus, the court should, keeping in view the preferences/options of parties, refer the matter to any one of the other three other ADR processes : (i) Lok Adalat; (ii) mediation by a neutral third party facilitator or mediator; and (iii) a judicial settlement, where a Judge assists the parties to arrive at a settlement.

(g) If the case is simple which may be completed in a single sitting, or cases relating to a matter where the legal principles are clearly settled and there is no personal animosity between the parties (as in the case of motor accident claims), the court may refer the matter to Lok Adalat. In case where the questions are complicated or cases which may require several rounds of negotiations, the court may refer the matter to mediation. Where the facility of mediation is not available or where the parties opt for the guidance of a Judge to arrive at a settlement, the court may refer the matter to another Judge for attempting settlement.

(h) If the reference to the ADR process fails, on receipt of the Report of the ADR Forum, the court shall proceed with hearing of the suit. If there is a settlement, the court shall examine the settlement and make a decree in terms of it, keeping the principles of Order 23 Rule 3 of the Code in mind.

(i) If the settlement includes disputes which are not the subject matter of the suit, the court may direct that the same will be governed by Section 74 of the AC Act (if it is a Conciliation Settlement) or Section 21 of the Legal Services Authorities Act, 1987 (if it is a settlement by a Lok Adalat or by mediation which is a deemed Lok Adalat). This will be necessary as many settlement agreements deal with not only the disputes which are the subject matter of the suit or proceeding in which the reference is made, but also other disputes which are not the subject matter of the suit.

(j) If any term of the settlement is ex facie illegal or unforceable, the court should draw the attention of parties thereto to avoid further litigations and disputes about executability.

32. The Court should also bear in mind the following consequential aspects, while giving effect to Section 89 of the Code :

(i) If the reference is to arbitration or conciliation, the court has to record that the reference is by mutual consent. Nothing further need be stated in the order sheet.

(ii) If the reference is to any other ADR process, the court should briefly record that having regard to the nature of dispute, the case deserves to be referred to Lok Adalat, or mediation or judicial settlement, as the case may be. There is no need for an elaborate order for making the reference.

(iii) The requirement in Section 89(1) that the court should formulate or reformulate the terms of settlement would only mean that court has to briefly refer to the nature of dispute and decide upon the appropriate ADR process.

(iv) If the Judge in charge of the case assists the parties and if settlement negotiations fail, he should not deal with the adjudication of the matter, to avoid apprehensions of bias and prejudice. It is therefore advisable to refer cases proposed for Judicial Settlement to another Judge.

(v) If the court refers the matter to an ADR process (other than Arbitration), it should keep track of the matter by fixing a hearing date for the ADR Report. The period allotted for the ADR process can normally vary from a week to two months (which may be extended in exceptional cases, depending upon the availability of the alternative forum, the nature of case etc.). Under no circumstances the court should allow the ADR process to become a tool in the hands of an unscrupulous litigant intent upon dragging on the proceedings.

(vi) Normally the court should not send the original record of the case when referring the matter for an ADR forum. It should make available only copies of relevant papers to the ADR forum. (For this purpose, when pleadings are filed the court may insist upon filing of an extra copy). However if the case is referred to a Court annexed Mediation Centre which is under the exclusive control and supervision of a Judicial Officer, the original file may be made available wherever necessary.

33. The procedure and consequential aspects referred to in the earlier two paragraphs are intended to be general guidelines subject to such changes as the concerned court may deem fit with reference to the special circumstances of a case. We have referred to the procedure and process rather elaborately as we find that section 89 has been a non-starter with many courts. Though the process under Section 89 appears to be lengthy and complicated, in practice the process is simple: know the dispute; exclude `unfit' cases; ascertain consent for arbitration or conciliation; if there is no consent, select Lok Adalat for simple cases and mediation for all other cases, reserving reference to a Judge assisted settlement only in exceptional or special cases. Conclusion

34. Coming back to this case, we may refer to the decision in Sukanya Holdings relied upon by the respondents, to contend that for a reference to arbitration under section 89 of the Code, consent of parties is not required. The High Court assumed that Sukanya Holdings has held that section 89 enables the civil court to refer a case to arbitration even in the absence of an arbitration agreement. Sukanya Holdings does not lay down any such proposition. In that decision, this Court was considering the question as to whether an application under section 8 of the AC Act could be maintained even where a part of the subject matter of the suit was not covered by an arbitration agreement. The only observations in the decision relating to Section 89 are as under:

"Reliance was placed on Section 89 CPC in support of the argument that the matter should have been referred to arbitration. In our view, Section 89 CPC cannot be resorted to for interpreting Section 8 of the Act as it stands on a different footing and it would be applicable even in cases where there is no arbitration agreement for referring the dispute for arbitration. Further, for that purpose, the court has to apply its mind to the condition contemplated under Section 89 CPC and even if application under Section 8 of the Act is rejected, the court is required to follow the procedure prescribed under the said section."

The observations only mean that even when there is no existing arbitration agreement enabling filing of an application under section 8 of the Act, there can be a reference under section 89 to arbitration if parties agree to arbitration. The observations in Sukanya Holdings do not assist the first respondent as they were made in the context of considering a question as to whether section 89 of the Code could be invoked for seeking a reference under section 8 of the AC Act in a suit, where only a part of the subject- matter of the suit was covered by arbitration agreement and other parts were not covered by arbitration agreement. The first respondent next contended that the effect of the decision in Sukanya Holdings is that "section 89 of CPC would be applicable even in cases where there is no arbitration agreement for referring the dispute to arbitration." There can be no dispute in regard to the said proposition as Section 89 deals, not only with arbitration but also four other modes of non-adjudicatory resolution processes and existence of an arbitration agreement is not a condition precedent for exercising power under Section 89 of the Code in regard to the said four ADR processes.

35. In the light of the above discussion, we answer the questions as follows :

(i) The trial court did not adopt the proper procedure while enforcing Section 89 of the Code. Failure to invoke Section 89 *suo moto* after completion of pleadings and considering it only after an application under Section 89 was filed, is erroneous.

(ii) A civil court exercising power under Section 89 of the Code cannot refer a suit to arbitration unless all the parties to the suit agree for such reference.

36. Consequently, this appeal is allowed and the order of the trial court referring the matter to arbitration and the order of the High Court affirming the said reference are set aside. The Trial Court will now consider and decide upon a non-adjudicatory ADR process.

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Creating Effective Communication in Your Life

*Randy Fujishin**

(*Creating Communications: Exploring and Expanding your Fundamental Communication Skills, 2nd Edn., Rownman Littlefield Publishers.2009, pp 1-17)

Portion Relevant for LB-602 Retained

THE PROCESS OF COMMUNICATION

Let's begin with an examination of communication itself, for it is communication that enables us to experience our lives and share experiences with others. The late-night talks, the laughter, the gentle touches, the tears, the encouragement, and the thousands upon thousands of other communication acts all combine to create what you experience as life. Our communication with others is not a little thing. It is life itself. The importance of communication cannot be overstated. It is often suggested that "Once a human being has arrived on this earth, communication is the single most important factor determining what kinds of relationships he makes and what happens to him in the world." In other terms, it is stated that "How he manages his survival, how he develops intimacy, and how he makes sense of his world are largely dependent upon his communication skills."

So, what exactly is communication? Let's define communication in a way that emphasizes your creative involvement in the communication process. Communication is the process whereby we create and exchange messages.

A Process

Any activity can be viewed as a thing or a process. A thing is static, time bound, and unchanging. A process is moving, continually changing, with no beginning or end. In our definition, communication is a process—something that is continually changing. Individual words, sentences, and gestures have no meaning in isolation. They make sense only when viewed as parts of an ongoing, dynamic process.

To fully understand the process of communication, we must notice how what we say and do influences and affects what the other person says and does. We must pay attention to the changes we experience and how these changes influence and affect our perception, interpretation, and interactions with others, from moment to moment, year to year, and decade to decade.

Similarly, we also need to be sensitive to the ongoing changes in those we communicate with because they are changing too. Communication is alive, and to fully appreciate it requires that we view it as a dynamic, fluid, and continually changing process.

Creating Messages

Language in any culture contains thousands if not hundreds of thousands of words to select from and arrange in endless combinations to form the basic structures of verbal communication. There are even more subtle and not-so-subtle nonverbal (or nonlanguage) communication behaviours that can be added to the mix.

It is our ability to create messages from the verbal and nonverbal dimensions of communication that truly distinguishes us from all other forms of life. Our ability to create communication not only is the most significant way humans differ from animals and plants, but it also may be one of the deepest and strongest drives within us—to express and share who we are. What more powerful and significant way to express who and what we are than by communicating our thoughts and feelings with others?

Exchanging Messages

After selecting the words, sentences, and nonverbal cues to form the thought or feeling we are attempting to communicate, we send the message to the recipient, who processes the message and gives a response in the form of feedback. The recipient's role in the communication process is also a creative process, because what he or she selectively perceives and interprets from the original message will determine the meaning of the message for him or her. The message recipient then creates a response from all the words and nonverbal behaviours available. Receiving and creating a response is just as important as creating and sending the original message.

VERBAL AND NONVERBAL COMMUNICATION

The communication process has two forms—verbal and nonverbal. Both forms usually operate together in the majority of messages you send and receive.

Verbal communication is all spoken and written communication. A mother whispering reassuring words to a child, a speaker addressing an audience of five thousand, or a sunbather reading a book on the beach is utilizing verbal communication.

Nonverbal communication is all communication that is not spoken or writ-ten. It is your body type, voice, facial expressions, gestures, movement, clothing, and touch. It is your use of distance, use of time, and the environment you create. It is your laughter, your tears, your gentle touch, your relaxed breathing, the car you drive, and the colour of your pen. All these things and countless others make up your nonverbal communication.

Verbal communication and nonverbal communication enable you and me to communicate. They provide all that is necessary for the process of connecting, and it is our privilege to use them creatively, effectively, and meaningfully.

COMPONENTS OF COMMUNICATION

Even though the following seven components of communication operate almost instantaneously, we will examine them separately to more clearly understand their specific

function. The seven components are source, message, receiver, encoding, channel, decoding, and context.

Source: The source is the originator of the message. It is the person or persons who want to communicate a message to another person or a group of people. The source of a message can be an individual speaker addressing a group, a child asking for candy, a couple sending out invitations to a family reunion, or a person writing a letter.

Message: The message is the idea, thought, or feeling that the source wants to communicate. This message is encoded or converted into verbal and nonverbal symbols that will most likely be understood by the receiver.

Receiver: The receiver is the recipient of the message. The receiver can be an individual or a group of people. Once the receiver hears the words and receives the nonverbal cues from the sender, she must interpret or decode them if communication is to occur.

Encoding: Once the source has decided on a message to communicate, he must encode or convert that idea, thought, or feeling into verbal and nonverbal symbols that will be most effectively understood by the receiver. This encoding process can be extremely creative because there are unlimited ways for the source to convert the idea or feeling into words and behaviours.

Consider a simple message such as "I want to see you again." The source can simply say, "I want to see you again," and smile as he says the words. He can also say, "Let's get together again," and cast a humorous glance, or he can murmur, "I need to see you again," with direct eye contact and outstretched arms. He could simply scribble a note on a napkin saying, "We need an encore," and place it gently in front of the other person. There are countless ways to encode this simple message and each one would be received and interpreted by the recipient in a slightly different way.

The important thing to remember is that you can open yourself up to the end-less possibilities of selecting, arranging, and delivering messages you want to communicate. Your willingness to put greater creativity into the encoding process will enhance and deepen your communication with others.

Channel: A **channel** is the medium by which the message is communicated. The source can utilize the channels of sight, sound, touch, smell, and taste. For instance, if you want to communicate affection for another person, you can utilize a variety of channels or combination of channels. You can say, "I like you" (sound). You can give a hug (touch). You can wink an eye (sight). You can send cookies that you baked (taste). Or you can deliver a dozen roses (smell). You can creatively select the channels of communication to productively communicate your message.

Decoding: Decoding is the process of making sense out of the message received. The receiver must decipher the language and behaviours sent by the source so they will have meaning. After the receiver decodes the message, the receiver (now the source) can encode a return message and send it back to the other person.

Context: All communication occurs within a certain context. The context is made up of the physical surroundings, the occasion in which the communication occurs, the time, the number of people present, noise level, and many other variables that can influence and affect the encoding and decoding of messages. The context plays an important role in the communication process.

As you consider the effects that the context can have on communication, you might want to put your creativity to good use. Think of ways you can create a serene, healthy, and productive communication environment. Simple things like choosing a time when you both have an opportunity to meet. Making the actual physical surroundings clean, uncluttered, and peaceful. Maybe straightening up the house, buying some flowers to cheer the place up, and even putting on some soothing background music. Perhaps a drive in the country or a walk in a park will create a more relaxed context in which you can communicate more effectively. Whatever you do, remember that you can have some influence over the context in which communication occurs within your life.

PERCEPTION

To more fully understand communication, we must recognize the importance of perception. **Perception** is the process by which we assign meaning to a stimulus. Or put another way, perception is giving meaning to the things we see and experience.

Selection

The process of perception involves our five senses. We see, hear, touch, smell, and taste. From these five senses we take in the stimuli of the world. It's from these five senses that we receive information to make sense of our lives. Because we are exposed to much more stimuli than we could ever manage, the first step in perception is to select which stimuli to attend to. In other words, we don't attend to every stimulus that is present at any given moment.

Even in the location where you're reading this book, if you were to count each stimulus in your field of vision, the number would be in the thousands, perhaps the tens of thousands. To pay attention to each stimulus at the same moment would be impossible. So you have to decide—do you select the words in this sentence or gaze at your left foot? Each selection changes your focus of vision. You can't select all the things, so you must select a few.

Interpretation

Once we have selected our perceptions, the second step is to interpret them in a

way that makes sense to us. Interpretation is the act of assigning meaning to a

stimulus. It plays a role in every communication act we encounter. Is a friend's humorous remark intended to express fondness or irritation? Does your supervisor's request for an

immediate meeting with you communicate trouble or a pay raise? When an acquaintance says, "Let's do lunch," is the invitation serious or not? Almost every communication act we encounter involves some level of interpretation on our part. Let's examine some factors that influence our perception.

Physical factors.

The most obvious factors that influence our interpretation are physical. What is the condition of our five senses? Can we see accurately or do we need glasses? Can we hear sufficiently or is our hearing diminished by age? Can we smell and taste sharply or are allergies causing difficulties? Can you touch and feel with adequate sensitivity or do clothing and gloves make it hard?

The time of day affects how we physically process the sensory input. Are you more awake in the morning or late at night? Some people are most alert and attentive in the morning, while others come alive late at night.

Your general state of health can influence interpretation. When you are ill, hungry, or depressed, you see and experience a very different world than when you are healthy, well fed, and cheerful.

Age also can affect your interpretation. Older people view the world and events with a great deal more experience than do younger people. By simply having lived longer, older people have generally been through more of life's developmental stages—early adulthood, parenthood, grandparenthood, retirement. Younger people, on the other hand, usually have much more physical energy and time to play, explore, and investigate the world around them. With fewer life experiences, younger people interpret life differently.

Other physical factors are fatigue, hunger, stress, monthly biological cycles, diet, and exercise. Our bodies play an important role in our interpretation of the world.

Psychological factors. The second category of factors that influence interpretation is psychological or mental. For example, education and knowledge affect how we see the world around us. An individual who never went beyond the seventh grade sees a much different world than an individual who has completed law school. A trained botanist sees a forest far differently than does a first-grader.

Past experiences also affect how we interpret perceptions. Someone who grew up happily on a farm may view rural environments very differently than some-one who grew up in New York City. A victim of robbery may be more fearful of a darkened street than someone who has never experienced a crime. An individual who grew up in a loving, stable family may have a more positive view of raising children than a person who grew up in a cold, unstable family.

Assumptions about people and the world in general influence interpretations also. A belief that people are basically good and honest, or basically untrustworthy and self-serving, will affect how we view the actions of others.

Finally, moods will influence how we interpret the things we see and experience. When we are feeling successful and competent, we see a very different world than when we are feeling sad, lonely, and depressed.

Cultural factors. A person's cultural background can affect and influence his or her interpretation of the world. Chapter 5 is devoted to intercultural communication and the role culture plays in how we communicate with those who are different from us. For now, we'll just briefly mention some cultural factors that influence perception.

Every culture has its own worldview, language, customs, rituals, artefacts, traditions, and habits. These factors not only affect how people perceive and interact with one another within a given culture, but also, they influence how they interact with people of different cultures. Culture can shape and determine how an individual sees the world. Americans interpret direct eye contact as a sign of confidence, honesty, and politeness, whereas Japanese interpret the same direct eye contact as rude and confrontational. People from Middle Eastern countries often converse within a few inches of each other's face, whereas Americans would find such closeness violation of personal space. For Americans, the "okay" sign made with the thumb and the forefinger is a sign that everything is fine, but in many cultures, it is an obscene gesture.

Position in space. The final factor that influences perception is position in space. Where we are determines how we see things. For instance, if you sit at the back of a classroom, you will perceive a very different environment than if you sit in the front row, right under the nose of the lecturer. The same holds true for adult interaction with children. You will perceive children differently if you kneel down to their eye level rather than stand over them. You even pay higher prices for better viewing positions. Think of the last concert, sporting event, or resort you attended or visited. The closer seats or the rooms with a view generally cost more.

Perception Checking

Because so many factors influence perception, what can we do to create more effective communication? Perception checking is a method for inviting feedback on our interpretations**.** Perception checking involves three steps:

1. An observation of a particular behaviour.
2. Two possible interpretations of that behaviour.
3. A request for clarification about how to interpret that behaviour.

Many times people observe and interpret the behaviour, and that's the end of it. Often their interpretations can be easily and readily corrected with a simple perception check. Here are two examples of how perception checking works:

> "I noticed you haven't been in class for the past two weeks. (observed behaviour) I wasn't sure whether you've been sick (first interpretation) or were dropping the class. (second interpretation) What's up?" (request for clarification)

> "You walked right past me without saying hello. (observed behaviour) It makes me curious if you're mad at me (first interpretation) or just in a hurry. (second interpretation) How are you feeling?" (request for clarification)

Often, perception checking is more to the point. You may not want to use all three steps:

> "I see you rolling your eyes at me. (observed behaviour) What's the matter?" (invitation for clarification)

> "Are you certain you want to go to the movies? (request for clarification) You don't act like you're too enthusiastic." (observed behaviour)

Perception checking can be a simple technique for clarifying communication behaviour in a way that is not threatening or confrontational. It simply asks for clarification.

PRINCIPLES OF COMMUNICATION

The portion has been edited to suit the requirements of the course. LB-602

Certain generally accepted truths or principles of communication are important to consider when communicating with others. These principles hold true for all people in every culture. By understanding these principles, you will experience greater communication effectiveness.

Communication Is Constant

You cannot *not* communicate. In other words, you are always communicating. Too often we think that if we are not talking, we are not communicating. You may not be communicating verbally, but your nonverbal communication is constantly displaying signs and cues that reflect what you are thinking and feeling internally. Your posture, gestures, facial expressions, clothing, use of time, and even the car you drive are just a few of the nonverbal messages that others perceive and interpret.

Even when you are speaking, your tone of voice, rate of speech, pitch, volume, pauses or lack of pauses, and vocal fillers such as "ah" and "um" are some of the nonverbal behaviours that can convey what you're thinking and feeling beneath the level of language. You're always communicating.

Communication Is Irreversible

"Forget I said that." "I'm sorry I did that. Let's pretend it never happened." We have all issued statements like these in an attempt to erase or diminish the impact of an angry word or action. Even though the other person agreed to forget or dis-miss the statement or behaviour, the memory of a careless word or deed can last a lifetime. I'm sure you can recall a stinging criticism or hurtful act you experienced during childhood. The memory of the criticism or act can linger and haunt you many years later. Likewise, uplifting, positive, and healing words and deeds can also be carried in the hearts and minds of others forever.

Your every word and deed can leave an indelible imprint on the minds and hearts of others. Be conscious of your choices as you create messages to others.

Communication Is Creative

The last principle of communication is that it is creative. This creativity is much broader than the creativity associated with art, music, and poetry. It is the creativity expressed in your daily communication, in the unique and special ways you communicate: When you choose to be silent. The way you listen. The

times you choose to speak. The words you select from your vocabulary palette and the sentences you create. The combinations of facial expressions, gestures, movements, and postures you choose to express your thoughts and feelings. The letters you send. The telephone calls you make. The clothes you wear. The car you drive. The room you decorate. The home you live in. These are just some of the ways you create communication in your life.

Your communication and the impact it has on others does not just happen. You make it happen. You decide whether or not to return a phone call. You decide whether or not to respond to a lunch invitation. You decide whether to respond in kindness or in anger to a criticism levelled your way. You create by choosing one behaviour and not another. You are always creating something in your communication life.

DO YOU ENLARGE OR DIMINISH OTHERS?

I believe that we enlarge or diminish others with our communication. We heal or hurt others with our words. People go away from our interactions feeling a little better or a little worse than before.

You are free to create the words and behaviours that will ultimately enlarge or diminish the recipient of your message. No one is writing your script or coaching your movements and gestures. You are ultimately the scriptwriter, the dialogue coach, the director, and the speaker who will deliver the lines. You are given a great deal of creative latitude for how you create your messages during your life. What will you create? Will you enlarge or diminish others with your communication?

Inside you there is an artist you might not know just yet. But relax, continue reading, and gently welcome the artist within you. The highest art you will ever create lies ahead—the art of communication.

Exercises below are intended to help you explore and experiment with new ways of communicating in a variety of settings and to expand your thoughts about who you are and the communication possibilities available to you.

Exploring Creative Tasks

1. Listen for thirty seconds or more without verbally interrupting a friend during a conversation. What changes did that create? What was your friend's response? How did you feel not interrupting as much?
2. Use perception checking in situations when another person's communication or behaviour is confusing, ambiguous, or unclear. What were the results of your perception check? What changes did it create in the conversation?
3. List ten positive characteristics or traits a friend possesses. Share the list with your friend. In your opinion, was the experience enlarging or diminishing for your friend? What makes you think so? Has this conversation changed your relationship?
4. Keep a daily journal of specific instances when you were consciously aware of attempting to create more positive messages to others. What does it feel like to keep this journal? What are you learning about yourself? About others?

Expanding your creative thinking

1. What are some of your current creative activities or hobbies? What art forms or creative activities would you like to do in the future? What benefits do you think you would derive from them? When would you like to begin these artful activities?
2. In what specific ways could you be more positive and enlarging in your communication with loved ones and friends? With co-workers and casual acquaintances? How do you think more positive communication behaviours would change your relationships with these people?
3. What factors influence your perception and communication during a given day? When are you the most alert, positive, and energetic? Are there any specific ways you modify or improve your "view" of others? What are they? Can you think of any other ways to "see" the best in others?
4. List five specific changes that you could undertake that would make you more self-accepting, calm, and loving. Tape this list to your bedroom mirror or your car dashboard to remind yourself of your goals.

Body Language (Non-verbal Communication)

Observing yourself and others is non-verbal communication - the way we express ourselves, not by what we say, but by what we do.

Stop for a moment and examine yourself as you read this. If someone were observing you now, what non-verbal clues would they get about how you are feeling? Are you sitting forward or reclining back? Is your posture tense or relaxed? Are your eyes wide open, or do they keep closing? What does your facial expression communicate? Can you make your face expressionless? Don't people with expressionless faces communicate something to you?

Of course, we do not always intend to send non-verbal messages. Consider, for instance, behaviors like blushing, frowning, sweating, or stammering. We rarely try to act in these ways, and often we are not aware when we are doing so. Nonetheless, others recognize signs like these and make interpretations about us based on their observations.

Understanding that you, and everyone around you, are constantly, sending off non-verbal cues is important because it means that you have a constant source of information available about yourself and others. If you can tune into these signals, you will be more aware of how those around you are feeling and thinking, and you will be better able to respond to their behavior

Non-verbal Communication Transmits Feelings

Although feelings are communicated quite well non-verbally, thoughts do not lend themselves to non-verbal channels. Without being able to use words, peoples' bodies generally express how they feel - nervous, embarrassed, playful, friendly, etc. What they think has to be gathered through some verbal medium.

Here is a list that contains both thoughts and feelings. Try to express each item non-verbally, and see which ones come most easily:

You are tired.

You are in favor of capital punishment.

You are attracted to another person in the group. You think marijuana should be legalized.

You are angry with someone in the group.

Non-verbal Communication Serves Many Functions

Verbal and non-verbal communications are interconnected elements in every act of communication. Non-verbal behaviors can operate in several relationships to verbal messages.

a. First, non-verbal behaviors can repeat what is said verbally. If someone asked you for directions to the nearest drugstore, you could say, "North of here about two blocks," and then repeat your instructions non-verbally by pointing north.

b. Non-verbal messages may also substitute for verbal ones. When you see a familiar friend wearing a certain facial expression, you do not need to ask, "How's it going?" In the same way, experience has probably shown you that other kinds of looks, gestures, and other cues say, "I'm angry at you" or "I feel great" far better than words.

* * * * *

Perceptions of the Two-Way Communicator

The "two way communicator" is someone who:

- Seeks, encourages feedback from receivers on how a message was understood;
- Asks many questions to assure understanding of another's message;
- Establishes a climate for routine give and take;
- Does not punish honesty or negative messages;
- Shows nonverbal comfort with dialogue;

Common Perceptions

The two way communicator:

1. Likes people
2. Is receptive to new information
3. Is fair
4. Wants full information before making important decisions
5. Is well liked by others
6. Dislikes extreme formality and control
7. Enjoys helping people feel comfortable
8. Feels good when communication is successful
9. Is a good listener
10. Believes that "perceptions" are very important and legitimate
11. Likes to learn from others
12. Is a good interpersonal communicator

Lessons of the One-Way/Two-Way Exercise

One-Way—little or no verbal feedback from receiver; no chance to check perceptions

Two-Way—relatively free interaction between sender and receiver

1. One- way is usually faster; two way is usually more accurate.
2. Two-way is expensive (time, money, energy); one way may be more expensive in the long run if misunderstanding causes errors, problems, conflict.
3. One-way gives control to the sender; two-way gives some control to the receivers.
4. In one-way, receivers may seek out unreliable information sources; in two -way, receivers have access to the reliable source- the sender.
5. Two-way includes risk by both the receiver and sender, one-way is perceived as less risky.
6. The one-way/two-way choice is a function of rewards, senders evaluate the relative payoffs of both options.

To Improve One-Way Communication:

- Prepare a message carefully, if message is to be spoken, practice
- Use previews, summaries, repetition; supplement with examples, specifics
- Evaluate intended receivers; adapt to specific individuals or groups
- Use visual support

To Improve Two-Way Communication:

- Seek out feedback.....don’t wait for it
- Avoid defensive reactions to questions, challenges
- Reinforce people who ask questions(remember most of us have been punished for this behaviour in the past)
- Use past feedback as a guide to future communication with the same or similar people

NEGOTIATION- INTRODUCTION, STYLE AND STRATEGIES

(a) Negotiation
(b) Exercise: The negotiating style profile
(c) Definitions of negotiation
(d) Development of conflict
(e) Negotiating techniques
(f) Eight critical mistakes
(g) Being assertive in negotiation
(h) Exercise: Questionnaire: opinions and attitudes
(i) Negotiation: the art of negotiating

NEGOTIATION- INTRODUCTION, STYLE AND STRATEGIES

NEGOTIATION

I. In the space below, write what the word "negotiation" means to you.

_____

_____

_____

_____

Negotiation - Whenever we attempt to influence another person through an exchange of ideas, or something of material value, we are negotiating. Negotiation is the process we use to satisfy our needs when some else controls what we want.

(EXERCISE)
THE NEGOTIATING STYLE PROFILE

The following instrument is designed to help you gain a deeper understanding of your negotiating style. There is no right or wrong answers. The data provided by this instrument will only be valid if you respond candidly to each of the statements.

Directions: There are 30 statements in this instrument. Please respond to each statement by circling the number corresponding to the response that most accurately reflects the extent to which the statement is descriptive of your thinking.

Strongly disagree	**1**
Disagree	**2**
Slightly disagree	**3**
Neither agree or disagree	**4**
Slightly agree	**5**
Agree	**6**
Strongly agree	**7**

Example:

I often feel I lack the power to produce a successful outcome.	SD D SD ? SA A SA 1 2 3 4 5 6 7

Directions: For each statement, circle the number that most accurately reflects the extent to which that statement is descriptive of you or your thinking. Remember to be called in your responses.

Strongly disagree	**1**
Disagree	**2**
Slightly disagree	**3**
Neither agree or disagree	**4**
Slightly agree	**5**
Agree	**6**
Strongly agree	**7**

Please turn the page and complete the instrument

		SD	**D**	**SD**	**?**	**SA**	**A**	**SA**
1.	When I negotiate, my interest must prevail.	1	2	3	4	5	6	7
2.	I try to identify common interests to use as a basis for satisfying both parties needs.	1	2	3	4	5	6	7
3.	I put aside unpleasant confrontations in favour of a friendly approach.	1	2	3	4	5	6	7
4.	Negotiators are adversaries.	1	2	3	4	5	6	7
5.	I am unable and week to take care of myself.	1	2	3	4	5	6	7
6.	I often feel I lack the power to produce a successful outcome.	1	2	3	4	5	6	7
7.	I enjoy the reputation of tough battler.	1	2	3	4	5	6	7
8.	Negotiation may be said to be effective when both Parties get their needs satisfied.	1	2	3	4	5	6	7
9.	Half a loaf is better than none.	1	2	3	4	5	6	7
10.	Negotiation is a contest of wills.	1	2	3	4	5	6	7
11.	You have to make concessions to the other party to build the relationship.	1	2	3	4	5	6	7
12.	I acknowledge that my co. has made a mistake.	1	2	3	4	5	6	7
13.	You should do unto others before they do it to you.	1	2	3	4	5	6	7
14.	Affable relationships produce the best results.	1	2	3	4	5	6	7
15.	Compromise is the essence of effective negotiation.	1	2	3	4	5	6	7
16.	An effective negotiator employs threats, bluffs, surprises.	1	2	3	4	5	6	7
17.	I keep a low profile during a negotiating discussion.	1	2	3	4	5	6	7
18.	Split the difference is my motto.	1	2	3	4	5	6	7
19.	I am unable to stand up for my rights	1	2	3	4	5	6	7
20.	A soft word can win a hard heart.	1	2	3	4	5	6	7
21.	Though the outcome is not fair to me, it will maintain relationship	1	2	3	4	5	6	7

22.	When negotiating, I attempt to work through our differences.	1	2	3	4	5	6	7
23.	I search for a solution the other party will accept.	1	2	3	4	5	6	7
24.	My approach is always to meet the other party halfway	1	2	3	4	5	6	7
25.	The most successful negotiation makes everyone a winner.	1	2	3	4	5	6	7
26.	I often let others take responsibility for solving the problem.	1	2	3	4	5	6	7
27.	When I negotiate, I put a lot of effort into looking for trade-offs so each party gets something out of the deal.	1	2	3	4	5	6	7
28.	You choose; any thing is fine with me	1	2	3	4	5	6	7
29.	I put aside decisions until conflicts have quieted down.	1	2	3	4	5	6	7
30.	In a successful negotiation everyone gives something but everyone also gains something.	1	2	3	4	5	6	7

Please do not turn the page until you have completed your responses.

Part I: Securing Key

Directions: The 30 statements in the instrument have been set up in five columns in the chart below. Transfer the number corresponding to your answer to each statement to the appropriate space in the chart. Then add up the total number of points in each columns and enter the total in the space provided

Question Number

	1_	3_	9_	2_	5_
	4_	11_	l 5_	8 _	6_
	7_	12_	18_	14_	17_
	10_	20_	24_	22_	19_
	13_	21_	27_	25_	26_
	16_	23_	30_	29_	28_
Total	a_____	b_____	c_____	d_____	e_____
	Defeat	**Accommodate**	**Compromise**	**Collaborate**	**Withdraw**

Part II: Negotiating Profile

Directions: In each of the style columns, circle the number representing the total points given for that style in Part 1. Then connect the circled numbers to produce a plot line.

Defeat	**Accommodate**	**Compromise**	**Collaborate**	**Withdraw**
38	38	38	38	38
36	36	36	36	36
34	34	34	34	34
32	32	32	32	32
30	30	30	30	30
28	28	28	28	28
26	26	26	26	26
24	24	24	24	24

20	20	20	20	20
18	18	18	18	18
16	16	16	16	16
14	14	14	14	14
12	12	12	12	12
10	10	10	10	10
8	8	8	8	8
6	6	6	6	6
4	4	4	4	4
2	2	2	2	2
0	0	0	0	0

Part III Interpretation

The style with the highest number represents your preferred negotiating style. If two or more styles have the same total, you probably use both styles and use them equally or alternatively. Perhaps you use one as a primary or "first approach" style and switch to the second style as a back-up.

The profile indicates the relative strength of our subscription to a particular style, as you perceive it. To the extent that your responses were honest, the data will be representative of our general philosophy of negotiating if, in fact, this philosophy is acted on, then the data represents your negotiating behaviour style.

All styles have usefulness in selected situations. However, the most satisfying and rewarding negotiations in the long term are achieved by consistent use of a Collaborative style. This approach produces a win/ win outcome for both parties.

PREDOMINANT NEGOTIATION STYLES

Defeat – This pattern is characterized by win-lose competition, pressure, intimidation, adversarial relationships and the negotiator attempting to get as much possible for him/ herself. Defeat the other party at any cost.

Collaborative – This pattern is characterised by searching for common interests with the other party, problem solving behaviour, recognising that both parties must get their needs satisfied for the outcome to be entirely successful. Collaborative behaviour and synergistic solutions result. Working to build a win-win outcome is the main purpose of the negotiator.

Accommodate – This pattern is characterised by efforts to promote harmony, avoidance of substantive differences, yielding to pressure to preserve the relationship, placing interpersonal relationships above the fairness of the outcome. Accommodate the other party's needs becomes the negotiator's style.

Withdraw – This pattern is characterised by feelings powerlessness, indifference to the bargaining result, resignation, surrender, taking whatever the other party is willing to concede. Withdraw and remove oneself becomes the behaviour of the negotiator.

Compromise – This pattern is characterised by compromise, meeting the other party half way, looking for trade-offs, spitting the difference and half-way measures. Conflict reduction is valued over synergistic problem solving. Finding an acceptable agreement is the objective of this style.

Discussion Questions

The value of your results from your negotiating profile will be greatly enhanced through discussion of the following questions with others in your training groups:

1. Do you think that your scores for the five negotiation styles actually represents your usual behavior when faced with negotiation situations at work? Why or why not?
2. What could you do specifically to increase your negotiating effectiveness?

Negotiation – Some Practical Definitions

Following are some accepted definitions of negotiation:

1. Whenever we attempt to influence another person through an exchange of ideas, or something of material value, we are negotiating. **Negotiation is the process we use to satisfy our needs when someone else controls what we want**. Every wish we would like to fulfill, every need we feel compelled to satisfy, are potential situations for negotiation. Other terms are often applied to this process such as: bargaining, haggling, bickering, mediating or bartering.
2. Negotiation between companies, groups or individuals normally occurs **because one has something the other wants and is willing to bargain to get it.**
3. Most of us are constantly involved in negotiations to one degree or another. Examples include: When people meet to draw up contracts, buy or sell anything; resolve differences; make mutual decisions; or agree on work plans. Even deciding where to have lunch makes use of the negotiation process.

DEVELOPMENT OF CONFLICT

Whatever the type, whomsoever the conflict affects, it always arises cut of a four stage process as follows.

Frustration

Conflict situations originate where an individual or group feels frustrated or about to be frustrated in pursuit of important goals. The cause can be:

- Performance goals;
- Promotion;
- Pay rises;
- Power;
- Scarce economic resources;

- Rules;
- Values;
- In short, anything the individual or group cares about.

Thus, failing to achieve a target or goal may cause the start of the conflict cycle. At the second state, parties to the potential conflict attempt'

- To understand the nature of the problem;
- What they themselves want as a resolution;
- The various strategies they may employ to achieve that resolution.

This is the stage where conflict most often be turned to good use or avoided if careful negotiation are employed. It is the moment of self or behaviour analysis. Effective analysis will determine the right behaviour pattern for the future to correct the frustration felt as a result of goal failure. False analysis will lead to behaviour that is doomed to increase the frustration.

Behaviour

As a result of the conceptualisation process, parties to the conflict attempt to implement their resolution by behaving in the pattern they have selected as most likely to achieve the desired result.

Instant conceptualisation, when the party to the conflict is still feeling frustrated, usually leads to worse behavioral patterns and further conflict.

Outcome

If the outcome results in one party feeling dissatisfied, the seeds will be sown for further conflict. Whatever the result, the outcome will be part of the patterning and conditioning that set the possible patterns of behaviour in future conflict.

Conflict can become an ever-decreasing; circle; the frustration leads to instant and false conceptualisation, which in its turn causes further wrong behaviour, the outcome of which is further frustration and even more false conceptualisatlion. The only way out of such a situation is to break the conflict at the conceptualisation stage.

How we respond to conflicts/Handling conflict

It is only at the conceptualisation stage of conflict development that the most effective solutions can be found, so part of handing conflict must be watching for the process of conflict development to begin. Once the pattern of the developing conflict has been established, help or self-help can be administered. Beware or starting too early and catching the remaining frustration, which can easily turn to anger. Trying to solve a conflict with an angry person is almost impossible and can result in the permanent rejection of the most sound and sensible idea.

Competing

Competing is handling conflict head on. It is standing firm and rejecting the views and beliefs of the other party or standing between the warring factions and demanding that the war cease.

Use it where:

- A quick decision is vital;

- Unpopular ideas on important issues must be implemented;
- Issues are vital to the organisation and you know you are right;
- Opponents take advantage of non-competitive behaviour.

Collaborating

Collaborating is less than the art of total compromise. It will in allprobability be the chosen method for dealing with cognitive conflict to ensure that no one good idea is needlessly sacrificed to the solution of conflict. To collaborate, take the ideas that come from both parties to the conflict and try to find a way of developing them all, without detracting from the overall goal. Use it where:

- both sets of concerns are too important to be compromised;
- your objective is to learn;
- your wish to merge insights from different people;
- you need commitment;
- you need a dispel feelings that have interfered with a relationship.

Compromising

Compromise is the art of win-win negotiation. Both parties to the conflict should feel that they have won but neither should feel any sense of loss. You will achieve it by using negotiation tactics as described in Chapter 13. Use it where:

- goals are important but not worth the disruption of mere assertive behaviour;
- opponents with equal power are committed to mutually exclusive goals;
- you wish to achieve temporary settlements to complex issues;
- time pressure is great;
- you need a back-up to failed collaboration or competition.

Avoiding

Avoiding means deciding not to get involved in the conflict and asking that it be shelved elsewhere. Use it where:

- the issue is trivial;
- more important issues are pressing;
- there is no chance of satisfying your concerns;
- the potential disruption outweighs the benefits of resolution;
- people need to cool down;
- gathering information might help;
- others can resolve the conflict more effectively;
- issues seem intangible.

Accommodation

Accommodating is the art of accepting the situation and agreeing to back down in conflict. Use it where:

- you are wrong;
- issues are more important to others than yourself;
- you can build social credits for future issues;
- you need to minimise loss, as you are outmatched and losing harmony and stability are especially important;

- subordinates need to learn by mistakes made.

Conflicts can be constructive

Don't forget that conflict can be constructive. Without conflict an organisation cannot grow and develop. Conflict is an essential part of change and creativity. Use it for:

- problem solving;
- engendering new ideas;
- personality development;
- training and educating;
- role playing to establish potential problem areas.

Conflict and anxiety

As a result of conflict, individuals often experience considerableanxietybut can find no easy way to reduce it. This is particularly the case where a solution to the conflict seems unobtainable or long term. As a result, the suffering individuals apply defence mechanisms. Three group types of defence mechanism may be employed:

Aggressive defence mechanisms

- Fixation won't budge from a point of view;
- Displacement - redirecting pent up emotions towards hate objects or individuals.
- Negativism-active or passive resistance, no cooperation.

Compromise defence mechanisms

- Compensation- individual works harder to make up for feeling inadequate.
- *Identification*- individual enhances self-esteem by copying the behaviour of someone he admires.
- *Projection*-individual pretends that his own undesirable traits are in fact attributable to others.
- *Rationalisation*- individual justifies behaviour and beliefs by providing explanations for them.
- *Reaction formation*- urges not acceptable to consciousness are repressed and the opposite attitudes displayed in their place by the individual.

Withdrawal defence mechanisms

- *Conversion* – emotional conflicts are expressed in muscular, sensory or bodily symptoms of disability, malfunctioning or pain.
- *Fantasy* – day-dreaming provides an escape from reality.
- *Regression* – individual returns to an earlier and less mature level of adjustment in the face of frustration .
- *Repression* – impulses, experiences and feelings that are psychologically disturbing, because they arouse a sense of guilt or anxiety, are completely excluded from consciousness.
- *Resignation* – apathy and boredom - switching off.
- *Withdrawal of flight* – leaving the area of frustration either physically or mentally.

The anxiety feelings caused by conflict show in the conceptualisation and the eventual behaviour outcome. Part of the resolution of conflict must be the treatment of the anxiety based reactions. This is particularly important when trying to resolve one's own conflicts.

Awareness of the normal reaction to anxiety should help to select the right approach at conceptualization.

NEGOTIATING TECHNIQUES/STRATEGIES

SALAMI:

Salami is a technique used to achieve an objective a little bit at a time rather than in one giant step. This strategy is said to have been named by Matyas Rakosis, General Secretary of the Hungarian Communist Party who explained it this way:

"When you want to get hold of a salami which your opponents are strenuously defending, you must not grab at it. You must start by carving yourself a very thin slice. The owner of the salami will hardly notice it, or at least he will not mind very much. The next day you will carve another slice, then still another. And so, little by little, the salami will pass into your possession.

