

# E-MEDIATION WRITINGS

October 2020

*a gift by-all to all*

Vol. 5

*"We build too many walls  
and not enough bridges."*

Isaac Newton



*"India is the most exciting geography in the world for ODR and the fastest moving geography for ODR. A billion people are going to get access to ODR at scale in India. **Mr. Modi government** is moving incredibly quickly in that direction, so that is very encouraging. The whole world is watching and I am sure when it's going to happen, it will happen the right way."*

**Mr. Colin Rule**  
President & CEO, mediate.com

*Euphoria*  
chit-chat **PAGE 31**  
with our confrère  
**Mr. Colin Rule**

e-magazine dedicated to mediation  
write-ups, columns, articles, updates

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Judge, Supreme Court of India  
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#### MESSAGE

The efforts of the Editorial Team and the associates in bringing out 'E-Mediation Writings' are commendable. October, 2020 will be the fifth publication of this E-Magazine. In present times mediation should not be a mere option for the parties but should be resorted to mandatorily if the administration of justice has to become meaningful in our country. The ever-increasing number of cases before all Courts in judicial hierarchy shows confidence and faith of the people in the administration of justice by the Courts. However, to ease the workload from traditional courts, Alternative Dispute Resolution (ADR) mechanisms have to be resorted to. Arbitration is one option, but it's an adjudication process, whereas mediation is a non-adjudicatory process with the intervention of a third person. A successful mediation takes the litigation out of the Courts which leads to reduction in backlog of cases. Mediation is generally helpful in resolving family and matrimonial disputes where such a process helps in maintaining peace in the family and relations. In these testing times of the pandemic, the shift to the use of technology has been accepted by all the stakeholders in the right spirit. The technology has made sure that the reel of justice keeps moving.

Keeping up with that spirit publishing an online mediation magazine like 'E-Mediation Writings' will help educate future mediators about it's intricacies while avoiding use of paper. I am very pleased that the editors of the 'E-Mediation Writings' magazine have taken the task of educating mediators through technology and also in making them aware of the tools that can be used in resolving conflicts between parties.

It is only because of the continuing efforts of the Editorial Team that we are now upon the publication of the fifth Edition. I applaud the effort of these young mediators to educate and raise awareness in fellow lawyers and mediators by way of this soft publication. My best wishes to all the mediators for many more successful mediations.

  
(Hemant Gupta)

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## **Mediation Musings**

# **Sarita Kapur**



*“Knowledge will bring you the opportunity to make a difference.”*

- Claire Fagin

The Indian society of yore had mediation and conciliation as a means of dispute resolution embedded within our social ethos and moorings. Remember the role played by panchayats and family/village elders for centuries. Somewhere in the colonial times with the dismantling of the traditional systems, this informal mechanism lost its efficacy. While reformers like Ishwar Chand Vidyasagar, Dayanand Saraswati and Swami Vivekanand brought back many a good tradition, this one did not get its due attention.

In recent times, professionals are getting more attracted to and invested in alternate dispute resolution methods, especially mediation. Mediation training is more accessible, and courts are promoting it. History was made in 2019 when the Singapore Convention on Mediation was signed; which has already been signed by 53 countries. The professional cadre for mediation is now getting built up by able-minded and trained professionals.

But what of the litigants? Are we doing enough to prepare the citizenry and more particularly, the next generation, for a smooth transition into not only understanding the concept of mediation, but also thinking of mediation as a means of settling any dispute before resorting to litigation? A majority of people who find themselves caught / embroiled in disputes are unaware of what is mediation and what are its benefits. Pre-litigation Mediation is not a first go-to option for a majority of litigants (barring compulsory pre-litigation cases). Most people are faced with this concept for the first time when their matter is referred to mediation by the courts.




# Mediation Musings

According to the National Education Policy 2020, *“Legal education needs to be competitive globally, adopting best practices and embracing new technologies for wider access to and timely delivery of justice.”* However, this policy is silent about the need for imparting basic legal awareness at the high school and middle school level.

Time has come to change this. We must de-mystify the concept of mediation for the common person. We must introduce our next generation to ADR, with focus on mediation, in the middle school itself. Eventually when these youngsters become decision makers, they will be aware of and be equipped to resort to mediation as an expeditious, inexpensive and plausible option to resolve any future disputes. Mediation has to be understood to naturally be the first step in the resolution of any kind of dispute, before approaching the courts.

We must also, through writings and articles in publications like the E-Mediation Writings, as also through public awareness seminars, familiarize the youth of today with the subject of mediation. The awareness and acceptance of mediation by the common man – the consumer of the service offered by the legal system – as a preferable voluntary option to resolve disputes, is vital for success of mediation in India.





A Tribute  
towards  
Gandhian  
Philosophy  
of Conflict  
Resolution

Created by: Amulya Gupta





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Continuous Mediation Education

# EMW-GENERATION NEXT

(First Step towards Mediation Education in India)

Mediation's Tribute to The Father of Mediation  
By **Shiv Kumar**

10



As we join the nation in remembering with gratitude, respect and honor the **Architect of our Nation-the indomitable visionary, Mahatma Gandhi-** Mediation pays to him a heartfelt tribute for introducing the World to a unique form of conflict resolution through non- violent means, namely Satyagraha.



