

ALTERNATIVE DISPUTES RESOLUTION



- Roshan Dalvi

Is there anyone in this room

who would rather

not have disputes settled?

MAHATMA GANDHI said:

“I realized that the true function of a lawyer was to unite parties A large part of my time during the 20 years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby – not even money, certainly not my soul.”

ADR

- Arbitration – affordable by a few
- Conciliation – used in few kinds of disputes
- Lok Nyayalayas – are intermittent
- Mediation – by far the most preferred mode of ADR

TYPES OF ADR IN THE USA

- Negotiation
- Mediation
- Arbitration
- Neutral Evaluation
- Settlement Conference
- Summary Jury Trial
- Med – Arb
- Police action

MEDIATION ATTRIBUTES IN CIVIL SUITS

What matters ?

- Possession suits
 - Recovery of possession
 - Protection of possession
- Specific Performance suits
- Commercial Disputes
 - Money Matters
 - Trade Disputes
 - Suits for Damages
- Corporate Litigation

What mode ?

- Ludo – *Aim for Home*
- *Throw the Dart*
- *No Snakes; All Ladders*
- *Rowing upstream*

ATTRIBUTES (Contd..)

- Family Disputes
- Partition suits
- Administration suits
- Partnership disputes
 - Suits for accounts
 - Suits for Dissolution
- Bank Suits
- Cards – *place the cards on the table*
- *Piecing the puzzle*
- Chess *Play*
- *Across the Table*
Tennis
- Golf – *Tee-off*

POSSESSION SUITS

Recovery of Possession:

- Consider the time period for handing over possession

Or

- Make allowance for payment to retain possession

Protection of Possession:

- To settle rights of parties such that future litigation is not necessitated



SPECIFIC PERFORMANCE SUITS



- Allow space for performance
- Allow time for payment
- Create secondary options
- Compensate the damage

Ensure that the wronged party is not unfairly prejudiced

COMMERCIAL DISPUTES

- Suits of Banks and Financial Institutions
- Suits under Negotiable Instruments Act
- Suits on business transactions
- Suits for damages



- Consider mode of Payment
- Allow time for payment

Bear in mind that parties will have a continuing relationship

CORPORATE LITIGATION

To bring about business co-operation;

Or

To end business strife



Exercise buy over / take over option

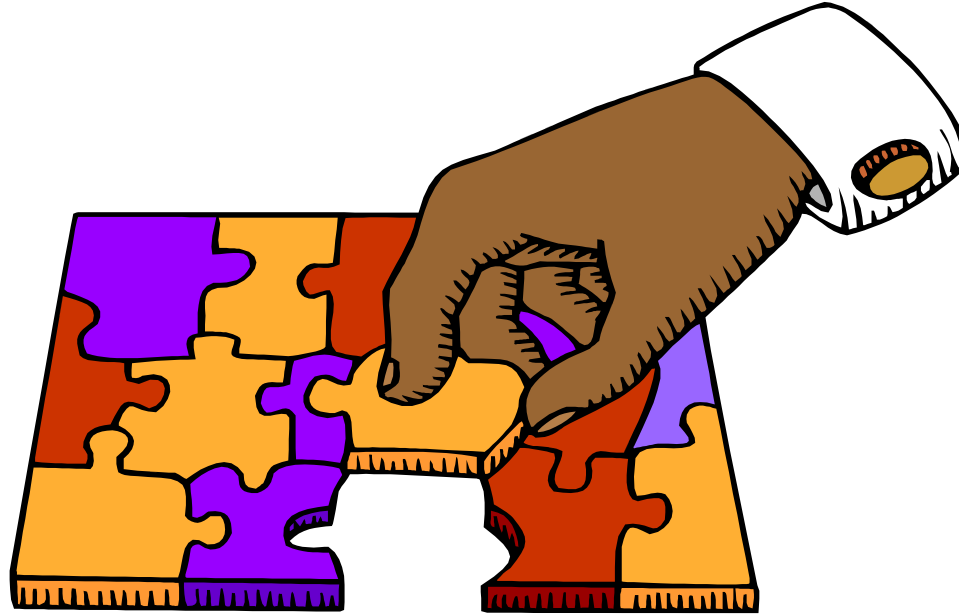
FAMILY MATTERS

- Suits as varied as snowflakes – from rights in flower pots
to rights in penthouses
- Relationships as fragile as glass – cuts across generations