You want to buy 5 acres of land from an elderly gentleman, who for sentimental reasons does not want to sell more than 1 acre now. You are in no hurry to acquire all 5. How would you approach the old gentleman?

Check Your Response with the One on the Next Page

From no to yes

1. Listen Actively

Show them you understand

- they feel strongly
- what they feel strongly about
- why they feel strongly about it

2. Win yourself a hearing

Explain your own feelings (backed up by fact)

- refer back to their points
- make your points firmly but stay friendly

3. Working to a joint solution

- seek their ideas
- build on their ideas (don't knock them down)
- offer your ideas (don't try to impose them)
- construct the solution from everyone's needs

APPLYING THE SALAMI STRATEGY

Offer to buy one acre now with an option to buy the other four, one acre at a time, over the next four years.

FAIT ACCOMPLI:

Residents of a community called Hillview woke up one morning to discover a local developer removing the top of a peak, which was an appealing part of their view. The developer did not have a legally required permit, but once removed the hill top could not be restored. The strategy he used is called Fait Accompli. He took action to accomplish his objective risking acceptance because he did not wish to spend the necessary time, effort or expense to follow the established guidelines. In effect the developer said, "I did what I wanted to, so now what are you going to do?". This can be risky. Those who employ it must understand and accept the consequences if the strategy fails. For example, the same developer later put up a fence in violation of local ordinances. This time the citizens protested and he was required to tear down the fence and move it to a legal boundary at considerable expense.

Some examples of Fait Accompli are given below. Please indicate how you would respond to them.

FAIT ACCOMPLI	RESPONSE
A contract was sent to you containing a provision you did not agree to and find unacceptable.	
You took your old vehicle to a garage to obtain a cost estimate on repairs. When you returned you found they already repaired it and presented you with a bill for $750.00	

POSSIBLE RESPONSES TO FAIT ACCOMPLI

1. Use Fait Accompli yourself. Delete the unacceptable clauses from the contract and send it back.
2. Several options including the following are possible:
    - Refuse payment.
    - Appeal to higher authority. Take it to the owner.
    - File, or threaten to file a lawsuit. If local laws or ordinances have been violated, appeal to enforcing agencies for assistance.
    - Tell others what happened to you. Document your case and let the public and others know of the unethical practices.

STANDARD PRACTICE:

"Standard Practice" is a strategy used to convince others to do or not to do something because of so called "standard practices". It often work very well because it infers it is the best way to do whatever needs to be done, and is probably a safe approach. Standard contracts are an example of this strategy. The party suggesting a standard contract assumes no one would want to change it, because it reflects what others routinely agree to under the circumstances. Often the other party will accept this fact of life, however, those who wish to test it can have good results.

A plumber who was contracted to install plumbing in a new home told his customer the payment terms were 30% when he started the job, 60% when it was half completed and 100% on completion. When the customer refused to accept the agreement, the contractor said the terms were industry standards and showed him the standard contract to prove it. The customer refused to sign. Finally, the contractor agreed to 30% at the start, 30% at the half-way point and 40% upon completion. This assured the customer that the plumbing would be finished before the contractor could take his profit, but provided adequate funds for the plumber to carry out the project.

DEADLINES:

Time is critical to people and organisations. Consequently deadlines can be an effective negotiation strategy. All too often we are aware of time pressures upon ourselves. But assume the other party has plenty of time. A better assumption would be that if we have deadlines, the other party probably has them too. The more we learn about the other party's deadlines the better we can plan our strategies. When others attempt to force us to their deadlines, we should not hesitate to test them. Most sales in retail stores that "start" on Tuesday and "end" on Friday, can be negotiated so that a buyer can take advantage of them on a Monday or Saturday as well. Most hotels will extend their check out time beyond 12 noon if you are willing to negotiate for a later time. Proposals requested by the 1st of the month arc often just as acceptable on the 2nd. Deadlines are usually as demanding as we are willing to think they are. The more we know about the person or organisation that set them, the better we can evaluate what they really mean.

Before entering a negotiation, ask yourself these questions:

1. What actual deadlines and time constraints am I under? Are these self imposed or controlled by someone else?
2. Are these deadlines realistic? Can I change them?
3. What deadlines might be controlling the other side? Can I usc these to my advantage?

Here is a dialogue between Dick Thomas a purchasing agent and Rick Forest, an office equipment sales manager.

Mr. Thomas: The supersonic typewriters you are suggesting will meet our requirements. Can you provide 3 by next Monday for $4,500?

Mr. Forest : I am not sure we can. Because you also want the output energizer that puts the price for 3 over $5,000

Mr. Thomas: That's more than our budget allows for this purchase.

Mr. Forest : Well, I am sorry about that. To meet your price, I would have to talk to my District Manager and he is hard to reach.

What might Mr. Thomas say to get Mr. Forest to agree to supply the typewriters for $4,500, or at least to make some price concession with minimum delay?

When you have completed your response, compare it with the possibilities suggested on the next page.

Possible Response by Mr. Thomas

Well I'm sorry we can't make a deal. I have an appointment this afternoon with High Speed and Quickline. Both have indicated they can provide comparable equipment at a cost within our budget. The department head who wants these machines is leaving tomorrow for 2 weeks vacation. He will make his choice before he leaves today.

FEINTING:

Feinting gives the impression one thing is desired when the primary objective is really something else. An employee, for example, may negotiate with the boss for a promotion when the real objective is a good increase in salary. If the promotion is forthcoming so is the raise. If the promotion is not possible, a nice raise may be the consolation prize. Politicians use a variation of this strategy to test receptivity by the public to something they plan to do. Their planned action is "leaked" by a "reliable source" to test acceptability before final decision is made. The public's response is then evaluated. If there is little opposition it is probably safe to proceed. If there is an adverse reaction, another approach can be explored.

APPARENT WITHDRAWAL:

Apparent withdrawal may include some deception as well as deferring and feinting. It attempts to make the other negotiator believe you have withdrawn from consideration of an issue when you really have not. Its purpose may be to ultimately get a concession or change in position. For example, the prospective buyer of a painting finds the seller unwilling to meet the price the buyer is prepared to pay. The buyer might say, "I'm sorry but can't meet your price. You know my price so unless there is some movement on your part we can't do business." The buyer then leaves. If the buyer has made a realistic offer, the seller may decide to make a concession. If not, the buyer can always go back with a slightly higher offer. In the meantime, of course, the buyer can consider other options.

GOOD GUY/BAD GUY:

The good guy/bad guy ploy is an internationally used strategy. One member of anegotiating team takes a hard line approach while another member is friendly and easy to deal with. When the bad guy steps out for a few minutes, the good guy offers a deal that under the circumstances may seem too good to refuse. There are many versions of "bad guys". They may be lawyers, spouses, personnel representatives, accountants, tax experts, sales managers, or economists.

One danger in using this strategy is that it will be recognised for what it is. Here are some ways to deal with it if you feel it is being used on you.

- Walk out.
- Use your own bad guy.
- Tell them to drop the act and get down to business.

LIMITED AUTHORITY:

Limited authority is an attempt to force acceptance of a position by claiming anything else would require higher approval. Individuals who claim to have limited authority arc difficult to negotiate with, because the reason they use to not meet your demands is due to someone else, or some policy or practice over which they have no control. A salesperson who cannot give more than a 5% cash discount; influence the delivery date; or accept a trade will not make concessions in those areas. Some negotiators will concede under these circumstances, while others will insist their offer be taken wherever necessary for approval or rejection. There is some risk this will terminate the negotiation, but it does give the other party a chance to gracefully re-evaluate their position.

Can You Recognise and Define the following?

	YES	NO
SALAMI	—	—
FAIT ACCOMPLI	—	—
STANDARD PRACTICE	—	—
DEADLINES	—	—
FEINTING	—	—
APPARENT WITHDRAWAL	—	—
GOOD GUY/BAD GUY	—	—
LIMITED AUTHORITY	—	—

NEGOTIATION: EIGHT CRITICAL MISTAKES

Tick those you intend to avoid:

- **Inadequate Preparation**

Preparation provides a good picture of your options and allows for planned flexibility at the crunch points.

- **Ignoring the give/get principle**

Each party needs to conclude the negotiation fecl.ing something has been gained.

- **Use of intimidating behaviour**

Research shows the tougher the tactics, the tougher the resistance. Persuasiveness not dominance makes for a more effective outcome.

- **Impatience**

Give ideas and proposals time to work. Don’t rush things, patience pays.

- **Loss of temper**

Strong negative emotions are a deterrent to developing a cooperative environment, and creating solutions.

- **Talking too much and listening too little**

"If you love to listen, you will gain knowledge, and if you incline your ear, you will become wise."

- **Arguing instead of influencing**

Your position can be best explained by education, not stubbornness.

- **Ignoring conflict**

Conflict is the substance of negotiation. Learn to accept and resolve it, not avoid it.

BEING ASSERTIVE IN NEGOTIATION

What is assertiveness?

Your definition:

What it is?

Assertiveness based on a philosophy of personal responsibility and an awareness of the rights of other people. Being Assertive means be honest with yourself and others. It means having the ability to say directly what it is you want, you need or you feel, but not at the expense of other people.

It means having confidence in yourself and being positive, while at the same time understanding other people's points of view. It means being able to behave in a rational and adult way. Being assertive means being able to negotiate and reach at workable compromises. Above all, being assertive means having self-respect and respect for other people.

Basically – **I AM OK – YOU ARE OK**

HONESTY

CONFIDENCE

I'M OK – YOU'RE OK

Assertive Body Language

- Use eye to eye contact (sometimes culturally inappropriate)
- Hold your body proud but not overbearing.
- I may be appropriate to balance your stance – et. Sit if the other person is sitting, stand if they're standing.
- If you feel "frozen" and don't know what to do, it may help to walk around, move your body.

	ASSERTIVE	**AGGRESSIVE**	**PASSIVE**
Posture	Upright/ Straight	Leaning Forward	Shrinking
Head	Firm not Rigid	Chin Jutting Out	Head Down
Eyes	Direct not starting. Good and regular eye	Strongly focused starting often piercing or glaring	Glancing away. Little eye contact.

	contact	eye.	
Face	Expression fits the words	Set/ Firm	Smiling even when upset.
Voice	Well modulated to fit content	Loud/ Emphatic	Hesitant/ Soft, trailing off at ends of words/sentences
Arms Hands	Relaxed/ Moving easily	Controlled Extreme/ Sharp gestures/ Fingers pointing, Jabbing	Aimless/ Still
Movement Walking	Measured pace suitable to action	Slow and heavy or fast deliberate, hard	Slow and hesitant or fast and jerky

Becoming Assertive-Work out Your Bottomline

- Set a goal - know which things are not negotiable and be clear about them.
- Stay firm- don't let yourself be distracted or "hooked in" by manipulation, anger, tears, etc.
- Be aware of someone else's feelings and be clear that is how they feel, not a signal that you are wrong.
- Sometimes it may be most important to make your statement.

Be prepared to let both of you come out winners if that is possible

- Look for compromise where possible (sometimes it is not).
- Winner-Winner is usually better for all than Winner-Loser or Loser-Winner.

MAKE DECISION AND CHOICES ABOUT WHATS HAPPENING

- Look at the process
- You can choose to initiate, maintain or terminate the conversation.

Be Persistent - Broken Record

- Repeat yourself if you need to - if the message doesn't get through the first time or if you are being manipulated.

Children are experts in the use of the Broken Record technique and use it very effectively. It is useful to help make sure that you are listened to and that your message is received. Sometimes when people are actively involved in their own concern or needs they pay little attention to what you have to say or to your situation. Broken Record makes sure that your message does get through without nagging, or whining.

With the Broken Record technique it is important to keep on repeating the message until it can no longer be ignored or dismissed. It is also important to use some of the same words over and over again in different sentences. This reinforces the main part of your message and prevents others raising red herrings or diverting you from your central message.

Example

To insistent customer –

'*We won't be able to complete by the 15th*. I understand it causes you problems, but the hard facts are *it won't be possible to complete all the work by the fifteenth.* However, we can

promise to finish key areas if you tell us your needs, and we will reschedule the rest. What *we can't do is complete everything by the 15th*.'
Your Examples

_____
_____
_____
_____
_____
_____

(EXERCISE)
QUESTIONAIRE: OPINIONS AND ATTITUDES

Read through the sentences below, and then put a circle around the number which most closely coincides with your opinion. Before, starting look at the key.

Key
1. I agree entirely
2. I agree on the whole
3. I can't make up my mind
4. I disagree on the whole
5. I disagree entirely

There is no life after death.	1 2 3 4 5
Wars never solve anything.	1 2 3 4 5
We should try to cure criminals, not punish them.	1 2 3 4 5
People suffering from incurable diseases should be painlessly put to death if they request it.	1 2 3 4 5
Men and women can never be equal.	1 2 3 4 5
It is wrong to pay people so much money for playing sport.	1 2 3 4 5
People should wait until they are at least 24 before getting married.	1 2 3 4 5
People were a lot happier 'in the old days'	1 2 3 4 5
There is too much fuss made about nuclear power these days.	1 2 3 4 5
Divorce is wrong.	1 2 3 4 5
Most people keep pets because they are lonely or have difficulty in making relationships with other people.	1 2 3 4 5
The United Nations is a waste of time and money	1 2 3 4 5

When you have finished, discuss your answers with another participant, remember to give reasons for your opinion and even to argue with your partner if you disagree with him or her.

NEGOTIATION: THE ART OF NEGOTIATING

Negotiation is the use of knowledge, time and power to influence the behaviour of other people so that you can achieve your goals. The steps are as follows:

- *Define needs*: what do you and the parties you represent need to get from this negotiation?
- *Check resources*: What resources do you have to help you with the negotiation? Who can you use? What are the facts?
- *Know limitations*: At what stage will you have to hand a negotiation over to someone else? How far is your side prepared to go in conceding to the other side?
- *Understand options*: List the possible options that could come out of the negotiation. How many of them are possible for your side to accept?
- *Formulate goals*: Decide what you hope to achieve and the elements of the goal that cannot be compromised.
- *Prepare for the encounter*: Prepare both mentally and physically.

Preparation

For the other party

- *Recognise the need*: What does he went from the negotiation?
- *Understand and define that need*: How strongly are those needs likely to be felt?
- *Check alternatives*: What possible alternatives are there? Will he have thought of them All?
- *Understand the options*: Realise the areas where your opponent cannot afford to compromise? And the options that can remain open for him.
- *Know the power of choice*: Understand that he is able to choose.

For yourself

- *Recognise your own need*: What do you hope to prove by this negotiation?
- *Check alternative resources*: Are there alternatives that you have rejected because of your assumptions or attitude?
- *Define options*: Write down your options; keep them all open.
- *Set goals*: Write down your goal and stick to it.
- *Set limits to goals*: How far they can be compromised? Make a careful list of areas that can be compromised.
- *Consider the effect of the passage of time*: Remember, what was important yesterday may change in the light of the negotiation.
- *Consider the time pressures:* Set time criteria.
- *Set cost limits*: What are the costs that are acceptable? Do not go above them.
- *Establish gain to be achieved*: Write down what are the anticipated achievements are to be.

Confrontation or collaboration?

The opposite parties in a negotiation are counterparts. Some negotiators think of their counterparts as the enemy. To negotiate, the two parties will have to come together, therefore life is much easier if you think of your counterpart as a friend: *attitude determines outcome.*

Negative Orientation: The enemy

- Opposition
- Opposition leads to suspicion

- Suspicion leads to aggression
- Aggression leads to deadlock

The confrontational mindset:
Counterpart = adversary
Difference = conflict
Resources = weapons
Positive orientation: *The friend*

- Opposition
- Opposition leads to cooperation
- Cooperation leads to partnership
- Partnership leads to settlement

The collaborative mindset
Counterpart = partner \
Difference = opportunities
Resources = incentives to co-operate

How to conduct collaborative negotiation:
The collaborative negotiator must show the following character traits if he has to succeed:

- Interest in the needs of the counterpart.
- Understanding of the counterpart's needs.
- Willingness to co-operate end compromise.
- Mind focused on settlement not obstacles.
- Mutual gain = win-win.

As a collaborative negotiator, you will achieve the following gains:

- Difference leads to opportunities.
- Co-operation leads to trust.
- Preparation leads to understanding.
- Counterpart becomes partner.
- Mutual problem solving brings settlement.

The stages of collaborative negotiation are:

- Analyse the needs of the counterpart.
- Demonstrate the desire for cooperation.
- Emphasise mutual interest.
- Demonstrate understanding of counterpart's needs.
- Understand the relationship between counterpart's needs and own resources and goals.

Power in negotiation

- Bargaining power is measured relative to that of the counterpart.
- Bargaining power is determined by external economic and political factors.
- It is preferable to negotiate from a powerful position.
- The balance of power in a negotiation is determined by the urgency of each side's needs and assets.

The power of persuasion

- Persuasion gives the negotiator power.

- Persuasion is a personal form of power.
- Persuasion can be learned and improved.
- Persuasion depends on selling ability.
- Persuasion depends on positive tone.
- Persuasion plays both to economic reasoning and to personal factors.

Assessing the balance of power

- How badly do you need what the counterpart has?
- How soon must your needs be fulfilled?
- What are the consequences should your negotiation break down?
- How badly does the counterpart need what you bring to the table?
- What are your counterpart's time restraints?
- Are there alternatives to dealing with this counterpart?
- Who is in the position of most immediate and greatest need?
- Who has the superior position with respect to resources?

How to win

Set sensible expectations

- Set high goals.
- Use realistic assumptions.
- Decide areas open for significant compromise.
- Decide areas not open for compromise.
- Be clear about what you hope to achieve.

Use the right level you hope to achieve.

- Know your limits.
- Find out the counterpart's limits.
- Don't let someone with limited authority wear you down.
- Try to bypass negotiators with limited authority.
- Share responsibility with those on whose behalf you negotiate.

Go for win-win

- Win-win brings together different needs and creates opportunities for mutual gain.
- Win-lose make enemies who fight harder next time.
- Focus on the goal.
- Confine disagreement to ideas.
- Avoid personal issues.

Use time with care

- Haste makes waste; the best negotiations take time.
- Be prepared; negotiate before the crisis.
- Over a barrel; urgency may force concessions.
- Sleep on it; avoid marathon sessions.

Use questions

- Ask them even if you know the answers.
- Ask for help.
- Listen.
- Question what is negotiable; don't be thrown by 'company policy'.

Personalise the negotiation

- Form bonds of respect and trust.
- Remember people as well as things are involved.
- Make personal contact, relax, and smile.
- Make it matter; show your concern.
- Relate to the organisation.

Use time

- Allow time for frequent recesses.
- Move the bargaining at a deliberate pace.
- Use recesses to calm down or research further.
- Maintain self-control at all times.

Watch for unspoken needs

- Remember your counterpart may have a hidden agenda.
- Watch the body language.
- Stay awake.
- Meet your counterpart's needs.
- Remember personal and social needs can often be met at minimum expense.

Finally:

- Aim to control the situation.
- Believe in yourself.
- Keep written records for the future.

Trouble -shooting

The likely needs or wants of your counterpart

- To feel good about himself.
- To avoid further trouble and risk.
- To be recognised as a man of good judgement.
- Knowledge.
- An easy life.
- To be listened to.
- To keep his job.
- Promotion.
- To save time.
- To be liked.
- Power.

How to break an impasse

Sometimes you his situation when nothing seem possible. No one is willing to give way. The only way out is changing.

Change:

- The shape of the package;
- A member of the team;
- The Time limits on the part of negotiation;
- The risk mix;
- The time scale of per performance;
- The bargaining emphasis;

  - The type of contract;
  - The base for a percentage.
- Call a mediator.
- Arrange summit meeting.
- Add options.
- Setup a joint study committee.
- Tell a joke.

How to make concessions

- Leave you self room to negotiate.
- Encourage the counterpart to open up first.
- Let the counterpart make the first concession.
- Make him work for his gains.
- Conserve Concessions.
- Don't give tit-for-tat concessions.
- A promise is a concession at a discount rate.
- Don't be afraid to say 'no'.
- Keep track of your concessions.
- Retreat from a concession if you have made a mistake.
- Don't give in too much too quickly.

Difficult counterparts

The majority of counterparts are polite and friendly and easy to deal with; it is only the occasional one that is difficult. Sometimes he has justification, while at other times he is someone who seems to enjoy being difficult.

To deal with the difficult, you need to hold on to the following - facts:

- People demonstrate their frustration in many ways; most of the difficult behaviour you hear is a direct result of frustration. They are all nice people underneath.
- Anxiety can have a strange effect on personality.
- Whatever the person says, it is not a personal insult or intended as such. Do not take personal offence.
- One temper lost is bad enough, to lose yours as well is will not improve matters.
- Only the facts matter at the end of the day; hold out for the facts.
- Taking a deep breath before you speak or react, gives you time to think. Thinking before you speak or react saves a lot of talking time later.

Complainers

Complaints fall into two categories: the just and unjust. Until you know the facts, you will not know which sort of complaint you are dealing with.

The technique

- Take a deep breath.
- Keep your voice up and friendly.
- Listen to what is being said and take notes.
- Do not interrupt; let the speaker get it all off his chest.

- Check the validity of complaints about the past.
- Sympathise without being disloyal.
- If the company is at fault, apologise.
- Never give excuse, it always seems lame.
- If you promise to do something, do it.

Never say:
- I'm not the person to talk to about… (Even if it is true, it won't solve any problems.)
- It's not my fault. (It probably isn't, but just saying so won't help anyone.)
- I didn't handle this. (See above.)
- We are having lots of problems with… (It doesn't help your caller, but it does harm the organisation.)

Never:
- interrupt the complainer, he will only start all over again;
- automatically accept responsibility or liability, as that may not be the case.
- jump to conclusions before gathering all the facts.
- talk down to your complainer, or accuse him of misuse – it may be be true, but it will not smooth ruffled feathers;
- lose your temper;
- appeal for sympathy by trying to Justify your position – It will sound like a lame exercise.

Aggression
Aggression is a symptom of both anxiety and frustration. It is the by-product of someone who has failed at a talk or feels insecure. Do not confuse it with assertion.

The technique
- Take a deep breath.
- Speak calmly and evenly on a middle pitch.
- Keep your temper.
- Do not respond with aggression.
- Ask for the facts and check your understanding of them.
- Say something like 'I'm sorry this is causing you a problem, but I can only help if you let me' (empathetic assertion).
- Encourage your counterpart to talk out his feelings of aggression. (The longer he goes on talking, the less aggressive he will become.)
- Be assertive and point out politely the consequences of continued aggressive reactions.
- If you cannot calm your counterpart, arrange a break.

Vagueness
Negotiating with a vague counterpart is very difficult. He will go on for a long time and say very little. You must be patient at all times and try to steer him back to the point.

The technique

- Maintain your patience.
- Write down all the facts as you hear them.
- Use the facts to guide your counterpart back to the point from time to time.
- Keep a smile in your voice.
- Be businesslike.
- Don't allow yourself to be dragged down red herring-strewn by ways.
- Keep to the point yourself.
- Keep your temper.
- Don't be abrupt.
- Summarise regularly.

Unfriendly

Some individuals are not particularly fond of people in general. They are not likely to be very friendly when negotiating. Other people confuse being businesslike with unfriendliness. An apparent unfriendly attitude may be a symptom of anxiety or frustration. Either way, do not take it personally; it is not intended personally.

The technique

- Smile as you speak.
- Take nothing personally.
- Keep your voice up and pleasant.
- Deal with the points as quickly as possible.
- Don't makes personal remarks.
- Get the facts and stick to them.
- Once the negotiation is over and the matter dealt with, forget your counterpart.

The Seven Elements of Negotiation

1. **ALTERNATIVES.** These are the walk away alternatives which each party has if agreement is not reached. These are things that one party or another can do by self-help, without requiring the agreement of the other. In general, neither party should agree to something that is worse for that party than its "BATNA" – its Best Alternative Agreement.

2. **INTERESTS**. This is the word we use for what it is that somebody wants. Underlying the positions of the parties are their needs, their concern, their desires, their hopes and their fears. Other things being equal, an agreement is better to the extent that it meets the interests of the parties.

3. **OPTIONS.** We use this word to identify the full range of possibilities on which the parties might conceivably reach agreement. We refer to options "on the table" or which might be put on the table. "We might decide that you get the orange, that I get it, that we cut it in half, or we might decide that I can have the peel for baking and that you can have the fruit to eat. They are all options. We have not yet decided." Generally speaking, an agreement is better if it is the best of many options:- if it could not be better for one party without being worse for another.

4. **LEGITIMACY.** Other things being equal, an agreement is better to the extent that each party considers it to be fair as measured by some external benchmark; some criterion or principle beyond the simple will of either party. Such external standards of fairness include international law, precedent, practice, or some principle such as reciprocity and most-favoured- nation treatment.

5. **RELATIONSHIP.** A negotiation has produced a better outcome to the extent that the parties have improved their ability to work together rather than damaged it. Most important negotiations are with people or institutions with whom we have negotiated before and will be negotiating again. Whatever else a relationship may involve, one crucial aspect is an ability to deal well with differences. One dimension of the quality of a negotiated outcome is the quality of the resulting working relationship: Are the parties better or worse able to deal with future differences? (Each element represents something desirable in a good outcome. There are likely to be trade-offs among them. Doing better on one may mean doing worse on another.)

6. **COMMUNICATION.** Other things being equal, an outcome will be better if it is reached efficiently without waste of time or effort. Efficient negotiation requires effective two-way communication.

7. **COMMITMENTS.** Commitments are oral or written statements about what a party will or won't do. They may be made during the course of a negotiation or may be embodied in an agreement reached at the end of the negotiation. In general, an agreement will be better to the extent that the promises made have been well planned and well-crafted so that they will be practical, durable,, easily understood by those who are to carry them out, and verifiable if that is important.

The 7 Elements as a Checklist for Preparation

Alternatives
- ✓ What's our BATNA? What's theirs?
- ✓ Can we improve ours? Worsen theirs?

Interests
- ✓ What are ours? What are theirs?
- ✓ Are there other parties to consider?
- ✓ Which interests are shared, which are just different, and which conflict?

Options
- ✓ What are some possible agreements that might creatively satisfy both our interests?

Criteria (Legitimacy)
- ✓ What standards might international law suggests?
- ✓ What "ought" to govern an agreement?
- ✓ How can they justify the outcome to their constituents?

Commitments
- ✓ What is our authority? Theirs?
- ✓ What kind of commitment do we want at each stage of the negotiation process?
- ✓ Process agreement?
- ✓ Framework? Tentative? Final?
- ✓ What might a framework for an agreement look like?

Relationship
- ✓ What kind would we like to have?
- ✓ How can we improve the relationship without conceding on the substance?

Communication
- ✓ What information do we want to listen for?
- ✓ How can we show them they have been heard?
- ✓ What messages do we want left in their heads?
- ✓ What is our process strategy? What might we say to start off?

Concept & Techniques of Mediation

Course Material Designed by
Delhi Mediation Centre for Training Programme in Mediation

"*.....both were happy with the result, and both rose in public estimation.... I realized that the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing out private compromises of hundreds of cases. I lost nothing thereby - not even money; certainly not my soul*."

Mahatma Gandhi

Why Mediation?

The concept of mediation is ancient and deep rooted in our country. In olden days, disputes used to be resolved in a panchayat at the community level. Panches used to be called Panch Parmeshwar. Now we have grown into a country of 125 crore people. With liberalization, globalization and tremendous economic growth there is an explosion of litigation in our country. Though our judicial system is one of the best in the world and is highly respected, but there is still a lot of criticism on account of long delays in the resolution of disputes in the courts of law. A point has now been reached when even an honest litigant is wary of approaching the court for a decision of his dispute. Hence, we have turned to alternative forms of dispute resolution.

We tried the system of Lok Adalats and gave statutory recognition to it through the Legal Services Authority Act, 1987. But, it is only a miniscule amount of litigation that has gone to the Lok Adalats, and even those cases are mainly compensation cases, house tax matters or small recovery disputes of big companies where only arithmetic calculations are to be made and there is hardly any dispute about the question of liability. The Arbitration & Conciliation Act, 1996 replaced the Arbitration Act, 1940 but even that has been unable to contain litigation. This is because disputes can go to arbitration only if there is an arbitration agreement between the parties; and experience has shown that in a very large percentage of cases, the aggrieved party files objections to the award, and that sometimes takes several years for disposal.

The legislature, by the Code of Civil Procedure (Amendment) Act, 1999, amended Section 89 of the CPC with effect from 1.7.2002 whereby mediation and judicial settlement were envisaged as modes of settlement of disputes. The amendment in Section 89 was made on the recommendation of the Law Commission of India and the Malimath Committee. It was suggested by the Law Commission that the court may require a party to a suit or proceeding to appear in person with a view to arrive at an amicable settlement of the dispute between the parties and make an attempt to amicably settle the dispute between them. It is now obligatory for the court after framing the issues to refer the dispute for settlement either by way of

arbitration, conciliation, mediation or judicial settlement. It is only when the parties fail to get their dispute settled through any of the alternative dispute resolution methods that a suit could proceed further. Thus, Section 89 has been introduced to promote alternative methods of dispute resolution.

In fact mediation is widely used as an alternative to litigation for quick resolution of disputes in USA, European countries and in Australia, particularly in commercial and matrimonial disputes.

Mediation started in USA in the late 1970's. Labour relations mediation began much earlier, which was limited to collective bargaining. Mediation became very popular in USA and European countries in 1990's. In our neighbouring countries like Pakistan, Bangladesh and Sri Lanka, mediation started earlier than in India. In Ahmedabad, a trust called Amlead was formed and registered by lawyers who opened a Mediation Centre on 27.7.2002. A Mediation Centre was established in Madras High Court in April, 2005. In Delhi, we started mediation only in August, 2005. Hon'ble Mr. Justice Y.K. Sabharwal, then Judge of the Supreme Court (former Hon'ble Chief Justice of India) formally inaugurated the Mediation Centre at Tis Hazari Court, Delhi on 24.10.2005. Since then, our results have been so very encouraging that another Mediation Centre was formally inaugurated on 5.5.2006 in Karkardooma Courts complex. As on 05.12.2007 as many as 5009 cases have been referred to the Mediation Centre at Tis Hazari and 2602 cases have been referred to the Mediation Centre at Karkardooma. The number of settled cases (including connected cases) is about 5782.

What is Mediation?

In the adversarial system, a litigant becomes insignificant, almost a non-entity. He is a mute spectator to the legal battle fought on his or her behalf, sometimes on grounds that are too technical.

Mediation is a negotiation process in which a neutral third party assists the disputing parties in resolving their disputes. A Mediator uses special negotiation and communication techniques to help the parties to come to a settlement. The parties can appoint a Mediator with their mutual consent or the Court, in a pending litigation, can appoint a Mediator. Mediation always leaves the decision making power with the parties. The Mediator does not decide what is fair or right, does not apportion blame, nor renders any opinion on the merits or chances of success if the case is litigated. Rather the Mediator acts as a catalyst to bring the two disputing parties together by defining issues and limiting obstacles to communication and settlement.

Why Do We Need Mediation?

We need mediation because it is a good method of resolving certain kinds of disputes especially those involving relationships. Relationships can be personal, business, contractual or social. These disputes are not easily resolved with the litigation process.

What are the Problems with Litigation?

It is expensive, has huge delays, aggravates the tension and fighting between parties, workable solutions are not arrived at and the dispute does not end with the verdict.

Is Mediation Used? Is it Working?

(a) Mediation is extensively used abroad especially in the United States of America, England, Europe, Australia, Singapore and Hong Kong amongst other countries.

(b) It is applied in a range of disputes from small causes and community disputes to business and contractual matters, from family matters to complex high value commercial disputes.

(c) The Success rate of mediation is high – the estimates of the percentage of cases in which it has worked ranges from 50% to 80%. Considering that a successful mediation is one where both parties are satisfied with the result that is surely a high figure.

(d) It is now becoming standard procedure for a mediation clause to be inserted in the dispute resolution section of agreements as a first try method before arbitration or litigation.

What are the Risks of Mediation?

(a) One of the risks is that it can be used to find out confidential information from the other side. For this reason the requirements of confidentiality must be strongly stressed and protected. Parties must be cautioned against revealing confidential information in joint sessions. As regards communication with the mediator, wherever the confidential nature of information needs to be maintained, the mediator must be clearly told so.

(b) When there is severe imbalance in the negotiating strength between the parties that may be reflected in the agreement. For this reason, there is a caution against mediating cases where such imbalance is present.

(c) An unethical mediator could abuse the position of trust and collude with one party to deprive the other. Just like any other office of trust, this too can be abused. However, in the case of mediation, a party can withdraw from it any time without adverse consequences. That is not possible in the case of a Judge or arbitrator. Secondly, parties are advised to attend the mediation with their lawyers who can protect their interests.

In some jurisdictions (notably in US), Codes of conduct and ethics have been drawn up for mediators, as also a certification procedure. This will provide for disciplinary action like withdrawal of certification. Fourthly, a mediator who is suspect on integrity will not get much business. The most important aspect here is that mediators should be drawn from those who possess integrity and credibility.

How Mediation is Different from Litigation and Arbitration

a) In litigation, the Judge decides the issue and parties are bound by the decision subject to the right of appeal/revision etc. In mediation, the parties themselves take the decision to find a solution to end the dispute.
b) In litigation the focus is usually on the past and on determining liability. In mediation the focus is on the future and improving the situation to the extent possible.
c) Litigative proceedings tend to the contentious and procedural and do not yield quick results. Mediation stresses co-operation and is solution oriented.
d) Arbitration proceedings are also adversarial in nature, like litigation. The difference is that parties can choose their arbitrators and the setting can be less formal. Arbitrators also give awards in favour of one party and against the other.
e) Mediation avoids the win-lose equation and instead tries to achieve a win-win solution,

which puts an end to the dispute.

Comparison of Mediation and Lok Adalat

1. Forum [where it takes place]

Mediation takes place in a private conference room. Only the parties, their advocates or other persons helping them or accompanying them or involved in the mediation process are present. Lok Adalat usually takes place in court premises when numerous cases referred to Lok Adalat are listed before different conciliators. Often more than 25 cases are placed before each group of conciliators. Lok Adalat proceedings are held in public, in the presence of all persons assembled to attempt to settle their cases.

2. Morphology [Structure] of the process.

Mediation is a structured process featuring introductory comments by the mediator, [a] detailed exchange of information in a joint session, a series of separate and private meetings with the parties and an agreement stage.

In Lok Adalat, it is customary for the conciliators to talk with the parties, with their advocates present, to help persuade the parties to settle their case. The exchange of information is limited. The discussion of possible terms, likewise, is limited. If conciliators talk with any party privately, it is generally only once, due to time constrains.

3. Who controls the Process?

In mediation the mediator controls the process by following the stages of mediation process and deciding the order or presentation, the length of presentation, setting the agenda, etc. In Lok Adalat, the conciliators determine how the process will be handled, which party speaks and when.

4. Who selects the neutral third party?

In mediation, generally the parties decide who will serve as the mediator.

In Lok Adalat, the parties do not have any role in deciding who the conciliators will be. The parties appear before those conciliators to whom their case is assigned. The parties do not have the freedom to select conciliators of their own choice.

5. Time spent in the process.

In mediation, parties are afforded reasonable time to negotiate the agreement. This may involve a number of hours or days. Mediation may take place over a course of time to accommodate the parties and the complexities of a dispute.

In Lok Adalat, there are usually strict time constraints. The agreement has to be reached in fixed amount of time as the tenure of the conciliators is only for the given day. If there is no settlement on that day, the case proceeds to trial. There is no continuity and follow up by the conciliators.

6. Who controls the outcome?

In mediation, the parties control the outcome and work together in arriving at a settlement with the assistance of the mediator.

In Lok Adalat, the parties may usually agree to disagree with a settlement proposed by

conciliators. However, experience reveals that, in practice, conciliators and advocates of the parties try to persuade the parties to settle.

7. How is a dispute referred to mediation? Who pays for the expenses?
In mediation, reference to mediation is made by court order, by consent of the parties, or pursuant to a contract clause, etc. The parties pay for mediation or the court pays for mediation, if the programme provides funds.
In Lok Adalat, reference is made mostly by consent of the parties or their advocates. Sometimes, a case placed before Lok Adalat by a court order. Parties may opt to appear or not to appear. Parties do not pay for Lok Adalat expenses. Conciliators are free volunteers. Arrangements or organisational expenses are mostly made and funded by Legal Service Authorities.

8. Confidentiality
Mediation is a private process. Without consent of the parties, neither the parties nor the mediator can disclose the statements made during mediation, or documents prepared for mediation, such as mediation work.
In Lok Adalat, the process is generally not private. It takes place openly and in presence of all others who have assembled for their respective cases.

9. Depth of Analysis.
In mediation, the factual and legal analysis is detailed and in depth.
Due to time constrains, conciliators in Lok Adalat are rarely able to engage in an extensive discussion of a claim [e.g., the precise nature of the claim, the factual background and damages and possible settlement terms]

10. Types of disputes resolved.
In Mediation, all types of disputes, including commercial disputes, contract disputes personal injury claims, real estate, probate etc., can be negotiated and resolved.
In Lok Adalat, mainly motor accident claims and insurance claims are tackled. Commercial and other disputes which require creative solutions are rarely referred to Lok Adalat.

11. Role of a neutral.
In mediation, the neutral persons works in partnership with the parties to assist them in finding a solution that meets with their needs, interests, priorities, future relationship, etc.
In Lok Adalat, conciliators attempt to persuade the parties to settle their case. There is no attempt to work together with the parties solutions that meet with the parties' individual needs, interests, priorities, future relationship etc.

12. Role of the parties.
In Mediation, parties play an active role in presenting factual background, discussing positions, developing offers and counter offers, making decisions , etc.
Parties play no active role in Lok Adalat. They play no active role in presenting information, identifying interests, making offers of settlement, responding to offers of settlement and

shaping the terms of settlement.

13. Role of Advocates.
In mediation, advocates play an active role, presenting the case, discussing positions, developing offers and counter offers, and advising clients regarding terms of settlement.
In Lok Adalat, advocates play a part in advising their clients to settle if they consider it advisable to settle.

14. Range of Possible Outcomes.
In mediation, parties are not bound by traditional legal remedies. Highly creative, innovative and nontraditional solutions are possible. In addition, it is possible to build future relationship by re-writing contracts, re-structuring relationship, etc.
Usually, in Lok Adalat the case is reduce to monetary damages. Imaginative solutions involving non-monetary or non-traditional remedies are not usually considered.

Stages of Mediation

1. INTRODUCTION
A Mediator introduces himself and the parties and explains the process of mediation. For instance where an Advocate is assisting a party and he/she has also brought some of his/her relations for the negotiation, the Mediator has to explain the role, which can be played by the Advocate and the relation/friend who has been brought in by the party. The Mediator must dispel the doubts in the mind of any of the party that a lawyer or a relation cannot participate in the mediation.
(i) **Establish Neutrality**: It is very important for the Mediator to exhibit his neutrality to the parties and the dispute. This can be done by very carefully using appropriate words, body language and making appropriate eye contact that shows equal treatment to the parties. A Mediator should sit squarely and by his conduct should not show any preference to one or the other side of the table undue eye contact to be avoided. A Mediator should avoid wishing the disputing parties or their Advocates in the waiting area before the first meeting, even if either of the parties is known to him or her because this may give a wrong signal to the opposite party. Of course, the Mediator must disclose any previous contact with any particular party but that can be done while explaining the process of mediation. A Mediator must always avoid calling a party by the first name because the opposite party may misconstrue it.
A Mediator should prefer to use neutral terms. For example, in a suit for breach of contract for supply of certain goods, the Mediator can describe it as a dispute with regard to a contract for supply of said goods instead of a case of breach of contract. Similarly, a suit for damages can be better described as a suit for compensation.
A Mediator should also show neutrality with regard to the date, venue and timing of mediation. If a Mediator asks for the convenient date from one of the parties, the other party may misconstrue it. Therefore, a Mediator can fix a date either as per his own diary, subject to the convenience of the parties, or can ask both the parties simultaneously to suggest a date and time which may be convenient to both of them.
(ii) **Describe the Role of a Mediator**: A Mediator must tell the parties that his role is simply

to assist them to come to a settlement which may be acceptable to all of them. Thus, his role is only facilitative and is not to decide the dispute between the parties. He should avoid early evaluation of the dispute even if requested by either of the parties by telling them that he is yet to get the complete information.

(iii) **Address Confidentiality**: A Mediator must explain to the parties/participants that the mediation proceedings are confidential so that they may feel more comfortable in giving their options towards resolution of dispute. A Mediator can draw the attention of the parties to the statute or the rules or the agreement whereby the proceedings are confidential. A Mediator should also tell the parties that they can disclose any confidential information during a caucus (private meeting) to be kept secret by the Mediator from the opposite party for coming to a settlement which may be acceptable to all the parties.

(iv) **Establish a Conducive Environment and Control over the Process:** A Mediator should be calm and relaxed during the mediation. He should be in complete control of the proceedings and should diplomatically handle any interruption without giving an indication to any party that he/she is not being given adequate attention.

While a Mediator is delivering the introduction or if one of the parties is presenting his or her point of view and the other party interrupts, a Mediator can request the said party to make a note of the point and that he (the Mediator) would be getting back to him in just a short while.

(v) **Generate a Momentum Towards an Agreement**: A Mediator should develop a positive frame of mind in the parties by expressing hope that if we work on the dispute, we may be able to come to a settlement which we would normally come to through hard work.

(vi) **Ground Rules**: Take an assurance that each and every party has to respect each other during the proceedings. One party shall not interrupt the other in the proceedings.

(vii) **Determine whether the Mediation Process has been Understood**: Enquire from the parties if they have any question or any doubt about the mediation process.