## **Mediation's Tribute to The Father of Mediation** By Shiv Kumar\*

Gandhi ji propounded and practiced Satyagraha, defined its contours, dimensions and philosophy, expounded its core values, explained its nuances, dwelt upon the competencies required to be a Satyagrahi and believed that it should, in fact, become a way of life. From this churning, the basic form, structure and philosophy of Mediation emerged and, therefore, also made him the “Father of Mediation”.

Mediation is a dispute/conflict resolution process, founded primarily upon the philosophy of Satyagraha [Satya =Truth and Graha=insistence/firmness] and non-violence. Historically, persons involved in conflict /dispute resolution (both terms being interchangeably used here since a dispute is considered to a manifestation of a conflict) are conversant with and have preferred the system of Courts, notwithstanding its adjudicatory nature and its emphasis on adversarial stances. It could be argued that in the jurisprudence of satyagraha, recourse to a court, by itself, is a

form of violence. It would be useful to recall what Gandhi ji said in this context:

*“Truly men became more unmanly and cowardly when they resorted to the Court of Law. Surely the decision of a third party is not always right. We in our simplicity imagine that a stranger by taking our money gives us justice”*

Concepts and definitions of “Justice”, its forms and multiple dimensions would be beyond this presentation and would be covered in later writings.

The existing formal legal system, though not infallible, has purported to offer an effective platform for the vindication of perceived individual rights and is based upon the age-old principle of punishing the wrongdoer while compensating the wronged. It is founded upon interpretation and applicability of statute or manmade Law, constricted by a variety of confounding Rules, and Regulations, (finding justification in the theory of uniformity and societal order), offering little or no scope for

the critical “human element”. It has failed to recognize the obvious truth, that invariably, it is the human element that generates conflict. Desire to humiliate or destroy the opponent, exploiting the opponent's weakness or vulnerability, an unhealthy focus only upon self-interest, dealing with the opponent as an 'enemy', devaluing the opponent's interests, vindictiveness, revenge, callousness for fellow human beings and utter disregard for nurturing relationships et al have been and continue to be some of the causative factors for micro and macro conflicts.

Sadly, it is believed and repeatedly reiterated, that the adversarial and adjudicatory judicial system alone provides a permanent and satisfactory resolution of these conflicts, leading to a sense of skepticism /disbelief in an alternate form of conflict resolution.

Conflict is inevitable, has existed and continues to exist in the best and most advanced Societies of the World. Hence, any short-term measures (including recourse to Courts) for resolution inevitably carries with it the peril of escalation in the long run.

Therefore, it may, not be, incorrect to suggest that having recognized the inherent deficiencies of conflict resolution through the adversarial approach, Satyagraha, consciously focused upon offering an innovative process in which the human element became the core component. Gandhi ji termed it “Truth Force” or “Soul Force” reflecting a foray into higher levels of human consciousness and morality.

Mediation as an alternative conflict resolution process is a recent development and originated in the USA in 1970 as a result of the Roscoe Pound Conference at which all stakeholders, alarmed by the inordinate delay in disposal of cases in Courts, evolved an alternate resolution

system which formally entered India in 2004. The philosophy and principles of Mediation, as known today, had already been visualized and propounded by Mahatma Gandhi in his lifetime in the concept of Satyagraha.

Mahatma Gandhi evolved the concept of “Satyagraha” and practiced it as a peaceful and nonviolent form of conflict resolution. (Detailed description and analysis would follow in later writings). He propounded this theory firm of a belief that every person was possessed of “good” (human goodness) and conscience which if recognized and appropriately nurtured would result in a permanent and peaceful resolution of conflict. He believed that human nature is likely, if not certainly *“to respond to any noble or friendly action”*. He was of the view that as violence was not a part of human nature, “human” ways of conflict resolution should be evolved rather than *“return to our animal past and use brute force”*. Mediation too unconditionally propounds these principles. The process of Mediation is designed, and Mediators( like Satyagrahis) are trained to identify, acknowledge, and dwell upon this human goodness, equally of all disputants, while appealing to and drawing upon their innate goodness and good conscience to end conflict.

Mahatma Gandhi recognized the place of free will in every human being and believed that by the proper exercise of such free will namely without compulsion or force, it would result in understanding nonviolence and thereby promote a non-violent resolution. To quote Mahatma Gandhi

*“Non-violence like charity begins at home. I learned the lesson of nonviolence from my wife when I tried to bend her over to my will. Her determined resistance to my will, on the one hand, and her quiet submission to the suffering*

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*on the other, ultimately made me ashamed of myself and cured me of my stupidity. She became my teacher in non-violence.”*

Mediation incorporates and promotes the exercise of free will in ensuring the right of self-determination and autonomy to parties in conflict. Mediation understands that resolution of conflict must result from the parties' willingness to seek resolution through dialogue and persuasion rather than through compulsion or force. It is said that the *“way of violence works as a monologue but that of non-violence is a dialogue”*. Therefore, in Mediation every participant retains an unconditional right of choice to participate in Mediation as also to determine terms of resolution.