Parties' relationship to be handled with care



PARTITION SUITS



Ascertain the co-owners

Apportion the shares

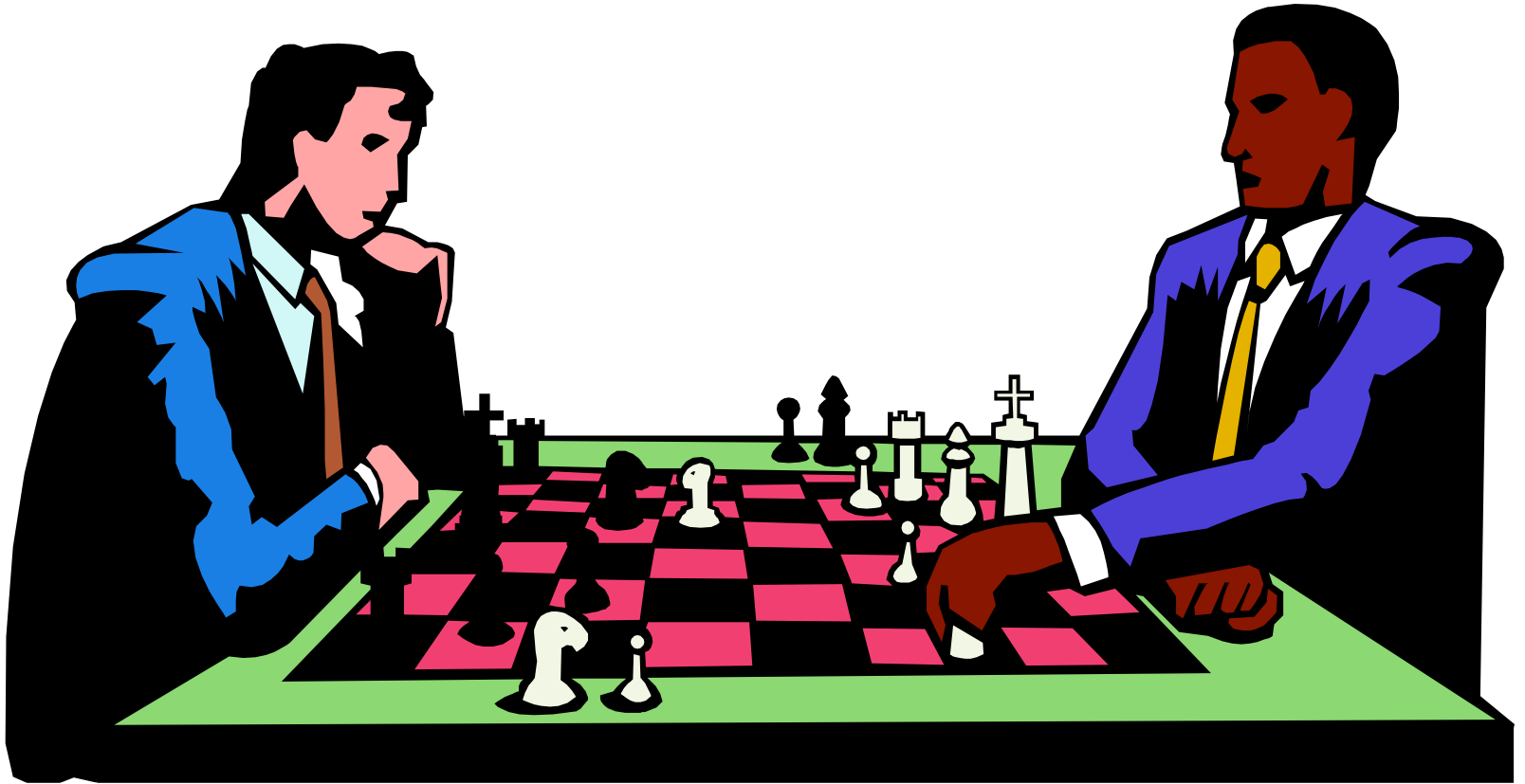
Divide the property by metes
and bounds

Evaluate the market value

Sell / buy over either party's
share

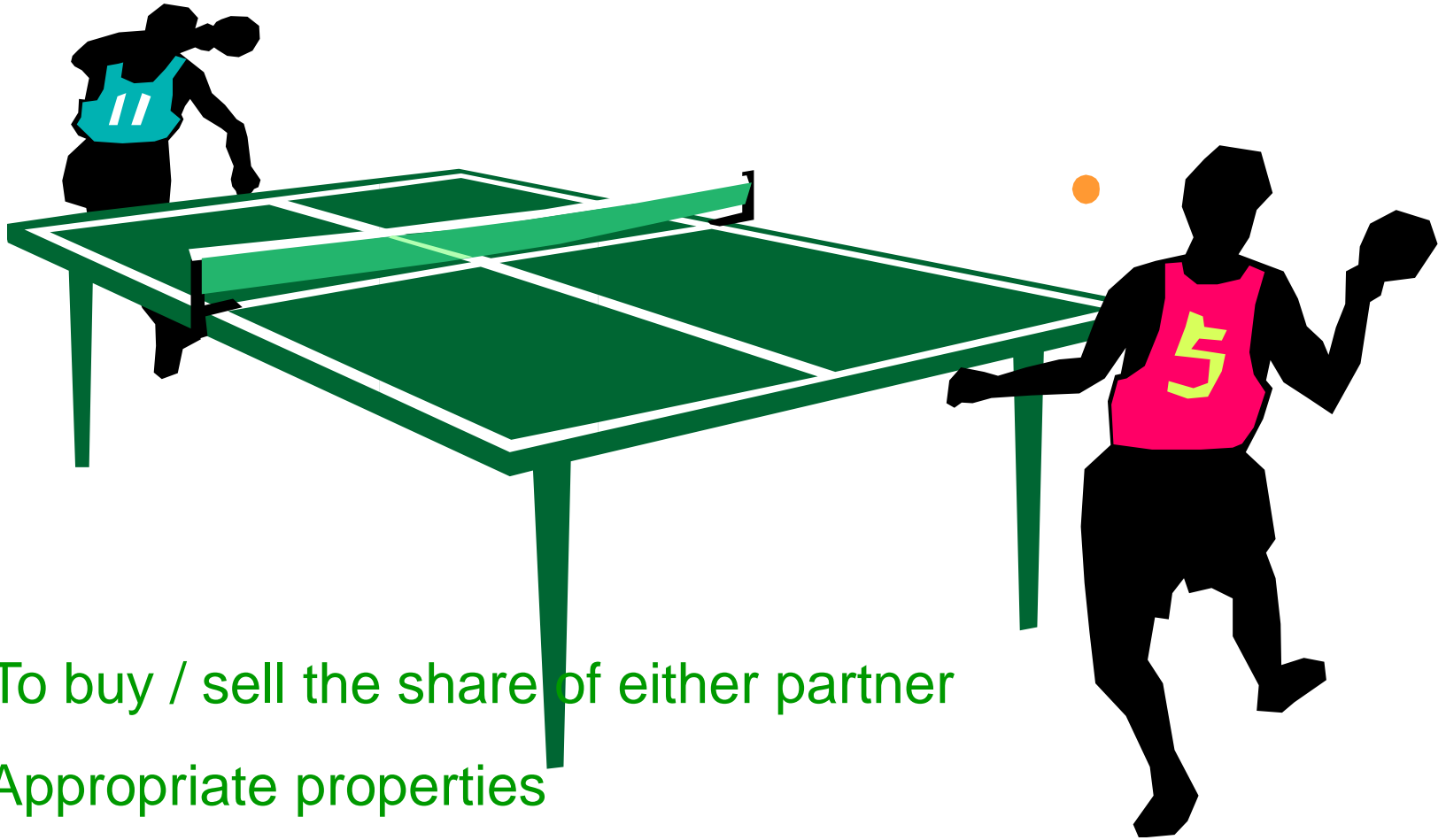
Ensure that there is no litigation in future

ADMINISTRATIVE SUITS



- Ascertain shares of the heirs of the deceased
- Identify properties
- Apportion the estate

PARTNERSHIP DISPUTES



- To buy / sell the share of either partner
- Appropriate properties
- Create future business options

BANK SUITS

- Ascertain the Financial Institution's policy
- To strike a balance between individual safeguards and public interest



**A group of suits of one Institution
can be settled by mediation collectively**

MEDIATION ATTRIBUTES IN MATRIMONIAL MATTERS

What matters ?