2. JOINT SESSION

Mediator's Goals

- Gather information about factual background.
- Learn about parties' claims, defence, arguments and positions.
- Gather information about parties' underlying interests.
- Manage interaction between parties.
- Maintain environment that is conducive to constructive negotiations.
- Elicit information by k each party if he / she has got any other point.
- Allow parties to give full information of facts
- Joint session to be done coolly and not to rush through - because both the parties will come to know of the stand of the respective parties in full view and this will enable the Mediator during negotiation in a separate session.
- Remain neutral - Do not give any idea to any party about the merits and demerits of a case.

Mediator's Dos & Donts

- Active listening - A good Mediator is a very active listener.
- Ask questions that bring out desired information (open-ended, clarifying closed questions that bring out underlying interests, fact-based questions, etc.)
- Manage outbursts and interruptions with acknowledgment. Acknowledge the point of feeling.
- Don't jump to conclusion.
- Don't rush to find a solution.
- Understand that, for most people, their perceptions equal their reality. To them, their perception is a fact.

- Understand that two people can perceive a situation differently and they can both be right.
- Let go of your desire to talk.
- Be careful in note taking.
- Be mindful of your body language and the speaker's body language.
- Minimize interruptions.

3. CAUCUS or SEPARATE SESSION

Purpose: In caucus parties get the chance to vent out their charged up feelings and emotions. A Mediator should not talk negative about any party. It often happens that a novice mediator starts taking sides and has sympathy with the parties, which is not conducive to the mediation process and ultimately embarrasses the Mediator.

- A Mediator explains confidentiality to the extent requested. Parties may discuss confidential information and issues.
- Gather information by asking more questions – Number of separate sessions will depend from case to case.
- Parties are encouraged to invent settlement options.
- Possibility to settle the case to be enquired from the parties.
- Strong on facts, soft on parties. (For example in a compensation case, a Mediator can ask the question "Do you have the medical bills?" (Defendant has raised the question of an exaggerated bill)"Do you have any other document" (Never tell a party that he cannot be believed and that if he had received the treatment he must be in possession of the bills or documents)

Agreement:

- Orally confirm a settlement in a separate session with the parties.
- Write down the terms of the settlement.
- Confirm the settlement in a joint session with both the parties.
- Who can draft agreement, parties, their Advocates or the Mediators?
- To be signed by the parties.
- Terms of Agreement - Clear, complete, concise, specific (give date) preferably in active voice.

Closing Comments:

It has been noticed that whenever the parties take an adjournment to draft the agreement as

per the terms settled during mediation, there has been a rethinking on the part of one or the other party to gain some more advantage. Experience has also shown that in some cases the agreement has failed. Even if an adjournment has to be granted, it should be preferably scheduled on the next day or in a couple of days – try to draft the agreement yourself but at the same time make sure about the provisions of law.

Approaches to Negotiations

There are two types of approaches to negotiations, that is, competitive and cooperative. A competitive negotiator may be aggressive, hostile, uncompromising while a cooperative negotiator may be accommodating, straightforward and courteous. A good negotiator mixes these approaches according to the circumstances of the negotiations. If a negotiator is too docile, he may not get a good bargain.

Types of Bargaining Used in Mediation

(i) **Rights-based Bargaining**: It is a customary and traditional form of bargaining in which the parties' primary focus is on right and wrong (for example, who violated the statute, who breached the contract, who was negligent). It is blame- oriented analysis.

(ii) **Positional Bargaining**: It is also a customary and traditional form of bargaining, in which the parties focus on their legal positions and offer to settle. It is often combined with right based bargaining (for example my client's claim is worth Rs.1 lakh as your client was 100% at fault for injuries).

(iii) **Distributive Bargaining**: This type of bargaining focuses on the allocation of fixed or limited resources between the parties. It is often referred to as "dividing the pie", where the "pie" represents a fixed amount of money, property, assets, etc. (For example, the assets of an estate). Distributive bargaining is also referred to as "zero sum" bargaining, because for each amount of resources received by one party, the other party loses the same amount. (Suit for partition, petition for grant of probate of Will, suit for dissolution of partnership and rendition of accounts etc. would come under distributive bargaining).

(iv) **Integrative Bargaining**: In this type of bargaining, a Mediator expands the resources that are the subject of negotiations by introducing the possibility of traditional additional resources that are outside the framework of initial negotiations. (For example, 18th camel, that is 1/2, 1/3rd and 1/9th of the camels).

(v) **Interest-based Bargaining**: In interest based bargaining, the focus shifts from law to the facts and underlying interests of the parties to develop terms of settlement that produce mutual gains (for example division of orange). It is a three-step process in which a Mediator (a) identifies the underlying interests of the parties, (b) prioritizes their interests (using information generated from the parties), and (c) develops settlement terms that promote the most important interests of the parties.

Interest based versus Right based Bargaining

A commercial mediation or even compensation mediation normally starts on the basis of right-based mediation. Like the plaintiff may have filed a suit for recovery of damages amounting to Rs. 1 lakh but he may be ready to accept Rs. 50,000/- as a settlement. The right-based bargainer may sometimes bring the mediation to an impasse and the Mediator must cleverly move towards interest based bargaining in order to save mediation.

Communication Technique Used in Mediation

Restatement: Restatement is a communication tool used frequently by the mediators to ensure that the mediator has accurately heard their statements. As the name suggests, restatement consists or mediators repeating of a party's point(s), at times using same or similar words as the party. This technique gives the party confidence that the mediator has accurately heard the party and noted the party's point. Restatement usually focuses on statement made by a party about facts, law and position.

Example :

Party : "I am not at fault because I delivered the product on time on June 16, 2006"

Mediator : Your position is that you are not liable because you carried out the terms of agreement by delivering the product on June 16, 2006.

Reflection: Reflection is a communication technique that is similar to restatement, except that reflection involves a mediator repeating of a party's statement about thoughts, feeling and emotions.

Example

Party : "I am frustrated because the other party delayed payment of the money I gave to him."

Mediator: "If I am hearing your correctly, you are frustrated about the timing of payment."

Summarizing: "Summarizing" is a technique used by a Mediator to briefly, clearly, and accurately re-state the essence of statements by a party or advocate regarding issues, positions, or proposed terms of settlement.

- In summarizing, a Mediator must be careful to:
- Be accurate
- Be brief
- Re-state the issues, positions, or terms in words that are neutral
- Be complete

Neutral Re-Framing: Neutral re-framing is the restatement by a Mediator, in neutral words, of a comment or position expressed by a party or his or her advocate. Using neutral re-framing, a Mediator attempts to extract the essential content of a statement, leaving out inflammatory or highly charged words. The Mediator's restatement is usually made for the purpose of re-phrasing the comment in terms that are clear and inoffensive. Neutral re-framing also may be used to focus the parties' attention on a particular aspect of the statement or position offered by a party.

Neutral re-framing may be used in a variety of situations:

- When a party or advocate makes a statement that is highly adversarial
- When a party or advocate uses words that are inflammatory
- When a party or advocate engages in a personal attack on another person

For instance, in a suit for recovery of Rs. 10 lakhs, the defendant may say in a caucus that he shall not pay a penny over and above Rs. 5 lakhs and he can see the plaintiff in Court. A Mediator can reframe the offer by removing the word "not a penny" and "over and above" and that "he can see the plaintiff in Court".

Re-Directing: "Re-directing is a communication technique used by a Mediator to shift the focus of a party from one subject to another. Re-directing may be used to:

- Focus on details.
- Re-focus on general issues, party expectations or goals.
- Respond to a hostile, inflammatory, or highly adversarial statement by a party or attorney.

Setting an Agenda: "Setting an agenda" is a communication technique used by a mediator to establish the order in which issues, positions, claims, defences, or proposed settlement terms will be addressed. Setting an agenda may be used to :

- Organize information.
- Determine the priority and relative importance of issues to a party.

Deferring: "Deferring" is a communication technique used by a Mediator to postpone a response to a question or statement by a party. It may be used in the following situations:

- Where a party or his or her advocate requests a premature evaluation. (It is too early, yet to get full facts).
- To follow an agenda established by the Mediator.
- To gather additional information.
- To de-fuse hostile, inflammatory, or highly adversarial statement.
- To break an impasse.

Acknowledgment: "Acknowledgment" is a communication technique used by a Mediator to reflect back a person's statement or position, in a manner that recognizes the perspective of the party who expressed the statement or position. One purpose of acknowledgment is to convey that the Mediator has accurately heard and understood the statement/position. Another purpose of acknowledgment is to convey that the Mediator understands the importance of the statement/position of the party.

Empathy without Reinforcement: Often, it is a Mediator's responsibility to express understanding and empathy, without expressing agreement or disagreement with a party. Words and phrases that express empathy without reinforcement include;

- I understand your position.
- I see what you are saying.
- I hear your point.

Words and phrases that, if used improperly or over-used, may lead a party to believe a Mediator agrees with him / her include:

- Yes
- Okay
- Uh-huh
- Silence (for example, after a party says, "Anybody would do the same thing under the circumstances")

In addition, certain gestures and body movements may convey agreement, including nodding the head up and down.

Finally, passive information gathering by a Mediator may convey the impression to the

speaker that the Mediator agrees with the party's comments (for example, allowing another person to have complete control of the agenda, scope, and degree of detail when relating factual background and positions).

Use of Apology in Mediation

Sometimes apology plays a very important role in resolution of a dispute between two warring parties A plaintiff may be hurt on account of an unreasonable conduct of the defendant taking the matter to the Court. The Mediator, therefore, has to use his/her intuition to find out if it would be helpful if one or both sides make an apology. The timing and sincerity of apology is crucial.

For instance, in a suit for damages in a motor vehicle accident or in a criminal case under Section 279/338 IPC, the plaintiff may be having a grievance that the defendant had fled the spot after the accident and had not even cared to take him to the hospital. The apology in addition to some compensation may prove very vital in settlement of the dispute.

An insincere apology, however, is worse than none at all. As a practical matter a mediator should never suggest an apology to the plaintiff without having already confirmed with the defendant that one is available and would be made if the plaintiff is happy.

Disputes where Mediation is Appropriate

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

Disputes where Mediation is not Appropriate

- Parties refuse to negotiate
- Parties want a judicial determination
- Parties want public airing of the dispute
- Parties want to establish legal precedent
- Delay in resolution benefits party
- Parties do not have sufficient information.
- Where an order of Court is necessary to enforce a right.
- Serious criminal offences.
- Cases which are prohibited from being settled through ADR, such as tax disputes.

Types of Disputes which can be Referred for Mediation

- Family Disputes (divorce, custody, visitation)
- Commercial disputes
- Dispute between neighbors (boundary disputes, noise, animal control)

- MACT/Insurance claim
- Copyright, Trademark disputes
- Billing disputes with public sector companies

Why Should Business Community Consider Mediation?

Mediation is very effective when there is a question of reputation of a big company involved in any dispute. For instance, there may be presence of some foreign substance in a bottle of soft drink. The soft drink company in order to avoid any adverse publicity would never like the dispute to go to the court and would try to settle the dispute to control rumors about the product.

A dispute between the employees and a business house and between a contractor and the business house are also best settled in mediation in order to avoid disruption in the work/business and in order to maintain the continuing relationship.

Stage at which Mediation can be Tried

Mediation can be tried before trial, during trial or even during pendency of the appeal.

Mediation *viz-a-viz* Traditional Litigation

There is no conflict between mediation and court trial. Some cases need to be litigated whereas other needs to be mediated. Thus, mediation is complimentary to the court proceedings and is not opposite to the Court proceedings. That is why Section 89 gives mediation as one of the methods for the resolution of a dispute in cases instituted in the Court.

Choice of Mediator

As per Mediation and Conciliation Rules framed by the Delhi High Court, retired Judges of the Supreme Court of India, retired Judges of Delhi Court, retired Judges of Delhi Higher Judicial Service, Serving officers of Delhi Higher Judicial Service, a Legal Practitioner with at least 10 years service at the bar, experts or professional with at least 15 years of standing are eligible to be empaneled as Mediators in a court annexed mediation. Otherwise, the parties can decide and choose any person to mediate any dispute between them which has not gone to the court.

Brainstorming: "Brainstorming" in mediation process involves the following:

- Inventing / Generating Options for an agreement.
- Evaluating Options for an agreement.
- Identifying the issues for resolution
- Focusing party on their long term interest.
- Getting parties to be realistic about their case especially its weakness
- Making them examine their alternatives to settlements.
- Giving them freedom to create options for settlement.
- Refining their suggestions and reaching agreement.

Lateral Thinking: "Lateral thinking" is a type of thinking that is creative, innovative, and

intuitive. Lateral thinking is non-linear and non-traditional. Mediators use lateral thinking during the brainstorming process to develop terms of agreement that further the interests of the parties. Lateral thinking is often contrasted with logical thinking, which also plays an important role in mediation. Logical thinking is linear, traditional, rational, and fact-based. Mediators use logical thinking to analyze facts, to assess liability, and to understand the positions of the parties.

Impasse or Dead Lock: This occurs due to following reasons:

- Ultimate acknowledgment of failure
- Failure of participants to reach an Agreement.

Steps which can be taken by Mediator

- Alert the participants
- Inform parties/Lawyers in caucus meetings
- Solicit any 'last ditch' efforts.
- Talk with lawyers apart from their clients
- Brainstorm on final settlement offers
- Before declaring an impasse, bring parties and lawyers in general session and seek final offers.

Origins of Impasse

- Emotional
  - Personal animosity / mistrust
  - Vengeance
  - Pride/ego/fear of loosing face.
  - Fear of change.
- Substantive
  - Lack of knowledge of facts and law.
  - Limited resources.
  - Lack of Bargaining Power.
  - Incompetence.
  - Third parties.
  - Fear of being taken advantage of
  - Standing on principles

- Procedural
  - Lack of authority.
  - Power imbalance
  - Mistrust of Mediator

Ten Effective Ways to Settle a Dispute

- Split the difference
- Conditional offers (“what if” offers)
- Use reactive devaluation.

- Convert to arbitration.
- Integrative bargaining
- Shift focus to finality, control, risk management, and other intangibles.
- Reality testing.
- Compare alternatives (BATNA, WATNA, MLATNA)
- Generate momentum toward settlement with multiple claimants by settling easy claims first.
- Re-visit issues.

Effective Mediator

1) Listens and respondents courteously and with understanding.
2) Acknowledge points made and the significance to the parties of problems and issues.
3) Encourages Parties to make their own decisions.
4) Subtly analysis Parties' presentations.
5) Asks relevant and insightful questions.
6) Probes, for clarification.
7) Keeps track of new information and changing positions.
8) Appears relaxed, alert and engaged with the process.
9) Demonstrates skill and confidence throughout in verbal communication.
10) Presents information, analysis and explanations in ways that influence the Parties positively.

Ineffective Mediator

1) Allow Interruption
2) Give attention to the person who interrupts
3) Fail to handle interruption appropriately.
4) Allow parties to cross talk.
5) Fail to hold caucus at appropriate time.
6) Cut off parties attorney / friends.
7) Rushing process.
8) Fail to follow four stages of mediation.
9) Reconvene joint session at wrong time.
10) Mediator fixing problem for the party.

Qualities of a Good Mediator

1) **Trust:** This is the most important characteristic. If the parties do not respect the Mediator, the chances of success are small. Mediation often involves private discussions between a party and the Mediator. If the party does not trust the Mediator to keep confidences disclosed at such a session, there will exist little chance of success. Similarly, if the parties cannot trust the Mediator to evaluate their positions impartially, the mediation is doomed.
2) **Patience**: Parties frequently come to the mediation with set positions that take a long time to modify. A Mediator must have the patience to work with the parties to bring them to the point where agreement is possible.
3) **Knowledge**: The chances of success are greater if the Mediator has some knowledge or expertise in the area of dispute. Because mediation does not result in a decision by the neutral, knowledge of the subject matter is not as crucial in mediation as it is in arbitration. However,

the parties in a complicated dispute over software, for example, will have more confidence in a Mediator who knows something about software technology than they would in a Mediator who knew nothing about the subject. Furthermore, such expertise will enable the Mediator to better assist the parties in identifying nontraditional solutions to their dispute.

4) **Intelligence**: A Mediator must be resourceful and attentive to understand not only the nature of the dispute, but also the motivations of the parties. Through an understanding of what is important to each of the parties, the Mediator can bring them into agreement much more quickly. The requirements are thus not only an ability to understand the subject matter, but an ability to understand people and their motivations as well.
5) **Impartiality**: This characteristic is closely related to trust. A Mediator must be impartial. Some Mediators will express their opinions about the position of a party, or will use their powers of persuasion in order to bring the parties to agreement. Other Mediators will not analyze or evaluate the merits of a dispute, but will cause the parties to realize on their own where the settlement potential lies. In either case, the parties must be satisfied that the Mediator is neutral. In the former situation, if the Mediator is not viewed as neutral, any opinions will carry no weight; in the latter situation, the parties will refuse to follow a biased leader.
6) **Good Communication skills**: An arbitrator needs only to listen to the evidence and render a decision based upon knowledge of the law and good judgment. Although these talents are extremely valuables ones, an arbitrator need not have the ability to communicate with the parties. A Mediator needs good judgment and good communication skills; it is the Mediator's job to evaluate and understand the motivations of the parties, foresee potential solutions, and then bring the parties to an agreement. Without good communication skills, this task is impossible.

Barriers to Resolution of Dispute

1) *Strategic Barriers*:

Negotiation is compared to making a pie and dividing the pie. Conflict resolution affects the size of the pie. And who gets what size? Litigation can shrink the pie – that is costs, time, relationship, priorities, needs etc. Negotiation can create values and enlarge the pie. On the other side, distributive aspects can create deadlocks. For example, A has 10 apples and B has 10 oranges. [Assume that no other apples and oranges are available in the market]. A hates apples but loves oranges. B loves both equally. If A tells B about it and asks oranges for exchange, B will do strategic bargaining and would say he also likes oranges, though it is not true. B will offer one orange for say 5 apples. But if A tells his interest in oranges to a Mediator in a private caucus and asks him not to disclose it to B, favourable solution can be reached faster and beneficial to both. Thus a mediator helps in overcoming strategic barriers by inducing the parties to reveal information about their underlying interests, needs, priorities and expectations.

2) *Principal and Agent Barriers*:

Incentives for an agent negotiating for the principal may induce behaviour that fail to serve the interests of the principal. A Mediator involves the parties directly and tackles this barrier. A mediator helps in overcoming Principal-Agent barriers by bringing real decision maker

[Principal] to the table and help him understanding his own interests.

3) *Cognitive or Perceptive Barriers*:
Each party has its own perception or feelings over an issue. Parties fight [gamble a litigation] to avoid loss. They settle to receive a gain. For example, there are two gates in this hall, and the organizers declare that those who exit from North Gate will get Rs. 1,000/- each and out of these who exit from South Gate randomly selected few, say two, will get Rs. 5,000/- each. Which gate will most of the people select? Usually people do not gamble for a gain. This is called Risk Aversion.
Now let us change the game. Organizers announce that those who go out of the North Exit will each pay Rs. 1,000/- and out of those who exit out of the southern Gate, randomly selected few, say two, will pay Rs. 5,000/- each. Which gate most people will select for exiting?

- Usually people gamble to avoid loss.
- Sure loss [No]
- Possibility to avoid loss [Yes]

Mediator takes parties from loss aversion to risk aversion. Thus a mediator helps in overcoming cognitive barriers by emphasizing potential gains and de-emphasizing or dampening the losses.

4) *Psychological Barriers* (*Reactionary Devaluation*): "If only we could settle for Rs. 10 lakhs, I would put an end to it". Next day the other side offers Rs. 10 lakh. "No, no! They must know something we do not know". Or "If it is a good settlement for them, it cannot be good settlement for us." Concessions offered are rated lower than concessions that are withheld. A mediator helps in overcoming psychological barriers or reactive devaluation by owning the source of the proposal. [Changing the messenger.

Place of Lawyer in Mediation

It has been found that wherever the lawyers are assisting their parties during the course of mediation, the settlements have been easy to come. (Barring a few case where the lawyers have stalled the settlement which was just going to be arrived.). Always give recognition to the presence of the lawyer and tell them their importance of being present with the parties and that it would be easier for the parties to settle the dispute if they are assisted by their lawyers. Give credits to the lawyers for reaching the settlement. The lawyers want their clients to feel that without them they would have paid more or get less.

Are there Benefits in Mediation for Lawyers?

a) Mediation helps lawyers as for lawyers
b) It is another avenue of professional practice and income.
c) Appearing for a client is a professional service for which lawyers charge their fees. When cases come up faster for resolution instead of decades later, the income is earned now.
d) Studies have shown that clients are far more willing to pay fees for mediations in which they participate and can understand than for litigation in which they feel excluded and do not see progress.

e) Mediation invariably means a satisfied clients who participate and sees results, and satisfied clients come back to their lawyers with more business.
f) There is satisfaction in helping to bring about beneficial solutions.

Lawyers as Mediators

Lawyers make good mediators and are sought after. Becoming a mediator is a new field which lawyers, especially senior ones, may like to try. It has elements of the resolver and peacemaker, and can also be professionally rewarding. So whether the lawyer refers clients' cases to mediation, or appears in mediations for clients, or becomes a mediator part or whole time, several opportunities have opened up for members of the legal profession. Abroad, it is now common to find leading lawyers and retired Judges of distinction focusing on mediation.

What is the Role of Lawyers in Mediation?

In Mediation the lawyer's role of arguing, demolishing or cutting down the other side's arguments does not help very much since there is no presiding officer to give a verdict for one or the other. Instead the lawyer's role is use his legal skills and practical knowledge to see if a solution is possible, and if so, to help evolve one. A primary role is to protect the client's legal interests. The lawyer must also ensure that the client is made aware of the implications of the decision he is taking. If the mediation is proceeding in a manner which is disturbing or not serving the interests of the party, the lawyer may advise terminating it.

Benefits of Mediation

A. ***It is Fast***: As the amount of time necessary for the parties and the Mediator to prepare for the mediation is significantly less than that needed for trial or arbitration, a mediation can occur relatively early in the dispute. Moreover, once mediation begins, the Mediator can concentrate on those issues he or she perceives as important to bring the parties to agreement; time consuming evidence-taking can be avoided, thereby making the best use of the parties' time and resources. Even if the entire evidence gathering has already occurred, it almost invariably takes less time to mediate a dispute than to try it in a court.
B. ***It is Flexible***: There exists no set formula for mediation. Different Mediators employ different styles. Procedures can be modified to meet the needs of a particular case. Mediation can occur late in the process - even during trial- or before any formal legal proceedings begin. The mediation process can be limited to certain issues, or expanded as the Mediator or the parties begin to recognize during the course of the mediation problems they had not anticipated.
C. ***It is Cost Efficient***: Because mediation generally requires less preparation, is less formal than trial or arbitration, and can occur at an early stage of the dispute, it is always less expensive than other forms of dispute resolution. If the mediation does not appear to be headed in a successful direction, it can be terminated to avoid unnecessary costs; the parties maintain control over the proceedings.
D. ***Brings Parties Together***: Parties can save and sometimes rebuild their relationship like in a family dispute or commercial dispute.
E. ***It is Convenient***: The parties can control the time, location, and duration of the proceedings to a significant extent. Scheduling is not subject to the convenience of courts.
F. ***It is Creative***: Resolutions that are not possible through arbitration or judicial determination may be achieved. For example, two parties locked in a dispute that will be resolved by an

arbitrator or a judge may be limited to recovery of money or narrow injunctive relief. A good Mediator makes the parties recognize solutions that would not be apparent – and not available - during the traditional dispute resolution process. Two companies may find it more advantageous to work out a continuing business relationship rather than force one firm simply to pay another money damages. The limit on creative solutions is set only by the variety of disputes a Mediator may encounter.

G. ***It is Confidential***: What is said during a mediation can be kept confidential. Parties wishing to avoid the glare of publicity can use mediation to keep their disputes low-key and private. Statements can be made to the Mediator that cannot be used for any purpose other than to assist the Mediator in working out a resolution to the dispute. Confidentiality encourages candour, and candour is more likely to result in resolution.

H. ***Control***: The parties control the outcome of the mediation and either party has the advantage of terminating the mediation, if it is felt that it is not in the interest of the said party.

I. ***Direct Communication***: In a mediation, there is party to party direct communication. At least the parties have the feeling of being heard by the Mediators if the parties or either of them is being represented by an advocate.

BATNA, WATNA & MLATNA

BATNA: Best Alternative To Negotiated Agreement
WATNA: Worst Alternative To Negotiated Agreement
MLATNA: Most Likely Alternative To Negotiating Agreement also termed as **EATNA** (Estimated Alternative To Negotiated Agreement)

In assessing the value of a settlement offer, it is important to compare the pending offer to any alternatives to settlement that may exist. In the context of litigation, for example, negotiations often compare settlement offers to the predicted outcome at trial, factoring in the additional expenses of going of trial, the risk of losing, and the delay in reaching a judgment or verdict. In this manner, the negotiator can use the projected trial outcome as a point of reference in determining whether a pending offer is favorable.

One method of comparison used by negotiators is to compare a pending settlement offer to the best outcome at trial, also known as the BATNA (best alternative to a negotiated agreement). Using this point of reference, the negotiator will determine whether the settlement offer is close to, equals, or exceeds the best outcome at trial, after adjusting for the litigation expenses of trial, the risk of losing, and the delay in resolving a dispute.

Another valuable method of comparison is for the negotiator to compare the pending settlement offer to the worst projected outcome at trial, which is the WATNA (worst alternative to a negotiated agreement). This point of reference is valuable to a negotiator in determining whether a settlement offer exceeds a party's worst possible outcome at trial.

Using the BATNA and the WATNA will help a negotiator determine whether a settlement offer falls within the range of projected trial outcomes by establishing the high and low alternatives to settlement.

Perhaps one of the most important points of reference for a negotiator is the MLATNA (most

likely alternative to a negotiated agreement), which reflects the most probable outcome at trial. Litigators are familiar with the possibility of a judge or jury rendering an award that falls within a reasonably predictable range (the BATNA and WATNA). Litigators are also familiar with the fact that it is often possible to narrow the range of possible trial outcomes further by using their experience as trial advocates and their knowledge of the community norms for valuing a particular type of case. Thus, as part of the negotiation process, a negotiator generally will predict the high, low, and most probable trial outcomes in order to develop a strong point of reference when deciding the relative value of a settlement offer.

Mediators can use the BATNA, WATNA, and MLATNA as part of the reality testing process in private caucus, to assist the parties and their advocates in evaluating the strength of a pending settlement offer in relation to the possible outcomes at trial. Systematically exploring the BATNA, WATNA and MLATNA with parties and advocates will also provide the mediator with valuable insight into the factual, legal, and analytical basis for their positions.

Another use of the BATNA, WATNA, and MALTNA by mediators is to employ this type of analysis for the purpose of overcoming negotiating impasses. It is often useful for a mediator to remind parties of their BATNA, WATNA, and MLATNA when they lose sight of their strategic objectives, when they are react strongly to an interim offer by another party, or when they believe they would like to terminate the negotiating process.

By focusing on the BATNA, WATNA, and MALTNA, a mediator can assist parties in making a balanced and systematic evaluation of their alternatives to settlement. This type of analysis will often bring clarity establishing alternatives and enabling the parties to develop a concrete measuring stick by which they can evaluate settlement offers.

The 'How to' of Conducting Meditation

"A peace is of the nature of a conquest; For then both parties nobly are subdued,
And neither party loser."

-- Shakespeare[1]

Telling people what to do is different from suggesting options and broadening their perspective to consider lines of thought or actions (for example, in a dispute cover sale of land: 'Maybe you can think of a division of land or jointly developing the property.'). Mediators can open up possibilities for parties to reflect on. It is preferable to cast it in general terms, and to give two or more options so that mediator preference is not indicated. Even this is best done a little later in the process. Avoid doing this in the beginning.

In closing, mediators may keep in mind the following tips about communications:

- The focus should be on the other person, thereby foresting proper listening and understanding, and indicating that one is trying to appreciate the feelings of the other.
- One should show interest in what the other person is saying. Irrespective of status, all persons deserve and consideration.
- A word of appreciation goes a long way.
- Expressions carelessly used can hurt or belittle.
- Matter can be stated carefully instead of bluntly.
- One should aim for clarity in communication. This stems from clarity of thought; such clarity should be maintained in speech.
- Words should be well chosen, and enunciated clearly.
- Precision should be sought and ambiguity avoided. Language ought to be easy to read and listed to. Being concise and relevant are the hallmarks of a good communicator; verbosity and repetition are displayed by the ineffective one.
- Using specific facts and figures shows that you are well informed.
- When one does not have the answers it is better to say so than to hazard guesses.
- Choice of words, using metaphors and turn of phrase add to the style and appeal of communication.

Having gained an understanding of the basic skills of communication, we return to mediation in the next chapter, so see how it is and practised.

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[1] King Henry IV, Act 4 Scene 2.

INTRODUCTION

This chapter deals with the procedure for conducting a mediation starting from the decision to submit a dispute to mediation, and going up to the stage of agreement.

If a law suit over the dispute is pending in court then it may be referred to mediation either on the parties' request or *suo motu* by the court under Section 89 of the Civil Procedure Code, 1908 (CPC). In this case the court may either refer the matter to the court annexed mediation centre, to a particular mediator or mediation centre by name. Such a mediation is governed by the CPC under Section 89, CPC. The mediation agreement comes back to the court for being recorded in an order or decree.

Mediation conducted out of the court system is with the consent of the parties and is governed by provisions of Part III of the Arbitration and Conciliation Act, 1996 (ACA). The term "conciliation" used in this Act is to be also read as mediation, and is contrasted with court-annexed mediation, this can usefully be referred to as private mediation. This parties may jointly appoint the mediator or seek the help of an institution to do so. If the provision for mediation exists in a contract between the parties, the same can be followed. Part III of the ACA is a comprehensive set of rules governing private mediation including appointment, conduct of the process, confidentiality, termination etc. Agreements reached here are to be treated as arbitral awards by consent and are thus enforceable. It may be clarified here that it is also open to the court to refer a dispute to private mediation which will then be governed by the ACA.

Once the mediator(s) has been appointed, his first step is to provide the parties with information on the process of mediation. Some mediators like to have a knowledge of the case before commencing the mediation; these may request parties for a brief note on the facts and perhaps some essential documents. Chapter 10 provides more information on communication between parties and mediators prior to the actual mediation, and other pre- mediation protocols.

CONFLICT OF INTEREST

When approached to mediate a case, the mediator should check if there is any conflict of interest which makes it necessary or preferable that he should withdraw. Potential conflicts of interest arise from a relationship between the mediator and a party or on account of a connection the mediator may have with the subject matter of the dispute. Before proceeding with the mediation it must be ensured that there is no conflict of interest. If any such conflict exists or emerges during the mediation, the mediator must disclose the same and withdraw. He may continue only if both the

parties request him to so and he himself is of the opinion that the degree of relationship or connection is so minimal as not to constitute a conflict.[2]

In a private mediation, the terms of the engagement of the mediator viz. Fees and expenses should be agreed to by the parties It is preferable that this done in the beginning itself. An agreement to mediate with undertakings of confidentiality and to participate in good faith[3] should also signed by the mediator and the parties (See Annexure 3).

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PARTICIPATION IN THE PROCESS

Once the parties have assembled at the mediation table, the mediator needs to ensure that all those who need to be present to resolve the dispute are present. Since the proves emphasises the participation of the parties, it is preferable that they all be present in person. While in a few cases it may be adequate to proceed only with the lawyers representing the parties, in most mediations the mediators like to secure the presence of the parties since this enables full communication and greater discussion of options leading to better solutions. Indeed, the mediation process is adapted for participation by parties, unlike the one in court which is designed for lead roles of lawyers. Where the party is a corporation, firm, institution or the government, the officer representing is must have the authority to do so. It is preferable that this be in writing.

The representative should be empowered to take decisions at the mediation table. Sometimes the representative is given a limited power of decision-making, and needs to check with his superiors to go beyond that. Should the mediator insist that the ultimate decisions-maker come? This is left to the mediator's discretion. In some cases it may be necessary to do so, especially when the discussion needs his presence. In other cases, it may be possible to proceed with the mediation, provided that a quick response and decision-making arrangement is in place. Business and locational realities are such that it may not be possible for the ultimate decision-taker to come to the mediation table. It should, however, be ensured that the representative is not merely a to-and-fro communicator or a person with extremely limited authority; he should be able to adequately participate in the discussion and the decision-making process.

There should not be too much disparity in the number of people representing each party. For example, the number of officers and lawyers representing it may be used by one side as a tactic to intimidate the other side.

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[2] For a detailed discussion on conflict of interest, see Chapter 11.

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It may also be necessary to keep some people out of the mediation session. Where numerous persons are affected in a dispute – for instance, many depositors seeking their moneys from a finance company – they will have to select their representatives; else, there will be too many voices at the table, decision-making becomes difficult, and the other side can be intimidated by the presence of so many rivals. Family members often want to be present, especially in matrimonial cases. The safer course is to keep them out, especially in the beginning. Their presence may inhibit the parties from speaking their minds; they may be, in fact, the root of the problem or contributories to it. Once the mediation is underway, it may be necessary to involve them not so much as to arrive at a decision but to carry it out. If, however, a party to the mediation, such a wife who is severely intimidated by the husband, is not able to effectively speak for herself, the assistance of a family member from the beginning is advisable.

Where minors are involved, care is indeed, In law, minors do not have the capacity to take decisions, and the ones taken on their behalf can be repudiated when the minor reaches the age of majority. Where it becomes necessary to deal with a minor's share, it is necessary that the person speaking for the minor is the parent or a guardian appointed by the court to represent the minor. In any event, mediator must be watchful that the minor's interests are not neglected or bartered away; if that seems to be the case the option to terminate are mediation should be exercised.

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Mediators should not prevent the appearance of legal counsel. It is better to have a lawyer – even a difficult one – at the table, rather that the party complaining later that it unknowingly gave up its rights in the mediation. Closing the door to the lawyer will just result in him advising the client outside that

representation."[4] pending.[5] Of 2000.[6] years.[7] Of cases.[8] The judges[9] in,177.[10] Despite).[11] At place.[12] years."[13] In population.[14] While inadequate.[15] All

[4] *Id.* at 52
[5] J. Venkatesan, ""
[6] Indian .
[7] *Ibid*.
[8] *Id.* at 35.
[9] *Id.* at 6:.
[10] *First*.
[11] Indian 7.
[12] The.
[13] *120th*.
[14] Recently,.
[15] This

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Chapter 7

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Mediators should not prevent the appearance of legal counsel. It is better to have a lawyer — even a difficult one — at the table, rather that the party complaining later that it unknowingly gave up its rights in the mediation. Closing the door to the lawyer will just result in him advising the client outside the mediation room that the process will work to the latter's disadvantage. In many cases, the parties will feel more secure having their legal advisers with them. Indeed, in some cases the mediators may even suggest that parties should bring along legal representation. A lawyer attuned to the mediation process can help in advising his client and focusing on solutions. Conversely, some lawyers can have an obstructive attitude to settlement: their clients may find mediation a difficult business and may have to override or change the lawyer. Even in such cases, it is better to have the lawyer in the room than out of it; the mediator can skillfully direct questions to him, the answers to which show that settlement is indeed a desirable option. While mediators encourage participation by the parties, their lawyers too can play a key role. In some cases the nature of the dispute, and the lack of ability and willingness of the parties to participate will call for a greater role to be played by the lawyers. Sometimes roles are shared: for example, opening statements are made by the parties, who also come in on key decisional matters, while the lawyers present the legal picture and work out the modalities of solutions.

THE STEPS IN THE MEDIATION PROCESS

The Opening Round

Mediator's opening statement explaining the process and the ground rules

The mediator will set the ball rolling with an opening statement. This is of utmost importance. It is often the first information that the parties have of the mediation process, and gives them their first view of their mediator. It sets the tone for the mediation. The mediator needs to take this very seriously; only then will the parties do so. Some new mediators may think that they can skim through this bit and go quickly to the case itself; they will find that they have made

their job so much harder and longer. The mediator's opening statement explains what mediation is all about. It conveys the essence of mediation. It educates the parties about this process. It reassures them that it poses no threat to them; instead it offers them unrivalled opportunity to participate in the mediation and end the dispute with a mutually acceptable solution. It stresses that mediation is voluntary, confidential, that decision-making lies with the parties and that the agreement reached is enforceable by the court.

The mediator will explain that he is not a judge or an arbitrator or an advocate for any party, but is a neutral facilitator. The mediator will make it clear that he is in charge of the process but that the outcome is very much in the domain of the parties to decide; they may also choose to call off the mediation at any time they wish. He will stress on the confidential nature of the separate sessions, and on the fact that nothing said during the mediation can be used in court. Of course, when an agreement of settlement is signed it can be enforced through the legal process.

The mediation procedure and steps in the process can then be explained. This includes the making of opening statements by the parties, joint and separate sessions, establishing facts and identifying issues, assessing interests, becoming realistic about the case and the situation, generating and evaluating options, and working on these to arrive at an agreement. The mediator will emphasise the importance of participation of the disputants.

Ground rules will be spelt out by the mediator. A basic one is courtesy in communication. This does not preclude statements indicating anger, hurt or disappointment. These can be expressed without crossing into the territory of abusive language. It makes little sense to be rude and disrespectful to the other party. As it is said, this poisons the well from which you must drink to get your settlement. The mediator must insist that parties must try to listen to the other without interruption. This is not easy for most of us, and is very difficult for parties in dispute. However, it is important that each party is allowed to put forth its case without impediment, and to extend the same courtesy to the other. While the mediation lasts, the mediator is in charge, and the parties must abide by his decision on the process to be followed.

The mediator may also point out that during the mediation sessions he may probe the parties to draw out their interests, or uncover a hidden agenda, or contradict an overly optimistic

expectation; these are part of the effort to bring the parties to a settlement and should not be misinterpreted as opposition or prejudice on his part. Similarly, there should not be any apprehension about the separate meetings mediators may hold with each party, since these are necessary for frank speaking and moving the process forward, and will be held with both sides.

The mediator should then ask the parties if they have any questions or doubts and must provide suitable clarification.

The aim of the opening statement is to first, ensure that parties fully understand the process and the role of the mediator, and second, to put the parties at ease and build trust and confidence in the mediator.

Check list for opening statement

- Welcome
- Introduction of mediators and parties
- Affirmation that all necessary parties are present
- Verification of authority of representatives
- Confirmation that the agreement to mediate and maintain confidentiality has been signed

Then explain:

- Process of mediation
- Role of the mediator
- Procedure to be followed in the mediation
- Ground rules
- Importance of confidentiality
- Role of parties' lawyers
- Clarify doubts

A model opening statement is provided in the next chapter.

Joint and Separate Sessions

Mediators have joint meetings with all the parties and can have separate meetings with each party. Most mediations start out with a joint meeting. This enables the basic facts to be recounted, the stands of parties to be articulated to each other, and for the contours of the dispute to emerge. Thereafter, as the mediation proceeds, most mediators will sooner or later have separate meetings with the parties.

In the USA, this is known as the "caucus". In the UK, the more conventional term "separate meeting" is used. The mediation progresses with joint and separate sessions which is left to the discretion of the mediator based on his assessment of the needs at the relevant time. The outline below of what happens at joint and separate sessions is not to be taken as cast iron.

Narration of basic facts by the parties

After the mediator has explained the process and the ground rules, he will usually ask each party to state the basic facts of the dispute in brief. This gives the parties the opportunity to explain their case the way they see it; it also makes them listen to the other's version of the dispute. Often, it is at the mediation table that each side first gets to know how the other views the matter and feels about it. It is also useful to allow the expression of these feelings; once they are vented, the discussion can move on to remedial aspects.

This opening round of statements by each of the parties provides the facts, and also gives the mediator some perception about the parties and their positions. Frequently, the facts stated by one side will be rebutted by the other, and vice versa; the mediator will allow this to happen, but make sure that parties don't interrupt each other and that all parties shall have an opportunity to speak. The mediator may himself seek clarification or explanation, avoiding the cross-examination method in favour of the broad open-ended mode of asking questions. Thus, instead of 'Isn't it true that you did not pay the plaintiff on this date?' a less challenging, 'Would it be possible for you to indicate the date of payment to the plaintiff?' is preferable. At this point in the process, the mediator should limit his questions and give room to the parties to vent their feelings and put forth their stand. Parties who have to keep responding to the mediator's questions rather than developing their point of view may feel inhibited or alienated and may not come out with useful information. The purpose of this session is to provide the opportunity of uninterrupted speaking to each party. After the parties' statements, the mediator can summarise and capture the essence of what was said, and do so in neutral terms.

As the facts emerge, the contours and the main elements of the dispute become clearer. The mediator and the parties can then see the specific areas of disagreement that need to be tackled, or, as mediators like to put it positively, the aspects on which agreement must be

reached for the dispute to be resolved. Framing it in the latter manner gives it a constructive edge, focusing less on liability and more on solutions. To ensure that he has understood the matter and to give parties that confidence as well, the mediator can spell out the issues that need to be resolved to end the dispute and check with the parties that this is a correct and comprehensive list.

Gathering relevant information

Rarely do all the relevant facts come out in the first opening statement of the parties. The mediator will have to probe to obtain more facts, to see where there is ambiguity or dispute on facts and how this can be resolved. It is recommended that at this stage separate sessions be held to understand from each party the background of the dispute, whether previous settlement discussions were held and their result, the relationship between the parties, financial and legal issues etc. All this information is relevant for the mediator to understand the case better, identify the real issues and see where lines of solution can emerge.

The mediator may continue with open-ended questions which better elicit information from parties and must refrain from interrupting unless absolutely necessary. It is important for the mediator to be prepared with the right questions to keep the parties on track and gather the relevant information. Where facts are in doubt, focused questions can be asked for clarification or elucidation.