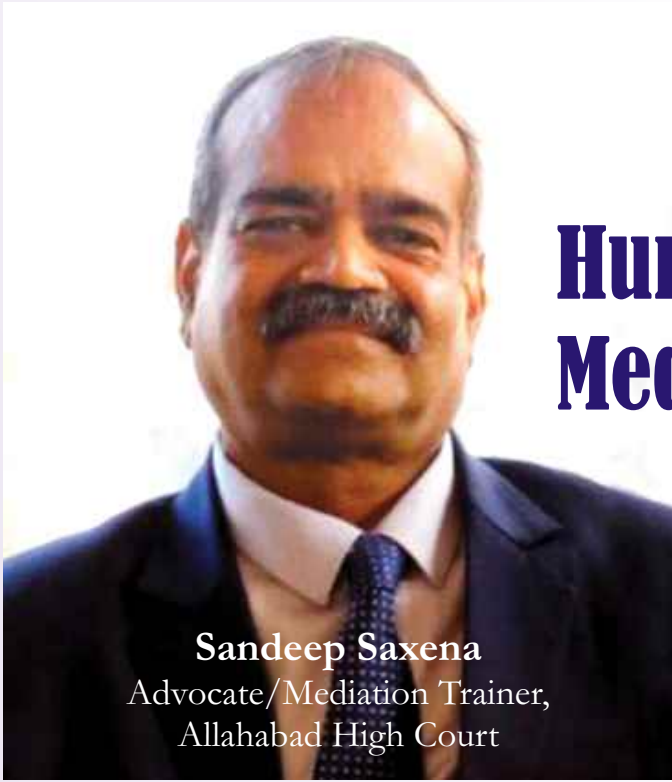
The Gandhian approach to conflict resolution accords importance to Negotiation. It envisages, inter-alia, recognizing the opponent as a friend, respecting, and trusting him /her, recognizing the opponent's interests, refraining from injuring, hurting, destroying, or annihilating the opponent, not exploiting the weakness of the opponent etc. Gandhi ji believed that Negotiation aimed at a *“restructuring of the opposing elements to achieve a situation which is satisfactory to both the opposing antagonists”*. The purpose of Negotiations and conflict resolution would be to *“liquidate antagonisms but not the antagonists themselves”*. He recognized that conflict resolution must be a “shared effort” without one opponent attempting to dominate the other. He advocated the conversion of an opponent, by persuasion, rather than by aggression, into recognizing and accepting the goodness of the other and seek a solution that was not based upon pure self-interest. Mediation is sustained on these same principles and the process is designed to separate the “person from the problem” and

focus on understanding and harmonizing opposing demands without causing injury to any person in conflict. Mediation attempts, like the Gandhian approach, to bring opponents to the same side, of the Table, to be a willing participant in a shared effort to constructively resolve conflict and evolve a WIN-WIN solution.

The Gandhian approach to conflict resolution underscores the criticality of effective communication and postulates that most often, failure or inability to convey or state what is essential begets misunderstandings, leading to suspicion and negative emotions, which not only promote conflict but also constitute serious barriers to resolution. Mediation, therefore, understands the criticality of effective Communication, identifies required competencies, techniques and skills, and enjoins upon a mediator, a duty to inspire, assist and persuade opponents to communicate honestly with each other. Hence Mediation ensures the emergence of a healthy, honest and neutral platform for the meaningful dialogue which is the sine qua non for peaceful conflict resolution.

The conclusion, I believe, is inevitable. Mediation, as a process of non-violent conflict resolution, began with Gandhi ji though the formal christening occurred much later. We, as Mediators, owe it to the Father of Mediation to internalize the principles of Satyagraha, harmoniously integrate them into Mediation, imbibe the qualities of a Satyagrahi that were postulated by him and proudly offer to the conflict-ridden world an irresistible resolution formula devoid of all forms of aggression or violence(physical or verbal) to ensure Peace, ■

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**Sandeep Saxena**  
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# Human Psychology and Mediation

from the fact that successful mediation requires sensitivity to the psychological dynamics underlying how people think, feel, and ultimately behave and make decision.

The phenomena of unconscious priming occur all the time in mediations, sometimes knowingly and sometimes unknowingly. Perhaps the most powerful form of priming in mediation comes from the description of mediation by the mediator at the beginning of the process i.e. opening statement.

Priming suggests that mediator should consider adding to his discussion an emphasis on the value of being flexible and open minded, the goal of reaching a fair and reasonable resolution and the need for creativity and thinking outside the box.