- Divorce Petitions
- Injunction suits
 - Deserted wife's equity
 - Battered wife's right of entry / protection
 - Recovery of possession
 - Protection of possession
- Petitions for Maintenance

What mode ?

- *Overcoming Hurdles*
- Baseball – *Hit a Home Run*
- Fishing – *Give her a fish or give her the rod !*

ATTRIBUTES (Contd..)

- Petitions for Custody / Access
- Criminal applications for maintenance
- Petitions for Divorce by mutual consent
- Tug of W.. *Peace*
- Weight-lifting *exercise*
- *Across the Net* - Volley Ball

DIVORCE PETITIONS

To work out a mode of reconciliation of the parties

Or

To consider the most amicable mode of dissolution of marriage



INJUNCTION SUITS

Deserted wife's equity:

- To preserve the right of residence

Or

- To consider the option of a new residence



Battered wife's right of entry / protection:

- To prevent entry of violent husband
- To make allowance for peaceful co-habitation

PETITIONS FOR MAINTENANCE

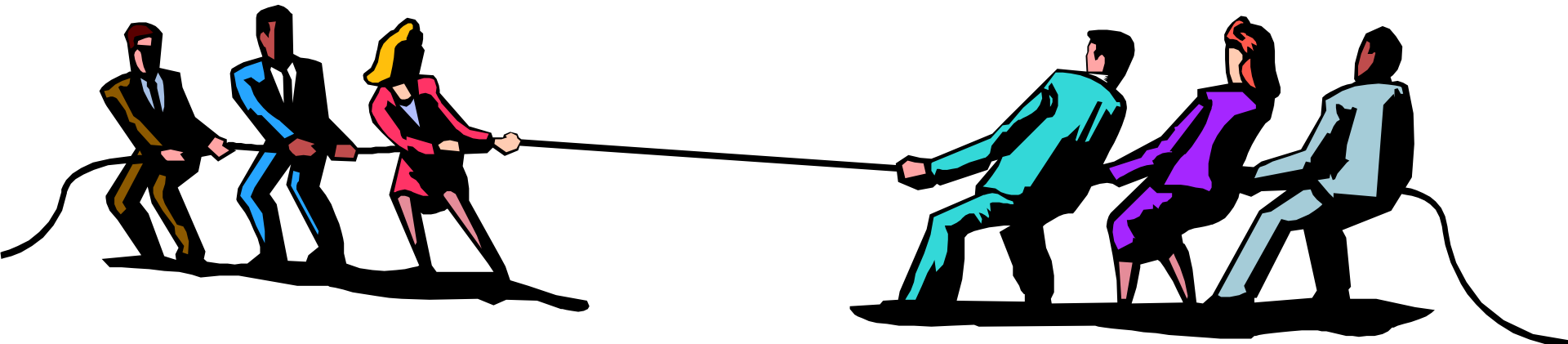
- Determine the quantum of Payment
- Consider mode of Payment
- Allow time for payment



PETITIONS FOR CUSTODY / ACCESS

- To move from self interest to mutual interest;
from separate consideration to joint consideration
- To consider special needs – strengths & weaknesses of parties

**Bear in mind that both parties' relationship
with the child is preserved**



Tug ... Tug Tug And bring Peace in the Family !

CRIMINAL APPLICATIONS FOR MAINTENANCE



- To consider the needs of wife, child or parent
- To ascertain the income / properties of the husband, father or child
- To evaluate the total resources
- To compute total requirements

PETITIONS FOR DIVORCE BY MUTUAL CONSENT



- To consider the requirements of both parties
- To apportion properties
- To make monetary settlements
- To settle children's rights

CAUTION

✘ Matters which cannot be referred to Mediation:

- ✘ Involving point of law
- ✘ Involving interpretation of documents
- ✘ Involving alleged fraud
- ✘ Acts against society / human rights

“All my life through, the very insistence on truth has taught me to appreciate the beauty of compromise.”