Exploring interests, settlement options, etc.

Once the mediator has gathered all the relevant information in separate sessions, he will be better placed to draw from the parties their motives, interests and needs.

The long-term interests of each party have to be elicited, as also its real needs. Its fears and concerns must be revealed to the mediator, as also its willingness and ability to enter into settlement. These discussions require a party to travel well beneath the surface of dispute and may even make the party itself realise and assess, for the first time, what its real needs and interests are and why it seeks what it does. It may also cause the party to honestly and clearly examine its motives. Therefore, these discussions can only be done in separate sessions.

The breakthroughs and the movement towards settlement invariably happen at the separate sessions that the mediator holds with each party. These meetings enable the mediator to be informed of the interests of each party, as also their concerns, which they may be reluctant to state in the presence of the other party.

- It also gives the mediator latitude to explore the possibilities of settlement, to know what concessions can be made, and what aids or blocks to settlement exist. Frequently, a mediator may have to point out that a party's assessment of its position in law and what a court proceeding will obtain for it is flawed or highly improbable. This is best done during a separate meeting: it will signal the end of the mediation if this assessment is given in the presence of the other side. Often the tension, if not hostility, between the parties is so strong that they simply will not make any positive move in joint sessions to identify interests or options for settlement. Separate meetings thus break the ice and help the process move forward.

It is in these sessions that the mediator can help parties to distinguish wants from needs, rational responses from emotional ones, future from the past, patent motives from latent ones, and realistic expectations from unrealistic hopes. Parties are assisted by the mediator to see the psychological, substantive and procedural aspects of the dispute.

Separate sessions are especially necessary for resolving impasse, when parties get stuck and movement does not take place. It is then that the key mediator strategies of resolving impasse are to be used. These will include making parties confront the legal inadequacies and difficulties with their case and the lack of appealing alternatives if no agreement is reached in mediation. It is in these sessions that the mediator can float ideas and options for parties to consider.

Making Separate Sessions Effective

Some points need to be borne in mind to make separate sessions more effective. In the opening statement itself it should be emphasised that holding separate sessions is a normal and accepted part of mediation. If a separate session is being held with one party, it should also be held with the other to demonstrate equal treatment. For the same reason the mediator should avoid disparity between the time spent with one party and that spent with the other. While having a separate session with one party, the mediator can assign some work to the other, such as listing out long-term interests, benefits of an

agreement, options for settlement, etc. Having them write it down concentrates their minds. It is not advisable to have separate sessions for too long a time; the other party may deplete its energies through boredom or speculate why so much time is being spent with its adversary.

At the initial stage it is preferable that the mediator not divulge any offer made by the other side; instead it is better to first get opening offers from both sides and to work with these. Another caution is that if an offer appears so unreasonable that the mere communication of it may cause the end of the mediation, the mediator will have to work with that party to examine the basis of the offer and how it might be brought to a more acceptable range.

The timing of the separate session should be chosen carefully. Generally, it can take place when it is necessary to probe into the crucial facts and underlying needs which will not be stated in front of the other party. It is also indicated when impasse takes place. That said, the mediator should avoid using separate sessions as a crutch.

At the end of every separate session the mediator can summarise the important points that have emerged. He should clarify what information the party would like to keep confidential. That request must be honoured. If the information to be withheld is such that the mediation cannot proceed without it being revealed, the mediator should explain this and must ask for permission to reveal it in an appropriate way. If the refusal is maintained, it may be necessary to terminate the mediation.

The focus in the separate sessions should first be on the needs, feelings and interests of the party to whom the mediator is talking, rather than that of the other. Only after the party has come out with its view should the mediator bring the other party into focus. In the separate sessions the mediator should go with the agenda of the party and not with the mediator's own agenda.

Subject to confidentiality, where facts mentioned by one party in a separate session are crucial or relevant, the mediator should verify the same with the other party either in a separate session or a joint one.

Negative or derogatory comments about the other party should not be relayed to it. Rephrasing statements will make a party see the issue more objectively. To give the parties some confidence, an issue or issues on which they are likely to be in agreement can be taken up first.

In the initial part of the separate sessions, the focus is on obtaining from parties the background and surrounding information about the dispute and identifying the issues. The parties may also have some offers for settlement, though at this stage it is unlikely that they will want to give much away. It is during the second individual session and sometimes even during the later portion of the first individual session that the gap between the offers starts to narrow.

One format for conducting mediations as taught and followed by the ADR Group UK involves commencing with a joint session where each party is given the opportunity to present their perspective on the facts and issues in dispute. This is followed by three sets of separate sessions with the parties. In the first set of separate sessions, called the 'what' sessions, the mediator further explores more facts about the dispute, the relationship between the parties, etc. The second set of separate sessions, the 'why' sessions, are focused on uncovering the underlying reasons for the dispute and the interests and needs of the parties. The last set of sessions, which may involve a back and forth between the mediating parties, is called the 'how' session. In these sessions, the mediator urges the parties towards solutions that would help them each achieve their interests and needs. It is the mediator's role to keep the separate sessions on track by asking the right questions that aim at first, getting the important information, then putting the parties in the right frame of mind with a focus on what is really important to them, and lastly, to develop solutions that would satisfy both parties' interests.

Conflicting views on separate session

It must be stated that there is an area of difference amongst mediators about the holding of separate sessions. Some practitioners of mediation are opposed to them, as they feel this gives the mediator excessive leverage and power, since it is only he who knows what transpires at these meetings. Another reason is that parties may be uncomfortable with the prospect of the mediator, the neutral, spending much time in conversation with the other party. Other mediators, who perhaps constitute a majority, are avid proponents of the separate meeting strategy, and hold that it requires meetings in private to effect the breakthroughs that come about when parties go beyond their expressed stands, look at underlying interests and fears, develop options and voice possible steps for solution. They feel that separate meetings well handled, are almost invaluable in directing parties to change the focus from contention to solution. To hold or not to hold such separate sessions is the choice of the mediator, which may be dictated by his assessment of the case and the style that comes naturally to him. It would be good, however, to be aware of the limitations of the joint meeting and the possible problems with separate meetings, and to be flexible enough to adopt the mode which seems most appropriate at the time.

Resolving Disagreements over Facts

Parties in conflict usually dispute every fact every inch of the way, but once solution-oriented issues have been framed, many facts become redundant. Take the case of the Occupier and the Institution in Chapter 3. Once the focus centered on whether an amicable sharing of the land value could be achieved, a huge mass of facts relating to the original landholding and legality of the settlement processes, etc., were neatly kept aside. In the case of the businessmen neighbours (in Chapter 3), once the focus was on whether a suitable limitation on building and proper use of the land could be arrived at, bones of contention about previous meetings and agreements could be ignored, to be revisited only if an amicable solution was not forthcoming.[4]

Some facts will need to be established for resolution. Different methods are available for this. As already noted, an expert's view may be sought, for example, on a technical or scientific matter. This could be specified as non-binding and advisory. Sometimes independent methods or standards are available to provide valuational figures such as market prices for land, interest or exchange rates. Appraisers frequently answer such questions. On occasions the mediation may proceed on the basis of assumptions, e.g., 'Let us assume that the property is worth so much.' and later on ascertain the real value if necessary.

Facilitative and Evaluative Mediation

An issue of fundamental importance needs to be dealt with here, and that is whether the mediator adopts the facilitative or evaluative mode of mediation. This choice will determine the manner in which the process is conducted, the role of the mediator and his interaction with the parties. The facilitative and evaluative are the main schools of

[4] For a detailed analysis of these illustrations, also see Chapter 1.

mediation.[5] The primary difference is the degree of intervention by the neutral.

The facilitative mediator plays the limited role of being the communicator between the parties. He will assist the parties in identifying relevant facts and issues; he will focus their attention from positions to their interests, and try to get them to gain clarity on their offers. Other than these he plays the limited role of the communicator between the parties. The mediator will take their proposals back and forth, transmit clarifications and changes, and may engage in examining proposals. It is the parties and their lawyers who will be doing the work of evaluating their case. Suggestions and options for settlement will have to come from the parties themselves. In this mode, the mediator steps back and the parties play a greater role in trying to resolve their dispute

The evaluative school of mediation envisages a significantly greater role for the mediator. In addition to doing the work of facilitation as mentioned above, he will engage in reality testing, bringing home to the parties the problems with their case and their situation. He will draw attention to the problems that persist or await them if they do not settle. He might even express an opinion on the merits of the issues in dispute, if he thinks that will move them to settlement. He will get parties started on creating suggestions and ideas for resolution and can also on his own come up with some. He will engage quite actively with them on examining proposals, drawing out their fears and concerns and exploring ways and means of handling these. He can give them his assessment of the legal position, after entering the caveat that he is not a judge or arbitrator. However, he should avoid giving legal advice as to what a party should or should not do.

It is said that facilitative mediation is more interest based while evaluative mediation is more rights based. This is not accurate. While facilitative mediation does not get into examining legal rights of the parties, it is hardly the case that the evaluative mediator does not explore the interests of the parties, in addition to evaluating the merits of the case and assessing their legal rights. A good evaluative mediator will be doing the entire gamut - making parties look at their interests

[5] Transformative mediation is the third school. The objective of this school is to transform the relationship between the parties. The proponents here hold that resolution of the conflict in hand will follow from the transformation of the relationship. The other schools focus on the resolution of the immediate conflict, with an improvement in the relationship being an agreeable, but not a necessary consequence.

and the realities of the situation, as well as assessing how strong their legal footing is, and also working actively with them on creating and refining suggestions for settlement.

One key area of difference between the two schools is in the making of suggestions to resolve the dispute. The facilitator will shy away; the evaluator will willingly enter the arena. However, even for the latter, there is an important distinction to maintain, a line not to be crossed. The mediator, even an evaluative one, must not decide, coerce or push parties to accept the settlement he has formulated. He can brainstorm with the parties, ask them to consider different ideas and approaches, and make suggestions for their consideration.

The best mediators are ones who can be facilitative and evaluative, with the capacity to use either mode, and the judgment to chose appropriately.

In the debate between the evaluative and facilitative schools, let us understand that this is not a one or the other situation. There are occasions when one is called for, and times when the other is required. Thus mediators can employ both methods. One rule of thumb (and no more than that) is that facilitative mediation is usefully employed in the beginning stages of mediation. Enable the parties to make their own movement; they would have come to the table with some concessions so let them make these on their own. This will also indicate the lines on which they are thinking. Your mediator strategies include a range of techniques to persuade and coax parties to move forward. Employing these strategies too early will exhaust your repertoire. So hold back for the time being. When they are not moving ahead on their own, then employ your tools of reality-testing of their case and situation, your ability to make them change their perspective thereby viewing their dispute in a different light and actively engage in devising and creating options for settlement and your other interventionist skills as a mediator to resolve impasse. When the mediation progresses and it is necessary to hone in on to a specific idea or ideas, the mediator can focus attention of parties, and engage with them in fuller examination and seeing where the blocks lie.

Positivist mediators were enthused by a study conducted by a Task Force on Improving Mediation Quality set up by the American Bar Association (ABA).[6] Most users responded saying that they

[6] Just Resolutions E newsletter, ABA Section of Dispute Resolution, February 2007.

expected more from their mediators than expertise, fairness and persistence. They wanted mediators to do more than shuttle between parties to get a settlement figure. They thought that the mediator should use a creative and intuitive approach, and actively work towards reaching settlement. Many users wanted vigorous reality testing and suggestion of ideas for resolution. Many also wanted mediators to prepare thoroughly by talking with parties/counsel in advance of the mediation about substantive matters relating to key interests, the party's backgrounds, the real issues and what might stand in the way of settling.

It helps to look at the mediation process as a spectrum ranging from the facilitative to evaluative processes. Flexibility of approach and adoption is necessary, rather than rigid classification. That said, it is the author's view that we are witnessing a shift towards the evaluative mode. One reason for this is the growth of court-annexed mediation in which there is a discernible focus on rights and the involvement of lawyers and former judges as mediators. It does also appear that facilitative mediators are now acknowledging the need to be more involved with the parties in the process of overcoming their differences and reaching solutions. In the Asian context it is seen that the evaluative practice is called for, especially since the mediator is looked up to as an authority figure, guide and controller of the process, leading the way forward.

Moving the Parties away from Entrenched Positions to Interests

As mentioned above, in the separate sessions with the parties the mediator explores the parties' long-term interests and needs.[7] This is a key part of the mediation process. The parties come locked into their positions, the stands which they take on the issue. Sometimes these are at different points on an axis: for example, workers demanding a bonus of 20 per cent and management willing to give only 8.33 per cent. In these cases the entitlement is not in issue, the quantum is. Other cases may see parties fighting for the same thing — custody of a child, control of a company. In some cases there may be jointly owned assets which have to be allocated among the owners, such as a partition of property or an inheritance. Virtually every case sees contrary stands being taken and held. Discussions which centre around these positions usually result in reiteration, justification and

[7] Refer to Chapter 4 for a discussion on positions, interest, and needs.

further entrenchment. A key mediation strategy and skill lies in moving the parties from positions to interests.

Interests are long-standing in perspective; and when attention is switched to them, a few important things happen. The parties discover that their long-term interests do not collide, as their positions often do; they realise that continuous disputing works against such interests; and they frequently discover that each of them has some needs which are more important to one than the other. Two illustrations: productivity, profits and good remuneration are long-term interests which both employees and management share; for a divorcing couple with children, the long-standing concerns are emotional and-financial stability for the children, individual needs for security, and resolution of the conflict in order to move on in life. The shift to a longer-vision mode opens parties to the need for, and desirability of, a solution. Without such attention on interests, the discussion would remain stuck in predictable models of blame and accusations, with either no agreement or an unsatisfactory one.

Typical questions to uncover interests

- What do you want out of this mediation?
- What do you really want?
- Why do you want it? (The question "why" is excellent to reveal real interests.)
- What will you do with it? Can you do without it?
- What is the case of the other person? (Stating the other's case is difficult, but helps to at least partially understand it).
- What are the relationships between you? (For example, college, profession, personal, etc.)
- What are your plans for the future?
- How were things before all this started?
- What would be good for a future relationship?
- Is it important that this dispute be resolved? Why?
- What do you both agree on? Let us build on that.

Offers and Proposals

Once parties recognize their interests the next step is to seek offers from them that would help them realize their interests. In a joint session or separate sessions, the mediator should ask parties to think

of offers for settlement that they would be willing to make. This could also be something that the mediator leaves a party to think about while meeting the other party for a separate session. These offers could set the ball rolling towards settlement. While getting these offers, the mediator can start the process of getting the offer to be more reasonable.

Some typical questions for offers

- What can you suggest as a solution?
- What offer would you be willing to make to resolve this situation?
- Could you explain the basis of your offer?
- How far would this take us to settlement?
- How do you think the other side will react to your offer? How would you have reacted?
- Can you think of something/a solution which will be acceptable to you and the other side? Remember that it takes both of you to make an agreement.

The first round of offers is likely to see parties quite apart. This in itself can be a sobering factor, as the parties then have to factor in the demands and stand of the other side. This may lead to them giving up more, since usually people start out on the more extreme end. The process of negotiation continues, aided by the mediator, who clarifies and communicates, and helps parties to examine, modify and refine their offers and proposals.

When the initial exchange of offers does not move the parties towards settlement, it is necessary to widen the frame by engaging the parties in developing options for settlement, which can be creative and multiple.

Generating Options

Devising options for settlement represents a significant part of mediation.[8] This is where it differs most significantly from contentious litigation. Mediators encourage the parties to come up with their own options for settlement since the parties know best their desired outcome, their priorities and what and how much they are willing to forego. The key strategy is to give them the freedom to

[8] Refer to Chapter 9 for different creative strategies to generate solutions.

create options and bring them up for discussion; in other words, to brainstorm. Parties are told that they can, without reservation, come out with ideas for settlement, and that they cannot be held to or be bound by their suggestions by just making them. The object is to get all possible options out on the table.

With this one move, the focus of effort has changed from the battleground of conflict to exploring the contours of a settlement acceptable to both parties. Attacking the problem replaces attacking each other. All the ideas in the examples in Chapter 3 which led to positive solutions came as a result of creating room for the parties to devise options for settlement.

One instance deserves to be quoted. In the Company and Converter case,[9] the idea that finally clicked came from a junior officer of the Company. In the mediation session where ideas were asked for, he raised his hand, and quickly lowered it when he was spotted by the mediator. He did this thrice. Obviously he had an idea but was also apprehensive that it would be shot down. He was encouraged to speak his mind by the mediator stating this was the best way for creative ideas to emerge and that the process was risk free. Reassured, he stepped forward with his suggestion: 'If we continue to give conversion orders to this converter, we could recover our dues.' The instant reaction from his colleagues was: 'Never heard of once bitten, twice shy?' Hard glances from superiors were directed his way. (Not so risk free, this mediation thing, he must have thought.) However, the idea was put on the table, and taken up when other options were rejected. An unthinkable proposition became a wonderfully creative and successful solution, saving the Company money and loss of reputation. It wouldn't have emerged without the freedom to create options.

Another example is a specific performance suit filed by a buyer against the seller of land. This can lead to a sale on a revised valuation or the buyer accepting compensation to give up his claim, or open up options for joint development, sharing of land, part or deferred sale and so on.

Should mediators suggest options for settlement? Yes, they can, and especially in the Asian context, they will be expected to. It is permissible to indicate possibilities. Parties may be nudged to move towards areas and lines of thinking that seem productive of a solution.

[9] For a detailed analysis of the illustration, see Chapter 3.

However, mediators must maintain the important distinction between making a suggestion, and telling the parties what to do.

Parties should be encouraged to brainstorm options, to just put all possible ideas on the table without filtering them for chances of success. Mediators can themselves throw up options. It is better if all options are first put on the table rather than examining them one at a time. In a separate session the mediator can tell a party that if it is unwilling to show that it is putting forth an option, the mediator can suggest the option as his idea. Again, in a separate session, the mediator can tell a party that an option put forth by it will not be accepted by the other side.

Options need to be tested in relation to the interests of parties. Criteria should be developed for assessing options: meeting the interests of all the parties, acceptability, workability, durability, etc. It is also necessary to consider the need for saving face. Options that enlarge the pie are especially valuable. This can enable both parties to be in a win-win situation and be significantly better off than they were before the dispute started. An example is a dispute over a patent which leads to a profitable joint venture.

The concept of trade-offs is at the heart of the mediation process. It essentially calls for identifying aspects and components in the dispute and in the possible solution package that are more important to one party than the other. This enables a solution which can secure to each party what it desires the most, yielding to the other party on what is not so important or is less desirable. The classic mediation example to illustrate this is the case of two parties fighting over the single egg of a rare bird,[10] till they realise that one needs the yolk, and the other the shell, and that they can now co-operate to secure and share the egg, each taking what is most important to it. Real-life situations are nowhere as easy of admitting such 100 per cent win-win solutions, but the point is, as the successes of mediation show, that given communication and the opportunity to explore options, possible lines of settlement do start to appear and the parties can identify differential needs and priorities. Working on these produces settlement agreements that substantially satisfy all parties to the dispute. Thus, in the

[10] For a detailed analysis of the illustration, see Chapter 5.

professional partners' case,[11] one was willing to yield several pending contracts because he had some new lucrative ones coming to him which depended on the dispute being resolved. The Hotel[12] did the trade-off of agreeing to forego a portion of its claim for the larger interest of preserving a profitable commercial relationship and future business. In a dispute over property, it can turn out that one is more interesting in establishing ownership, while the other values the right to use. Mediators can develop package proposals that contain such barters and satisfy the important interests of each party. More movement can be generated once attention is focused on such a package deal, rather than on disparate issues. Discussions on trade-offs can proceed on a contingent basis: 'If you give up here, you will receive that.'

Some suggestions for options

- Think of something — an action, an outcome, etc. — which is good for you, and the other party.
- How can we move forward in this matter?
- What do you think can be done in this situation? What can you do?
- Just put options / ideas /suggestions for resolution on the table.
- Do you think this — assessment, offer, course — is realistic?
- Would you move forward if you got an offer like this?
- Is this really your bottom line?
- What is your proposal?
- What range will you accept?
- If you could imagine a solution, what would it be?
- Will you accept this package deal?
- Put yourself in the shoes of the other — Can you picture yourself as the other party? Why do you think the other party wants this? What would you do if you were the other party? Can you think of a reason why the other party may not accept your proposal? How can you modify your proposal to secure acceptance?

[11] For a detailed analysis of the illustration, see Chapter 3.
[12] For a detailed analysis of the illustration, see Chapter 3.

Options must be worked on, discussed with the respective parties, evaluated against the criteria for agreement, refined and fine-tuned till the stage of acceptability is reached. This can be hard work. The parties will baulk, will refuse to consider and will be obdurate. Mediators can expect to encounter blocks, resistance, stubbornness — some valid, others understandable, and some sheer pig-headed. The mediator's skill and powers of persuasion will be needed to move parties beyond these obstruction points by making changes, proposing alternative formulations, building on areas of agreement, and introducing a fresh perspective. Once the process is appreciated and the mediator trusted, the parties respond; they communicate better, become more constructive, voice ideas and work at possible lines of solutions. Reaching this stage, the parties become more responsive as they see the positives; their initial skepticism gives way to interest and then to actually seeing the possibility of an agreement — the light at the end of the tunnel.

Sometimes parties may be too far away in their offers and/or unable to devise or develop options for settlement which can yield an agreement. They will refuse to move from their stands. This is called an impasse. There are a range of mediator strategies to overcome impasse. These are discussed in Chapter 9. Some key strategies in the armoury of a mediator are legal realism, lack of alternatives to settlements, going back to basics, identifying the block, stressing relationships and other problem solving approaches.

Crossing an impasse enables parties to get back on the track of devising options and making proposals. The mediator will continue to be engaged with them in this. Sometimes a stage is reached where the parties themselves engage in discussion with each other. This is a positive aspect since it shows the extent to which the communication between the parties has improved. So the process of discussion, considering offers, revising and refining proposals, and resolving impasse continues till parties reach agreement.

The mediator must beware, though, when he thinks the end is near. This is when he may encounter surprisingly stiff resistance from the parties. The last bit is sometimes more difficult to cross than the big stretches in between. Mediators have seen parties give up millions in claims, and yet get stuck on the last few thousands. Giving up a dispute is sometimes not an easy process; for some people it has

become a part of their lives. Resistance at the last post should, therefore, be expected.

The Final Steps

Then comes the task of putting the agreement into writing. The parties and their lawyers can draft the agreement; usually the mediator would be asked to assist. It is advisable to keep the language simple, straightforward and crisp.[13] The broad outlines of an agreement can be developed and then the details worked in. Tax implications should be considered. The parties should sign the agreement. Cases vary and each will have its own terms of settlement. Here is a generalised list of what may figure in a settlement agreement:

The essentials of a settlement agreement

- Nature of dispute, briefly mentioned
- The coming to mediation, appointment of mediator, dates of sessions
- That settlement has taken place, in whole or part
- Performance — who is to do what, and when (be specific)
- Payment of interest
- Other terms and conditions
- Compliance and consequences of non-compliance
- Penalty for delay
- Withdrawal of legal proceedings
- Monitoring and review (if needed)

Having looked at the theory of how to conduct a mediation, let us now visit in the next chapter one actually being conducted.

[13] Elements of an agreement are spelt out in Chapter 11 and Annexure 3.

Legality of Referral of Criminal Compoundable Cases to Mediation (para 59-62)

Dayawati v. Yogesh Kumar Gosain

243 (2017) Delhi Law Times 117 (DB), decided on October 17, 2017

GITA MITTAL, ACTING CHIEF JUSTICE

1. The legal permissibility of referring a complaint cases under Section 138 of the NI Act for amicable settlement through mediation; procedure to be followed upon settlement and the legal implications of breach of the mediation settlement is the subject matter of this judgment.

2. The brief Facts:

Before dealing with the questions raised before us, it is necessary to briefly note some essential facts of the case. The appellant Smt. Dayawati ("*complainant"* hereafter) filed a complaint under Section 138 of the NI Act, complaining that the respondent Shri Yogesh Kumar Gosain herein *("respondent"* hereafter) had a liability of Rs.55,99,600/- towards her as on 7th April, 2013 as recorded in a regular ledger account for supply of fire-fighting goods and equipment to the respondent on different dates and different quantities. In part discharge of this liability, the respondent was stated to have issued two account payee cheques in favour of the complainants of Rs.11,00,000/- (Cheque No.365406/- dated 1st December, 2014) and Rs.16,00,000/- (Cheque No.563707 dated 28th November, 2014). Unfortunately, these two cheques were dishonoured by the respondent's bank on presentation on account of "*insufficiency of funds".*

7. As a result, the complainant was compelled to serve a legal notice of demand on the respondent which, when went unheeded, led to the filing of two complaint cases under Section 138 of the NI Act before the Patiala House Courts, New Delhi being CC Nos.89/1/15 and 266/1/15. In these proceedings, both parties had expressed the intention to amicably settle their disputes. Consequently, by a common order dated 1st April, 2015 recorded in both the complaint cases, the matter was referred for mediation to the Delhi High Court Mediation and Conciliation Centre.

8. We extract hereunder the operative part of the order dated 1st April, 2015 which reads as follows :

> *"... Ld. Counsel for accused submits that accused is willing to explore the possibilities of compromise. Ld. Counsel for complainant is also interested (sic) in compromise talk. Let the matter be referred to Mediation Cell, High Court Delhi, Delhi. Parties are directed to appear before the Mediation Cell, Hon'ble High Court, Delhi on 15.04.2015 at 2:30 p.m."*

9. It appears that after negotiations at the Delhi High Court Mediation and Conciliation Centre, the parties settled their disputes under a common settlement agreement dated 14th May, 2015 under which the accused agreed to pay a total sum of Rs.55,54,600/- to the complainant as full and final settlement amount in installments with regard to which a mutually agreed payment schedule was drawn up. It was undertaken that the complainant would withdraw the complaint cases after receipt of the entire amount. In the agreement drawn up, the parties agreed to comply with the terms of the settlement which was signed by both the parties along with their respective counsels.

10. This settlement agreement was placed before the court on 1st June, 2015 when the following order was recorded:

> *"File received back from the Mediation Centre with report of settlement. Settlement agreement dated 14.05.2015 gone through. At joint request, put up for compliance of abovesaid settlement agreement and for making of first installment on 30.06.2015"*

11. Unfortunately, the accused/respondent herein failed to comply with the terms of the settlement. Though vested with the obligation thereunder to pay a sum of Rs.11,00,000/- as the first installment on 25th June, 2015, he paid only a sum of Rs.5,00,000/- to the complainant through RTGS without giving any justification. On the 30th June of 2015, the Metropolitan Magistrate consequently recorded thus:

> *"... Ld. Counsel for complainant submits that the accused has not made the payment of first installment in terms of mediation settlement dated 14.05.2015. Ld. Counsel for complainant further submits that accused was to pay first installment of* Rs.*11,00,000/- on or before the 25.06.2015 however he has paid only* Rs.*5,00,000/- through RTGS. No reasonable explanation for the non-payment of full amount of first installment is given by the accused. Further, no assurance is given by the accused for making of the due installments within the stipulated time.*

> *Considering the facts of the case and submissions on behalf of both the parties, it is apparent that the accused is not willing to comply with the terms and conditions of the mediation settlement. Hence, mediation settlement failed.*
>
> *Let the matter be proceeded on merit, put up on 14.08.2015"*

12. Thereafter, two more opportunities were given by the Metropolitan Magistrate on 14th August, 2015 and 21st August, 2015 to the accused to comply with the settlement. Finally, in view of the continued non-compliance, the matter was listed for framing of notice on 28th September, 2015 and trial on merits.

13. In the meantime, the Negotiable Instruments (Amendment) Ordinance, 2015, received the assent of the President of India on the 26th of December, 2016. On account of promulgation of the ordinance, Section 142 of the Negotiable Instruments Act, 1881 stood amended with regard to jurisdiction of offences under Section 138 of the enactment and therefore these cases stood transferred from Patiala House Courts to Tis Hazari Courts at which stage the matter came to be placed before the ld. referral judge.

14. At this stage, an application dated 16th November, 2015 was filed by the complainant seeking enforcement of the settlement agreement dated 14th May, 2015 placing reliance on the judicial precedents reported at ***2013 SCC OnLine Del 124 Hardeep Bajaj v. ICICI; 2015 SCC OnLine Del 7309 Manoj Chandak v. M/s Tour Lovers Tourism (India) Pvt Ltd and 2015 SCC OnLine Del 9334 M/s Arun International v. State of Delhi.*** The complainant urged that the settlement agreement was arrived at after long negotiations and meetings; that it was never repudiated by the accused nor challenged on grounds of it being vitiated for lack of free consent or any other ground and lastly, that the accused having paid part of the first agreed installment, has also acted upon the mediation settlement and cannot be allowed to wriggle free of his obligation under the same.

15. The respondent, on the other hand, argued that the settlement agreement was not binding contending primarily, for the first time, that the settlement amount was exorbitant and onerous pointing out that the complaints were filed with regard to two cheques which were for a cumulative amount of Rs.27,00,000/- while the settlement amount was of Rs.55,54,600/- and this by itself was evidence that the agreement was unfair, arbitrary and not binding on the accused. It was further urged that on receipt of the case from the mediation cell, the statement of the parties ought to have been recorded before the court whereby the parties would have adopted the mediation settlement agreement so that the same bore the *imprimatur* of the court. As per the respondent, absence of such statement in the case denuded the settlement agreement of its binding nature and efficacy.

16. The ld. Metropolitan Magistrate was of the view that these questions had arisen, not just in this case, but a plethora of other cases as well. Consequently, the order dated 13th of January 2016 was passed making the aforestated reference under Section 395 of the Cr.P.C. to this court. At the same time, so far as the complaints under Section 138 of the NI Act are concerned, the ld. MM additionally directed thus:

> *"In view of the question of law that has arose in the present case, the decision on which is necessary for further proceedings and a proper adjudication of the present case – a reference has been made u/s 395 of the CrPC for consideration and guidance of the Hon'ble High Court of Delhi.*
>
> *The office attached to this court is directed to send this Reference Order to the Ld. Registrar General, Hon'ble High Court of Delhi in appropriate manner and through proper channel.*
>
> *List the matter now on 06.06.2016 awaiting the outcome of the reference and clarity on the legal issue."*

VIII. Dispute resolution encouraged in several cases by the Supreme Court in non-compoundable cases as well

59. We note that there have been several instances when the Supreme Court has approved exercise of inherent powers under Section 482 of the Cr.P.C. by the High Court for quashing criminal cases on account of compromise/settlement even though they are not included in the list of compoundable cases under Section 320 of the Cr.P.C. ***In (2012) 10 SCC 303, Gian Singh v. State of Punjab,*** it was held that this was in exercise of statutory power of the High Court under Section 482 of the Cr.P.C. The relevant extract of the judgment is reproduced as under:

> "*61. … But the criminal cases having overwhelmingly and predominatingly civil flavour stand on a different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, the High Court may quash the criminal proceedings if in its view, because of the compromise between the offender and the victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing*

> *the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."*

60. In a recent pronouncement dated 4th October, 2017, reported at ***2017 SCC OnLine SC 1189 Parabatbhai Aahir @ Parbatbhai Bhimsinhabhai Karmur and Ors v. State of Gujarat and Anr*** a three-Judge bench of the Supreme Court speaking through D.Y. Chandrachud, J. cited with approval, inter alia, the judgment in ***Gian Singh*** reiterating that in exercise of its inherent jurisdiction under Section 482 of the Cr.P.C, the High Court is empowered to quash FIRs/Criminal Proceedings emanating from non-compoundable offences if the ends of justice and the facts of the case, so warrant. While, so approving the Supreme Court, laid down the exposition of the law in the form of exhaustive guidelines which are extracted thus:

> *'(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court;*
>
> *(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is noncompoundable.*
>
> *(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;*
>
> *(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;*

(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

(vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

(x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance.'

61. The judicial precedent in **(2013) 5 SCC 226, K. Srinivas Rao v. D.A. Deepa** is in the context of a complaint filed by the respondent wife under Section 498A of the Indian Penal Code, against the appellant husband and his family members, the offence under Section 498A of the IPC being non-compoundable. Noting that mediation, as a method of alternative dispute redressal had got legal recognition, observations regarding settlements of matrimonial disputes were made in paras 39 and 46 by the Supreme Court to the courts dealing with matrimonial matters which read thus :

> *"39. Quite often, the cause of the misunderstanding in a matrimonial dispute is trivial and can be sorted out. Mediation as a method of alternative dispute resolution has got legal recognition now. We have referred several matrimonial disputes to mediation centres. Our experience shows that about 10% to 15% of matrimonial disputes get settled in this Court through various mediation centres. We, therefore, feel that at the earliest stage i.e. when the dispute is taken up by the Family Court or by the court of first instance for hearing, it must be referred to mediation centres……*
>
> xxx xxx xxx
>
> *44. We, therefore, feel that though offence punishable under Section 498-A IPC is not compoundable, in appropriate cases if the parties are willing and if it appears to the criminal court that there exist elements of settlement, it should direct the parties to explore the possibility of settlement through mediation. This is, obviously, not to dilute the rigour, efficacy and purport of Section 498-A IPC, but to locate cases where the matrimonial dispute can be nipped in bud in an equitable manner. The Judges, with their expertise, must ensure that this exercise does not lead to the erring spouse using mediation process to get out of clutches of the law. During mediation, the parties can either decide to part company on mutually agreed terms or they may decide to patch up and stay together. In either case for the settlement to come through, the complaint will have to be quashed. In that event, they can approach the High Court and get the complaint quashed. If, however, they choose not to settle, they can proceed with the complaint. In this exercise, there is no loss to anyone. If there is settlement, the parties will be saved from the trials and tribulations of a criminal case and that will reduce the burden on the courts which will be in the larger public interest. Obviously, the High Court will quash the complaint only if after considering all circumstances it finds the settlement to be equitable and*

genuine. Such a course, in our opinion, will be beneficial to those who genuinely want to accord a quietus to their matrimonial disputes.

xxx xxx xxx

46. We, therefore, issue directions, which the courts dealing with the matrimonial matters shall follow.

Xxx xxx xxx

46.2. The criminal courts dealing with the complaint under Section 498-A IPC should, at any stage and particularly, before they take up the complaint for hearing, refer the parties to mediation centre if they feel that there exist elements of settlement and both the parties are willing. However, they should take care to see that in this exercise, rigour, purport and efficacy of Section 498-A IPC is not diluted. Needless to say that the discretion to grant or not to grant bail is not in any way curtailed by this direction. It will be for the court concerned to work out the modalities taking into consideration the facts of each case.

46.3. All mediation centres shall set up pre-litigation desks/clinics; give them wide publicity and make efforts to settle matrimonial disputes at pre-litigation stage."

62. Therefore, the Supreme Court has recognized the permissibility of the High Court's quashing the criminal prosecutions in exercise of their inherent jurisdiction under Section 482 of the Cr.P.C. on a consideration of the subject matter of the cases. The Supreme Court has accepted compromises in non-compoundable offences upon evaluation of the genuineness, fairness, equity and interests of justice in continuing with the criminal proceedings relating to noncompoundable offences, after settlement of the entire dispute especially in offences arising from *"commercial, financial, civil, partnership*" or such like transactions or relating to matrimonial or family disputes which are private in nature.

United Nations Convention on International Settlement Agreements Resulting from Mediation, 2018
(SingaporeConvention on Mediation)

Preamble

The Parties to this Convention,

Recognizing the value for international trade of mediation as amethod for settling commercial disputes in which the parties in disputerequest a third person or persons to assist them in their attempt tosettle the dispute amicably,

Noting that mediation is increasingly used in international anddomestic commercial practice as an alternative to litigation,

Considering that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to thetermination of a commercial relationship, facilitating the administrationof international transactions by commercial parties and producingsavings in the administration of justice by States,

Convinced that the establishment of a framework for internationalsettlement agreements resulting from mediation that is acceptableto States with different legal, social and economic systems wouldcontribute to the development of harmonious international economic relations,

Have agreed as follows:

Article 1. Scope of application

1. This Convention applies to an agreement resulting frommediation and concluded in writing by parties to resolve a commercialdispute ("settlement agreement") which, at the time of its conclusion,is international in that:

(a) At least two parties to the settlement agreement have theirplaces of business in different States; or

(b) The State in which the parties to the settlement agreementhave their places of business is different from either:

(i) The State in which a substantial part of the obligationsunder the settlement agreement is performed; or

(ii) The State with which the subject matter of thesettlement agreement is most closely connected.

2. This Convention does not apply to settlement agreements:

(a) Concluded to resolve a dispute arising from transactionsengaged in by one of the parties (a consumer) for personal, familyor household purposes;

(b) Relating to family, inheritance or employment law.

3. This Convention does not apply to:

(a) Settlement agreements:

(i) That have been approved by a court or concluded inthe course of proceedings before a court; and

(ii) That are enforceable as a judgment in the State ofthat court;

(b) Settlement agreements that have been recorded and areenforceable as an arbitral award.

Article 2. Definitions

1. For the purposes of article 1, paragraph 1:
(a) If a party has more than one place of business, the relevantplace of business is that which has the closest relationship to thedispute resolved by the settlement agreement, having regard to thecircumstances known to, or contemplated by, the parties at the timeof the conclusion of the settlement agreement;
(b) If a party does not have a place of business, reference isto be made to the party's habitual residence.

2. A settlement agreement is "in writing" if its content is recordedin any form. The requirement that a settlement agreement be inwriting is met by an electronic communication if the informationcontained therein is accessible so as to be useable for subsequentreference.

3. "Mediation" means a process, irrespective of the expressionused or the basis upon which the process is carried out, wherebyparties attempt to reach an amicable settlement of their disputewith the assistance of a third person or persons ("the mediator")lacking the authority to impose a solution upon the parties to thedispute.

Article 3. General principles

1. Each Party to the Convention shall enforce a settlementagreement in accordance with its rules of procedure and under theconditions laid down in this Convention.

2. If a dispute arises concerning a matter that a party claims wasalready resolved by a settlement agreement, a Party to the Conventionshall allow the party to invoke the settlement agreement in accordancewith its rules of procedure and under the conditions laid down inthis Convention, in order to prove that the matter has already beenresolved.

Article 4. Requirements for reliance on settlement agreements

1. A party relying on a settlement agreement under this Conventionshall supply to the competent authority of the Party to the Conventionwhere relief is sought:
(a) The settlement agreement signed by the parties;
(b) Evidence that the settlement agreement resulted frommediation, such as:
(i) The mediator's signature on the settlement agreement;
(ii) A document signed by the mediator indicating thatthe mediation was carried out;
(iii) An attestation by the institution that administeredthe mediation; or
(iv) In the absence of (i), (ii) or (iii), any other evidenceacceptable to the competent authority.

2. The requirement that a settlement agreement shall be signed bythe parties or, where applicable, the mediator is met in relation to anelectronic communication if:
(a) A method is used to identify the parties or the mediatorand to indicate the parties' or mediator's intention in respect of theinformation contained in the electronic communication; and

(b) The method used is either:
(i) As reliable as appropriate for the purpose for whichthe electronic communication was generated or
communicated, in the light of all the circumstances,including any relevant agreement; or
(ii) Proven in fact to have fulfilled the functionsdescribed in subparagraph (a) above, by itself ortogether with further evidence.

3. If the settlement agreement is not in an official language of theParty to the Convention where relief is sought, the competentauthority may request a translation thereof into such language.

4. The competent authority may require any necessary documentin order to verify that the requirements of the Convention have beencomplied with.

5. When considering the request for relief, the competent authorityshall act expeditiously.

Article 5. Grounds for refusing to grant relief
1. The competent authority of the Party to the Convention whererelief is sought under article 4 may refuse to grant relief at the requestof the party against whom the relief is sought only if that partyfurnishes to the competent authority proof that:
(a) A party to the settlement agreement was under someincapacity;
(b) The settlement agreement sought to be relied upon:
(i) Is null and void, inoperative or incapable of beingperformed under the law to which the parties havevalidly subjected it or, failing any indication thereon,under the law deemed applicable by the competent
authority of the Party to the Convention whererelief is sought under article 4;
(ii) Is not binding, or is not final, according to its terms;or
(iii) Has been subsequently modified;
(c) The obligations in the settlement agreement:
(i) Have been performed; or
(ii) Are not clear or comprehensible;
(d) Granting relief would be contrary to the terms of thesettlement agreement;
(e) There was a serious breach by the mediator of standardsapplicable to the mediator or the mediation without which breachthat party would not have entered into the settlement agreement; or
(f) There was a failure by the mediator to disclose to theparties circumstances that raise justifiabledoubts as to the mediator'simpartiality or independence and such failure to disclose had amaterial impact or undue influence on a party without which failurethat party would not have entered into the settlement agreement.

2. The competent authority of the Party to the Convention whererelief is sought under article 4 may also refuse to grant relief if it findsthat:
(a) Granting relief would be contrary to the public policy ofthat Party; or

(b) The subject matter of the dispute is not capable ofsettlement by mediation under the law of that Party.

Article 6. Parallel applications or claims

If an application or a claim relating to a settlement agreement hasbeen made to a court, an arbitral tribunal or any other competentauthority which may affect the relief being sought under article 4,the competent authority of the Party to the Convention where suchrelief is sought may, if it considers it proper, adjourn the decision andmay also, on the request of a party, order the other party to givesuitable security.

Article 7. Other laws or treaties

This Convention shall not deprive any interested party of any rightit may have to avail itself of a settlement agreement in the mannerand to the extent allowed by the law or the treaties of the Party to
the Convention where such settlement agreement is sought to berelied upon.

Article 8. Reservations

1. A Party to the Convention may declare that:
(a) It shall not apply this Convention to settlement agreementsto which it is a party, or to which anygovernmental agencies or anyperson acting on behalf of a governmental agency is a party, to theextent specified in the declaration;
(b) It shall apply this Convention only to the extent that theparties to the settlement agreement have agreed to the application ofthe Convention.