Psychological in depth of the mediator in reframing is crucial in the process of mediation. It is the mediator's job to evaluate the meaning of communication or behavior and if there is a mismatch then correct the interpretation by reframing the event for the parties. The mediator must be alert to any small clues which may contain the essence of conflict and can be articulated by either reframing or helping parties clearly stating their interests and need rather than be continually influenced by distorted perception of other party.



The human psychology has great application to provide psychological phenomenon and examine their application to mediation. It provides mediator as well as their lawyers and disputants, to use mediation as a guide to navigate their powerful psychological and emotional instincts that flows through mediation process.

An awareness of psychological principles can help mediator understand why parties have taken certain positions or why they are behaving in a certain way as well as anticipate how well parties may respond to mediators queries.

Mediation involves, healing individuals, business and other entities to resolve conflict when they have differing needs perspectives, beliefs and personality. The questions and outcome in mediation are as much about people as they are about the problems.

Successful mediation requires knowledge about psychodynamics. There is no escape

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The understanding of emotional power of the mediator is the force that can be harnessed to help parties solve their disputes although reframing provides a cognitive structure for new perceptions.

Cognition and emotion are two pillars of human psychology and two aspect of human consciousness and interactions that affect the way people behave. Taken together cognition and emotion creates belief. Core belief is personal pieces of faith because of which human experience resist changes. The following strategies are useful to mediators in dealing with stubbornly attitude of the parties, who resist change:

- Reality testing- can be used to make each party understand their past position.
- Face to face communication- between the parties reveals their intentions and perspectives and mediator by using his skill sometimes soften hardened beliefs.
- The mediator can help the parties develop options that address the parties' core beliefs, even if those beliefs are antagonistic.

The mediator must be prepared for the emotional heat that is generated by the combination of parties' often incompatible personality.

The simple release of emotion is an essential step towards settlement. It again mainly depends upon mediators understanding of psychology of the parties. Mediators are trained to manage the venting process so that it does not derail the mediation. The expression of anger can cause fear and anxiety and mediator needs to make judgment as to when angry words or angry gestures will advance the process of resolution or retard it. In the later case, the

mediator should enforce the ground rule that prohibits raised voices, obscene languages, angry physical gesture and other intimidating behavior, while creating an avenue for more constructive expression of emotion.

Mediator's skill is to provide emphasis on shift of thought of lawyer and parties from "should to could". For this shift, the mediator has to work to change parties approach to any mediation and this is possible only when mediators understand the psychology of lawyers and parties.

The lawyers, who can harness the insights of psychology, will be more effective and they can engage in more successful negotiations and conduct more efficient and useful discovery and they can more effectively persuade judges and others through their written or spoken words. The lawyer should determine their appropriate role in consultation with their clients and they shall consider the economic and psychological factors that may be blocking amicable resolution of the dispute in determining what role they and their clients ought to play in mediation. The lawyer plays a positive role by acting as their clients advocate in mediation and thereby they can ensure a fair result. Lawyer cannot be excluded from the process of mediation; in as much as, the lawyer has to be sensitive to the range of possible role they and their clients may play in mediation.

Understanding the psychology of the litigants/parties including third parties is also an essential factor in mediation. Without understanding the viewpoint and underlying ideas of the parties, the mediation process cannot progress to its logical conclusion.

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**Some key psychological principles narrated below which play important part in the process of mediation (it is not exhaustive):**

**BIAS:** It can lead counsel/parties to overrate strengths and underrate weaknesses in their case and as a result they reject reasonable settlement offers, which should be accepted. The mediator deals with the bias by applying the principles of reality testing, and mediators evaluation come across as more credible and thus may persuade parties to rethink their positions. It is important for mediator to remain patient and not give up prematurely. Thus bias is best combated by breaking down a dispute into components and reaching agreement on a series of small points sequentially.

**COGNITIVE DISSONANCE:** It occurs when there is lack of harmony between the disputants because of their perception. When parties enter into mediation they often perceive their adversaries negatively. The mediator's job then is to change their belief by encouraging conduct of the parties in such a manner which may help them to continue negotiating. It is mental discomfort which one feels when our conduct contradicts our belief. To eliminate the cognitive dissonance we can either change our conduct or change our belief. The mediator capitalizes on this cognitive dissonance during mediation. One tool for changing perception is bracketing with reciprocal move. By using his skills, mediator brings forth the actual scenario before such a party.

**RECIPROCATION BIAS:** It is the obligation people feel to return favour in other words it is human nature to feel that a

person who does a favour for me is entitled to return action. Mediator can capitalize on reciprocation bias during mediation by encouraging small reciprocal concessions that is to the extent one party retreats slightly from opposition, the other side will feel obligated to reciprocate. In turn a reciprocal concession brightens further changes of compromise between the parties.

**REACTIVE DEVALUATION:** It represents the tendency to devalue an offer because it is suggested by an adversary. Mediator can neutralize the effect of reactive devaluation by presenting a proposal from one side to the other party without telling the other party that the proposal originated with its adversary. Instead the mediator should present the proposal by giving its ownership to a third party which increases the likelihood of its acceptance.