- Mahatma Gandhi

TIME FOR REFERENCE



🕒 Pending Matters

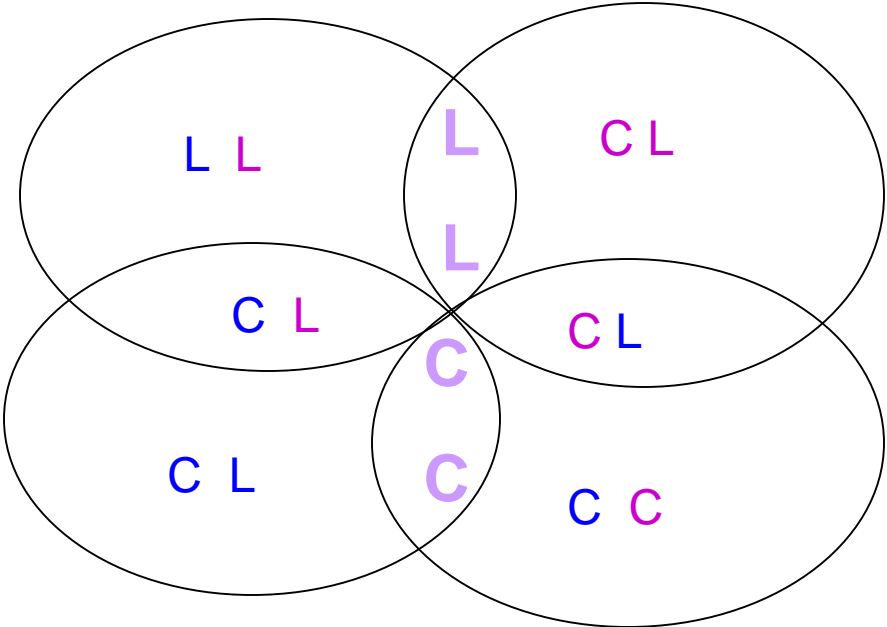
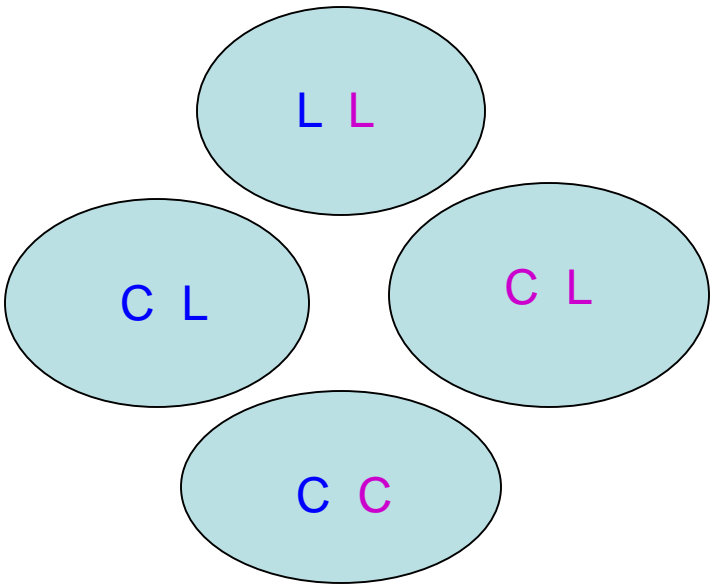
- ✦ Any time is good time
- ✦ At the time of hearing of interim application
- ✦ After Issues are framed and before evidence is recorded
- ✦ Even after part trial

🕒 New Matters

- ✦ At the time of the filing itself (in case of all referable matters)
- ✦ After the first hearing (as deemed fit by the Judge)

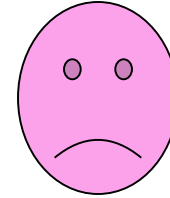
SUBSTANCE OF MEDIATION

Connecting People



MEDIATION STRATEGY

P – Identifying **P**roblems



O – Generating ptions

S – Reaching **S**olution



Genius is the ability to reduce
the complicated into the simple !