2. No reservations are permitted except those expressly authorizedin this article.

3. Reservations may be made by a Party to the Convention at anytime. Reservations made at the time of signature shall be subject toconfirmation upon ratification, acceptance or approval. Suchreservations shall take effect simultaneously with the entry into forceof this Convention in respect of the Party to the Conventionconcerned. Reservations made at the time of ratification, acceptanceor approval of this Convention or accession thereto, or at the timeof making a declaration under article 13 shall take effect simultaneouslywith the entry into force of this Convention in respect of the Partyto the Convention concerned. Reservations deposited after the entryinto force of the Convention for that Party to the Convention shalltake effect six months after the date of the deposit.

4. Reservations and their confirmations shall be deposited withthe depositary.

5. Any Party to the Convention that makes a reservation underthis Convention may withdraw it at any time. Such withdrawals areto be deposited with the depositary, and shall take effect six months
after deposit.

Article 9. Effect on settlement agreements

The Convention and any reservation or withdrawal thereof shallapply only to settlement agreements concluded after the date whenthe Convention, reservation or withdrawal thereof enters into forcefor the Party to the Convention concerned.

Article 10. Depositary

The Secretary-General of the United Nations is hereby designated as
the depositary of this Convention.

Article 11. Signature, ratification, acceptance, approval,accession

1. This Convention is open for signature by all States in Singapore,on 7 August 2019, and thereafter at United Nations Headquarters inNew York.
2. This Convention is subject to ratification, acceptance or approvalby the signatories.
3. This Convention is open for accession by all States that are notsignatories as from the date it is open for signature.
4. Instruments of ratification, acceptance, approval or accessionare to be deposited with the depositary.

Alternative Dispute Resolution, including Arbitration, Mediation and Conciliation

All India Bar Examination Preparatory Materials
By Dr. Aman Hingorani

Introduction

Article 39A of the Constitution directs the State to secure that the operation of the legal system promotes justice, on the basis of equal opportunity, and in particular, to provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

The Supreme Court has recognized the "right to speedy trial" as being implicit in Article 21 of the Constitution. (*Hussainara Khatoon v State of Bihar*, AIR 1979 SC 1360).

To give effect to the said mandate, Parliament has recognized various alternative dispute resolution (**ADR**) mechanisms like arbitration, conciliation, mediation and Lok Adalats to strengthen the judicial system.

Section 89 of the Code of Civil Procedure, 1908 (**the Code**) expressly provides for settlement of disputes through ADR.

Section 89 (1) of the Code provides that where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for arbitration, conciliation, judicial settlement including settlement through Lok Adalat or mediation.

Section 89 (2) of the Code provides that where a dispute has been so referred

- for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (**the 1996 Act**) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act.
- to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of Section 20 (1) of the Legal Services Authorities Act 1987 (**the 1987 Act**) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat.
- for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all other provisions of the 1987 Act shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act.
- for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

Order X Rule 1 A of the Code further provides that after recording the admissions and denial, the Court shall direct the parties to the suit to opt either mode of the settlement outside the Court as may be opted by the parties. Order X Rule 1B of the Code provides for the fixing of the date of appearance before the conciliatory forum or authority, while Order X Rule 1C contemplates the referral of the matter back to the Court consequent to the failure of efforts of conciliation.

The Code contemplates recourse to ADR in several other circumstances. Order XXXII-A, which pertains to suits relating to matters concerning the family, imposes a duty on the Court to assist the parties, where it is possible to do so consistently with the nature and circumstances of the case, in arriving at a settlement in respect of their dispute and empowers it to secure the assistance of a welfare expert for such purpose. Similarly, Order XXVII Rule 5 (B) mandates that in every suit or proceeding to which the Government, or a public officer acting in his official capacity, is a party, it shall be the duty of the Court to make, in the first instance, every endeavour, where it is possible to do so consistently with the nature and circumstances of the case, to assist the parties in arriving at a settlement in respect of the subject matter of the suit.

Model Civil Procedure Alternative Dispute Resolution Rules

The 1996 Act and the 1987 Act do not contemplate a situation where the Court asks the parties to choose one of the ADR mechanism, namely, arbitration, conciliation or through Lok Adalat. These Acts, thus, are applicable only from the stage after reference is made under Section 89 of the Code. (*Salem Advocates Bar Association v Union of India*, AIR 2005 SC 3353).

In view of right to speedy trial being implicit in Article 21 of the Constitution and in order to provide fair, speedy and inexpensive justice to the litigating public, the Supreme Court has recommended the High Courts to adopt, with or without modification, the model Civil Procedure Alternative Dispute Resolution and Mediation Rules framed by the Law Commission of India. (*Salem Advocates Bar Association v Union of India*, AIR 2005 SC 3353)

The model Alternative Dispute Resolution Rules framed by the Law Commission lay down the procedure for directing parties to opt for alternative modes of settlement. The Court is mandated to give guidance as it deems fit to the parties, by drawing their attention to the relevant factors which the parties will have to take into account, before exercising their option as to the particular mode of settlement. The Rules provide for the procedure for reference by the Court to the different modes of settlement, as also the procedure for the referral back to the Court and appearance before the Court upon failure to settle disputes by ADR mechanisms. (*Salem Advocates Bar Association v Union of India*, AIR 2005 SC 3353).

It is permissible for the High Courts to frame rules under Part X of the Code covering the manner in which the option to one of the ADRs can be made. The rules so framed by the High Courts are to supplement the rules framed under the Family Court Act, 1984. (*Salem Advocates Bar Association v Union of India*, AIR 2005 SC 3353).

Arbitration

Arbitration is an adjudicatory process in which the parties present their disputes to a neutral third party (arbitrator) for a decision. While the arbitrator has greater flexibility than a Judge in terms of procedure and rules of evidence, the arbitration process is akin to the litigation process.

A valid arbitration must be preceded by an arbitration agreement which should be valid as per the Indian Contract Act, 1872. The parties to an agreement must have the capacity to enter into a contract in terms of Sections 11 and 12 of the said Act.

Apart from statutory requirement of a written agreement, existing or future disputes and an intention to refer them to arbitration (Section 7, 1996 Act), other attributes which must be present for an agreement to be considered an arbitration agreement are

- the arbitration agreement must contemplate that the decision of the arbitral tribunal will be binding on the parties to the agreement.

- the jurisdiction of the arbitral tribunal to decide the rights of the parties must derive either from the consent of the parties or from an order of the Court or from the statute, the terms of which make it clear that the process is to be arbitration.
- the agreement must contemplate that substantive rights of the parties will be determined by the arbitral tribunal.
- the arbitral tribunal must determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides.
- the agreement of the parties to refer their disputes to the decision of the arbitral tribunal must be intended to be enforceable in law.
- the agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when the reference is made to the tribunal.
- the agreement should contemplate that the tribunal will receive evidence from both sides and hear their contentions or atleast give the parties an opportunity to put them forward.

(K. K. Modi v K. N. Modi, AIR 1998 SC 1297, *Bharat Bhushan Bansal v U.P. Small Industries Corporation*, AIR 1999 SC 899, *U.P Rajkiya Nirgam Ltd. V Indure (P) Ltd*., AIR 1996 SC 1373).

It is possible to spell out an arbitration agreement in a contract by correspondence with the Government. (*P.B. Ray v Union of India*, AIR 1973 SC 908). But even such contract by correspondence with the Government has to be entered into by the officer duly authorized to enter into contract on behalf of the Government under Article 299 of the Constitution. A contract by a person not so authorized is void. *(State of Punjab v Om Prakash*, AIR 1988 SC 2149).

Arbitration and Expert Determination

Expert determination is the referral of a dispute to an independent third party to use his expertise to resolve the dispute. Such determination is helpful for determining valuation, intellectual property or accounting disputes. The expert is not required to give reasons for his determination. However, the determination of an expert is not enforceable like an arbitral award. Nor it can be challenged in a court of law.

To hold that an agreement contemplates arbitration and not expert determination, the Courts have laid emphasis on

- existence of a "formulated dispute" as against an intention to avoid future disputes.
- the tribunal or forum so chosen is intended to act judicially after taking into account relevant evidence before it and the submission made by the parties before it.
- the decision is intended to bind the parties.

(K. K. Modi v K. N. Modi, AIR 1998 SC 1297).

Nomenclature used by the parties may not be conclusive. One has to examine the true intent and purpose of agreement. The terminology "arbitrator" or "arbitration" is persuasive but not always conclusive.

Illustration : Two groups of a family arrived at a MoU for resolving the disputes and differences amongst them. The relevant clause of this memorandum purported to prevent any further disputes between the two groups, in connection with division of assets in agreed

proportions, after their valuation by a named body and under a scheme of division by another named body. It further intended to clear any other difficulties which may arise in implementation of the agreement by leaving it to the decision of the Chairman of the Financial Corporation, who was entitled to nominate another person for deciding another question. The clause did not contemplate any judicial determination or recording of evidence. It was held to be a case of expert determination and not arbitration, even though the parties in correspondence used the word 'arbitration'. (*K. K. Modi v K. N. Modi,* AIR 1998 SC 1297).

Institutional Arbitration

The contract between the parties often contains an arbitration clause which designates an institution to administer and conduct the arbitration process under pre-established set of rules. Examples of such institutions are the Court of Arbitration of International Chambers of Commerce, London Court of International Arbitration and American Arbitration Association. Should the administrative costs of the institution, which may be substantial, be not a factor, the institutional approach is generally preferred. The advantages of institutional arbitration to those who can afford it are

- availability of pre-established and well tried rules and procedures which assure that arbitration will get off the ground.
- availability of administrative and technical assistance.
- availability of a list of qualified and experienced arbitrators.
- appointment of arbitrators by the institution should the parties request it.
- physical facilities and support services for arbitrations.
- assistance in encouraging reluctant parties to proceed with arbitration and
- final review and perspective of a valid award ensuring easier recognition and enforcement.
- operational benefits of the parties rarely disputing proper notice.
- availability of panel of arbitrators to fall back on if appointment is challenged or the arbitrator resigns or is replaced.
- The primary disadvantages of institutional arbitration are that it is slow and rigid.
- administrative fees for services and use of facilities may be high in disputes over large amounts, especially where fees are related to the amount in dispute. For lesser amounts in dispute, institutional fees may be greater than the amount in controversy.
- the institution's bureaucracy may lead to added costs and delays.

Ad-hoc Arbitration

Ad hoc arbitration is a proceeding constructed by the parties themselves (and not a stranger or institution) with rules created solely for that specific case. The parties make their own arrangement with respect to all aspects of the arbitration, including the law which will be applied, the rules under which the arbitration will be carried out, the method for the selection of the arbitrator, the place where arbitration will be held, the language, and finally and most importantly, the scope and issues to be resolved by means of arbitration.

If the parties approach the arbitration in a spirit of cooperation, ad hoc proceedings can be more flexible, suitable, cost effective and faster than an institutional arbitration proceeding.

However, the disadvantages of ad hoc arbitration are

- there is high party control which entails the need of party cooperation right upto the end since there are no pre established set of rules.
- the parties run risk of drafting inoperative arbitral clauses. Clauses are often drafted in great detail and which are rarely workable and are susceptible to different interpretations, leading to litigation.
- the arbitral award itself may be rendered unenforceable if wrong procedure is prescribed and followed
- it suffers from lack administrative supervision to schedule hearings, fees, engagement of translators etc. It is also attendant with lack of facilities and infrastructure.

Ad hoc arbitration need not be entirely divorced from institutional arbitration. Parties can choose choosing applicability of rules of an institution to conduct arbitration without giving function to institution. Conversely, the parties can designate an institution to administer the arbitration proceeding but excluding applicability of part of its rules. The parties can simply require an institution to only appoint the arbitrator for them. While parties in ad hoc arbitration adopt own set of rules, it is always open to them to adopt the rules of an arbitral institution adapted to their case or of Model Law of UNCITRAL.

Statutory Arbitration

There are a large number of Central and State Acts, which specifically provide for arbitration in respect of disputes arising on matters covered by those enactments. Instances of such enactments are the Electricity Act, 1910 and Electricity (Supply) Act, 1948. In view of the position that such an arbitration would also governed by the 1996 Act, the provision for statutory arbitration is deemed to be arbitration agreement (*Grid Corporation of Orissa v Indian Change Chrome Ltd.*, AIR 1998 Ori 101)**.**

Fast Track Arbitration/Documents only Arbitration

Should the parties agree that no oral hearings shall be held, the arbitral tribunal could fast track the arbitration process by making the award only on the basis of documents.

Arbitration under the 1996 Act

The 1996 Act repeals the earlier law on arbitration contained in the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961.

The 1996 Act seeks to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation, taking into account the UNCITRAL Model Law and Rules. However, the said Model Law and Rules do not become part of the Act so as to become an aid to construe the provisions of the Act. (*Union of India v East Coast Boat Builders and Engineers Ltd*., AIR 1999 Del 44).

The 1996 Act is a long leap in the direction of ADR. The decided cases under the Arbitration Act, 1940 have to be applied with caution for determining the issues arising for decision under the

1996 Act (*Firm Ashok Traders v Gurumukh Das Saluja*, (2004) 3 SCC 155.) Interpretation of the provisions of the 1996 Act should be independent and without reference to the principles underlying the Arbitration Act, 1940 (*Sundaram Finance Ltd v NEPC India Ltd*, AIR 1999 SC 565).

Under the Arbitration Act, 1940, there was a procedure for filing and making an award a rule of Court i.e. a decree, after the making of the award and prior to its execution. Since the object of the 1996 Act is to provide speedy and alternative solution to the dispute, the said procedure is eliminated in the 1996 Act. Even for enforcement of a foreign award, there is no need to take separate proceedings, one for deciding the enforceability of the award to make it a rule of the Court or decree and the other to take up execution thereafter. The Court enforcing the foreign award can deal with the entire matter in one proceeding. (*Fuerst Day Lawson Ltd. v Jindal Exports Ltd*., AIR 2001 SC 2293).

Commencement of 1996 Act

Though the 1996 Act received the Presidential assent on 16 August 1996, but it, being a continuation of the Arbitration and Conciliation Ordinance, is deemed to have been effective from 25 January 1996 i.e. the date when the first Ordinance was brought in force. (*Fuerst Day Lawson Ltd. v Jindal Exports Ltd*., AIR 2001 SC 2293). Therefore, the provisions of the Arbitration Act, 1940, will continue to apply to the arbitral proceedings commenced before 25 January 1996. (*Shetty's Construction Co. (P) Ltd. v Konkan Railway Construction,* (1998) 5 SCC 599).

Section 85 (2) (a) of the 1996 Act further provides that notwithstanding the repeal of the Arbitration Act, 1940, its provisions shall continue to apply in relation to arbitration proceedings which commenced prior to the coming into force of the 1996 Act on 25 January 1996, unless otherwise agreed by the parties. Section 21 gives the parties an option to fix another date for commencement of the arbitral proceedings. Therefore, if the parties to the arbitration had agreed that the arbitral proceedings should commence from a day post 25 January 1996, the provisions of the 1996 Act will apply.

In cases where arbitral proceedings had commenced before coming into force of the 1996 Act and are pending before the arbitrator, it is open to the parties to agree that the 1996 Act will be applicable to such arbitral proceedings. (*Thyssen Stahlunion Gmbh v Steel Authority of India*, (1999) SCC 334).

Domestic Arbitration

The expression "domestic arbitration" has not been defined in the 1996 Act. An arbitration held in India, the outcome of which is a domestic award under Part I of this Act, is a domestic arbitration (Sections 2(2) and 2(7)). Therefore, a domestic arbitration is one which takes place in India, wherein parties are Indians and the dispute is decided in accordance with substantive law of India (Section 28(1) (a)).

Part I of the 1996 Act

Part I restates the law and practice of arbitration in India, running chronologically through each stage of arbitration, from the arbitration agreement, the appointment of the arbitral tribunal, the conduct of the arbitration, the award to the recognition and enforcement of awards.

Once the parties have agreed to refer a dispute to arbitration, neither of them can unilaterally withdraw from the arbitral process. The arbitral tribunal shall make an award which shall be final and binding on the parties and persons claiming under them respectively (Section 35), and such

award unless set aside by a court of competent jurisdiction (Section 34), shall be enforceable under the Code, in the same manner as if it were a decree of the Court (Section 36).

Limited judicial intervention

Under the 1996 Act, there is no provision for reference to arbitration by intervention of the Court. Section 5 of the 1996 Act provides for limited role of judiciary in the matters of arbitration, which is in consonance with the object of the Act to encourage expeditious and less expensive resolution of disputes with minimum interference of the Court (*P. Anand Gajapathi Raj v P.V.G. Raju*, AIR 2000 SC 1886).

Arbitration Agreement

The existence of arbitration agreement is a condition precedent for the exercise of power to appoint an arbitrator under Section 11 of the 1996 Act. The issue of existence and validity of the "arbitration agreement" is altogether different from the substantive contract in which it is embedded. The arbitration agreement survives annulment of the main contract since it is seperable from the other clauses of the contract. The arbitration clause constitutes an agreement by itself. *(Firm Ashok Traders v Gurumukh Das Saluja,* (2004) 3 SCC 155).

In cases where there is an arbitration clause, it is obligatory for the Court under the 1996 Act to refer the parties to arbitration in terms of their arbitration agreement (Section 8). However, the Act does not oust the jurisdiction of the Civil Court to decide the dispute in a case where parties to the arbitration agreement do not take appropriate steps as contemplated by Section 8 of the Act.

Similarly, the Court is to refer the parties to arbitration under Section 8 of the 1996 Act only in respect to "a matter which is the subject matter of an arbitration agreement". Where a suit is commenced "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8. The words "a matter" indicates that the entire subject matter of the suit should be subject to arbitration agreement. (*Sukanya Holdings Pvt. Ltd. V Jayesh H. Pandya*, (2003) 5 SCC 531).

Section 8 of the 1996 Act is attracted to only arbitrable disputes, which the arbitrator is competent or empowered to decide.

Illustration : The parties agreed to refer the question of winding up a company to arbitration. However, the power to order winding up of a company is conferred upon the company court by the Companies Act. As the arbitrator has no jurisdiction to wind up a company, the Court cannot make such a reference under Section 8. (*Haryana Telecom Ltd. v Sterlite Industries (India) Ltd*., AIR 1999 SC 2354).

Illustration : The parties agreed to refer the question as to whether probate should be granted or not to arbitration. Since the judgement in the probate suit under the Indian Succession Act is a judgement *in rem*, such question cannot be referred to arbitration (*Chiranjilal Shrilal Goenka v Jasjit Singh*, (1993) 2 SCC 507).

The application under Section 8 of the 1996 Act can be filed in the same suit or as an independent application before the same Court.

Ordinarily the application under Section 8 of the 1996 Act has to be filed before filing of written statement in the concerned suit. But when the defendant even after filing the written statement applies for reference to arbitration and the plaintiff raises no objection, the Court can refer the dispute to arbitration. The arbitration agreement need not be in existence before the action is brought in Court, but can be brought into existence while the action is pending. Once the matter

is referred to arbitration, proceedings in civil suit stands disposed of. The Court to which the party shall have recourse to challenge the award would be the Court as defined in Section 2 (e) of the Act, and not the Court to which an application under Section 8 is made. (*P. Anand Gajapathi Raju v P.V.G Raju* AIR 2000 SC 1886).

Where during the pendency of the proceedings before the Court, the parties enter into an agreement to proceed for arbitration, they would have to proceed in accordance with the provisions of the 1996 Act.

Illustration : The High Court, in exercise of its writ jurisdiction, has no power to refer the matter to an arbitrator and to pass a decree thereon on the award being submitted before it. (*T.N Electricity Board v Sumathi*, AIR 2000 SC 1603).

Interim measures by the Court

The Court is empowered by Section 9 of the 1996 Act to pass interim orders even before the commencement of the arbitration proceedings. Such interim orders can precede the issuance of notice invoking the arbitration clause. (*Sundaram Finance Ltd v NEPC India Ltd*, AIR 1999 SC 565). The Court under Section 9 merely formulates interim measures so as to protect the right under adjudication before the arbitral tribunal from being frustrated. (*Firm Ashok Traders v Gurumukh Das Saluja*, (2004) 3 SCC 155).

If an application under Section 9 of the 1996 Act for interim relief is made in the Court before issuing a notice under section 21 of the Act, the Court will first have to be satisfied that there is a valid arbitration agreement and that the applicant intends to take the dispute to arbitration. Once it is so satisfied, the Court will have jurisdiction to pass orders under Section 9 giving such interim protection as the facts and circumstances of the case warrant. While passing such an order and in order to ensure that effective steps are taken to commence the arbitral proceedings the Court, while exercising the jurisdiction under section 9, can pass a conditional order to put the applicant to such terms as it may deem fit with a view to see that effective steps are taken by the applicant for commencing arbitral proceedings. (*Sundaram Finance Ltd v NEPC India Ltd*, AIR 1999 SC 565).

Once the matter reaches arbitration, the High Court would not interfere with the orders passed by the arbitrator or the arbitral tribunal during the course of arbitration proceedings. The parties are permitted to approach the Court only under Section 37 or through Section 34 of the 1996 Act. *(SBP and Co. v Patel Engineering Ltd.*, 2005 (3) Arb LR 285 (SC)).

Composition of Arbitral Tribunal

The arbitral tribunal has been defined by Section 2 (d) of the 1996 Act to mean a sole arbitrator or a panel of arbitrators appointed in accordance with the provisions of Sections 10 and 11 of the Act. The number of arbitrators should not be an even number.

An arbitrator must be independent and impartial. A prospective arbitrator should disclose in writing to the parties any circumstances likely to give rise to justifiable doubts as to his independence or impartiality (Section 12(1), 1996 Act). The 1996 Act prescribes the procedure for challenging the arbitrator, terminating his mandate, and his replacement by a new arbitrator (Sections 13 to 15).

Arbitration under the 1996 Act is a matter of consent and the parties are generally free to structure their agreement as they see fit. The parties have been given maximum freedom not only to choose their arbitrators, but also to determine the number of arbitrators constituting the arbitral tribunal.

There is no right to challenge an award if the composition of the arbitration tribunal or arbitration procedure is in accordance with the agreement of the parties even though such composition or procedure is contrary to Part I of the 1996 Act. Again, the award cannot be challenged if such composition or procedure is contrary to the agreement between the parties but in accordance with the provisions of the 1996 Act. If there is no agreement between the parties about such composition of the arbitral tribunal or arbitration procedure, the award can be challenged on the ground that the composition or procedure was contrary to the provisions of the Act. *(Narayan Prasad Lohia v Nikunj Kumar Lohia,* (2002) 3 SCC 572*).*

Where the agreement between the parties provides for appointment of two arbitrators, that by itself does not render the agreement as being invalid. Both the arbitrators so appointed should appoint a third arbitrator to act as the presiding officer (Section 11 (3), 1996 Act). Where the parties have participated without objection in an arbitration by an arbitral tribunal comprising two or even number of arbitrators, it is not open to a party to challenge a common award by such tribunal on the ground that the number of arbitrators should not have been even. The parties are deemed to have waived such right under Section 4 of the 1996 Act. *(Narayan Prasad Lohia v Nikunj Kumar Lohia,* (2002) 3 SCC 572*).*

The determination of the number of arbitrators and appointment of arbitrators are two different and independent functions. The number of arbitrators, in the first instance is determined by the parties, and in default, the arbitral tribunal shall consist of a sole arbitrator. However, the appointment of an arbitrator should be in accordance with the agreement of the parties, or in default, in accordance with the mechanism provided under Section 11 of the 1996 Act.

The power of the Chief Justice under Section 11 of the 1996 Act to appoint the arbitral tribunal is a judicial power. Since adjudication is involved in constituting an arbitral tribunal, it is a judicial order. The Chief Justice or the person designated by him is bound to decide

- whether he has jurisdiction.
- whether there is an arbitration agreement.
- whether the applicant is a party to the arbitration agreement.
- whether the conditions for exercise of power have been fulfilled.
- if the arbitrator is to be appointed, the fitness of the person to be appointed.

(SBP and Co. v Patel Engineering Ltd., 2005 (3) Arb LR 285 (SC)).

The process, being adjudicatory in nature, restricts the power of the Chief Justice to designate, by excluding non judicial institution or non judicial authority from performing such function. The Chief Justice of India can, therefore, delegate such power only to another Judge of the Supreme Court, while the Chief Justice of a High Court can delegate such power only to another Judge of the High Court. It is impermissible to delegate such power to the District Judge. *(SBP and Co. v Patel Engineering Ltd,* 2005 (3) Arb LR 285 (SC)).

Notice must be issued to the non applicant to given him an opportunity to be heard before appointing an arbitrator under Section 11 of the 1996 Act. *(SBP and Co. v Patel Engineering Ltd,* 2005 (3) Arb LR 285 (SC)).

No appeal lies against the decision of the Chief Justice of India or his designate while entertaining an application under Section 11 (6) of the 1996 Act, and such decision is final. However, it is open to a party to challenge the decision of the Chief Justice of a High Court or his designate by way of Article 136 of the Constitution. *(SBP and Co. v Patel Engineering Ltd.,* 2005 (3) Arb LR 285 (SC)).

Where an application for appointment of arbitrator is made under Section 11(2) of the 1996 Act in an international commercial arbitration and the opposite party takes the plea that there was no mandatory provision for referring the dispute to arbitration, the Chief Justice of India has the power to decide whether the agreement postulates resolution of dispute by arbitration. If the agreement uses the word 'may' and gives liberty to the party either to file a suit or to go for arbitration at its choice, the Supreme Court should not exercise jurisdiction to appoint an arbitrator under Section 11 (12) of the Act (*Wellington Associates Ltd. v Kirit Mehta*, AIR 2000 SC 1379). Where the arbitrator is to be appointed, the Supreme Court can use its discretion in making an appointment after considering the convenience of the parties. (*Dolphin International Ltd. v Ronark Enterprises Inc.*, (1998) 5 SCC 724).

Jurisdiction of Arbitral Tribunal

The arbitral tribunal is invested with the power to rule on its own jurisdiction including ruling on any objection with respect to the existence or validity of the arbitration agreement. For that purpose, the arbitration clause shall be treated as an agreement independent of the other terms of the agreement even though it is part of the said agreement. So, it is clear that even if the arbitral tribunal decides that the agreement is null and void, it shall not entail *ipso jure* the invalidity of the arbitration clause. (*Olympus Superstructures (P) Ltd. v Meena Vijay Khetan*, AIR 1999 SC 2102).

Objections to jurisdiction of the arbitral tribunal must be raised before the arbitral tribunal. If the arbitral tribunal accepts the plea of want of jurisdiction, it will not proceed further with the arbitration on merits and the arbitral proceedings shall be terminated under Section 32 (2) (c) of the 1996 Act. Such decision, however is appealable (Section 37 (2) (a)). In case the tribunal rejects the plea of jurisdiction, it will continue with the arbitral proceedings and make an arbitral award, which can be challenged by the aggrieved party under Section 34 (2) of the 1996 Act. The Court has no power to adjudicate upon the question of the want of jurisdiction of an arbitral tribunal.

Section 16 of the 1996 Act, however, does not take away the power of Chief Justice in a proceeding under Section 11 to decide as to whether there is a valid arbitration agreement or not, before deciding whether the dispute should be referred to the arbitrator for arbitration. (*Wellington Associates Ltd. v Kirit Mehta*, AIR 2000 SC1379).

The arbitral tribunal, during the arbitral proceedings, can order interim measure for the protection of the subject matter of the dispute and also provides for appropriate security in respect of such a measure under Section 17 of the 1996 Act. Such an order for interim measures is appealable under Section 37 (2) of the Act.

The power of interim measure conferred on the arbitral tribunal under Section 17 of the 1996 Act is a limited one. The tribunal is not a Court of law and its orders are not judicial orders. The tribunal cannot issue any direction which would go beyond the reference or the arbitration agreement. The interim order may be addressed only to a party to the arbitration. It cannot be addressed to other parties. No power has been conferred on the arbitral tribunal under this section to enforce its order nor does it provide for judicial enforcement thereof. *(M.D Army Welfare Housing Organization v Sumangal Services (P) Ltd.,* AIR 2004 SC 1344*).*

Conduct of Arbitral Proceedings

Sections 18 to 27 of the 1996 Act lay down various rules dealing with arbitral procedure. Section 19 establishes procedural autonomy by recognizing parties' freedom to lay down the rules of procedure, subject to the fundamental requirements of Section 18 of equal treatment of parties. Section 20 gives right to the parties to agree on the place of arbitration.

The arbitral tribunal is not bound by the procedure set out by Code. It is for the parties to agree on a procedure and if the parties are silent, then the arbitrator has to prescribe the procedure. However, the procedure so prescribed should be in consonance with the principles of natural justice. The doctrine of natural justice pervades the procedural law of arbitration as its observance is the pragmatic requirement of fair play in action.

Arbitral award

The award-making process necessarily minimizes the derogable provisions of the 1996 Act and is mainly concerned with the role of the arbitrator in connection with making of the award (Sections 28 to 33). Section 28 pertains to the determination of the rules applicable to the substance of the disputes. Section 29 provides the decision-making procedure within the tribunal. Section 30 relates to settlement of a dispute by the parties themselves and states that with the agreement of the parties, the arbitration tribunal may use mediation, conciliation and other procedures at any time during the arbitral proceedings to encourage settlement. Section 31 refers to the form and contents of arbitral award. Unlike the 1940 Act, the arbitral award has to state reasons upon which it is based unless the parties have agreed that no reasons are to be given or the award is an arbitral award on agreed terms under Section 30. Section 32 pertains to the determination of the arbitral proceedings, while Section 33 relates to the corrections and interpretation of an award as also to making of additional awards.

Recourse against arbitral award

Section 34 of the 1996 Act provides for recourse against the arbitral award. The limited grounds for setting aside an arbitral award are

- incapacity of party.
- invalidity of agreement.
- absence of proper notice to the party.
- award beyond scope of reference.
- illegality in the composition of arbitral tribunal or in arbitral procedure.
- dispute being non arbitrable.
- award being In conflict with public policy.

Section 34 of 1996 Act is based on Article 34 of the UNCITRAL Model law. The scope for setting aside the award under the 1996 Act is far less than that under Sections 30 or 33 of the Arbitration Act, 1940. (*Olympus Superstructures (P) Ltd. v Meena Vijay Khetan*, AIR 1999 SC 2102).

The arbitrator is the final arbiter of a dispute between the parties and it is not open to challenge the award on the ground that the arbitrator has drawn his own conclusions or has failed to appreciate the facts. (*Sudershan Trading Co. v Government of Kerala*, AIR 1989 SC 890).

The arbitrator is the sole judge of the quality and quantity of evidence and it will not be for the Court to re-appreciate the evidence before the arbitrator, even if there is a possibility that on the same evidence, the Court may arrive at a different conclusion than the one arrived at by the arbitrator (*M.C.D. v Jagan Nath Ashok Kumar*, (1987) 4 SCC 497). Similarly, if a question of law is referred to the arbitrator and he gives a conclusion, it is not open to challenge the award on the ground than an alternative view of the law is possible (*Alopi Parshad & Sons Ltd v Union of India*, (1960) 2 SCR 793).

The power of the arbitral tribunal to make an award is different from its power to issue procedural orders and directions in the course of the arbitration proceedings. Such orders and directions are not awards and hence are not open to challenge under Section 34 of the 1996 Act, though they may provide basis for setting aside or remission of the award. For instance, questions concerning the jurisdiction of the arbitral tribunal or the choice of the applicable substantive law are determinable by arbitral process resulting in an award. On the other hand, questions relating to the admissibility of evidence or the extent of discovery are procedural in nature and are determinable by making an order or giving a direction and not by an award.

In view of the principles of acquiescence and estoppel, it is not permissible for a party to challenge an arbitration clause after participating in arbitration proceeding.

Illustration: Where a party consented to arbitration by the arbitral tribunal as per the arbitration clause and participated in the arbitral proceedings, it cannot later take the plea that there was no arbitration clause (*Krishna Bhagya Jala Nigam Ltd. V G Hari's Chandra Reddy*, (2007) 2 SCC 720).

However, the principle of acquiescence is inapplicable where the arbitrator unilaterally enlarges his power to arbitrate and assumes jurisdiction on matters not before him.

Illustration : The parties, by express agreement, referred to arbitration only the claims for refund of the hire charges. The arbitrator, upon entering into the reference, enlarged its scope. Since the arbitrator continued to adjudicate on such enlarged dispute, despite objections, the parties were left with no option, but to participate in the proceedings. Such participation did not amount to acquiescence. Once appointed, the arbitrator has the duty to adjudicate only the matter brought before it by the parties. The award is liable to be set aside as the arbitrator had misdirected himself and committed legal misconduct. (*Union of India v M/s G. S. Atwal*, AIR 1996 SC 2965).

The Court to which the party shall have recourse to challenge the award would be the Court as defined in Section 2(1)(e) of the 1996 Act and not the Court to which an application under Section 8 of the Act was made *(P. Anand Gajapathi Raju v P.V.G Raju*, AIR 2000 SC 1886)

Finality and enforcement of awards

Section 35 of the 1996 Act provides that subject to the provisions of Part I of the Act, an arbitral award shall become final and binding on the parties claiming under them respectively. The word 'final" with respect to an award, as used in this section, is not to be confused with the expression 'final award'. The word 'final' means that unless and until there is a successful challenge to the award, it is conclusive as to the issues with which it deals as between the parties to the reference and persons claiming under them. The award can, therefore, be enforced, even if there are other issues outstanding in the reference.

Section 36 of the 1996 Act renders an arbitral award enforceable in the same manner as if it were a decree, if no challenge is preferred against it within the time prescribed for making a challenge or, when upon a challenge being preferred, it has been dismissed. However, the fact that an arbitral award is enforceable as if it were a decree does not make the arbitral proceedings a suit.

The arbitral award becomes immediately enforceable without any further act of the Court once the time expires for challenging the award under Section 34 of the 1996 Act. If there were residential doubts on the interpretation of the language used in Section 34, the scheme of the 1996 Act would resolve the issue in favor of curtailment of the Court's powers by the exclusion of the operation of Section 5 of the Limitation Act *(Union of India v Popular Constructions*, (2001) 8 SCC 470*)*

When the arbitration proceedings commenced before the 1996 Act came into force but award was made after the 1996 Act came into force, the award would be enforced under the provisions of Arbitration Act, 1940. (*Thyssen Stahlunion Gmbh v Steel Authority of India,* (1999) SCC 334).

International Commercial Arbitration and Foreign Awards

An "international commercial arbitration" has been defined in Section 2(f) of the 1996 Act to mean an arbitration relating to disputes arising out of legal relationships considered commercial under the law in force in India and where atleast one of the parties is

- a foreign national or an individual habitually resident outside India
- a body corporate incorporated outside India
- a company or association of individuals whose central management and control is exercised by a country other than India
- the Government of a foreign country

The law applicable may be Indian law or foreign law depending upon the contract (Section 2(1)(f) and Section 28(1)(b)).

Part I of the 1996 Act is to also apply to international commercial arbitrations which take place out of India, unless the parties by agreement, express or implied, exclude it or any of its provisions. The definition of international commercial arbitration in Section 2(1)(f) of the 1996 Act makes no distinction between international commercial arbitration held in India or outside India. Part II of the 1996 Act only applies to arbitrations which takes place in a convention country. An international commercial arbitration may, however, be held in a non-convention country. The 1996 Act nowhere provides that the provisions of Part I are not to apply to international commercial arbitrations which take place in a non-convention country. The very object of the Act is to establish a uniform legal framework for the fair and efficient settlement of disputes arising in international commercial arbitrations. (*Bhatia International v Bulk Tradings,* AIR 2002 SC1432).

Illustration **:** Even if in terms of the arbitration agreement, the arbitration proceedings between two foreign parties were being held under I.C.C Rules outside India, yet a party to the arbitration proceedings may seek an interim injunction under Section 9 of the Act against Oil and Natural Gas Commission, a Government Company, for restraining it making any payment to the opposite party till the arbitration proceedings pending between the parties is not concluded. Such injunction in respect of the properties within territory of India is maintainable. However, if the injunction is sought for properties outside the country, then such an application under Section 9 is not maintainable in Indian Court. *(Olex Focas Pty. Ltd. V Skodoecport Co. Ltd.,* AIR 2000 Del. 161).

Part II of the 1996 Act pertains to the enforcement of certain foreign awards and consists of two chapters. Chapter I relates with New York Convention Awards which are supplemented by the First Schedule to the 1996 Act. Chapter II refers with Geneva Convention Awards which is to be read with the Second and the Third Schedule of the Act.

The expression "foreign award" which means an arbitral award on differences between persons arising out of legal relationship considered as commercial under the law in India. An award is 'foreign' not merely because it is made on the territory of a foreign state but because it is made in such a territory on an arbitration agreement not governed by the law of India. (*NTPC v Singer Company*, AIR 1993 SC 998).

A foreign award given after the 1996 Act came into force can be enforced only under Part II of 1996 Act, there being no vested right to have the same enforced under the Foreign Awards

(Recognition and Enforcement) Act, 1961. It is relevant that arbitral proceedings had commenced in the foreign jurisdiction before the commencement of the 1996 Act. (*Thyssen Stahlunion Gmbh v Steel Authority of India*, (1999) SCC 334).

Mediation

Mediation is a voluntary, disputant-centred, non binding, confidential and structured process controlled by a neutral and credible third party who uses special communication, negotiation and social skills to facilitate a binding negotiated settlement by the disputants themselves. The result of the mediation agreement is a settlement agreement, and not a decision.

The focus in mediation is on the future with the emphasis of building relationships, rather than fixing the blame for what has happened in the past. The purpose of mediation is not to judge guilt or innocence but to promote understanding, focus the parties on their interests, and encourage them to reach their own agreement. The ground rules of mediation include

- neutrality : the mediator should be neutral having no interest with the dispute or either party.
- self determination : mediation is based on the principle of the parties' self-determination, which means each party makes free and informed choices. The mediator is, therefore, responsible in the conduct of the process while the parties control the outcome.
- confidentiality : it is of the essence of successful mediation that parties should be able to reveal all relevant matters without an apprehension that the disclosure may subsequently be used against them as well. Were the position otherwise, unscrupulous parties could use and abuse the mediation process by treating it as a gigantic, penalty free discovery process. The mediator must state to the parties
- that he and the parties shall keep confidential all matters relating to the mediation proceedings, and that confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for the purposes of its implementation and enforcement.
- that unless otherwise agreed by the parties, it would be legally impermissible for him to act as an arbitrator or a witness in any arbitral or judicial proceeding in respect of the dispute that is the subject of mediation proceedings and that the parties are not allowed to introduce such evidence – neither on facts (like the willingness of one party to accept certain proposals) nor on views, suggestions, admissions or proposals made during the mediation.
- that the only behavior that might be reported is the information about whether parties appeared at a scheduled mediation and whether or not they reached a solution.
- fair process : the process is just as important as the outcome. It is crucial that parties feel they are being treated fairly and their concerns are being heard.
- voluntary process : mediation is possible only with consent of parties, who get bound once they sign the settlement arrived at during mediation.

Pre-mediation preparation

The mediator often asks for a pre-mediation summary from the parties to familiarize himself with the dispute. The participants during mediation need not necessarily be only the actual disputants but all parties that could facilitate or block a settlement.

In preparing the case, it will be useful for the mediator and/or the parties to analyze the dispute. In doing so, the mediator must be conversant with the applicable law and practice, the perspective of both sides on the facts and the issues that are of most concern to either party.

Demeanor of the mediator

The mediator should try to establish his neutrality and control over the process by maintaining neutral body language; using neutral, plain and simple words; using words of mutuality that apply to all parties; having appropriate eye contact; using calm, moderate, business like and deliberative tone and having a attentive posture. Importance must be given to seating arrangement so as to ensure closeness, eye contact and audibility.

Opening Statement

The mediation commences with the opening statement by the mediator, which must be simple and in a language/ style adapted to the background of parties. In the opening statement, the mediator

- introduces himself, his standing, training and successful experience as a mediator.
- expresses his hope to bring about a settlement in the present case.
- asks the parties to introduce themselves.
- asks parties which language they would prefer to be addressed in and how they would they like to be addressed.
- welcomes their lawyer.
- enquires about previous experience of parties and counsel in any mediation process.
- declares impartiality and neutrality, and describes the role of the mediator.
- addresses confidentiality and neutrality by using appropriate eye contact, words and body language.
- emphasizes on the non adversarial aspect of the process like the absence of recording of evidence pr pronouncement of judgment or award or order.
- emphasizes the voluntary nature of process.
- informs that he can go beyond the pleadings and may cover other disputes.
- states the mediation process (i.e. gives a road map) and the possibility of having private sessions.
- explains procedure where there is settlement or no settlement.
- informs that Court fee is refunded on settlement.

The mediator manages any outbursts, handles administrative matters such as breaks or order of presentation, determines whether the parties are clear about what to do, gets confirmation that the parties want mediation and invites both parties to state their perspective. Either side can speak first, both having been given an assurance of equal opportunity.

Stages and sessions of Mediation

Introduction is followed by

- problem understanding stage.
- needs and interests understanding stage.
- problem defining stage.
- issues identification stage.
- options identification stage.
- options evaluation stage.

These stages could be in joint session or private session (caucus)

In a joint session

- parties and respective counsels are present.
- parties are advised not to say anything that will upset the other parties and that any such information can be stated in private session.
- parties/counsels are allowed to speak without interruption.
- normally the party is asked to speak first, with the counsel supplementing with legal issues.
- any friend or relative of the parties are heard too.
- the mediator summarizes after hearing each party/counsel as to what he has understood.
- parties/counsels may add on any information.
- the mediator should accede to the request of parties who would like to talk.
- the mediator may seek clarifications.
- after hearing one side, the mediator listens to the other side.
- no interruptions are allowed as the decorum and dignity is be maintained.