**MALICIOUS CONDUCT (Wish of one party to hurt the other):** There is a tendency to attribute to malice conduct that might be just as substantially explained by more gentle cause. Mediator should be attuned to parties assigning malicious motive to their adversaries especially in mediation when there is a strong emotional component. In response, Mediator should encourage parties to see that the dispute from their adversary perspective and consider whether there are more innocent explanation for conduct they deemed objectionable. Suggesting alternate narratives helps promote reconciliation.

Thus, we see that it is very important for the mediator to understand the psychology of the parties and their counsel so that the misnomers in their minds and their misperceptions can be rectified for taking the mediation to its logical conclusion. ■



## De-Coding the Positive Psychology Genes of Mediation's

# DNA

By **Dimitra B. Mousioli\***

**Dr Seuss, the famous American children's author, poet and filmmaker,** gave us a very enlightening story of how people behave in conflict. In that story, he demonstrates how a stubborn "**North-going Zax**" and an equal stubborn "**South-going Zax**" kept arguing of who would move away from the path, so the other one would pass. Sitting firmly in their "position", the two angry Zax were leaving the life passing by without even noticing it as all their energy was focused on their opponent and their pride.

*(<https://www.youtube.com/watch?v=dZmZzGxGpSs>)*

That conflict mindset is quite familiar to me as a family mediator, when parents first enter into a mediation process. Feelings like anger, disappointment, sadness, hostility, insecurity, wounded ego or pain are keeping these two people apart, not even allowing them to have decent eye conduct, not even calling each other with their names anymore and making

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impossible for them to see a light at the end of their long tunnel.

But is conflict necessarily a threat, where we always have to act with the primitive survival response of "fight, flight or freeze" as most people believe? And how can we, as mediators, persuade our clients to overcome their mistrust in everything that takes them out of their comfort zone and let the mediation process change this haunted myth around conflict?

These two questions - that come in the surface again and again in my practice - found, unexpectedly, their clear answer a couple of years ago, when I started my studies for my Master's Degree in Applied Positive Psychology (PP).

**The science of PP is all about helping people become their best possible selves by finding their strong points, setting realistic goals with a down to earth optimism, approaching life's problems as opportunities and not obstacles and become, as a result, more resilient when things don't go the way they had imagined.**

Words like: "flourish," "compassion," "motivation," "wellbeing," "inner growth," "strengths" that were coming over and over in every PP module became "bulbs" in my head and brought a totally new light to my understanding of my profession making me realize how strongly connected mediation is to PP and how PP tools (that mediation unconsciously was using) could help parents, on one hand, become functional again and children on the other thrive through a divorce.

**So, let's find how the PP philosophy is part of the mediation process before and after the session begin and how it can transform negative feelings and nasty conflicts to positivity and collaboration.**

(The words that will follow in bold are words that are related to PP and have been proved through several studies that they help people experience positive emotions and build solid wellbeing no matter what the circumstances are.)

Before the mediator enters in the **mediation** room he needs to be aware of his emotional and somatic state. By using meditation and **breathing control exercises** he prepares himself to be positive, composed and under control.

Throughout the mediation session, the PP philosophy is present in every stage of it.

When the parties first enter in the mediation room, they realize the huge difference between a court and a mediation procedure. The room is cosy, away from loud noises and indiscrete eyes, not very big with natural light and the right temperature. Coffee, tea and snacks are on a table, creating with their smell a safe and comforting place to be.

The mediator uses the first names of the parties and welcomes them with a **"Duchenne smile"** (The Duchenne smile is named after Guillaume Duchenne, a French anatomist who studied many different expressions of emotion, focusing on the smile of pure enjoyment - <https://pubmed.ncbi.nlm.nih.gov/23012270/>) and a strong, warm handshake. The tone of

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mediator's voice is also soft, the moves of the hands gentle and the eyes follow equally both of them.

The parties have the chance to sit next to each other and share their stories, feelings and needs. After this sharing, the mediator **empowers** the parties to use their **strengths**

(<https://positivepsychology.com/classification-character-strengths-virtues/>) and their knowledge of the situation to find their solutions. The mediator doesn't impose any solution. He is there to facilitate the conversation and keep them on the right track (with his positive and respectful attitude.) Having faith in parties' **"inner wisdom"** (Hanlon-Davis, 1992), mediator encourages them to test if the solutions they suggest are fair for them and their children.

Already from the mediator's open statement, the parties feel his strong faith in their capacity to solve the problem. The mediator is the **"appreciative eye"** (*Cooperrider, 1987*) which sees the best in people and tries to bring it to the surface.

Questions like: "On a scale from 1 to 10 where are you now and what can you do to move one step higher?" or "If you had a magic wand and you could change the current situation what would be different?", make the parties visualize their future and by using their strengths **they set small goals to bridge the gap between their current situation and their ideal one.** (*Discrepancy Loop - Carver and Scheier*)

During the "brainstorming procedure" where the parties try to find solutions the

mediator acknowledges their progress, brings back beautiful memories (by using family photos or by asking them to remember the time where they best worked together) and gradually by using the **"Building and Broaden theory" he generates positive feelings to the parties.** The positive feelings help them to be more creative and allow them to open up and include others in their sense of self (Waugh & Fredrickson).