MEDIATION STRATEGIES

- **Case of contracts**
 - Create options for novation by Negotiation
- **Case where the bottom line is money**
 - Arrive at the right figure

(from: *“How to win any argument”* by Robert Mayer)

TYPES OF STRATEGIES

1. To arrive at a figure :

2 persons/arbitrators naming a figure,

It is not acceptable,

Ask a 3rd independent person to state,

His decision is final.

There should be less talk;

A preaching point is not a meeting point.

- Mother Teresa

TYPES OF STRATEGIES (contd....)

2. To choose between properties:

The 2 parties would number the properties

e.g., 1 to 4,

The 1st would get his 1st & 4th choice

The 2nd would get his 2nd & 3rd choice

If not, a flip of a coin would decide.

*No greater justification than justice is required;
No less justification is acceptable.*

TYPES OF STRATEGIES (contd....)

3. Buy or sell :

Both parties write down their figure.

(This is the value of the property - to pay or to accept)

If the 2 are within 15% of each other, they would be averaged.

Else, a neutral party would select the more realistic figure.

(This ensures reasonableness.)

A friend in court makes the matter short.

TYPES OF STRATEGIES (contd....)

4. Buy or sell :

A figure for the property is fixed by the parties

(This is the value of the property - to pay or to accept)

If they are more than 15% apart, a neutral party would write down a figure which is most reasonable,

The parties would write their figures,

The figure close to the neutral party's figure would be accepted.

Don't keep your meat so high the dogs won't jump for it !

TYPES OF STRATEGIES (contd....)

5. Buy or sell :

One party puts the value upon the property:

The other gets the choice: to buy it or sell it.

*Mediation means not thinking less about ourselves,
But thinking about ourselves less.*

TYPES OF STRATEGIES (contd....)

6. To choose from many properties :

1 party would choose 2 properties,

The other would get any 1 of those 2.

Again the 1st party would choose 2 other properties,

The 2nd party would get any 1 of those properties.....

Experience has shown that Mediation is not always by the book !

WHAT THE MEDIATOR CAN DO

- Co-ordinate parties
- Improve communication
- Help them understand the others' point of view

Mediation is not necessarily justice, but it is the Agreement that the parties desired.


WHAT THE MEDIATOR SHOULD NOT DO

- ❑ Mediator should only UNDERSTAND and EMPATHISE
- ❑ He should not
 - Agree
 - Advise
 - Persuade
 - Solve
 - Impose himself

He should help parties settle and NOT pass an award

STAGES OF MEDIATION

- ✦ Introduction of the concept and the Mediator, himself
 - ✦ Concept of confidentiality
- ✦ Opening statements
(optional)
- ✦ Understanding the problem
 - ✦ Create trust
- ✦ Developing options
 - ✦ Ask about alternatives
 - ✦ Brainstorm
 - ✦ Put one party in other's shoes
 - ✦ Let go – let the process work



Mediation is not
always
by the book

STAGES OF MEDIATION (Contd.)

✳ Moving towards the solution

✳ Write down points of agreement

✳ Concluding the agreement

✳ To be drafted by parties or lawyers
(preferably then and there)

There should be less talk;

A preaching point is not a meeting point

- Mother Theresa

What mediation teaches...

- Compassion
- Empathy
- Acceptance of others' values
- Not to be judgmental
- To live in the present
- To perceive the illusion of power
- To be answerable to the call of our conscience

TYPES OF MEDIATION

- I C M - Information Centered Mediation
 - * Mediator, a neutral facilitator
- P C M - Process Centered Mediation
 - * Mediator, a power balancer



Not thinking less
about ourselves

but



Thinking about
ourselves less

KINDS OF PARTIES

- Avoiders
 - Delay outcome
- Competitors
 - Only takers; not givers
- Negotiators
 - Give and Take principle
 - The most likely settlers

No greater justification than justice is required,
And no less justification is acceptable

KINDS OF BARGAINS

- **Positional** bargaining
 - Party wants fixed amount; nothing less
 - Mediator to dislodge that position
- **Principled** Bargaining
 - All sit together and apply their mind to solve the problem
- **Integrated** Bargaining
 - Find out the obvious
 - Mediator to help give creative relief