Where a party requests for a private caucus, the mediator should conclude the joint session before meeting in private. The private session with one party should be followed with private session with other party. The mediator should explain beforehand that a private session may take more time with one party.

The mediator should use private session

- to share private matters and information that cannot be discussed in joint sessions.
- to regain control when a party is getting out of hand.
- when the parties are near a deadlock or impasse.
- to allow the parties to vent their emotions in a productive manner.

- to expose unrealistic expectations.
- to shift from discussion to problem solving.
- to evoke options for settlement.
- to communicate offers and counter-offers.

The mediator should avoid private session

- when a party can be directly persuaded.
- a party can communicate a compelling position.

Mediation Techniques

Mediation is all about transforming conflicts. The mediator must take the sting out of the hostility between the parties. The mediator could use the technique of neutral reframing to rephrase an offensive or inflammatory statement of a party in an inoffensive manner by focusing on the positive need in that statement

Illustration :. Party : He is so dominating that he never talks to me, forcing me to keep everything bottled up.

Mediator : You would like to be heard

The mediator has thus not only converted the negative statement into a positive one, he has exposed the other party to the positive need (of being heard) underlying the statement. Other mediation techniques listed by commentators are

- summarizing : the mediator restates the essence of the statement of the party briefly, accurately and completely.
- acknowledgement : the mediator reflects back the statement of a party in a manner that recognizes that party's perspective.
- re-directing : the mediator shifts the focus of a party from one subject to another in order to focus on details or respond to a highly volatile statement by a party.
- deferring : the mediator postpones a response to a question by a party in order to follow an agenda or gather additional information or defuse a hostile situation.
- setting an agenda : the mediator establishes the order in which the issues, positions or claims are to be addressed.
- handling reactive devaluation : the mediator takes ownership of an information or statement of a party in order to pre-empt the other party from reacting negatively to such information or statement solely based on the source of the information.

The mediator should endeavor to shift from positions to interests by

- talking to the parties to uncover their long term interests, and in the process, discover interests common to the parties.
- using open questions to elicit more facts.

- inviting options again from the parties for settlement.
- putting all settlement options, no matter how ostensibly insignificant, on the table.
- examining each options one by one as any given option might just appeal to a party on deeper analysis.
- do reality check by comparing a pending offer with
- the best result a party can get in litigation (BATNA or best alternative to a negotiated agreement).
- the worst result a party can get in litigation (WATNA or worst alternative to a negotiated agreement).
- the most likely result a party can get in litigation (MLATNA or most likely alternative to a negotiated agreement).

Handling emotions

The mediator should be familiar with his own reaction when faced with emotions. Strategies to handle emotions include

- accepting some venting, though preferably in a private session.
- utilizing active listening to verify the sincerity of the emotions.
- identifying the source or reason for the emotion and addressing the cause, not the behavior .
- insisting that order be maintained.
- moving to an easier issue on the agenda.
- dealing with one issue at a time.
- inviting parties to disclose the emotional impact of the situation or express their feelings to one another.
- simply suggesting a recess.

Role of silence in mediation

Use of silence in mediation cannot be overemphasized. A mediator is required to understand the relevance of the pauses and silence of the parties during mediation. Sometimes an important piece of information is revealed after a period of silence.

Silence can be helpful to the speaker because it:

- allows the speaker to dictate the pace of the conversation.
- gives time for thinking before speaking.
- enables the speaker to choose whether or not to go on.
- Silence can be useful to the listener because

- demonstrates interest, respect and patience.
- gives an opportunity to observe the speaker and pick up non-verbal clues.

Use of Apology and Saving Face approach in mediation

Apology is to acknowledge and express regret for a fault without defense. The emphasis is on that the act done cannot be undone but it should not go unnoticed. Fear of losing face is also a powerful emotion to make parties stick to their positions or continue with litigation. The mediator should explore settlement options that give honorable "exit".

Handling Impasse

The mediator could

- shift gears between private and joint sessions get the parties to do a reality check on how "foolproof" their case actually is.
- Have a private session with the counsel if he has given legally untenable advise to his client who is falsely assured that he is bound to win in litigation.
- warn the participants/ bring the parties together to acknowledge the situation.
- solicit any last ditch efforts.
- change atmosphere/use humor to relax atmosphere.
- revisit issues, or areas of agreement.
- proceed with preferably an easier issue.
- ask parties about cause of an impasse.
- ask parties to suggest options to overcome the deadlock.
- praise work and accomplishments of parties.
- try role-reversal.
- propose hypothetical solutions .
- suggest (or threaten) ending the mediation.
- suggest third party/ expert intervention.
- allow emotions to emerge.
- take a break.

Settlement agreement

The settlement agreement must be reduced in writing. It must

- comprise the statement about parties' future relationship.
- describe responsibility of each party in implementing the settlement.
- be clear, concise, complete, concrete, realistic and workable.
- be balanced and should reflect each party is gaining something.
- be positive, without any blame assessment.

- contain non-judgmental language.

The settlement agreement can be drafted by the parties but it is preferable if it is drafted by the mediator. If mediator drafting the agreement, the mediator should orally recite the terms of the settlement, clarify the terms and confirm the terms before putting it down.

While drafting an agreement, the mediator should be specific and must avoid ambiguous words such as "reasonable", "soon", "frequent", "co-operative" or "practicable". He should state clearly "who" will do "what", "when", "where", "how", "how much" and for "how long".

The mediator should avoid legal jargon and use plain language, preferably the language of the parties. The parties to the agreement should sign each page, while the counsel should attest the signature of their client by signing on the last page. Once the settlement agreement is signed by the parties, the mediator should sign the agreement and furnish a copy of the same to each party.

Ending mediation

The mediator should pay special attention on a proper ending to the mediation process, which is the outcome of the efforts of the parties. If parties do not come to terms, the mediator should congratulate them for the progress made, with hope for settlement in future. There is no such thing as failed mediation. If parties come to terms, the mediator should congratulate parties. Mediation ends on the date of the settlement agreement.

Model Civil Procedure Mediation Rules 2003

While there is no comprehensive statute governing mediation in India, the Supreme Court has recommended the High Courts to adopt, with or without modification, the model Civil Procedure Mediation Rules framed by the Law Commission of India. (*Salem Advocates Bar Association v Union of India*, AIR 2005 SC 3353).

The Rules provide for the procedure for appointment of a mediator, the qualifications of the mediator and procedure for mediation. Rule 12 provides that the mediator is not bound by the Evidence Act 1872 and the Code, but shall be guided by principles of fairness and justice, having regard to the rights and obligations of the parties, usages of trade, if any, and the nature of the dispute, Rule 16 describes the role of mediator and states that the mediator shall attempt to facilitate voluntary resolution of the dispute by the parties, and communicate the view of each party to the other, assist them in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and generating options in an attempt to resolve the dispute, emphasizing that it is the responsibility of the parties to take decision which affect them; he shall not impose any terms of settlement on the parties.

Rule 17 emphasises that the parties alone responsible for taking decision and that the mediator will not and cannot impose any settlement or give any warranty that the mediation will result in a settlement. The Rules have strict provisions with regard to the confidentiality of the mediation process. While Rule 11 enables the mediator to meet or communicate with each of the parties separately, Rule 20 restrains the mediator from disclosing to the other party any information given to him by a party subject to a specific condition that it be kept confidential, and mandates the mediator and the parties to maintain full confidentiality in respect of the mediation process. The Rule 20 further requires the parties not to rely on or introduce the said information in any other proceedings as to

- views or admissions expressed by a party in the course of the mediation proceedings
- confidential documents, notes, drafts or information obtained during mediation
- proposals made or views expressed by the mediator

- the fact that a party had or had not indicated his willingness to accept a proposal for settlement.

Rule 21 limits the communication between the mediator and the Court to informing the Court about the failure of a party to attend and, with the consent of the parties, his assessment that the case is not suited for settlement through mediation or that the parties have settled their disputes.

Rule 24 provides for the reduction of the agreement between the parties into a written settlement agreement duly signed by the parties. The settlement agreement is to be forwarded to the Court by the mediator with a covering letter. The Court would pass the decree in terms of the settlement under Rule 25. Should the settlement dispose of only certain issues in the suit which are severable from the other issues, the Court may pass decree straightaway in accordance with the settlement on those issues without waiting for a decision of the Court on the other issues which are not settled. If the issues are not severable, the Court shall wait for the decision of the Court on the other issues which are not settled.

Rule 27 lays down ethical standards of a mediator, stating that he should

- follow and observe the Rules strictly and diligently.
- not carry on any activity or conduct which could reasonably be considered as conduct unbecoming of a mediator.
- uphold the integrity and fairness of the mediation process.
- ensure that the parties involved in the mediation and fairly informed and have an adequate understanding of the procedural aspects of the process.
- satisfy himself that he is qualified to undertake and complete the mediation in a professional manner.
- disclose any interest or relationship likely to affect impartiality or which might seek an appearance of partiality or bias.
- avoid, while communicating with the parties, any impropriety or appearance of impropriety.
- be faithful to the relationship of trust and confidentiality imposed in the office of mediator.
- conduct all proceedings related to the resolutions of a dispute, in accordance with the applicable law.
- recognize that the mediation is based on principles of self-determination by the parties and that the mediation process relies upon the ability of parties to reach a voluntary agreement.
- maintain the reasonable expectations of the parties as to confidentiality, refrain from promises or guarantees of results.

Conciliation

Conciliation is a term often used interchangeably with mediation. Some commentators view conciliation as a pro-active form of mediation, where the neutral third party takes a more active

role in exploring and making suggestions to the disputants how to resolve their disputes (*Salem Advocates Bar Association v Union of India,* AIR 2005 SC 3353).

The manner of conducting conciliation, the ground rules and ethical standards are similar to that of mediation.

The 1996 Act is the first comprehensive statute on conciliation in India. Part III of the 1996 Act adopts, with minor contextual various, the UNICITRAL Conciliation Rules, 1980.

The 1996 Act provides the procedure for commencement of conciliation proceedings through invitation of one of the disputants (Section 62) and the submission of statements to conciliator describing the general nature of the dispute and the points at issue (Section 65). The conciliator is not bound by the Code or the Indian Evidence Act, 1872 (Section 66).

Role of Conciliator

Section 67 of the 1996 Act describes the role of conciliator as under

- the conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.
- the conciliator shall be guided by principles of objectivity, fairness and justice giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.
- the conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.
- the conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons thereof.

Confidentiality is integral to the conciliation process. While Section 69 of the 1996 Act enables the conciliator to meet or communicate with each of the parties separately, Section 70 restrains the conciliator from disclosing to the other party any information given to him by a party subject to a specific condition that it be kept confidential. Section 75 mandates that notwithstanding anything contained in any other law for the time being in force, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

Unless otherwise agreed by the parties, the conciliator is barred by the 1996 Act from acting as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings as also from being presented by the parties as a witness in any arbitral or judicial proceedings (Section 80).

Section 81 of the 1996 Act provides that the parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings

- views expressed or suggestions made by the other party in respect of a possible settlement of the dispute.
- admissions made by the other party in the course of the conciliation proceedings.
- proposals made by the conciliator.
- the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

Section 73 of 1996 Act mandates that the settlement agreement signed by the parties shall be final and binding on the parties and persons claiming under them respectively, which is to be authenticated by the conciliator. Section 74 confers the settlement agreement to have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30 i.e. the status of a decree of a Court.

A successful conciliation proceeding comes to an end only when the settlement agreement signed by the parties comes into existence. It is such agreement which has the status and effect of legal sanctity of an arbitral award under section 74 of the 1996 Act. (*Haresh Dayaram Thakur v State of Maharashtra,* AIR 2000 SC 2281)

Conciliation under other statutes

Several statutes contain provisions for settlement of disputes by conciliation, like the Industrial Disputes Act, 1947, the Hindu Marriage Act, 1948, the Family Courts Act, 1984 and the Gram Nyayalayas Act 2008. Section 20 of the 1987 deals with cognizance of cases by Lok Adalats and mandates that every Lok Adalat shall, while determining any reference before it under this Act, act with utmost expedition to arrive at a compromise or settlement between the parties and shall be guided by the principles of justice, equity, fair play and other legal principles. The 1987 Act also provides for pre-litigation conciliation and settlement and lays down the procedure for reference of the matter to conciliation before the Permanent Lok Adalat which is to assist the parties in their attempt to reach an amicable settlement of the dispute in an independent and impartial manner.

DUTIES OF ARBITRATOR

By

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(Source: http://www.markandalaw.com/wp-content/themes/twentysixteen/pdf/Impartiality-of Arbitrator.pdf)

Duty to act fairly

Duty to act fairly is the first and foremost function of an arbitrator. He must act in a fair and reasonable manner to both the parties and in the arbitration hearings he must not show or exhibit favour towards one party more than towards the other and must refrain from doing for one party which he cannot do for the other. Showing undue favours to one party at the cost of the other in matters handled by him would be looked upon with suspicion by the Courts. It was in this context that Donaldson J. in the Myron, (1969)1 Lloyd's Rep. 411 (at page 415) observed that "Mr.___ had, indeed, been the arbitrator appointed by them on several occasions and was described before me as their first choice arbitrator, language more usually heard in the context of Smithfield or Covent Garden market produce than of a well-known arbitrator, but the meaning is clear enough."

The position of the arbitration is like that of Creaser's wife who should be above all suspicion. The Courts have continually held that rules of natural justice must be followed by the arbitrators including the principles incorporated in the maxim *audi alterem partem*. Ignorance of the rules of natural justice cannot be defended on the plea that the evidence was inconsequential or had not affected the mind of the arbitrator or was of a trifling nature.

Adherence to the principles of natural justice

An arbitrator must act in accordance with the principles of natural justice. It is now well settled that an arbitrator is not bound by the technical and strict rules of evidence which are founded on fundamental principles of justice and public policy. However, in proceedings of arbitration, there must be adherence to justice, equity, law and fair play in action. The proceedings must adhere to the principles of natural justice and must be in consonance with practice and procedure which will lead to proper resolution of dispute.

The rule of natural justice requires that parties should be given an opportunity to be heard by the arbitrators, which means whatever material they want to place before the arbitrators should be allowed to be placed. *Oil & Natural Gas Commission Ltd.* v. *New India Civil Erectors Pvt. Ltd*., 1996 (Suppl) Arb LR 426 (DB—Bom).

Where the arbitrator refuses to consider the contentions of the contractor and refuses permission to produce evidence, inasmuch as directions were not given to the government to produce the record which had been withheld on the ground of privilege, without even

indirectly or incidentally mentioning the nature and volume of the record held privileged, it was held that these lacunas are the violations of the principle of natural justice and denial of opportunity to the contractor to press and prove his case. *President of India* v. *Kesar Singh*, AIR 1966 J&K 113: 1966 Kash LJ 287.

In Mustill and Boyd‟s Law and Practice of Commercial Arbitration in England, 1982 Ed., p. 261, the following cardinal rules have been suggested for being followed by the arbitral tribunal in order to ensure fairness in conducting arbitration between the litigant parties:

1) Each party must have a full opportunity to present his own case to the tribunal.
2) Each party must be aware of his opponent's case, and must be given a full opportunity to test and rebut it.
3) The parties must be treated alike. Each must have the same opportunity to put forward his own case, and to test that of the opponent.

The above principles (Sr. Nos. 1 and 3) are in consonance with Section 18 of the Act and the principle stated at Sr. No. 2 conforms to Section 23(1) of the Act. The principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary.

Hearing in absence of one party

An arbitrator would be guilty of misconduct if he is charged with any information having been obtained from one side which was not disclosed to the other. Such an information may be oral or in writing. It is with this aspect in mind that the Legislature provided in Section 24(3) of the Act that "All statements, documents or other information supplied to, or applications made to the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties".

When the arbitrator accepts documents from one party in the absence of the other party, the arbitrator would be guilty of misconducting the proceedings because no arbitrator can accept document from one party at the back of the other. *Padam Chand Jain* v. *Hukam Chand Jain*, AIR 1999 Del 61.

During the conduct of a reference the arbitrator required the attendance of a witness whom neither side proposed to call. After this witness had given evidence the proceedings terminated, and the arbitrator said that he required nothing further from either of the parties. Subsequently, however, the plaintiff found the arbitrator closeted with the witness and a special pleader who was acting for the defendants, the three persons being engaged in considering the papers and plans connected with the arbitration. The arbitrator explained that the witness was explaining to him information in connection with the case, by which, however, his opinion would not be biased. Held that, as there had been an opportunity for the mind of the arbitrator to have been biased by information given on behalf of one side without

the other having had an opportunity of meeting it, the award eventually made by the arbitrator must be set aside [(1844) 14 L.J.Q.B. 17]

Failure to consider vital documents

The well-settled rule of law is that an arbitrator misconducts the proceedings if he ignores very material documents to arrive at a just decision to resolve the controversy. Even if the department did not produce those documents before the arbitrator, it was incumbent upon him to get hold of all the relevant documents for arriving at a just decision. In *K.P. Poulose* vs *State of Kerala*, AIR 1975 SC 1259, it had been held by the Hon'ble Supreme Court as under:

"Misconduct under Section 30(a) has not a connotation of moral lapse. It comprises legal misconduct which is complete if the Arbitrator on the face of the award arrives at an inconsistent conclusion even on his own finding or arrives at a decision by ignoring very material documents which throw abundant light on the controversy to help a just and fair decision.

In the instant case, the Arbitrator has misconducted the proceedings by ignoring the two very material documents to arrive at a just decision to resolve the controversy between the Department and the contractor. Even if Department did not produce those documents before the Arbitrator, it was incumbent upon him to get hold of all the relevant documents including the two documents in question for the purpose of a just decision. Further, he arrived at an inconsistent conclusion even on his own finding. The award suffered from a manifest error apparent ex facie."

The making of an award without the basic documents, namely, the arbitration agreement before the arbitrators at the time of application of mind, i.e. at the time of considering the rival contentions of the parties is not permissible. The arbitrator has to insist on the production of the agreement, even if not presented by the parties, as without such agreement being on record, the respective contentions of the parties cannot be adjudicated upon. *Hooghly River Bridge, Commissioner* v. *Bhagirathi Bridge Construction Co. Ltd.*, AIR 1995 Cal 274.

Arbitrator must act within submission

The aim of arbitration is to settle all disputes between the parties and to avoid further litigation. Hence, where the contractor claimed amounts for work done after arbitration proceedings had begun and the claim statement filed with the arbitrator also included this claim, the arbitrator had jurisdiction to make an award on the said claim also. *Shyama Charan Agarwala & Sons* v. *Union of India*, (2002) 6 SCC 201.

In order to determine whether the arbitrator has acted in excess of jurisdiction what has to be seen is whether the claimants could raise a particular dispute or claim before the arbitrator. If the answer is in affirmative, then it is clear that arbitrator would have the jurisdiction to deal with such a claim. On the other hand, if the arbitration clause or a specific term in the contract or the law does not permit or give the arbitrator the power to decide or to adjudicate on a

dispute raised by the claimant or there is a specific bar to the raising of a particular dispute or claim, then any decision given by the arbitrator in respect thereof would clearly be in excess of jurisdiction. In order to find whether the arbitrator has acted in excess of jurisdiction the court may have to look into some documents including the contract as well as the reference of the dispute made to the arbitrators limited for the purpose of seeing whether the arbitrator has the jurisdiction to decide the claim made. *Himachal Pradesh State Electricity Board* v. *R.J. Shah*, (1999)4 SCC 214; *Rajasthan State Mines & Minerals Ltd.* v. *Eastern Engg. Enterprises*, 1999(3) RAJ 326 (SC).

An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialized branch of the law of agency (Mustill and Boyd's Commercial Arbitration, 2nd Ed., p.641). He commits misconduct if by his award he decides matters excluded by the agreement (Halsbury Laws of England, Vol. II, 4th Ed., para 622). As an arbitrator derives his jurisdiction only from the agreement for his appointment, it is never open to him to reject any part of that agreement, or to disregard any limitation placed on his authority. A deliberate departure from contract amounts to not only manifest disregard of his authority or misconduct on his part, but it may tantamount to a mala fide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award, *Shyama Charan Agarwala & Sons* v. *Union of India*, (2002)6 SCC 201.

It is an integral part of the duties of the arbitrator to adhere to the conditions of the contract agreed to between the parties and must always be within the terms of reference in accordance with which the parties desire him to make and publish the award. Thus, it is mandatory and obligatory on his part to act strictly in accordance with the law laid down by the Courts and not to act whimsically and arbitrarily and in the manner which he thinks is just and reasonable.

Where in a works contract a contractor demands extra costs due to price escalation, which had been barred specifically under the terms of the agreement, the award of such extra costs by the arbitrator was held to be bad in law on the ground that the arbitrator acted in excess of the jurisdiction conferred on him. *Continental Construction Co. Ltd.* vs *State of Madhya Pradesh*, AIR 1988 SC 1166)

An arbitrator derives authority from the reference made to him either by the parties or by a person named in the agreement having the authority to appoint the arbitrator, as authorized by the parties in the agreement itself. The arbitrator is not permitted in law to enlarge the scope of reference. Any decision or award on an item(s) which is beyond the scope of reference shall not have the sanction of law. If the award on an item not referred for adjudication in arbitration had been decided by the arbitrator and is not severable from the rest of the award, then the whole of the award shall be set aside by the Court. In *Jivrajbhai Ujamshi Sheth and others* vs *Chintamanrao Balaji and others*, AIR 1965 SC 214, the Hon'ble Supreme Court laid down the law as under:

"If the parties set limits to action by the arbitrator, then the arbitrator has to follow the limits set for him, and the Court can find that he has exceeded his jurisdiction on proof of such action. The assumption of jurisdiction not possessed by the arbitrator renders the award, to the extent to which it is beyond the arbitrator's jurisdiction, invalid. And if it is not possible to severe such invalid part from the other party of the award, the award must fail in its entirety."

Arbitrator to decide on his skill and knowledge

Lord Goddard, CJ in *Mediterranean & Eastern Export Co. Ltd.* vs *Fortress Fabrics Ltd.*, [1948]2 All ER 186, held as under:

"A man in the trade who is selected for his experience would be likely to know and indeed be expected to know the fluctuations of the market and would have plenty of means of informing himself or refreshing his memory on any point on which he might find it necessary so to do. ..... It must be taken I think that in fixing the amount that he has, he has acted on his own knowledge and experience. The day has long gone by when the Courts looked with jealousy on the jurisdiction of the Arbitrators. The modern tendency is in my opinion more especially in commercial arbitrations, to endeavour to uphold awards of the skilled persons that the parties themselves have selected to decide the questions at issue between them.....".

Arbitrator cannot delegate his functions

In Russell on Arbitration, 20th Ed., page 228, it has been stated as under:

"One who has an authority to do an act for another must execute it himself, and cannot transfer it to another; for this, being a trust and confidence reposed in the party, cannot be assigned to a stranger, whose ability and integrity were not so well thought of by him for whom the act was to be done".

"Arbitrators cannot refer their arbitrements to others, nor to an umpire; if the submission be not so; neither can they make their arbitrement in the names of themselves and of a third person to whom no submission was made; nor alter it after it is once made."

Power to proceed *ex-parte*

An arbitrator ought not to proceed *ex parte* against a party if he has not appeared at one of the sittings. The arbitrator should give another notice fixing date, time and venue and intimate that he would proceed with the matter *ex parte* if either party fails to attend. Even after notice if the defaulting party does not attend, the arbitrator may proceed in his absence. *Hemkunt Builders P. Ltd.* v. *Panjabi University, Patiala*, 1993(1) Arb LR 348.

As per terms of the arbitration agreement, both the parties were required to nominate their respective arbitrators. Delay occurred on the part of one party to nominate its arbitrator. Thereupon, the nominee-arbitrator of the other party started conducting arbitration proceedings *ex parte* in a tearing haste without waiting for other party. He not only proceeded *ex parte* on same date but also recorded statement of witness and heard arguments. It was held

that the procedure adopted by the arbitrator was in violation of the principles of natural justice and the award rendered by him was set aside, *Shri Ram Ram Niranjan* v. *Union of India,* AIR 2001 Del 424

Russell on Arbitration, 20th Ed., p. 263 states:

"In general, an arbitrator is not justified in proceeding *ex parte* without giving the party absenting himself due notice. It is advisable to give the notice in writing to each of the parties or their solicitors. It should express the arbitrator's intention clearly, otherwise the award may be set aside.

"If a party says: "I will not attend, because you (the arbitrator) are receiving illegal evidence, and no award which you can make will be good, the arbitrator may go on with the reference in his absence; and it seems that it is not necessary in such a case to give the recusant any notice of the subsequent meetings. But, though it may not always be necessary, it is certainly advisable that notice of every meeting should be given to the party who absents himself, so that he may have the opportunity of changing his mind, and of being present if he pleases."

If the arbitrator did not allow adjournment of just one day, as the counsel of the party was busy in another arbitration proceedings and proceeded to pass an *ex parte* award, without giving notice of his intention to do so, the award would be invalid. *Executive Engineer, Prachi Division* v. *Gangaram Chhapolia,* AIR 1983 NOC 205 (Ori).

Failure to act without unreasonable delay

Section 14(1)(a) of the Act provides that the mandate of an arbitrator shall terminate if he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay. Thus, where the named arbitrator does not act for three months despite repeated reminders, it can be clearly said that the mandate of the named arbitrator shall be deemed to have been terminated as he failed to act without undue delay as contemplated under section 14(1)(a) and the court gets the power to appoint a new arbitrator under section 11(5). *Deepa Galvanising Engg. Industries Pvt. Ltd.* v. *Govt. of India,* 1998(1) ICC 410 (AP).

Where the parties stipulated by consent that if the arbitrator does not complete the arbitral proceedings on or before a particular date his mandate shall stand terminated, then the mandate automatically terminates on the expiry of that date. Consent order is nothing but an agreement between the parties with super imposed seal of the court. *Kifayatullah Haji Gulam Rasool* v. *Bilkish Ismail Mehsania,* AIR 2000 Bom 424.

What is reasonable dispatch depends upon the type of arbitration and the size and complexity of the dispute. The question of reasonableness should be determined by reference to the nature of arbitration and the interests of the parties and not individual circumstances of the arbitrator. Thus, if the arbitrators were delayed in proceeding by illness or unexpected absence abroad, they would be open to removal, even though they had not personally flawed. Conversely, fault is not sufficient to amount to a failure to use all reasonable dispatch: an

arbitrator may be incompetent or guilty of misconduct and yet not be guilty of such delay. (Mustil & Boyd's Commercial Arbitration, p. 474).

In this regard, Karnataka High Court in *Rudramani Devaru v. Shrimad Maharaj Niranjan Jagadguru*, AIR 2005 Kant 313 summarized the principles to be followed by an arbitral tribunal as under:

"The minimum requirements of a proper hearing should include: (i) each party must have notice that the hearing is to take place and of the date, time and place of holding such hearing; (ii) each party must have a reasonable opportunity to be present at the hearing along with his witnesses and legal advisers, if any, if allowed; (iii) each party must have an opportunity to be present throughout the hearing; (iv) each party must have a reasonable opportunity to present statements, documents, evidence and arguments in support of his own case; (v) each party must be supplied with the statements, documents and evidence adduced by the other side; (vi) each party must have a reasonable opportunity to cross-examine his opponent's witnesses and reply to the arguments advanced in support of his opponent's case. It is expected of an arbitral tribunal that it should ensure that the date of the hearing is not so close that the case cannot be properly prepared. Equally, an arbitral tribunal, while fixing the date of hearing, should try to accommodate any party who is placed in difficulty by his absence due to unavoidable circumstances such as illness or compelling engagements of himself elsewhere etc. Each party is also entitled to know any statements, documents, evidence or information collected by the arbitral tribunal itself which are adverse to his interest, if they are not contested. The arbitral tribunal is neither to hear evidence nor arguments of one party in the absence of the other party, unless despite opportunity, the other party chooses to remain absent. So also, the arbitral tribunal is not to hear evidence in the absence of both the parties unless both the parties choose to remain absent despite proper notice. Each party to arbitration reference is entitled to advance notice of any hearing and of any meeting of the arbitral tribunal as provided under S.24 of the Act".

2015 Amendment to the Arbitration and Conciliation Act, 1996

By Argus Partners

Introduction

The Arbitration and Conciliation Act, 1996 ("Act") has been amended by the Arbitration and Conciliation (Amendment) Ordinance, 2015 ("Ordinance"), promulgated by the President of India on October 23, 2015.

The Ordinance has introduced significant changes to the Act and seeks to address some of the issues, such as delays and high costs, which have been affecting arbitrations in India.

The Ordinance is an attempt to make arbitration a preferred mode for settlement of commercial disputes and to make India a hub of international commercial arbitration. With the amendments, arbitrations in India are sought to be made more user-friendly and cost effective. The major changes brought about by the Ordinance are summarized in this update.

Interim Measures

The Ordinance introduces a paradigm shift in the mode and method of grant of interim measures in an arbitration proceeding.

Recent judicial decisions (*Bharat Aluminum Co v. Kaiser Aluminum Technical Services*, Supreme Court (2012) 9 SCC 552) had held that Part I of the Act (which, inter alia, includes provisions on seeking interim reliefs before a Court in India) would not apply to foreign seated arbitrations. The Ordinance has inserted a proviso to section 2 of the Act, whereby, sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of Section 37 (all falling in Part I of the Act) have been made applicable to international commercial arbitrations, even if the place of arbitration is outside India. As a result a party to an arbitration proceeding will be able to approach Courts in India for interim reliefs before the commencement of an arbitration proceeding, even if the seat of such arbitration is not in India.

Importantly, under the newly inserted section 9(3), a Court cannot, as a matter of course, entertain an application for interim measure once an arbitral tribunal has been constituted, unless the Court finds that circumstances exist which may not render the remedy available under section 17 of the Act, i.e. approaching the arbitral tribunal for interim measures, efficacious. The intention of the Legislature is to limit the involvement of Courts in an arbitration proceeding thereby making such proceedings swift and effective.

Another important change introduced by the Ordinance is the power of an arbitral tribunal to grant interim reliefs. Though the original section 17 of the Act afforded an arbitral tribunal the power to grant interim measures, it definitely did lack the saber- tooth. In this regard the Supreme Court of India had held that though section 17 of the Act gave an arbitral tribunal the power to pass interim orders, but the same could not be enforced as an order of a Court (*M/s. Sundaram Finance v. M/s. NEPC India Ltd.*, AIR 1999 SC 565,

and *M.D. Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd.*, AIR 2004 SC 1344). The Ordinance has substituted section 17 by a new section which ensures that an order passed by an arbitral tribunal under section 17 will now be deemed to be an order of the Court and shall be enforceable under the Code of Civil Procedure, 1908. Moreover, as discussed above, once the arbitral tribunal is constituted, all applications seeking interim measures would now be directed to it and not the Court.

Strict Timelines

The Ordinance brings about some strict timelines in completion of arbitration proceedings. Proceedings before Courts have also been made time-bound.

Commencing arbitration proceedings after obtaining an interim order from a Court

In order to discourage litigants who obtain an interim order under section 9 of the Act, but do not commence arbitration proceedings, a timeline of 90 (ninety) days to commence arbitration proceedings after obtaining an order under section 9 of the Act has been introduced.

Application to set aside an arbitral award

An application to set aside an arbitral award under Section 34 of the Act has to be disposed of by the Court within a period of 1 (one) year from its filing.

Application for appointment of an arbitrator

The Ordinance provides that the Chief Justice of the High Court or the Chief Justice of the Supreme Court of India, in an application for appointment of an arbitrator, can only confine themselves to ascertaining that a valid arbitration agreement exists. Such application is required to be disposed of within a period of 60 (sixty) days.

Completion of arbitration proceedings

As far as arbitration proceedings are concerned, newly introduced section 29A of the Act mandates completion of arbitration proceedings within a period of 12 (twelve) months of entering into a reference. Amended section 12 of the Act now requires an arbitrator to make a specific disclosure if there are circumstances which would affect his ability to complete the arbitration proceeding within the period of 12 (twelve) months.

Further, amended section 24 of the Act now empowers the arbitrator to impose exemplary costs on a party that seeks an adjournment before the arbitral tribunal without citing sufficient cause.

The parties to an arbitration may, however, by consent, extend the period for making an arbitration award for a further period not exceeding 6 (six) months. In case of expiry of the extended period, the mandate of the arbitral tribunal will stand terminated, unless a Court grants a further extension of the period, upon an application of the parties to the arbitration proceeding. When the Court grants an extension of time as above, it may substitute some or all of the arbitrators.

Fast Track Arbitrations

The Ordinance introduces a fast track arbitration proceeding.

Newly introduced section 29B of the Act provides for an option whereby the parties to an arbitration agreement may mutually decide to appoint a sole arbitrator who decides the dispute on the basis of written pleadings, documents and submissions. Oral hearing and technical formalities may be dispensed with for the sake of an expeditious disposal. An award has to be rendered within a period of 6 (six) months of entering into a reference.

Challenging an Award

Public Policy

Section 34 of the Act provides that an arbitral award may be set aside if it is contrary to 'public policy'.

The Supreme Court of India in ONGC v. Saw Pipes (2003) had expanded the test of 'public policy' to mean an award that violates the statutory provisions of Indian law or even the terms of the contract in some cases. Such an award would be considered as 'patently illegal' and therefore in violation of public policy. This interpretation practically afforded the losing party an opportunity to re-agitate the merits of the case. Though in a very recent judgment, the Supreme Court noted that while the merits of an arbitral award can be scrutinized when a challenge is made on grounds that an arbitral award has violated 'public policy, there were limitations as to the extent to which, such a re-evaluation can be conducted.

The Ordinance, however, clarifies that an award will be in conflict with the public policy of India, only in certain circumstances, such as if the award is induced or affected by fraud or corruption, or is in contravention with the fundamental policy of Indian law, or is in conflict with the most basic notions of morality or justice. Further, the Ordinance provides that a determination of whether there is a contravention with the fundamental policy of Indian law cannot entail a review of the merits of the dispute. This amendment seeks to limit the re-appreciation of the merits of the dispute at the stage of challenge to the award before the Court.

Hence, the Legislature has fundamentally reduced the scope of the inquiry by the judiciary into the question of violation of 'public policy'.

Patent illegality

Another amendment brought about by the Ordinance is that an arbitral award can be set aside by a Court if the award is vitiated by patent illegality appearing on the face of the award.

However, an award cannot be set aside merely on the ground of an erroneous application of law or by re-appreciation of evidence.

Stay on enforcement of an award

The Ordinance provides that the mere filing of an application challenging an arbitration award would not automatically stay the execution of the award. The execution of an award will only be stayed when the Court passes any specific order of stay on an application by a party to the proceeding.

Ensuring Impartiality of an Arbitrator

The Ordinance gives foremost importance to the impartiality of an arbitrator. Original Section 12 of the Act necessitated an arbitrator to disclose in writing circumstances likely to give rise to justifiable doubts as to his independence or impartiality. The Ordinance specifies in elaborate detail the circumstances which may lead to such justifiable doubts. The newly inserted fifth schedule of the Act lists 34 (thirty four) such grounds which shall act as a guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. It is now important to see how proximate the arbitrator is to a party to the proceeding and/or the party's lawyer.

Arbitration Fees

In a very significant step, the Ordinance provides a cap on the fees to be paid to an arbitrator, barring international commercial arbitrations and institutional arbitrations. The amendment to Section 11 of the Act empowers the concerned High Court to frame rules to determine the fees of the Arbitral Tribunal and the mode of such payment. The rates specified in the newly inserted fourth schedule have to be considered.

The Definition of 'Court'

Original Section 2(e) of the Act provided a single definition of "Court", which meant a District Court, or the High Court exercising its ordinary original civil jurisdiction, as the case may be. The Ordinance, however, bifurcates the definition and clearly specifies that unlike other arbitrations, in case of international commercial arbitrations, only a High Court exercising its ordinary original civil jurisdiction will qualify as a "Court".

The 2019 Arbitration Amendment Act and the Changes It Ushers In - A Primer

By
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Source: https://barandbench.com/npac-arbitration-review-2019-arbitration-amendment-act/
(August12, 2019)

Having received presidential assent on August 9, 2019, the Arbitration and Conciliation (Amendment) Act, 2019 ('2019 Amendment') has formally been published in the Official Gazette. The key features of the Amendment are dealt with below:

Modified timeline for completion of proceedings

The 2019 Amendment relaxes the stringent time-period for completion of arbitration proceedings as prescribed by the 2015 Amendment to a certain extent.

The 2019 Amendment frees international commercial arbitrations from a pre-determined time-period, albeit retaining a 'pious-hope' provision for completion thereof within a period of 12 months from the date of completion of pleadings. In the case of a domestic arbitration, the time-period of 12 months (extendable of course by another 6 months subject to consent by the parties, and thereafter by the Court) for the conclusion of the proceedings is now to be reckoned from the date of completion of pleadings instead of from the date of constitution of the arbitral tribunal.

In order to ensure that this phase of completion of pleadings does not become a runaway-horse, there is a period of six months which has been prescribed for the filing of the Statement of Claim and Defence. It is, however, unclear as to what are the consequences of a breach of the six-month period by the parties.

Mandate of the Arbitrator(s) to continue pending an application for extension of time

The 2019 Amendment specifies that when the parties have approached the Court concerned with an application under Section 29A for extension of time for completion of the arbitration proceedings, then the mandate of the arbitrator(s) shall continue till the disposal of the said application.

This ensures the continuation of the arbitration proceedings for the period when the said application is pending before the Court, which period prior to this amendment could not be put to any beneficial use inasmuch as an arbitrator(s) with a lapsed mandate could revive the proceedings only once the Court would allow an application filed under Section 29A.

Yet further, it has also been provided in the 2019 Amendment that if a Court deems it fit to effect a reduction in the fees of the arbitrator(s) while considering such an application, it shall

do so only after giving the arbitrator(s) concerned an opportunity of being heard in the matter.

Confidentiality of Arbitration Proceedings

The 2019 Amendment explicitly incorporates a requirement for the arbitrator(s), the arbitral institution concerned and the parties themselves to maintain the confidentiality of all arbitration proceedings, except where disclosure of the award is necessary for the purpose of its implementation and enforcement.

Manner of demonstrating circumstance(s) that would justify interference with an award in a petition under Section 34

An interesting modification brought about by the 2019 Amendment is in relation to the manner of 'proving' the pre-requisites for interference with an award under Section 34. Whereas the provision in the 1996 Act required a party to 'furnish proof' of the existence of circumstances that would justify interference with an award, the 2019 Amendment clarifies that the said circumstances have to be established on the basis of the record of the arbitral tribunal. This not only removes the otherwise ambiguous phrase 'furnish proof', yet further, it seems to expressly clarify that the demonstration has to be made by the party concerned on the basis of the record of the arbitral tribunal alone, thereby expressly barring reference to material which was not placed before the arbitral tribunal.

Excision of Power of Arbitrators to make orders under Section 17 in the Post-Award stage

The 2015 Amendment had permitted the parties to obtain interim measures from an arbitral tribunal under Section 17 of the 1996 Act during the pendency of the arbitration proceedings or at any time after the making of the award, but before it was enforced in accordance with Section 36.

This period for which the arbitral tribunal can order interim relief has now been reduced in the 2019 Amendment, by the removal of the said power after the making of the arbitral award. This, therefore, means that after the making of an award and before its enforcement, it is the concerned Court only which can be approached for interim measures under Section 9 of the 1996 Act. This ties in with the general prescription that the arbitral tribunal is by and large functus-officio after the passing of the award except for certain limited functions such as those mentioned in Section 33 of the 1996 Act.

Protection for Arbitrators

The 2019 Amendment also puts in place an express safety-net for arbitrators and clarifies that no suit or other legal proceedings shall lie against an arbitrator(s) for anything done in good faith or intended to be done under the 1996 Act.

Prima Facie finding enough for refusal to refer parties to Arbitration under Section 45

The 2019 Amendment has sought to bring about textual equivalence between Section 45 and Section 8 of the 1996 Act as regards the nature of the determination required to be made by a Court. Section 45 which required the Court to come to a definitive finding that a matter was not capable of settlement through arbitration, has now been amended to reflect, pari-materia with Section 8(1), that a Court may refuse a reference to arbitration under Section 45 upon arriving at a prima-facie finding that the arbitration agreement was null and void, inoperative or incapable of being performed.

Formal recognition of Arbitral Institutions and delegation of crucial functions

The 2019 Amendment brings to practical fruition the normative push initiated by the 2015 Amendment towards setting up and establishing arbitral institutions in the country. To this end, the 2019 Amendment specifically empowers the Supreme Court and the High Courts to designate arbitral institutions for performing crucial functions, including appointment of arbitrators.

This is a significant step inasmuch as appointment of arbitrators under Section 11 has consistently been regarded as a judicial function in terms of the judgment of the Supreme Court in *SBP & Co.* v. *Patel Engineering Ltd*. [(2005) 8 SCC 618], though there was a dilution of this principle in the 2015 Amendment inasmuch as it provided, under Section 11(6)(B), that delegation of the powers of appointment of an arbitrator by the Court concerned to an arbitral institution shall not amount to a delegation of judicial power.

This function has now by the 2019 Amendment been expressly permitted to be delegated to an institution to be so designated by the Court concerned. The applications for appointment which were hitherto to be filed before the Supreme Court, in the case of an international commercial arbitration, and the High Court, in the case of a domestic arbitration, are now to be filed before the institution, if any, designated by the Supreme Court and the High Court respectively.

An arbitral institution when so approached is required to dispose of the application within a period of 30 days from the date of service of notice on the opposite party, though the practicality or mandatory enforceability of this provision is uncertain. Yet further, if the High Court concerned is unable to designate an arbitral institution for lack of availability, then the High Court may maintain a panel of arbitrators for discharging the functions and duties of arbitral institution and any reference to the arbitrator(s) would be deemed to be an arbitral institution.