If things don't go well the mediator can be creatively flexible. He can use his humour to lift parties' mood, he can propose a short break for a coffee or a walk with him in a park to clear their minds and reduce their stress.

As mediation is a future-oriented process the mediator helps the parties to **vision a better wellbeing, to set clear goals and work towards them.**

One of the goals of mediation is to rebuild the **relationship** that has been broken and if not repair and fix it at least make it functional so as the parties can live their lives with no past burdens. Having good relationships with the people we work with, with our neighbours or with our ex's is crucial for our mental health and our happiness. This is one of the elements that according to Martin Seligman's **PERMA model** make happiness possible. M. Seligman is the father of PP science and his PERMA model which gives the answer to the one million dollar question: "What is happiness?" refers to P – Positive Emotion; E – Engagement; R – Relationships; M – Meaning; A – Accomplishments;

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(<https://positivepsychology.com/perma-modell/>)

An additional support to the importance of the healthy relationships in our happiness is also **“The Harvard Study of the Adult Development”**, one of the world's longest studies of adult life where scientists began tracking the health of 268 Harvard sophomores for nearly 80 years

(<https://news.harvard.edu/gazette/story/2017/04/over-nearly-80-years-harvard-study-has-been-showing-how-to-live-a-healthy-and-happy-life/>).

With all the above and by targeting to the three out of five human needs of the Maslow Pyramid ( Safety, Esteem and Self-Actualization) mediation builds positive emotions to people, encourages their strengths to emerge, cultivates their resilience, helps people to reach their optimal functioning, improves their mental health by creating conditions where good and healthy relationships can grow and leave the participants with an overall experience that makes them feel satisfied, pleased and motivated

(<https://www.unige.ch/communication/comm-uniques/en/2020/arguments-between-couples-our-neurons-like-mediation/>). And all that because of its PP genes!

So, what if PP was a compulsory module in mediation training not only for the wellbeing of the parties but for the mediators as well? And what if part of a family mediation session would include PP interventions such as:

- **"The Three Good Things Journal"**, a powerful tool that can be used to increase positive emotions and gratitude and make

positive events and moments more visible (<https://happyproject.in/three-good-things/>) :

- Every night, just before you go to bed, sit down for a while and look back at your day
- Then think of 3 things that went well for you during the day;
- Write them down and reflect upon each of them.

- **"The "Character Strengths Survey"**

where people find their five top strengths and focus on them rather on trying to fix their weaknesses.

(<https://www.viacharacter.org/survey/account/register>)

Considering that divorce is close behind bereavement and unemployment in terms of their long-term negative effect on overall wellbeing (*Lucas, 2003*) imagine what a huge difference in parents' behaviour (during the mediation session and after that in real life) and in children's lives that would bring if only we, as mediators could emerge the PP genes of mediation in the surface and introduce some interventions that they would boost their positivity and creativity while they are trying to find a common ground in their new situation.

And imagine what a great impact a PP module could have on our training as mediators for our own wellbeing that very often can be tested in our job.

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How To Use Silence In Mediation  
By **Adv. George Merlo Pallath**

Mediator Neutrality -- How is it possible ?  
By **Rachel Fishman Green, Esq**

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# *How to use Silence in Mediation*

By **Adv. George Merlo Pallath**  
Mediation Trainer, Kerala

Imagine the husband and wife bickering. Both will be shouting at the top of their voices and both will be misunderstood, misinterpreted and there will be total breakdown of communication. Despite their raised voices, there is zero communication. Compare this with two lovers sitting on the beach watching the sunset. There is silence. No words being spoken, but they are in total communion with each other. Imagine a Buddhist ascetic meditating. Total silence. Yet there is absolute communication.

In an hospital room, the aged husband and wife is lying on adjacent beds. Both are critically ill. Their hands are clasped. No words being spoken. But everything is understood.

You are at a flea market and see an item you like and asked the vendor for his best price. He says, "200." Do you think you will get a better response by looking at him disappointedly in silence and starting to

turn away or by saying, "Can't you do better than that?" we can all agree that the former works better.

In mediation, the disputants come to us for a resolution of their dispute, to make themselves heard, to open their minds and empty their hearts of all their sorrows, anger, frustration, and helplessness. Many a times, just a patient listening will suffice to mitigate their emotions and drain out their negativities. Sometimes they will get angry, violent, aggressive. One of the best weapons in our armoury to counter these negative emotions or to neutralize them is "SILENCE". People abhor silence the way nature abhors a vacuum and rush to fill it with the same alacrity. Silence feeds our imaginations and provokes all types of anxious conjurations. If we are clever about it, however, we can leverage these negative reactions to create positive value. Silence is also a form of communication.