Move from **Positional** to **Principled** to **Integrated** Bargaining

ROLE OF MEDIATORS

During Mediation

- To render customer service.
Hence, it entails –
- Efficiency, punctuality and empathy

On conclusion

- To enumerate the points of agreement between the parties

ROLE OF LAWYERS

During Mediation

- To appear for the parties.
Hence, it entails –
- Knowledge of the facts of the case

On conclusion

- To draw up the agreement between the parties – *at the same sitting*

**A FRIEND IN COURT
MAKES THE MATTER SHORT**

HOW MEDIATORS CAN USE LAWYERS EFFECTIVELY

- Remind the Lawyer about his responsibility
- Tell him when he pitches his case too high
- Ask him what he thinks the probabilities of losing / winning are
- Ask him what it will cost him
- Tell him to summarize the other party's case

Why battle?? Why not settle ?

CONFIDENTIALITY

- The negotiation process is completely confidential
- The written agreement alone can be disclosed
- Even the conduct of the Mediator cannot be quoted
- The Mediator also keeps confidential what is disclosed by one party unless that party specifically tells him to disclose

Therefore:

When the oral agreement is arrived at, the amount is paid and the suit is dismissed.

Hence:

If the dispute is not settled, report nothing except that it did not

MED-ARB / MID-ARB

- Med-Arb in the UK, USA, Canada
 - In case of an impasse, the Mediator becomes the Arbitrator.
- Mid-Arb in India
 - In case of an impasse, the parties may leave the final solution to the Mediator. But, they must sign the settlement agreement / consent terms as per the last suggestion of the Mediator. The Mediator does not give an award.

RESULTS OF MEDIATION

- Effects
 - Reduced Costs and Delays
 - Increased Speed of Disposals
- Side-Effects
 - Better Court Climate
 - More Efficient Court Management
- Anti-Effects
 - ? ?

The Mediator “enlarges the pile”

Challenges for Mediation

- The Legislative approach
 - Wider Court Rules
 - New Legislation
- Human resources
 - Training of Mediators
 - Selection of Co-ordinators
- Infra-structure
 - Providing properly equipped Mediation Centres
- Limits of Mediation
 - Family matters
 - Criminal Matters
 - Property Disputes