While there can be a lot of debate about the efficacy of delegating such a function to an arbitral institution, on an ancillary note, it is definitely another indicator of the rapidly denigrating position of the Supreme Court as a Constitutional Court, and its evolution into a predominantly appellate forum.

The present position is that orders passed by the High Courts in exercise of jurisdiction under Section 11 are, due to the lack of an appellate provision in the 1996 Act, directly assailed before the Supreme Court in exercise of jurisdiction under Article 136 of the Constitution of India. Now, with the delegation of the power of appointment of arbitrators under Section 11 being delegated to arbitral institutions, the Supreme Court of India will directly hear challenges, under Article 136, against orders passed by designated arbitral institutions. This distinction or affliction, depending on the perspective, is seemingly unique to the Indian Supreme Court amongst apex judicial forums in countries across the world.

Applicability of the Fee Provisions enshrined in the Fourth Schedule

The 2019 Amendment postulates, through some very convoluted language, that in the absence of a designated arbitral institution, the High Court is required to maintain a panel of arbitrators and if a party were to appoint an arbitrator from such a panel then the fee as stipulated in the Fourth Schedule shall be applicable to the arbitrator so appointed.

Yet further, any reference to an arbitrator from this panel is to be deemed to be a reference to an arbitral institution. Even in the case of a designated arbitral institution, unless in the case of an international commercial arbitration or in the case where the parties have agreed for determination of fees as per the rules of an arbitral institution, then the fee as stipulated in the Fourth Schedule shall be applicable to the arbitrator so appointed by the arbitral institution concerned.

Establishment of the Arbitration Council of India

Tied in with the introduction of arbitral institutions is the creation of the Arbitration Council of India which, in terms of the provisions of the 2019 Amendment, has been modelled as a premier arbitration regulator/overseer performing various functions for promoting, reforming and advancing the practice of arbitration in the country. In the furtherance of this goal, the Arbitration Council of India has been given powers inter-alia for grading arbitral institutions, recognizing professional institutes providing accreditation of arbitrators, maintaining a repository of arbitral awards made in India etc.

The constitution of the Arbitration Council of India as comprising of the Chairperson, a Chief Executive Officer and various members has also been laid down in perfunctory detail. For greater clarity on the exact scope of the powers and functions of the Arbitration Council of India, and its internal constitution, one would have to await the introduction of the relevant

regulations in this regard which the Central Government has been empowered to frame and prescribe.

Express Qualifications to be accredited as an Arbitrator

Unlike the 1996 Act or the 2015 Amendment, wherein there were no specific qualifications prescribed for being appointed as an arbitrator, aside from the general requirements of independence and impartiality, the 2019 Amendment has introduced the Eighth Schedule which specifically provides that only a certain specific class of persons holding certain qualifications would be eligible to be accredited as an arbitrator including advocates, chartered accountants, cost accountants and company secretaries [all with 10 years of experience] or officers of the Indian legal service, or officers with a law degree or an engineering degree [both in the government and in the private sector with 10 years of experience], officers having senior level experience of administration [both in the government and in the private sector with 10 years of experience], or a person having educational qualification at the degree level with 10 years of experience in a technical or scientific stream in the fields of telecom, information technology, intellectual property rights or other specialized areas [both in the government and in the private sector].

The ability to be an arbitrator is therefore expressly tied-in with qualification and experience. There are a few more vague general norms applicable to arbitrators, which primarily deal with their impartiality and independence and their legal and practical competence to be able to render a reasoned award and their understanding of the applicable law and best practices.

Significantly, any person having been convicted of any offence involving moral turpitude or an economic offence would fall afoul of these norms. However, both these qualifications and norms, are introduced by the 2019 Amendment in relation to Section 43J which pertains to accreditation of arbitrators by the Arbitration Council of India. There does not seem to be any express reference to the incorporation of these parameters in the existing Fifth Schedule or the Seventh Schedule, meaning thereby that for the moment there is no proscription against persons not falling within the parameters as specified in the Eighth Schedule being appointed as arbitrators.

Non-Retrospective

The retrospective nature of the far-ranging 2015 Amendment inasmuch as it related to Court proceedings has been conclusively determined by the Supreme Court in the judgment in *Board of Control for Cricket in India* v. *Kochi Cricket (P.) Ltd*. [(2018) 6 SCC 287] in the context of Section 36 of the 1996 Act, and in *Ssangyong Engineering and Construction Co.*

Ltd. v. *National Highways Authority of India* [2019 (3) Arb. LR 152 (SC)] in the context of Section 34 of the 1996 Act.

In Kochi Cricket (supra), the Supreme Court had gone so far as to express its displeasure with the then pending proposal to render the 2015 Amendment prospective in nature. The Supreme Court had urged a re-think in this regard. However, Parliament has specifically disregarded the advice of the Supreme Court, and through the 2019 Amendment expressly made the 2015 Amendment prospective in nature i.e. the provisions of the 2015 Amendment would only apply to cases where the arbitration was invoked post October 23, 2015. The all-encompassing language makes the applicability of the 2019 Amendment prospective not only to arbitration proceedings themselves but also related court proceedings.

The immediate fallout of this, inter-alia, would that be a large number of execution petitions which, inspired by the decision in Kochi Cricket (supra), had come to be filed in relation to awards which arose from arbitrations which were invoked prior to October 23, 2015 and in which Section 34 award-challenge petitions are pending, would now, unless the same have already been disposed of, be rendered non-maintainable inasmuch as Section 36 of the un-amended 1996 Act provides for automatic stay of awards upon the filing of a Section 34 award-challenge petition.

However, the 2019 Amendment does not itself contain an express provision about the retrospectivity or otherwise of the changes it introduces to the 1996 Act. Whereas such an omission arguably veers to a presumption of prospectively, this issue is nonetheless likely to lead to future litigation on this aspect in the absence of an express provision.

Excerpts from Drafting Dispute Resolution Clauses

American Arbitration Association

Drafting clear, unambiguous clauses contributes to the efficiency of the ADR process. For example, arbitration agreements require a clear intent to arbitrate. It is not enough to state that "disputes arising under the agreement shall be settled by arbitration." While that language indicates the parties' intention to arbitrate and may authorize a court to enforce the clause, it leaves many issues unresolved. Issues such as when, where, how and before whom a dispute will be arbitrated are subject to disagreement once a controversy has arisen, with no way to resolve them except to go to court. Some of the more important elements a practitioner should keep in mind when drafting, adopting or recommending a dispute resolution clause follow.

- The clause might cover all disputes that may arise, or only certain types.
- It could specify only arbitration – which yields a binding decision – or also provide an opportunity for non-binding negotiation or mediation.
- The arbitration clause should be signed by as many potential parties to a future dispute as possible.
- To be fully effective, "entry of judgment" language in domestic cases is important.
- It is normally a good idea to state whether a panel of one or three arbitrator(s) is to be selected, and to include the place where the arbitration will occur.
- If the contract includes a general choice of law clause, it may govern the arbitration proceeding. The consequences should be considered....
- The parties are free to customize and refine the basic arbitration procedures to meet their particular needs. If the parties agree on a procedure that conflicts with otherwise applicable AAA rules, the AAA will almost always respect the wishes of the parties....
- The parties can provide for arbitration of future disputes by inserting the following clause into their contracts (the language in the brackets suggests possible alternatives or additions).

- Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial [or other] Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

- We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Commercial [or other] Arbitration Rules the following controversy: [describe briefly]. We further agree that a judgment of any court having jurisdiction may be entered upon the award.

The standard clause is often the best to include in a contract. It makes clear that all disputes are arbitrable. Thus, it minimizes dilatory court actions to avoid the arbitration process. It is self-enforcing. Arbitration can continue despite an objection from a party, unless the proceedings are stayed by court order or by agreement of the parties. It provides a

complete set of rules and procedures. This eliminates the need to spell out dozens of procedural matters in the parties' agreement. It provides for the selection of a specialized, impartial panel. Arbitrators are selected by the parties from a screened and trained pool of available experts.

The parties should consider adding a requirement regarding the number of arbitrators appointed to the dispute and designating the place and language of the arbitration.....For strategic or long-term commercial international contracts, the parties may wish to provide a "step" dispute resolution process encouraging negotiated solutions, or mediation in advance of arbitration or litigation. A model step clause and mediation clause follow.

"*In the event of any controversy or claim arising out of or relating to this contract, the parties hereto shall consult and negotiate with each other and, recognizing their mutual interests, attempt to reach a solution satisfactory to both parties. If they do not reach settlement within a period of 60 days, then either party may, by notice to the other party and the International Centre for Dispute Resolution, demand mediation under the International Mediation Procedures of the International Centre for Dispute Resolution. If settlement is not reached within 60 days after service of a written demand for mediation, any unresolved controversy or claim arising out of or relating to this contract shall be settled by arbitration in accordance with the International Arbitration Rules of the International Centre for Dispute Resolution."*

Usually, the effective management of time and expense in arbitration is best left in the hands of experienced case managers and arbitrators. Occasionally, however, parties wish to ensure that matters are resolved in a minimum of time and without recourse to the expense and time necessitated by common law methods of pre-hearing information exchange. The clauses that follow limit the time frame of arbitration (clauses presented in the alternative) and the amount of pre-hearing information exchange available to the parties. One word of caution: once entered into, these clauses will limit the arbitrator's authority to mold the process to the specific dictates of the case.

Other Provisions That Might be Considered

A. Specifying a Method of Selection and the Number of Arbitrators

The parties may agree to have one arbitrator or three (which significantly increases the cost).

The arbitration clause can also specify by name the individual whom the parties want as their arbitrator. However, the potential unavailability of the named individual in the future may pose a risk. All of these issues and others can be dealt with in the arbitration clause. Some illustrative provisions follow.

- The arbitrator selected by the claimant and the arbitrator selected by respondent shall, within 10 days of their appointment, select a third neutral arbitrator. In the event that they are unable to do so, the parties or their attorneys may request the American Arbitration Association to appoint the third neutral arbitrator. Prior to the commencement of hearings, each of the arbitrators appointed shall provide an oath or undertaking of impartiality.

- Within 14 days after the commencement of arbitration, each party shall select one person to act as arbitrator and the two selected shall select a third arbitrator within 10 days of their appointment. [The party-selected arbitrators will serve in a non-neutral capacity.] If the arbitrators selected by the parties are unable or fail to agree upon the third arbitrator, the third arbitrator shall be selected by the American Arbitration Association.

- In the event that arbitration is necessary, [name of specific arbitrator] shall act as the arbitrator.

When providing for direct appointment of the arbitrator(s) by the parties, it is best to specify a time frame within which it must be accomplished. Also, in many jurisdictions, the law permits the court to appoint arbitrators where privately-agreed means fail. Such a result may be time consuming, costly, and unpredictable. Parties who seek to establish an ad-hoc method of arbitrator appointment might be well advised to provide a fallback, such as, should the particular procedure fail for any reason, "arbitrators shall be appointed as provided in the AAA Commercial Arbitration Rules."

B. Arbitrator Qualifications

The parties may wish that one or more of the arbitrators be a lawyer or an accountant or an expert in computer technology, etc. In some instances, it makes more sense to specify that one of three arbitrators be an accountant, for example, than to turn the entire proceeding over to three accountants. Sample clauses providing for specific qualifications of arbitrators are set forth below.

- The arbitrator shall be a certified public accountant.

- The arbitrator shall be a practicing attorney [or a retired judge] of the [[specify]] [Court].

- The arbitration proceedings shall be conducted before a panel of three neutral arbitrators, all of whom shall be members of the bar of the state of [specify], actively engaged in the practice of law for at least 10 years.

- The panel of three arbitrators shall consist of one contractor, one architect, and one construction attorney.

- The arbitrators will be selected from a panel of persons having experience with and knowledge of electronic computers and the computer business, and at least one of the arbitrators selected will be an attorney.

- In the event that any party's claim exceeds $1 million, exclusive of interest and attorneys' fees, the dispute shall be heard and determined by three arbitrators.

Parties might wish to specify that the arbitrator should or should not be a national or citizen of a particular country. The following examples can be added to the arbitration clause to deal with this concern.

- The arbitrator shall be a national of [country].

- The arbitrator shall not be a national of either [country A] or [country B].
- The arbitrator shall not be of the nationality of either of the parties.

C. Locale Provisions

Parties might want to add language specifying the place of the arbitration. The choice of the proper place to arbitrate is most important because the place of arbitration implies generally a choice of the applicable procedural law, which in turn affects questions of arbitrability, procedure, court intervention and enforcement. In specifying a locale, parties should consider (1) the convenience of the location (e.g., availability of witnesses, local counsel, transportation, hotels, meeting facilities, court reporters, etc.); (2) the available pool of qualified arbitrators within the geographical area; and (3) the applicable procedural and substantive law. Of particular importance in international cases is the applicability of a convention providing for recognition and enforcement of arbitral agreements and awards and the arbitration regime at the chosen site. An example of locale provisions that might appear in an arbitration clause follows.

- The place of arbitration shall be [city], [state], or [country].

D. Language

In matters involving multilingual parties, the arbitration agreement often specifies the language in which the arbitration will be conducted. Examples of such language follow.

- The language(s) of the arbitration shall be [specify].
- The arbitration shall be conducted in the language in which the contract was written.

Such arbitration clauses could also deal with selection and cost allocation of an interpreter.

E. Governing Law

It is common for parties to specify the law that will govern the contract and/or the arbitration proceedings. Some examples follow.

- This agreement shall be governed by and interpreted in accordance with the laws of the State of [specify]. The parties acknowledge that this agreement evidences a transaction involving interstate commerce. The United States Arbitration Act shall govern the interpretation, enforcement, and proceedings pursuant to the arbitration clause in this agreement.
- Disputes under this clause shall be resolved by arbitration in accordance with Title 9 of the US Code (United States Arbitration Act) and the Commercial Arbitration Rules of the American Arbitration Association.
- This contract shall be governed by the laws of the state of [specify].

F. Conditions Precedent to Arbitration

Under an agreement of the parties, satisfaction of specified conditions may be required before a dispute is ready for arbitration. Examples of such conditions precedent include written notification of claims within a fixed period of time and exhaustion of other contractually established procedures, such as submission of claims to an architect or engineer. These kinds of provisions may, however, be a source of delay and may require linkage with a statute of limitations waiver (see below). An example of a "condition precedent" clause follows.

> ➢ If a dispute arises from or relates to this contract, the parties agree that upon request of either party they will seek the advice of [a mutually selected engineer] and try in good faith to settle the dispute within 30 days of that request, following which either party may submit the matter to mediation under the Commercial Mediation Procedures of the American Arbitration Association. If the matter is not resolved within 60 days after initiation of mediation, either party may demand arbitration administered by the American Arbitration Association under its [applicable] rules.

G. Preliminary Relief

If the parties foresee the possibility of needing emergency relief akin to a temporary restraining order, they might specify an arbitrator by name for that purpose in their arbitration clause or authorize the AAA to name a preliminary relief arbitrator to ensure an arbitrator is in place in sufficient time to address appropriate issues. Specific clauses providing for preliminary relief are set forth below.

> ➢ Either party may apply to the arbitrator seeking injunctive relief until the arbitration award is rendered or the controversy is otherwise resolved. Either party also may, without waiving any remedy under this agreement, seek from any court having jurisdiction any interim or provisional relief that is necessary to protect the rights or property of that party, pending the establishment of the arbitral tribunal (or pending the arbitral tribunal's determination of the merits of the controversy).

Pending the outcome of the arbitration, parties may agree to hold in escrow money, a letter of credit, goods, or the subject matter of the arbitration. A sample of a clause providing for such escrow follows.

> ➢ ESCROW 1 : Pending the outcome of the arbitration [name of party] shall place in escrow with [law firm, institution, or AAA] as the escrow agent, [the sum of _____, a letter of credit, goods, or the subject matter in dispute]. The escrow agent shall be entitled to release the [funds, letter of credit, goods, or subject matter in dispute] as directed by the arbitrator(s) in the award, unless the parties agree otherwise in writing.

H. Consolidation

Where there are multiple parties with disputes arising from the same transaction, complications can often be reduced by the consolidation of all disputes. Since arbitration is a process based on voluntary contractual participation, parties may not be required to arbitrate a dispute without their consent. However, parties can provide for the consolidation of two or more separate arbitrations into a single proceeding or permit the joinder of a third party into

an arbitration. In a construction dispute, consolidated proceedings may eliminate the need for duplicative presentations of claims and avoid the possibility of conflicting rulings from different panels of arbitrators. However, consolidating claims might be a source of delay and expense. An example of language that can be included in an arbitration clause follows.

> ➢ The owner, the contractor, and all subcontractors, specialty contractors, material suppliers, engineers, designers, architects, construction lenders, bonding companies, and other parties concerned with the construction of the structure are bound, each to each other, by this arbitration clause, provided that they have signed this contract or a contract that incorporates this contract by reference or signed any other agreement to be bound by this arbitration clause. Each such party agrees that it may be joined as an additional party to an arbitration involving other parties under any such agreement. If more than one arbitration is begun under any such agreement and any party contends that two or more arbitrations are substantially related and that the issues should be heard in one proceeding, the arbitrator(s) selected in the first-filed of such proceedings shall determine whether, in the interests of justice and efficiency, the proceedings should be consolidated before that (those) arbitrator(s).

I. Document Discovery

Under the AAA rules, arbitrators are authorized to direct a prehearing exchange of documents. The parties typically discuss such an exchange and seek to agree on its scope. In most (but not all) instances, arbitrators will order prompt production of limited numbers of documents which are directly relevant to the issues involved. In some instances, parties might want to ensure that such production will in fact occur and thus provide for it in their arbitration clause. In doing so, however, they should be mindful of what scope of document production they desire. This may be difficult to decide at the outset. If the parties address discovery in the clause, they might include time limitations as to when all discovery should be completed and might specify that the arbitrator shall resolve outstanding discovery issues. Sample language is set forth below.

> ➢ Consistent with the expedited nature of arbitration, each party will, upon the written request of the other party, promptly provide the other with copies of documents [relevant to the issues raised by any claim or counterclaim] [on which the producing party may rely in support of or in opposition to any claim or defense]. Any dispute regarding discovery, or the relevance or scope thereof, shall be determined by the [arbitrator(s)] [chair of the arbitration panel], which determination shall be conclusive. All discovery shall be completed within [45] [60] days following the appointment of the arbitrator(s).

J. Depositions

Generally, arbitrators prefer to hear and be able to question witnesses at a hearing rather than rely on deposition testimony. However, parties are free to provide in their arbitration

clause for a tailored discovery program, preferably to be managed by the arbitrator. This might occur, for example, if the parties anticipate the need for distant witnesses who would not be able to testify except through depositions or, in the alternative, by the arbitrator holding a hearing where the witness is located and subject to subpoena. In most cases where parties provide for depositions, they do so in very limited fashion, i.e., they might specify a 30-day deposition period, with each side permitted three depositions, none of which would last more than three hours. All objections would be reserved for the arbitration hearing and would not even be noted at the deposition except for objections based on privilege or extreme confidentiality. Sample language providing for such depositions is set forth below.

> ➢ At the request of a party, the arbitrator(s) shall have the discretion to order examination by deposition of witnesses to the extent the arbitrator deems such additional discovery relevant and appropriate. Depositions shall be limited to a maximum of [three] [insert number] per party and shall be held within 30 days of the making of a request. Additional depositions may be scheduled only with the permission of the [arbitrator(s)] [chair of the arbitration panel], and for good cause shown. Each deposition shall be limited to a maximum of [three hours] [six hours] [one day's] duration. All objections are reserved for the arbitration hearing except for objections based on privilege and proprietary or confidential information.

K. Duration of Arbitration Proceeding

Parties sometimes underscore their wish for an expedited result by providing in the arbitration clause, for example, that there will be an award within a specified number of months of the notice of intention to arbitrate and that the arbitrator(s) must agree to the time constraints before accepting appointment. Before adopting such language, however, the parties should consider whether the deadline is realistic and what would happen if the deadline were not met under circumstances where the parties had not mutually agreed to extend it (e.g., whether the award would be enforceable). It thus may be helpful to allow the arbitrator to extend time limits in appropriate circumstances. Sample language is set forth below.

> ➢ The award shall be made within nine months of the filing of the notice of intention to arbitrate (demand), and the arbitrator(s) shall agree to comply with this schedule before accepting appointment. However, this time limit may be extended by agreement of the parties or by the arbitrator(s) if necessary.

L. Remedies

Under a broad arbitration clause and most AAA rules, the arbitrator may grant "any remedy or relief that the arbitrator deems just and equitable" within the scope of the parties' agreement. Sometimes parties want to include or exclude certain specific remedies. Examples of clauses dealing with remedies follow.

- The arbitrators will have no authority to award punitive or other damages not measured by the prevailing party's actual damages, except as may be required by statute.
- In no event shall an award in an arbitration initiated under this clause exceed $_____.
- In no event shall an award in an arbitration initiated under this clause exceed $_____ for any claimant
- The arbitrator(s) shall not award consequential damages in any arbitration initiated under this section.
- Any award in an arbitration initiated under this clause shall be limited to monetary damages and shall include no injunction or direction to any party other than the direction to pay a monetary amount.
- If the arbitrator(s) find liability in any arbitration initiated under this clause, they shall award liquidated damages in the amount of $_____.
- Any monetary award in an arbitration initiated under this clause shall include pre-award interest at the rate of ____% from the time of the act or acts giving rise to the award.

M. "Baseball" Arbitration

"Baseball" arbitration is a methodology used in many different contexts and is particularly effective when parties have a long-term relationship.

• The procedure involves each party submitting a number to the arbitrator(s) and serving the number on his or her adversary on the understanding that, following a hearing, the arbitrator(s) will pick one of the submitted numbers, nothing else.

A key aspect of this approach is that there is incentive for a party to submit a highly reasonable number, since this increases the likelihood that the arbitrator(s) will select that number. In some instances, the process of submitting the numbers moves the parties so close together that the dispute is settled without a hearing. Sample language providing for "baseball" arbitration is set forth below.

- Each party shall submit to the arbitrator and exchange with each other in advance of the hearing their last, best offers. The arbitrator shall be limited to awarding only one or the other of the two figures submitted.

N. Arbitration within Monetary Limits

Parties are often able to negotiate to a point but are then unable to close the remaining gap between their respective positions. By setting up an arbitration that must result in an award within the gap that remains between the parties, the parties are able to eliminate extreme risk, while gaining the benefit of the extent to which their negotiations were successful. There are two commonly-used approaches. The first involves informing the arbitrator(s) that the award should be somewhere within a specified monetary range. Sample contract language providing for this methodology is set forth below.

- Any award of the arbitrator in favor of [specify party] and against [specify party] shall be at least [specify a dollar amount] but shall not exceed [specify a dollar amount]. [Specify a party] expressly waives any claim in excess of [specify a dollar amount] and agrees that its recovery shall not exceed that amount. Any such award shall be in satisfaction of all claims by [specify a party] against [specify a party].

A second approach is for the parties to agree but not tell the arbitrator(s) that the amount of recovery will, for example, be somewhere between $500 and $1,000. If the award is less than $500, then it is raised to $500 pursuant to the agreement; if the award is more than $1,000, then it is lowered to $1,000 pursuant to the agreement; if the award is within the $500-1,000 range, then the amount awarded by the arbitrator(s) is unchanged. Sample contract language providing for this methodology is set forth below.

- In the event that the arbitrator denies the claim or awards an amount less than the minimum amount of [specify], then this minimum amount shall be paid to the claimant. Should the arbitrator's award exceed the maximum amount of [specify], then only this maximum amount shall be paid to the claimant. It is further understood between the parties that, if the arbitrator awards an amount between the minimum and the maximum stipulated range, then the exact awarded amount will be paid to the claimant. The parties further agree that this agreement is private between them and will not be disclosed to the arbitrator.

O. Assessment of Attorneys' Fees

The AAA rules generally provide that the administrative fees be borne as incurred and that the arbitrators' compensation be allocated equally between the parties and, except for international rules, are silent concerning attorneys' fees; but this can be modified by agreement of the parties. Fees and expenses of the arbitration, including attorneys' fees, can be dealt with in the arbitration clause. Defining the term 'prevailing party' within the contract is recommended to avoid misunderstanding. Some typical language dealing with fees and expenses follows.

- The prevailing party shall be entitled to an award of reasonable attorney fees.

- The arbitrators shall award to the prevailing party, if any, as determined by the arbitrators, all of its costs and fees. "Costs and fees" mean all reasonable pre-award expenses of the arbitration, including the arbitrators' fees, administrative fees, travel expenses, out-of-pocket expenses such as copying and telephone, court costs, witness fees, and attorneys' fees.

- Each party shall bear its own costs and expenses and an equal share of the arbitrators' and administrative fees of arbitration.

- The arbitrators may determine how the costs and expenses of the arbitration shall be allocated between the parties, but they shall not award attorneys' fees.

P. Reasoned Opinion Accompanying the Award

In domestic commercial cases, arbitrators usually will write a reasoned opinion explaining their award if such an opinion is requested by all parties. While some take the position that reasoned opinions detract from finality if they facilitate post-arbitration resort to the courts, parties sometimes desire such opinions, particularly in large, complex cases or as already provided by most applicable rules in international disputes. If the parties want such an opinion, they can include language such as the following in their arbitration clause.

- The award of the arbitrators shall be accompanied by a reasoned opinion.
- The award shall be in writing, shall be signed by a majority of the arbitrators, and shall include a statement setting forth the reasons for the disposition of any claim.
- The award shall include findings of fact [and conclusions of law].
- The award shall include a breakdown as to specific claims.

Q. Confidentiality

While the AAA and arbitrators adhere to certain standards concerning the privacy or confidentiality of the hearings (see the AAA-ABA Code of Ethics for Arbitrators in Commercial Disputes, Canon VI), parties might also wish to impose limits on themselves as to how much information regarding the dispute may be disclosed outside the hearing. The following language might help serve this purpose.

- Except as may be required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties.

The preceding language could also be modified to restrict only disclosure of certain information (e.g., trade secrets).

R. Appeal

The basic objective of arbitration is a fair, fast and expert result, achieved economically. Consistent with this goal, an arbitration award traditionally will be set aside only in egregious circumstances such as demonstrable bias of an arbitrator. Sometimes, however, the parties desire a more comprehensive appeal, most often in the setting of legally complex cases. Some sample clauses incorporating appeal provision are

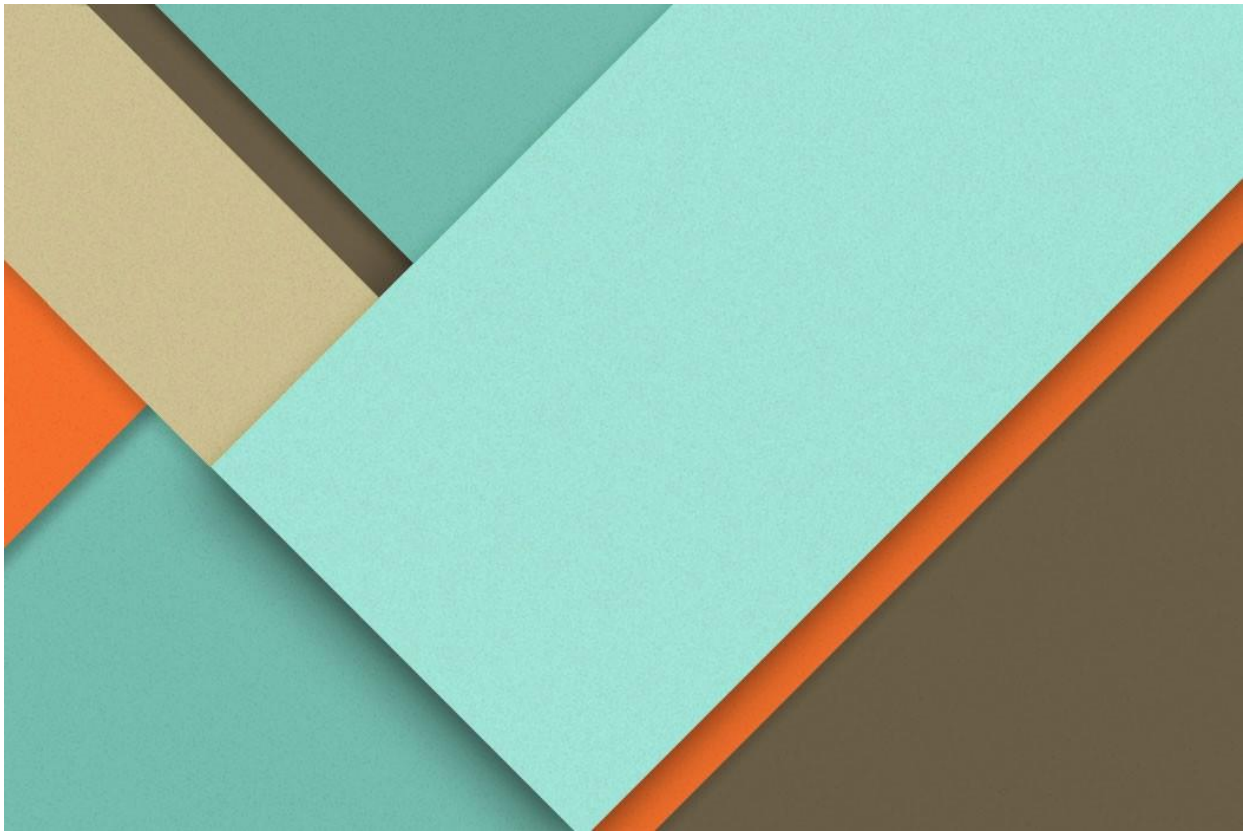
- "Notwithstanding any language to the contrary in the contract documents, the parties hereby agree: that the Underlying Award may be appealed pursuant to the AAA's Optional Appellate Arbitration Rules ("Appellate Rules"); that the Underlying Award rendered by the arbitrator(s) shall, at a minimum, be a reasoned award; and that the Underlying Award shall not be considered final until after the time for filing the notice of appeal pursuant to the Appellate Rules has expired. Appeals must be initiated within thirty (30) days of receipt of an Underlying Award, as defined by Rule A-3 of the Appellate Rules, by filing a

> Notice of Appeal with any AAA office. Following the appeal process the decision rendered by the appeal tribunal may be entered in any court having jurisdiction thereof..."

S. Mediation-Arbitration

A clause may provide first for mediation under the AAA's mediation procedures. If the mediation is unsuccessful, the mediator could be authorized to resolve the dispute under the AAA's arbitration rules. This process is sometimes referred to as "Med-Arb." Except in unusual circumstances, a procedure whereby the same individual who has been serving as a mediator becomes an arbitrator when the mediation fails is not recommended, because it could inhibit the candor which should characterize the mediation process and/or it could convey evidence, legal points or settlement positions ex parte, improperly influencing the arbitrator. Sample:

If a dispute arises from or relates to this contract or the breach thereof, and if the dispute cannot be settled through direct discussions, the parties agree to endeavor first to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration. Any unresolved controversy or claim arising from or relating to this contract or breach thereof shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. If all parties to the dispute agree, a mediator involved in the parties' mediation may be asked to serve as the arbitrator.



Draft Mediation Bill 2021

Some points of discussion

05.04.2022

Dr. Sunanda Bharti
& Contributing Colleagues (Dr. Neelam Tyagi…)

ADR
Update

Overview

The following may be considered as a working paper on what may be discussed during lectures, by teachers, on the Draft Mediation Bill, 2021.

What appears to be a drawback		What appears to be a good point
Chapter 8 provides for the establishment of a mediation council in India; but it does not have any practicing mediator in its constitution…can this be a professional council then?	1	Mediation and Conciliation have to be used interchangeably–that is one confusion sorted.
Section 7 and 1st Schedule give out a list of exclusions–15 of them. It makes one wonder what can be mediated then! None seems merited except for heinous criminal offenses perhaps. Anything that can be potentially settled should have the option of being settled through mediation.	2	It calls for registration of mediators–which at least hints at creating mediation into a stand-alone profession.
For some curious reason, the Bill reserves only 'commercial' disputes for international mediation. Domestic mediation can be resorted to for even noncommercial disputes. Similarly, for international commercial disputes to which a non-Indian law applies has not been mentioned at all	3	It makes pre-litigation mediation compulsory which appears to be good on the face of it. It may provide mediation the necessary fillip–but at the same time it would be removed from the umbrella of ADR–for it would cease to be an 'alternative'...
Under the proposed section 29, a MSA can be challenged on grounds of fraud, impersonation, or corruption, or if the matter is in the 1st schedule—except for fraud, the remaining three appear to be vague/not defined and/or problematic.	4	Finally, we are talking of mediation legislation–itwould streamline many things…

It calls for registration of mediators by the Mediation Council–it may be seen as a cumbersome requirement Also would non registered mediators be allowed to practise?	5	It devotes a chapter to online mediation giving them sanctity and status.
Should it be a Code rather than an Act? After all, its implementation is dependent on so many other laws–the Laws of Contract, Personal laws, CPC for instance.	6	Community mediation is recognised
A few types of settlement agreements are excluded from the scope of the Singapore Convention, namely settlement agreements that have been approved by a court or concluded in court proceedings, and that are enforceable as a judgment or decree of a court. The Draft Mediation Bill Clause 28 provides that 'mediated settlement agreement resulting from mediation is final and binding and is enforceable in accordance with the provisions of Code of Civil Procedure, 1908, in the same manner as if it were a judgement or decree passed by a court.' Now the problem is that if an international mediation is conducted in India, and results in a MSA, it would be enforceable as a judgment of the court. On one hand the Bill proclaims to make India a hub of mediation, on the other hand it ensures that we do not get the benefit of the Singapore Convention. A FEW MORE POINTS: 1. The consequences of non-registration and non-compliance with a Mediated	7	Situation where confidentiality would not apply have been mentioned 1. Binding nature of the mediation settlement agreement and to recognise it as a judgment or decree of a court that will be

Settlement are missing under the Draft Bill. 2. As per Section 23(1)(iii) of the Bill, documents produced during the mediation will not be admissible in the courts or tribunals. However, if one of the parties sues the opposite party after the failure of mediation, this provision will prevent introducing these key documents as evidence in court being part of the mediation proceedings. 3. The Bill provides that the chairperson will be appointed by the central government rather the members of the council should be experts in mediation and CJI should have a role in these appointments. 4. The Bill does not lay down any details of qualifications or criteria to become a trained mediator. 5. Community mediation must have provisions to check these proceedings to prevent any party from becoming a victim of caste or gender discrimination, especially in rural areas. 6. Section 18 of the Draft Bill requires the mediator to communicate 'the view of each party to the other to the extent agreed to by them'. It could give rise to a conflict of interest and strike the confidentiality requirement of the mediation process which must be kept supreme throughout. 7. Making pre-litigation mediation mandatory will be contrary to the core/spirit of mediation i.e. it is a voluntary process. What if the parties are unwilling to mediate.		binding and enforceable by law. 2. Recognition of institutional mediation and constitution of Mediation Council of India under chapter IX of the Draft Bill that will recognise mediation institutes for grading of the Mediation Service Providers and to maintain a panel of mediators. 3. Time-limit for completion of mediation mentioned under Section 20 of the Draft Bill stipulates 180 days from the commencement of mediation for its completion, with a further extension for an additional period of 180 days with the parties' consent.

Annexure-III

Sample Field Visit Documents

दिल्ली विश्वविद्यालय
University of Delhi

Swati Solanki <swatisolanki@lc2.du.ac.in>

Request for Mediation Centre Visit (Faculty of Law, University of Delhi)

3 messages

Swati Solanki <swatisolanki@lc2.du.ac.in> Tue, Apr 18, 2023 at 3:14 PM
To: mediation.dhc@nic.in, dhcmcc@gmail.com
Cc: contact@harshitjain.co.in

Dear Ma'am,

Greetings of the day.

I, Swati Solanki, Assistant Professor, Faculty of Law, am writing to you to permit the final year students of Law Centre II (Section B& C) to visit the Delhi High Court Mediation Centre from this week onwards. I once again extend my thanks for having permitted the students of the 2022 batch last year through the recommendation of Advocate Harshit Jain (Mediator).

I'm attaching a letter with this mail for your kind consideration.

Sincerely,
Swati Solanki
Assistant Professor
Faculty of Law
University of Delhi
Contact No. 9999214285

Letter for Mediation Centre Visit_2023.pdf
406K

Swati Solanki <swatisolanki@lc2.du.ac.in> Fri, Apr 21, 2023 at 3:29 PM
To: mediation.dhc@nic.in, dhcmcc@gmail.com
Cc: contact@harshitjain.co.in

Dear Ma'am,

In continuation of the earlier mail, please find the list of students attached with this mail.

Regards,
Ms. Swati Solanki
[Quoted text hidden]

List of Students - Mediation Visit .pdf
180K

Mediation Centre Delhi High Court <mediation.dhc@nic.in> Wed, Apr 26, 2023 at 5:01 PM
To: swatisolanki@lc2.du.ac.in

Respected Madam,

Reference to your letter dated 18/04/2023, you are informed that a batch of 20-25 students per day has been allowed by the competent authority to visit the Delhi High Court Mediation and Conciliation Centre till 5th May, 2023 after 3 PM onwards (except gazetted holidays and Sunday).

Regards
Delhi High Court Mediation & Conciliation Centre, Samadhan

From: swatisolanki@lc2.du.ac.in
To: "Mediation Centre Delhi High Court" <mediation.dhc@nic.in>, dhcmcc@gmail.com

		Section B		Section C	
Day	S.No	Roll No.	Names	Roll No.	Names
24 Apr	1	202004	Sahil	202286	Vishal Gupta
	2	202008	Urmila Sharma	202800	Manisha Chauhan
	3	202010	Umang Malik	202149	Vivek Gaur
	4	202013	Abhishek Singh Bhandari	202145	Parth Verma
	5	202053	Himanshu Jaiswal	202445	Vikrant Yadav
	6	202058	Sahla Nechiyil	202499	Aahna Shresth
	7	202066	Priyal Gupta	202443	Shubham
	8	202068	Jyotsna	202674	Ashwini Kumar
	10	202074	Apoorv Shreyansh	202677	Himanshu Mehra
	11	202082	MANTHOOR SAIPRIYA	202728	Dhruv Tanwar
	12	202097	Komal Kanwal	202798	Rebecca Zovi
	13	202104	Ambika Katyal	202285	Divya bhatt
	14	202406	Mayank Sharma	202188	Shantnu Pundir
25 Apr	1	202144	Abhishek Dubey	202389	Anupam Anand
	2	202151	Saurabh Deep	202233	Shagun Garg
	3	202159	Tannu Gogia	202723	Uday Prakash
	4	202162	Devanshi Tripathi	202236	Mahima Mukherjee
	5	202179	Ali Muqtadir Ahmad	202238	Saumya Rai
	6	202183	Medha Pandey	202578	Shivani Malhotra
	7	202807	AMIT PANDEY	202496	Vishnu Kumar Chaurasiya
	8	202827	Shreyangana Bag	202534	Pooja
	10	202342	Aatif Hussain	202147	Saneh Kumari
	11	202213	Nishant Singh	202833	Monika Singh
	12	202217	YUGAL PANDEY	202192	Aditi
	13	202219	Anshu Aditya	202283	Nuthanaganti Tejaswini
	14	202227	Komal Sharma	202575	Haritha K V
26 Apr	1	202305	Himanshu Tripathi	198005	Yogyank Mishra
	2	202310	Arvind pratap singh	198079	Mukul Mehta
	3	202318	Gautam Sawarn	198237	Subiya Masood
	4	202340	Manoj Kumar	198437	Vaibhav Choudhary
	5	202341	Altaf	202038	Annie Panwar
	6	202346	Aqsa Rehman	202041	Neeraj Singh Negi
	7	202350	Vikas khangwal	202042	Ashutosh Ranjan
	8	202390	Anushka	202045	Mahima Tyagi
	10	202392	Mohammad Fahad	202096	Amaan Ahmad
	11	202440	NAMIT YADAV	202098	Anubhav
	12	202474	Azharuddin	202099	Rhythm Kalra
	13	202476	Mohd javed	202102	Pragya Virmani
	14	202433	Amulya Sachan		
27 Apr	1	202497	SHEHREEN GAURI	202198	Vanshika Arora
	2	202509	Nandini	202199	Ankush Chhikara
	3	202520	Priyanka kumari	202237	Ananya Trivedi
	4	202536	NIKHIL PAL	202287	JAYA SINGH
	5	202550	Bijay Lakshmi Sahu	202352	Ashish Maurya
	6	202551	VINAY KUMAR SINGH CHAUHAN	202387	Akanksha
	7	202577	Satish Kumar	202395	Nidhi Kumari
	8	202579	Aadarsh kumar	202398	Jwala Prasad Yadav
	10	202586	Rajnandani Kumari	202399	Rohit Rawal
	11	202617	BINDU KUMARI	202436	Khyati prajapati
	12	202640	Sourabh Rai	202446	Ashween Gaurav
	13	202641	Avni Kardam	202488	BRIJ MOHAN GIRI
28 Apr	1	202694	Pooja Singh	202494	Hawa singh
	2	202697	MANISH KUMAR	202535	Abhay Yadav
	3	202703	Pushpank raj	202538	Viplav kumar satyam
	4	202704	Nandini chouhan	202539	Gaurav Yadav
	5	202709	NEERAJ KUMAR	202575	HARITHA K V
	6	202729	Ritu	202576	Vaishali Pawar
	7	202792	Bharat Bandhu Majhi	202582	NAYEEM HASAN RAZA
	8	202796	RAVI PRASAD	202583	Shana Saifi
	10	202187	Priyal Raje Singh Chauhan	202584	Naina
	11	202412	Vasundhara Singh	202619	Ravi Verma
	12	202189	Saurabh Tripathi	202621	Priyanka
	13	202819	Ankit Goswami	202150	Mandeep
1 May	1	202011	Utsav kumar	202795	Thonrin YK Thangal
	2	202139	Mansi Katiyar	202832	Mirza Gulzar Ahmed Beg
	3	202857	ROHIT	202833	Monika Singh
	4	202753	Rajnish Kumar Sharma	202835	Aryan Sharma
	5	202687	ANUJ KUMAR	202725	KARAN
	6	202274	Gautam kumar mishra	202799	Nikhil Tejaka
	7	202442	Pramod Kumar Yadav	202338	Vishal Kumar Yadav
	8	202092	Zafar Arqam	202234	Sherin Mathew

	9	202094	INDRAJEET KUMAR	202673	Kamal
	10	202073	Prerit	202100	Harsh Deo Singh
	11	202439	RISHIT	**202148**	**ABHISHEK RATHI**
	12	202191	KRISHAN KUMAR	202624	Harshita
	13	202854	pratap	202194	NEHA CHOPRA
	14	202313	Vaibhav Soni	202046	Jasjeet Singh Sandhu
2nd May	1	202651	Rakhi Tomar	202338	VISHAL KUMAR YADAV
	2	202652	PRERNA SINGH	202344	Jitender bhatia
	3	202654	Praveen Kumar	202349	Bibhanshu Verma
	4	202592	KRISHNA KUMAR YADAV	202288	PUNEET
	5	202241	Mansi Dhami	202540	Nitish
	6	202262	Himanshu Sharma	202445	Vikrant Yadav
	7	202273	Neha Verma	202801	Thenkhosei Haokip
	8	202302	ANKIT KUMAR TIWARY	202675	BRIJESH PAL
	9	202744	Sushant Gautam	202490	AMIT KUMAR CHAUDHARY
	10	**202749**	**Kamin Danggen**	**202719**	**Ankit Guran**
	11	202756	ANKIT KATHIYAL	202721	SAMRAT ANKIT KUMAR SINGH
	12	202759	Moses Loshu Ariina		

DELHI STATE LEGAL SERVICES AUTHORITY

(Constituted Under the 'Legal Services Authorities Act, 1987', an Act of Parliament)

Under the Administrative Control of High Court of Delhi

Central Office, Patiala House Courts Complex, New Delhi - 110001

Ph. : 23384781, 2037

1626, Fax : 23387267, Email : **dslsa-phc@nic.in, lokadalatwing-dslsa@nic.in**

Website :- www.dslsa.org **24x7 Helpline No. 1516**

No. 01/ADRWing/DSLSA/NLA/2019 Dated 06.03.2019

(Through e-mail)

To

Sh. Digvinay Singh
Secretary
Delhi High Court Legal Services Committee
High Court of Delhi,
New Delhi.