In mediation, when some disputants lose

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their control and shout at the mediator, the mediator can just stay silent and calmly continue to look at the disputant in the eye. The mediator's silence will calm down the disputant, bring down the temperature, and give them time to reflect and think rationally.

*You are most powerful when you are silent. People never expect silence. They expect words, motion, defence, offense, back and forth. They expect to leap into the fray. They are ready, fists up, words hanging leaping from their mouths. Silence? No. ~Alison McGhee*

*"Silence is one of the great arts of conversation". ~Marcus Tullius Cicero*

Silence, is one of the most powerful weapons an individual can bring to the table. But where does the power of silence lie?

**Silence implies confidence:** There is a reason that the descriptors "strong" and "silent" are often paired together. It takes a confident person to calmly sit in silence in the face of a tough negotiation. Even if you do not feel particularly confident, strategically choosing to employ silence in your negotiations can help get there.

**Silence shows that you are listening:** In negotiation, information is power. It is how we learn more about the other side's interests, identify new ways of creating value, and work towards win-win solutions. If we spend most of the time talking, rather than opening space for the other person to speak, we miss out of key information that will make us more effective negotiators and help us create better deals. Silence gives the

other person space to speak, and it displays your willingness to listen and learn more. "Silent" and "Listen" are comprised of the same letters. Coincidence? Probably not.

**Silence expects a response:** Sometimes, your negotiation counterpart is quiet or reserved with their communication. Perhaps they are utilizing positional negotiation tactics, hoping to draw you into a framework of bargaining and haggling. In this case, you need to convince the other side to negotiate in an interest-based way focused on mutual gains. While you can clearly state your goal to work together to create more value in the negotiation, you can also utilize silence to elicit more open communication. Just as you might be uncomfortable with silence, it is likely that your negotiation counterpart is as well. After a thoughtful question, allowing silence increases the likelihood that the other side will respond with more information and clarity.

When used genuinely and sparingly, you can utilize silence in a way that exemplifies your confidence and empowers your negotiation counterpart to collaborate with you, without creating too much pressure or making the other person uncomfortable or defensive.

**Encourage them to speak with inquiry:** Start by asking your negotiation counterpart an open-ended question, then sit back and be ready to listen. When the other person is finished speaking, allow a few more seconds of silence. This shows that you respect their space and want to

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hear from them, and they may continue speaking after a pause.

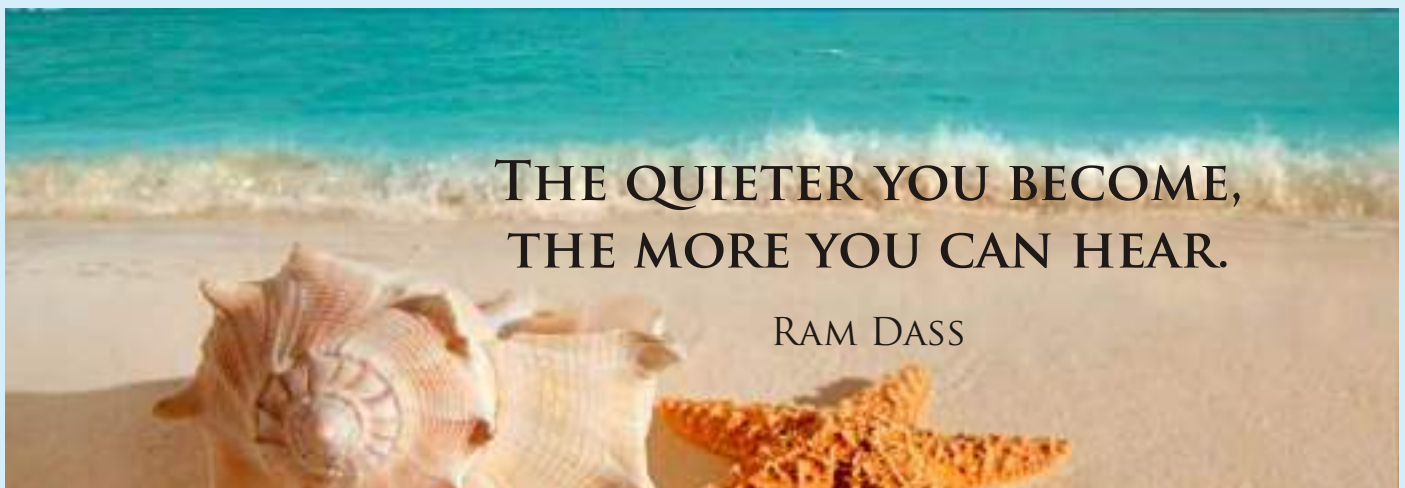
**Practice Active Listening:** You may be silent, but that does not mean you are not engaged. Show that you are still part of the conversation and eager to hear more by opening your body language and making eye contact. If the silence continues, sit back in your chair, and shift your eye contact to remove some pressure from the other side. Once they are done speaking, try to recap what you heard, focusing on naming any of their interests you identified.