KEY FACTORS

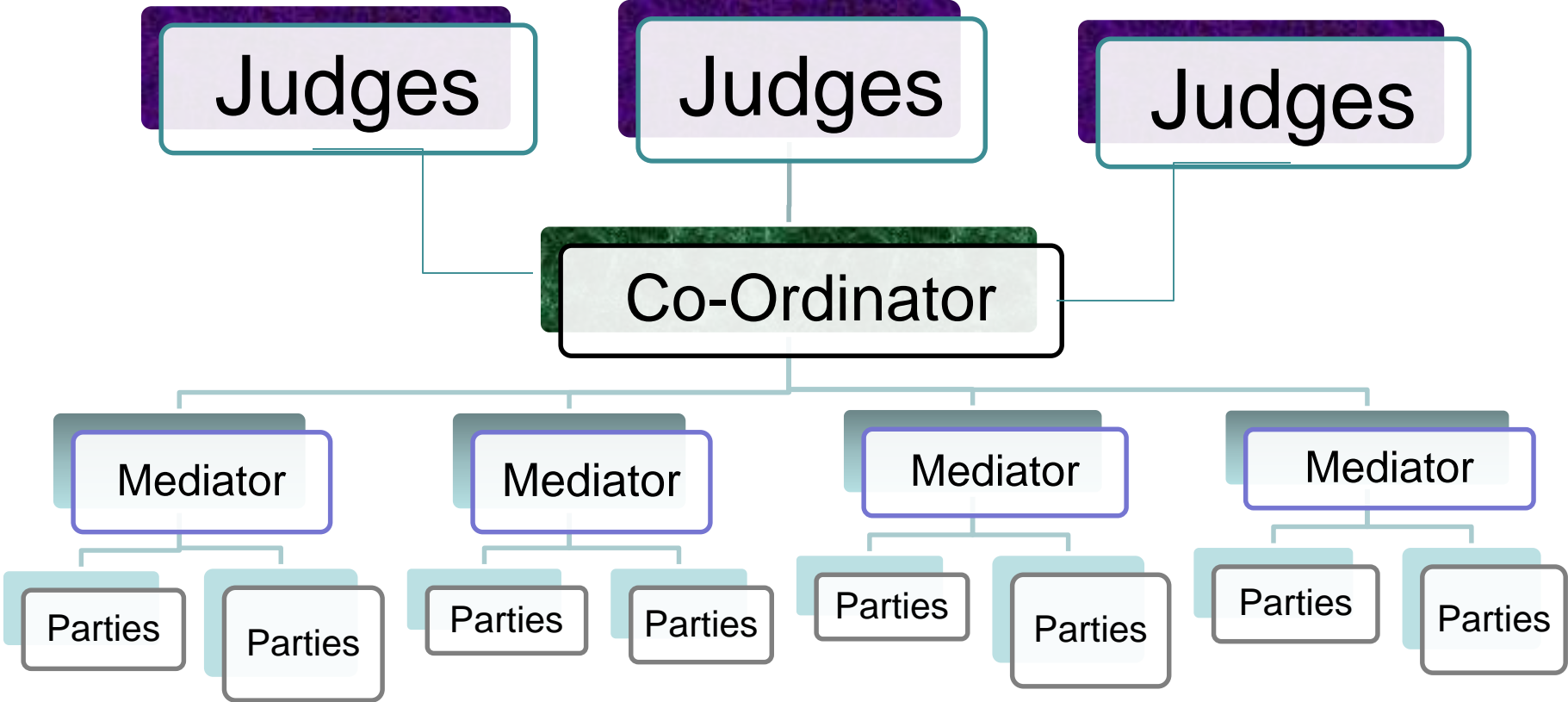
- Pilot Programme
- Public awareness
- Stakeholders involvement
- Consistent players e.g. banks, insurance
- TOT
- Impact Assessment
- The courts in this country should not be the places where resolution of disputes begins;

WHY IT FAILS – WHAT IT REQUIRES

- Lack of Institutionalisation
- Lack of Case Management
- Excessive Interlocutory Appeals

- Mandatory Reference to ADR
- Case Management by Judges
- Committed Teams of Lawyers & Judges
- The test is, at the end of the negotiation, both must smile.

THE 4 ARMS OF MEDIATION



PROCEDURE FOR REFERENCE TO MEDIATION

- The **Judges** shall:
 - Identify matters for Mediation
 - Show them separately on Board
 - Notify on Board for Reference to Mediation
 - Take them up in the beginning of the day for reference
 - Fix date and time for appearance before Co-ordinator
 - Adjourn them for a specified period to give settlement a chance

PROCEDURE FOR REFERENCE TO MEDIATION (Contd..)

- The **Co-ordinator** shall:
 - Obtain list of referred matters from the Sheristedars daily
 - Assign matters to Mediators, preferably of the choice of the parties
 - Maintain a register of the matters referred to Mediation

PROCEDURE FOR REFERENCE TO MEDIATION (Contd..)

- The **Mediators** shall:
 - Fix date and time for Mediation
 - Complete within time-frame
 - File Report in Court and inform co-ordinator

*Those who bring Sunshine to the lives of others
Cannot keep it from themselves !*

PROCEDURE FOR REFERENCE TO MEDIATION (Contd..)

- The **parties** shall:
 - Contact the Mediator and fix up time and venue for Mediation
 - Provide a set of R & P to the Mediator, as required
 - Report to Court about the conclusion of the Mediation on the date to which the suit was adjourned for Directions

Provisions which are rigid in theory

are frigid in practice

RESULT OF REFERENCE

✓ “Successful” Mediation

- Consent Terms to be drawn up by the parties
- Matter disposed of

✗ “Failed” Mediation

- Matter to be taken up by the Judge expeditiously as “Failed Mediation” matters
 - Take Affidavit of Evidence
 - Consider admissibility of documents
 - Refer matters to Commissioners for cross-examination
 - Fix date for arguments
 - Deliver Judgment

THE JOURNEY
OF
A THOUSAND MILES
BEGINS WITH
A SINGLE STEP