Sub : Visiting of students of Faculty of Law, Law Centre-I, Delhi University for observing National Lok Adalat to be held on 09.03.2019.

Sir,

May I inform your goodself that we are in receipt of the e-mail dated 27.02.2019 of Dr.(Mrs.) Alok Sharma, Assistant Professor, Law Centre -1, Faculty of Law, University of Delhi whereby it has been apprised that as per the guidance of Bar Council of India curricula, ADR has become a compulsory course in which attending the Lok Adalat proceeding is a must, on the basis of which they have to submit their reports which shall be evaluated as a part of their examination and hence, requested for permission to their students for attending the National Lok Adalat proceeding which is going to be held on **9th March, 2019** in all Six Courts Complexes in Delhi.

Taking into consideration of the benefits of the students, the aforesaid proposal for visiting of students to the ensuing National Lok Adalat to be held on 09.03.2019 is being approved. The list of aforesaid students who will visit the ensuing National Lok Adalat in High Court is attached herewith. The Law Centre -1 will appoint Co-ordinator(s) for coordination with DHCLSC who will take the attendance of students and share it with the office of DHCLSC.

Therefore, may I request your goodself to kindly permit the aforesaid students for visiting the Lok Adalat benches on 09.03.2019 to observe the proceedings.

With Regards,

Yours faithfully

6/3/19

(Sanjeev Jain)
Member Secretary

Encl.: Aforesaid schedule of students.

Copy to :- (1) Dr. (Mrs.) Alok Sharma, Assistant Professor, Faculty of Law, University of Delhi.

Gmail **Swati Solanki <swati.solanki89@gmail.com>**

Fwd: Request to allow students of 6 th semester to attend and observe the National Lok Adalat on 16 , February, 2020.

1 message

Shikha Kamboj <kambojshikha@gmail.com> Wed, Jan 10, 2024 at 11:08 AM
To: PIC LC2 <pic@lc2.du.ac.in>, Swati Solanki <swati.solanki89@gmail.com>, Dr Ashish Kumar <ashllm.du@gmail.com>

---------- Forwarded message ---------
From: **Shikha Kamboj** <kambojshikha@gmail.com>
Date: Sat, Feb 15, 2020, 3:02 PM
Subject: Fwd: Request to allow students of 6 th semester to attend and observe the National Lok Adalat on 16 , February, 2020.
To: <charshita221@gmail.com>

---------- Forwarded message ---------
From: **Shikha Kamboj** <kambojshikha@gmail.com>
Date: Sat, 15 Feb 2020, 15:01
Subject: Fwd: Request to allow students of 6 th semester to attend and observe the National Lok Adalat on 16 , February, 2020.
To: <charshita221@gmail.con>

---------- Forwarded message ---------
From: **Shikha Kamboj** <kambojshikha@gmail.com>
Date: Sat, 15 Feb 2020, 15:00
Subject: Fwd: Request to allow students of 6 th semester to attend and observe the National Lok Adalat on 16 , February, 2020.
To: V K Ahuja <vkahuja2002@yahoo.co.in>

---------- Forwarded message ---------
From: **Hari Gopal** <lokadalatwing-dslsa@nic.in>
Date: Sat, 15 Feb 2020, 14:26
Subject: Re: Request to allow students of 6 th semester to attend and observe the National Lok Adalat on 16 , February, 2020.
To: Neeti Suri Mishra <central-dlsa@nic.in>, Vinod Kumar Meena <west-dlsa@nic.in>, Secretary DLSA (North) <north-dlsa@nic.in>, Sh. Chander Jit Singh PHC <nddistrict.dlsa@gmail.com>
Cc: Shikha Kamboj <kambojshikha@gmail.com>

All Ld. Secretaries,
Central, West, North, New Delhi, District Legal Services Authorities,
Delhi.

Sub : Visiting of students of Law Centre-II, Faculty of Law, Delhi University for observing National Lok Adalat to be held on 16.02.2020.

Sir/Madam,

May I inform your goodself that we are in receipt of an e-mail dated 14.02.2020 of Ms. Shikha Kamboj, Assistant Professor, Law Centre -II, Faculty of Law, University of Delhi whereby it has been apprised that as per the guidance of Bar Council of India curricula, ADR has become a compulsory course in which attending the Lok Adalat proceeding is a must, on the basis of which they have to submit their reports which shall be evaluated as a part of their examination and hence, requested for permission to their students for attending the National Lok Adalat proceeding which is going to be held on **16th February, 2020** in Delhi.

Taking into consideration of the benefits of the students, the aforesaid proposal for visiting of students to the ensuing National Lok Adalat to be held on 16.02.2020 is being approved. The schedule in respect of visiting of students to the Lok Adalats is attached herewith. The Law Centre -II will appoint the Co-ordinator(s) for each DLSA. The deputed Co-ordinator(s) will co-ordinate with the respective DLSA as well as take the attendance of students and share it with the office of respective DLSA.

Therefore, may I request your goodself to kindly permit the aforesaid students for visiting the Lok Adalat benches on 16.02.2020 in your respective district to observe the proceedings.

Thanking you,

Yours sincerely

(Gautam Manan)
Special Secretary

Encl.: Aforesaid schedule of students.

Copy to:-
Ms. Shikha Kamboj, Assistant Professor, Law Centre-II, Faculty of Law, University of Delhi. (Mob. No. 8130069872)

From: "Legal Literacy Wing" <legallitwing-dslsa@nic.in>
To: "Hari Gopal" <lokadalatwing-dslsa@nic.in>
Sent: Saturday, February 15, 2020 10:09:20 AM
Subject: Fwd: Request to allow students of 6 th semester to attend and observe the National Lok Adalat on 16 , February, 2020.

From: "Shikha Kamboj" <kambojshikha@gmail.com>
To: legallitwing-dslsa@nic.in
Sent: Friday, February 14, 2020 7:16:16 PM
Subject: Request to allow students of 6 th semester to attend and observe the National Lok Adalat on 16 , February, 2020.

Respected Sir / Maam

I am writing this mail to seek your permission on behalf of my students studying in VIth semester at Law Centre -II, University of Delhi. These students are studying ADR as a clinical subject and they need to attend Lok Adalat and share there observation as a field report as a part of curriculum.
Kindly allow them to attend the same, the total no of students are 40 , so we can divide them in 4 group of 10 students each. It will be highly appreciable to consider our request for the first hand information on the subject.
I shall be highly obliged.
Thanking you
Warm regards
Shikha Kamboj
Asst Prof. LC -II
Faculty of Law, DU
8130069872.

--
Legal Literacy Wing
Delhi State Legal Services Authority
Patiala House Courts,

New Delhi

LIST OF STUDNENT FROM LC II.pdf
53K

Room No. 287, Tis Hazari Courts, Delhi (23933231, 23925035) :-	
S. No	**Name**
1	Harshita Chodhary
2	Nishika Yadav
3	B V Swathi
4	Huma
5	Unnati Gupta
6	Nisha Lamba
7	Jyoti
8	Abhishek Kumar
9	Rohit Sharma
10	Jigyasa Sharma
West District Legal Services Authority Room No. 295, Tis Hazari Courts, Delhi (23968052, 23950919)	
11	Rakshit Rautela
12	Amit Kumar
13	Deepanshi Garg
14	Aekansh Yadav
15	Tushaar Garg
16	Ram Narayan
17	Sukanya Hazarika
18	Richa
19	Mukesh Kumar
20	Anjali Tacker

North District Legal Services Authority Room No. 405, Rohini Courts, Delhi (27557310) :

S. no	Name
1	Deepak Punia
2	Venkatesh
3	Yogesh Sarwan
4	Love Jindal
5	Sanchita Beniwal
6	Nidhi
7	Sunil

New Delhi District Legal Services Authority Patiala House Court, New Delhi (23072418):-

S. no	Name
1	Udita Singh
2	Kamei
3	Megha Jain
4	Ishita saxena
5	Hament Kumar
6	Prabhav Pachory
7	Sakshi Rai
8	Neda Akhtar
9	Shivam Sharma

DELHI STATE LEGAL SERVICES AUTHORITY

(Constituted Under the 'Legal Services Authorities Act, 1987', an Act of Parliament)

Under the Administrative Control of High Court of Delhi

Central Office, Patiala House Courts Complex, New Delhi – 110001 Ph. : 23384781,
20371626, Fax : 23387267, Email : **dslsa-phc@nic.in, lokadalatwing-dslsa@nic.in**

Website :- www.dslsa.org **24x7 Helpline No. 1516**

No. 01/ADRWing/DSLSA/NLA/2020 Dated 07.02.2020

All Ld. Secretaries,
District Legal Services Authorities,
Delhi.

Sub : Visiting of students of Law Centre-1, Faculty of Law, Delhi University for observing National Lok Adalat to be held on 16.02.2020.

Sir/Madam,

May I inform your goodself that we are in receipt of an e-mail dated 06.02.2020 of Dr.(Mrs.) Alok Sharma, Assistant Professor, Law Centre -1, Faculty of Law, University of Delhi whereby it has been apprised that as per the guidance of Bar Council of India curricula, ADR has become a compulsory course in which attending the Lok Adalat proceeding is a must, on the basis of which they have to submit their reports which shall be evaluated as a part of their examination and hence, requested for permission to their students for attending the National Lok Adalat proceeding which is going to be held on **16th February, 2020** in Delhi.

Taking into consideration of the benefits of the students, the aforesaid proposal for visiting of students to the ensuing National Lok Adalat to be held on 16.02.2020 is being approved. The schedule in respect of visiting of students to the Lok Adalats is attached herewith. The Law Centre -1 will appoint the Co-ordinator(s) for each DLSA. The deputed Co-ordinator(s) will co-ordinate with the respective DLSA as well as take the attendance of students and share it with the office of respective DLSA.

Therefore, may I request your goodself to kindly permit the aforesaid students for visiting the Lok Adalat benches on 16.02.2020 in your respective district to observe the proceedings.

Thanking you,

Yours sincerely

(Gautam Manan)
Special Secretary

Encl.: Aforesaid schedule of students.

Copy for information and necessary action to:-

(1) Prof. Ved Kumari, Faculty of Law, University of Delhi
(2) Dr.(Mrs.) Alok Sharma, Assistant Professor, Law Centre-1, Faculty of Law, University of Delhi.

	NAME	ROLL NUM	SECTION	MOBILE NUMBER
CENTRAL DLSA, TIS HAZARI COURTS				
1	Piyush kumar	196516	I	8447808071
2	Sushil lohia	196035	I	9899479255
3	Devender Mittal	196070	C	9255129998
4	Vikas Yadav	196517	I	9990936499
5	Swati	196490	F	9582166159
6	Hitesh Goyal	196449	F	8567829822
7	Jayam singh chauhan	196398	D	9958678734
8	Mohd shad	196370	D	9991615840
9	shubham	196358	D	7677036564
10	Swati prasad	196427	I	9953788087
11	Narender singh	196355	D	9050985544
12	Pratik Kumar Chakma	196551	I	8420851113
13	Pooja Gautam	196435	E	9643351768
14	Pooja	196381	H	9654072129
15	VIJAY RAJPUT	196024	A	9205730781
16	Shubham Agarwal	196477	I	9958611088
17	Kshitij Sukhlecha	196016	G	9950708199
18	Kartikeya mudgal	196180	H	7982555873
19	Sanjeev Kumar	196209	H	7895340863
20	Anuj Kumar	196236	H	8448805943
21	AMIT Kumar jaiswal	196192	B	8506928070
22	Aadarsh Prakash	196100	G	9958214241
23	ABDUR RASHEED	196086	G	8587848515
24	Deepak Rajora	196081	A	9871960386
25	Nishita Jagetia	196021	G	7042200952
26	Vijay kumar	196163	A	9650786358
27	rohit kumar chaubey	196332	f	9044699659
28	Vaibhav Oberoi	196487	Section I	9971288197
29	YASH SINGHAL	196042	A	9910171522
30	Aditya Singh	196318	C	8630997749
WEST DLSA, TIS HAZARI COURTS				
1	Arpit Goel	196067	A	9873745909
2	Arvind	196475	I	6387669948
3	Abhijeet kumar Bhatt	196402	I	9123442682
4	Suchitra yadav	196061	G	7042773969
5	Shiva Narang	196133	G	9999880368
6	Shivanshu Maheshvar	196268	F	8643110622
7	Jivika jolly	196564	I	9910058326
8	Prashant Singh	196270	C	9999470647
9	Maan Akashdeep Sing	196110	G	9592041185
10	Vidit Deswal	196074	A	9540787275
11	Meghna Piplani	191065	A	7838518881
12	Gaurav Chand	196159	B	9013233366
13	Shivangi Gupta	196031	G	8527095980
14	Nawaz Sherif	196379	E	8940571971
15	Kailash	196504	I	9971245383
16	Aastha jain	196045	G	7838598065
17	Piyush Garg	196496	F	8130043453

18	Vinay Goswami	196158	G	9891637487
19	Shashank Rai	196508	F	9599169130
20	Shoyab Khan	196525	F	9650211987
21	Sandeep Kumar	196302	H	8475946091
22	Shashank Shekhar Up	196331	Section-D	7566060069
23	Ayush rastogi	196380	D	9027369136
24	Chandan Nath	916513	F	7289900539
25	Jayesh Mishra	196393	D	70079 41237
26	Bhavya khatter	196366	A	8130875791
27	Sonali Gambhir	196119	A	9910376330
28	Kartikeya Gautam	196538	I	9835084565
29	shubham singh	196399	F	6388269143
30	Nisheeth Chandracho	196342	D	8076073849
EAST DLSA, KARKARDOOMA				
1	sachi	196420	I	9350244460
2	Sneha Sagar	196307	H	8755955023
3	Pappu priyanshu	196407	E	7004226850
4	Motiram Sharma	196075	A	9873708354
5	Vikram Singh dhapola	196482	I	7859962645
6	Shubham Mishra	196548	E	9873034568
7	Deborah L.S Serto	196417	E	9774239573
8	Vasuda Sharma	196194	B	8853532926
9	Avnish Malho	196228	A	9999310904
10	Seema	196349	D	9958715012
11	Yash Kumar Mehrotra	196135	B	8130714043
12	Shruthi	116	G	9582364900
13	YASHPAL MANDA	196063	G	9891236763
14	Shruthi sirish kumar	196116	G	9582364900
15	rohit kumar	196296	f	9.18076E+11
16	K.Dhinesh kumar	196387	D	9080125909
17	Tanay shahi	196017	C	8447802205
18	Sidharth	196193	B	9728555806
19	Bhagyashree Agarwal	196023	G	7042450724
20	Rohit kumar sah	196356	F	9873531931
21	Manish Sharma	196368	B	9555565588
22	Sagar Kumar	196492	F	9560820323
23	Ram krishna rao	196139	Section B	7042771906
24	Deepanshu yadav	196414	E	8375019309
25	SAURAV KUMAR SHA	196343	H	9113322819
26	Aditi Sinha	196258	H	9835466665
27	Sumit Kumar	196304	D	9888045965
28	Anushiri Srivastava	196104	A	9963646232
29	Harsh Vardhan	196491	F	9873705777
30	ARAVIND P L	196297	C	8448279150
NORTH-EAST DLSA, KARKARDOOMA				
1	Anshuman Shukla	196107	A	8736018044
2	Shripal Upadhyay	196078	G	88821 85967
3	Karn Singh Rajput	196467	I	8800760360
4	Cheshta Rajora	561	F	9625204037
5	Ankita kolhi	196541	F	8447842109

6	Akbar khan	196416	Section-E	9716533838
7	Chhavi Arora	196122	A	9599247858
8	BHANU PRAKASH KOT	196188	B	9560427140
9	Shrawan kumar	196128	B	7905664465
10	Rahul	196250	H	9891382794
11	Keerti saini	196195	B	7530811275
12	Chandresh soni	196409	E	9588260596
13	Anjali Brahma	196391	I	9717106159
14	Veer Chand Kumar	196221	H	9958356955
15	Ranjana Meena	196255	B	9069478183
16	Tannu Rani	196121	C	8860073445
17	Abhinav Chauhan	196384	B	8279855830
18	Mudrakshi	196083	G	8512847977
19	Anand Tripathi	196186	C	7309664275
20	Anurag Sarthi	466	F	8882115409
21	Shivani kashyap	196090	G	83770 30056
22	Priyanka sharma	196400	E	7503659641
23	ABHIJEET DHINGRA	196114	C	9811201195
24	Rishabh Attri	196273	C	7082438446
25	Paras Chaudhary	196440	E	7988928311
26	Pankhuri Yadav	196056	A	9650469033
27	Ravina	196064	G	8285665769
28	Parth gaurav	196479	F	8102068494
29	Kitusmita Barman	196038	C	8011130001
30	Sunil yadav	196499	I	8750393378
SHAHDARA DLSA, KARKARDOOMA COURTS				
1	Sudhir kumar	196237	C	9968619321
2	Meghna choudhary	196543	F	8860906041
3	Pankaj kumar	465	F	9718811183
4	nitin kumar	196013	G	7678504902
5	Rajas Ranu	196157	C	9717891890
6	Pradeep raja T	196394	D	7678351850
7	Palak	196245	C	9899180894
8	Sanjiv Kumar	196336	F	9958185981
9	Rahul Aggarwal	196066	A	9810706975
10	abhisar sharma	196007	G	8709625591
11	Riya Sardana	196174	B	9643867322
12	PRATIK KUMAR SINGH	196275	B	8299075815
13	Vishnuram P	196361	D	8148471653
14	Neha Manoj Dabral	196156	G	9820718893
15	Anuj kashyap	196502	F	7837809970
16	Neha Prajapati	196408	i	9953404337
17	Aakash dhanda	196451	E	9996798999
18	Rambha	196313	B	8826448388
19	Ammar Raj Regmi	196259	H	9810438220
20	Adheer Kumar	196130	B	7052121839
21	Vivek Trivedi	196374	G	8744860099
22	Anil Kumar	196327	D	9599908523
23	Arun Kumar Bharti	196060	A	8750953962
24	Amita singh	196088	G	8130887703

25	Anshu Kumar	196207	H	9871778720
26	ABHIMANYU MINHAS	196406	E	9871914262
27	Nirvan kaushik	196162	B	9999576436
28	Rahul	196545	F	8950694656
29	Pynkmen Rymbai	478	i	9667056645
30	Medha Mishra	196025	A	8840537379
SOUTH DLSA, SAKET COURTS				
1	Rajan Raj	196272	C	8506826347
2	Himanish Rana	196532	I	9599223344
3	Mayank Yadav	306	D	9598876666
4	SAURABH	196322	C	8307005110
5	PRAVEEN CHAUDHAR	196201	H	8178594822
6	Mohd Anees	196204	H	8802401678
7	Anand kumar Gupta	196311	H	9717707150
8	Divya jyoti	196382	H	8810491146
9	Vipasha Jain	196055	A	9999167518
10	Mukund Mubayi	196073	A	9910526229
11	Aiman Hashmi	196106	A	9818680785
12	Priye Rana	196046	A	9899202007
13	Anjali Tajayan	196234	H	9711074884
14	Aparna yadav	196214	B	7290821016
15	Abhishek Kumar Ojha	196028	A	7503694022
16	Rajiv kumar keshri	196437	E	9971612507
17	Deepika kathuria	196554	I	8860767570
18	Jyotsna Bhardwaj	196019	G	9599475311
19	Akshita Gupta	196463	E	9799564680
20	Rajsarit Khare	196099	A	8858105898
21	Aditi Sharma	196473	E	7292028662
22	GOVIND GAURAV	196231	H	9582242599
23	Vijay kumar	196566	H	9953195039
24	RIFA SANBAQ	196413	E	9562398835
25	Sourabh Suthar	196125	F	7737768805
26	Manav yadav	196287	H	7988354294
27	Babita	196298	H	9911577788
28	Poonam Maurya	485	I	8800437587
29	Aditi Chaudhary	196173	A	88603 51748
30	Deepti Singh	196364	H	7987118629
SOUTH EAST DLSA, SAKET				
1	ANJIT RAJ ANJAN	196052	A	8709180814
2	Sheetal	196140	B	8595310033
3	Akshita yadav	196519	F	9654479903
4	Tejesh Sinha	196263	H	8860999692
5	Surabhi Bharti	196282	H	9354711549
6	Tanay jareda	196060	G	7976143984
7	Azad Singh Handa	196006	A	7973959178
8	Deepika Guglani	196102	G	9871820722
9	Rupinder Kaur	196321	D	9650913114
10	Shreya Singh	196312	H	9454041186
11	Amartya sen verma	196039	A	8840256295
12	Ayushi Sharma	196203	C	9718138320

13	Amitabh Ranjan	196341	C	9990577754
14	Lalit kharya	196530	I	9993825850
15	ADESH KUMAR	196120	A	8802015851
16	Gautam Gandhi	196041	G	8950689893
17	Sarvesh Chaturvedi	196476	B	9818925341
18	Kamal singh	196238	C	9599969620
19	Preeti	196030	A	9643190965
20	Swati	196309	H	9811673228
21	Ketan mor	196053	C	9910302130
22	Sachin choudhary	196059	A	9990423202
23	Camran iqbal	196181	H	8586824179
24	Nawal Mundhra	196395	D	9971584796
25	Kusum Toor	196076	A	7838478584
26	Babita	196298	H	9911577788
27	Nilakshi	196390	I	8340513632
28	Pushkar maurya	196314	H	9821081455
29	Chetan Goel	196001	G	9810889527
30	Tuhi Singh	196127	G	9113387694
NORTH DLSA, ROHINI COURTS				
1	Praveen Kumar	196252	B	8745810820
2	RISHI CHAUHAN	196032	A	9560385126
3	Kanupriya Goyal	196101	A	9643960682
4	AVI GUPTA	196283	D	8410166148
5	Vivek Trivedi	196374	H	8744860099
6	Chandni Bajaj	196033	C	9717450757
7	Shahrukh	196153	G	8700071119
8	PUJA SARMAH	196069	G	8376949533
9	Jitender	196515	G	9958617827
10	Shivani kast	196090	G	8377030056
11	ANJUM SAIFI	196072	A	9810837227
12	Faraz Ahmad Khan	196537	E	9354077692
13	Medha raj	196471	E	7979730772
14	Jivika Jolly	196564	I	9910058326
15	Hanshi Mishra	196050	G	7042433162
16	Pradeep Gulrajani	196018	A	9910818311
17	Gurdeep singh	196396	I	7217850318
18	Srishty Jaura	196310	D	8860618981
19	Neel kanth	196344	H	8650422474
20	Devesh kaushik	196300	D	7053533663
21	S G RABBANI	196043	G	9867474559
22	SUMIT KUMAR	196129	C	9555777433
23	Akhil Saini	196199	C	9582958299
24	Harsh	196198	C	9871112424
25	Heena Batra	196284	C	9990091215
26	Sunil kumar Arya	196540	I	8527586825
27	YASH GARG	196134	C	7844039970
28	Padhmanabha Raja K	196036	A	9566262062
29	Riya Sachdeva	196279	D	7838485700
30	Vivek Kumar Gaurav	196062	G	9717073987
NORTH-WEST DLSA, ROHINI COURTS				

1	Jayant Singh Sengar	196375	H	9005305115
2	Pratham Sawant	196068	G	9910681232
3	Lokesh kumar	196528	I	9675188869
4	Bharti basist	196179	H	9999355632
5	DISHA BIDHURI	196367	C	9958085788
6	Vishakha	196484	I	9654766427
7	Rashmi Singh	196080	A	9711416647
8	Bhaskar Sundaram	196103	C	9717909505
9	Robin Kumar Bansal	196560	I	9464422550
10	Nitin	196292	D	7292001911
11	Pallavi Anand	196111	G	9899321071
12	Neha Jain	196014	G	8375084917
13	Deepak	196232	I	8447261564
14	PRAVEEN CHAUDHAR	196201	H	8178594822
15	Sadiq ali wazir	196559	I	8130359380
16	Rini Maria Minj	196254	H	7289851465
17	Kusalu Lohe	196376	H	7065826920
18	Kanchan	196363	D	7011584544
19	Kumar Rahul Anand	185436	I	7004833536
20	ILAYARAJA K	196512	E	9962414511
21	Rajat Maken	196326	H	9773946224
22	Akansha Gupta	196444	E	9958107899
23	ABHISHEK KUMAR SIN	196115	G	9711790645
24	Yatendra Singh	196531	E	8630592459
25	Shruti Agrawal	196020	G	7999856756
26	Bompi Gapak	196185	C	8448362958
27	Naman joshi	196015	G	8527040593
28	Neikim haokip	196085	G	8448036974
29	Aanchal Sharma	196097	A	9711884901
30	Navjot Singh	196003	G	7009215932
SOUTH-WEST DLSA, DWARKA COURTS				
1	Rani Reshma Bara	196047	G	9999832705
2	Mohd Yawar	196488	I	9891835797
3	Vishal Yadav	196058	G	8802494494
4	Shuchi Mahima	196271	H	9631440311
5	Pratham Sawant	196068	G	9910681232
6	Manjeet Singh	196187	B	9654700780
7	Nishant bajar	196226	C	8949460485
8	Shivani	196090	G	8377030056
9	Ajeet singh	196212	H	9716701464
10	Richa Tiwari	196562	E	7669930959
11	Kufa mega	196176	C	7005055785
12	Randhir Kumar Choud	196247	H	9911402880
13	Balkrishan Sharma	19605	G	9761950699
14	SUMIT MANDAL	196291	C	8910035093
15	Muskan Maheshwari	196131	B	9910103556
16	Suman Kumari	196200	B	7042549347
17	CHETAN VERMA	196552	I	8130577877
18	rahul baisoya	196257	c	9599666602
19	Priya kumari	196240	Section-C	7903583191

20	Gaurav singh	196011	A	9473841491
21	Vandana chauhan	196077	A	9540896499
22	Rahul Singh	196249	C	9958291113
23	Umesh Kumar Sharma	196071	C	9818084912
24	SHALINI ARYA	196087	A	8630942679
25	Lakshita Sharma	196299	D	8920635480
26	Abhilasha	196010	G	8828476672
27	Amit bansal	196509	I	9013372999
28	Prashant kashyap	196191	H	7503374637
29	Bhawna	196223	H	9555354424
30	Aman tiwari	196503	B	7906161853

DELHI STATE LEGAL SERVICES AUTHORITY

(Constituted Under the 'Legal Services Authorities Act, 1987', an Act of Parliament)

Under the Administrative Control of High Court of Delhi

Central Office, Patiala House Courts Complex, New Delhi - 110001

Ph. : 23384781, 2037

1626, Fax : 23387267, Email : **dslsa-phc@nic.in, lokadalatwing-dslsa@nic.in**

Website :- www.dslsa.org **24x7 Helpline No. 1516**

No. /ADRWing/DSLSA/NLA/2022 /6518 - 6524, -6526. Dated 10.06.2022

(Through e-mail)

To

(i) **Sh. B.R. Kedia, Ld. Chairperson,**
Permanent Lok Adalat-I, Mata Sundri Road, Near ITO

(ii) **Ms. Reena Singh Nag, Ld.Chairperson,**
Permanent Lok Adalat-II, Mata Sundri Road, Near ITO

(iii) **Sh. R.P. Pandey, Ld. Chairperson,**
Permanent Lok Adalat-III,

Sub : Visiting of students of Faculty of Law, Law Centre-I, Delhi University for observing the proceeding of Permanent Lok Adalat.

Respected Sir/Madam,

May I inform your goodself that we are in receipt of an e-mail dated 07.06.2022 of **Dr.(Mrs.) Alok Sharma, Associate Professor, Law Centre-1**, Faculty of Law, University of Delhi whereby it has been apprised that as per the guidance of Bar Council of India curricula, ADR has become a compulsory course in which attending the Lok Adalat proceeding is a must, on the basis of which they have to submit their reports which shall be evaluated as a part of their examination and hence, requested for permission to their 395 students for observing the proceedings of all three Permanent Lok Adalats.

Taking into consideration of the benefits of the students, the aforesaid proposal for visiting of students to observe the proceedings at Permanent Lok Adalat in following manner:-

(i) *Law Centre-1 (LC-1) will appoint a Coordinator for each Permanent Lok Adalat (PLA) for coordination with PLAs who will take the attendance of students and share it with the office of PLAs as well as DSLSA Central Office.*

(ii) *Coordinators, LC-1 will prepare a roster of students in such a way that around 20 students will visit at each PLA i.e. around 60 students on a day at all three PLAs.*

(iii) *Coordinators, LC-1 shall ensure that all visiting students shall follow the existing Covid-19 protocols, guidelines.*

(iv) *It will be effected from 13.06.2022.*

Therefore, you are requested to kindly permit the aforesaid students to visit your respective Permanent Lok Adalat for observing the proceedings.

With Regards,

Yours faithfully

10/06/2022

(Bharat Parashar)
Member Secretary

Copy to: - Dr. (Mrs.) Alok Sharma, Associate Professor, Faculty of Law, University of Delhi.

Gmail

Dr. Anita Yadav <ayadav@clc.du.ac.in>

Fwd: List of students from CLC to participate in National Lok Adalat on February 11

Shashank Rai <shashankrai02@gmail.com> Tue, 7 Feb 2023 at 5:32 PM
To: Dr. Anita Yadav <ayadav@clc.du.ac.in>

By mistake he has cc'ed the email to ayadav.**cic**.du and not **clc**.du

---------- Forwarded message ---------
From: **Hari Gopal** <lokadalatwing-dslsa@nic.in>
Date: Tue, Feb 7, 2023 at 3:49 PM
Subject: List of students from CLC to participate in National Lok Adalat on February 11
To: West District Legal Services Authority <West-dlsa@nic.in>, Secretary Central DLSA <central-dlsa@nic.in>, Secretary North DLSA <north-dlsa@nic.in>, DLSA SOUTH <south-dlsa@nic.in>, Isha Singh <southeast-dlsa@nic.in>, Ms. Anuradha Jindal <southwest-dlsa@nic.in>, Saema Jain <east-dlsa@nic.in>, Secretary Shahdara <shahdara-dlsa@nic.in>, Anil Kumar Butta <northeast-dlsa@nic.in>, Secretary North West DLSA <northwest-dlsa@nic.in>, HELLY FUR KAUR <newdelhi-dlsa@nic.in>, Rouse Avenue <rouseavenue-dlsa@delhi.gov.in>
Cc: <ayadav@cic.du.ac.in>, <shashankrai02@gmail.com>

Respected Sir/Madam,

May I inform your goodself that we are in receipt of an e-mail dated 06.02.2023 from Legal Aid Society, CLC, University of Delhi whereby it has been apprised that as per the guidance of Bar Council of India curricula, ADR has become a compulsory course in which attending the Lok Adalat proceeding is a must, on the basis of which they have to submit their reports which shall be evaluated as a part of their examination and hence, requested for permission to their students for attending the National Lok Adalat proceeding which is going to be held on **11th February, 2023**.

Taking into consideration of the benefits of the students, **Ld. Secretary (Litigation)** has been pleased to approve the aforesaid proposal for visiting of students to the ensuing National Lok Adalat to be held on 11.02.2023. The list of students district-wise is attached herewith. Legal Aid Society, CLC will appoint the Co-ordinator(s) for each DLSA. The deputed Co-ordinator(s) will co-ordinate with the respective DLSA as well as take the attendance of students and share it with the office of respective DLSA.

In this regard, I am directed to request your goodself to kindly permit the aforesaid students for visiting the Lok Adalat benches on 11.02.2023 in your respective district to observe the proceedings.

Thanks & regards

Hari Gopal
Superintendent
ADR Wing, DSLSA
011-23232124

Copy to:-

Dr. Anita Yadav, Faculty Convener, Legal Aid Society, Assistant Professor (Sr. Scale), Campus Law Centre, Faculty of Law, University of Delhi.
(Mob. No.9742865247) (email Id:- ayadav@cic.du.ac.in)

From: shashankrai02@gmail.com
To: "Hari Gopal" <lokadalatwing-dslsa@nic.in>
Sent: Monday, February 6, 2023 10:54:49 PM
[Quoted text hidden]
Central THC.xlsx, East KKD.xlsx, New Delhi PHC.xlsx, North Rohini.xlsx, North West Rohini.xlsx, rouse avenue.xlsx, South Saket.xlsx, South East Saket.xlsx, South West Dwarka.xlsx, West THC.xlsx, North East KKD.xlsx, Shahdara KKD.xlsx

दिल्ली विश्वविद्यालय
University of Delhi

Swati Solanki <swatisolanki@lc2.du.ac.in>

List of Students- Mediation Centre Visit

3 messages

Swati Solanki <swatisolanki@lc2.du.ac.in> Sun, Jul 3, 2022 at 9:01 PM
To: contact@harshitjain.co.in

Dear Harshit,

Hope this email finds you well.

I'm writing to you to arrange a Mediation Centre visit for the third-year students of Law Centre-2, Faculty of Law, University of Delhi. I'm attaching an excel sheet enclosing the list of students from Section C.

I am looking forward to hearing from you.

Best,

Swati Solanki
Assistant Professor
Faculty of Law

Meditaion Centre Visit - Section C - 3rd Year.xlsx
16K

Swati Solanki <swatisolanki@lc2.du.ac.in> Wed, Jul 6, 2022 at 12:20 AM
To: contact@harshitjain.co.in

Dear Harshit,

In continuation of our telephonic conversation, I'm sending you the letter addressed to the Secretary of the Delhi High Court Mediation and Conciliation Centre. I'm also enclosing the list of students with this email.
Looking forward to hearing from you.

Best,
Swati Solanki
Assistant Professor
Faculty of Law
University of Delhi
[Quoted text hidden]

2 attachments

Letter for Mediation Centre Visit.pdf
402K

Meditaion Centre Visit - Section C - 3rd Year_Delhi High Court.xlsx
14K

Swati Solanki <swatisolanki@lc2.du.ac.in> Mon, Jul 18, 2022 at 11:24 PM
To: contact@harshitjain.co.in

Dear Harshit,

Please check it and let me know if I need to change anything.
[Quoted text hidden]

Letter for Mediation Centre Visit.docx
38K

विधिकेंद्र–II
विधिसंकाय
दिल्ली विश्वविद्यालय

LAW CENTRE-II
FACULTY OF LAW
UNIVERSITY OF DELHI

Swati Solanki
Assistant Professor

Email*:* swatisolanki@lc2.du.ac.in*;*
swati.solanki89@gmail.com
Contact No. 9999214285

Date: 6th July 2022

To,
Ms. Veena Ralli
Organising Secretary
Samadhan
Delhi High Court Mediation and Conciliation Centre
Sher Shah Marg
New Delhi

Subject: Request for Students' Visit to the Delhi High Court Mediation Centre for Academic Purposes.

Resepected Ma'am,

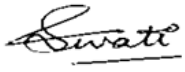
I, Swati Solanki, am writing this letter to you requesting to allow the final year students of Section-C, Law Centre- II, Faculty of Law, University of Delhi to visit the Delhi High Court Mediation Centre for academic purposes. As a part of the CLE Course on Alternative Dispute Resolution taught in the sixth semester of three year LL.B. Degree, students are compulsorily required to visit the Mediation Centre and observe one session for understanding the role of Mediator, the process of court-annexed mediaton, and the experiences of parties.

The course has two objectives. Firstly, to provide the students with a theoretical understanding of the concepts and the legal provisions relating to ADR. Secondly, the course is geared to train the students in the practical skills required to effectively participate in the ADR processes. After the visit to the Mediation Centre, students will have to submit a descriptive report maintaining the confidentiality of the parties and the matter, sharing their opinions on the effectiveness of the mediation process and suggestions for improvement, if any.

The total strength of the abovementioned class is 95 students. It is my benign request to you to provide an opportunity for our students to visit the Delhi High Court Mediation Centre in the coming week. I look forward to your positive response.

Thanking in anticipation and for considering my request for permission.

Sincerely,



Ms. Swati Solanki
Assistant Professor

ADR, Section C, Law Centre-2, Faculty of Law, University of Delhi

Name of the Teacher: Ms. Swati Solanki (Assistant Professor)

S.No	Names of the Students	Roll Number
1	Abhimanshi Singh	198223
2	Abhishek Anand	198310
3	Abhishek Bhushan	198297
4	Abhishek Bishnoi	198184
5	Abhishek Koushik	198225
6	Ajit Kumar	198361
7	Amrita Jha	198199
8	Ankita Sawhney	198248
9	Bhavesh Sharma	198308
10	Chamandeep Mittal	198323
11	Deepanshu dabas	198313
12	Deepu	198394
13	Divyansh Singh	198048
14	Esha Bahal	198246
15	Feroz Khan	198420
16	Gagan singh	198560
17	Gaurav jaiswal	198418
18	Gaurav Verma	198444
19	Govind Singh Yadav	198436
20	Gurdas Kashyap	198358
21	Habib Muzaffar	198299
22	Harsh Gautam	198617
23	Harsh Gupta	198834
24	Himanshu Bharadwaj	198204
25	Himanshu Kishor	198137
26	Hitesh Yadav	188526
27	Indrajeet Kumar	198503
28	Indrajeet Kumar	198503
29	Jai Bhagwan	198487
30	Kajal Yadav	198385
31	Kalpana Verma	198538
32	Kamal Kishor	198374
33	Kapil Kumar	198440
34	Karishma Negi	198406
35	Kartik Kumar	198564
36	Kartikey	198561
37	Kashif Raza	198482
38	Kavita Balyan	198022
39	Khyati Jain	198123
40	Krishna khurana	198749
41	Kritika	198646

42	Kritika saini	198097
43	Kshitij Sharma	198074
44	Kuldeep Tiwari	198353
45	Lakham Kalra	198272
46	Madhu Yadav	198371
47	Mahesh Chand	198653
48	Mahima	198558
49	Manish Kataria	198569
50	Manish Kumar	198468
51	Manish Lohiya	198534
52	Manish Verma	198654
53	Manjot Singh Matta	198302
54	Manoj Bharal	198357
55	Manoj Kumar	198663
56	Manoj Kumar	198498
57	Mayank Mahajan	198084
58	Mehtab Kambhoj	198293
59	Mehul Sharma	198094
60	Mitual Sehrawat	198166
61	Mohan	198390
62	Mohammed Mohsin	198513
63	Monika Yadav	198460
64	Mukesh Kumar	198039
65	Mukul Kulhari	198439
66	Murari Mohan	198510
67	Nancy garg	198082
68	Narendra Kumar	188190
69	Naveen	198379
70	Naveen Yadav	177826
71	Neeraj Kumar	198551
72	Nikesh Kumar Chaturvedi	198325
73	Pallav Jain	198215
74	Piyush Arora	198207
75	Piyush Kumar	198365
76	Pranav Gautam	198192
77	Praveen S K	198289
78	Pravesh goyal	198210
79	Prince Thomas	198265
80	Radhika Gupta	198335
81	Rajat Sharma	198173
82	Sagar Singh	198337
83	Sahil Bharadwaj	198205
84	Sahil Kumar	198296
85	Saksham Thareja	198298

86	Sheena Khan	198182
87	Shivani Singla	198261
88	Shruti Lamba	198262
89	Sonam Singh	198393
90	Sourav Srivastav	198751
91	Sumit Kumar	198270
92	Vasundara koushik	198226
93	Vinayan singh	198185
94		
95		