**After you speak, be silent:** After you make a statement or request to your negotiation counterpart, avoid the instinct to tack on follow-up questions and explanations. Instead, utilize silence. This gives the other person space to be thoughtful about their response to what you said, and it allows your statement to sink in and clarify. It also allows the other person to respond openly to what they found most important in your statement, rather than to a narrow follow-up question.

**Avoid the desire to fill gaps:** Sometimes, conversations come to a natural lag. Rather

than viewing this as a negative, use that time to be thoughtful about why there is silence. Are you feeling stuck for a specific reason? Take time to assess your counterpart's body language and tone – do they seem uncomfortable, angry, or upset? Are they possibly analysing an option that was put on the table, digesting a large amount of information or a statement that was difficult to hear, or planning how to move forward in a resource-strapped situation? Rather than mindlessly filling blank spaces in the conversation, utilize that time to diagnose what is happening and plan the next best step.

In conclusion, Use silence as a furnace of transformation to bring down tempers, to calm people, to make people introspect, to reconsider, to think, to give time to the disputants to realize ground realities. Silence demonstrates that sometimes things must unfold in their own time. Silence brings about a transformation in the mind of the disputants. So long as it is used sparingly and with perfect timing, it is a potent weapon to bring clarity to the fuddled minds of the disputants. ■





# Mediator **Mediator Neutrality - How is it possible?**

By **Rachel Fishman Green, Esq.\***

## Neutrality



How could a mediator be neutral in a divorce? Surely one of you is right, the other wrong! If you know in your bones – and your friends agree – that you are right, would mediation make sense? You don't want to compromise!

First –you won't agree in mediation to something you don't agree to! Mediation can clarify and coalesce your goals and outlook. I don't ask you to agree– only to try to understand each other. To accomplish that, mediator neutrality is a valuable, powerful tool.

If I understand how you feel, how this experience changed you, the challenges that you face– then I can help your spouse understand these things, and I can ensure that the agreement addresses your needs and interests.

The theory underlying our adversarial legal system, is that each will hire a bright, skilled warrior who will see the situation completely from the client's perspective, and present the strongest case possible to the judge. The judge will get the strongest perspectives of each side, and be neutral. The judge will mete out justice and wisdom.

Sadly, due to over-loaded court systems, most judges do not hear the people behind the paperwork. Litigants often feel short-changed because they had no chance to speak.

Mediation gives you a voice. You are the expert about your life and your needs. No hired expert will care as much as you, because only you and your family will live with your agreement. You are the in the best position to decide what should happen.

As a mediator, I will not make decisions FOR you – but I will, like a judge, remain neutral. I will listen to what each needs to say, ask questions to make sure we have complete information, brainstorm how to get the information. They might need an accountant, a financial planner, a child specialist, divorce coach or an attorney, before feeling able to evaluate offers or make decisions.

Each person must HEAR the other. Divorcing couples misunderstand each other. A neutral mediator improves your understanding of where the other is coming from, and why you believe your proposal is best. It helps to understand why you disagree.

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Children perceive their parents neutrally during a divorce. You might want your child to side with you against the other parent, but a child will never thank you for taking away his mother or father. A child contains a bit of each parent, and they are able intuitively to understand both parents. Children understand the limitations and strengths of both their parents and love them, and provide a model for mediator neutrality.

How does it work in practice? How can I be on both people's sides, when they are in conflict?

**Case 1 – Empathy v. Judgment:** Anice and Marshall came in for divorce mediation. Anice expressed her thoughts. She loved Marshall passionately and still believed he was the love of her life. She had made a commitment to him which, to her, meant that she would stay no matter what. Marshall had had other affairs but had always returned. “How do I know that now you are serious?” she asked. “What makes you think that in 3 months, you won't change your mind again and come back to me?”

The couple had recently purchased a house. Anice said, “Why did you buy this house with me if you wanted out?” The couple had greatly disparate incomes, and although Anice had been the motivator behind purchasing a home, she couldn't pay the expenses of the house herself.

I could have felt Anice was “right,” and Marshall – a lousy toad. She had commitment, vision; she stuck with her husband through thick and thin. She planned and worked so they could buy a home. After this loyalty, her reward? Constant betrayal, multiple affairs! Then Marshall spoke eloquently about his

need to move on from a relationship which felt was stagnant, and lacking intimacy or romance. He was grateful to Anice for her love and support, and acknowledged what she had enabled him to achieve. But for a long time he felt something was missing. This feeling drove him to seek outside relationships. Even though he felt Anice's love, he felt stifled and responsible for Anice. He knew she couldn't earn as much as he and felt trapped. He felt platonic love/respect for Anice, but he had a new girlfriend. For Marshall, the 12-year relationship had evolved into friendship.

I felt Marshall's pain. I felt how Anice's willingness to stay in a relationship with a man who was sleeping with another woman made Marshall feel trapped. He saw her as a woman lacking self respect, who wanted to live with him even though he rejected her.

I felt empathy for both Anice and Marshall. Through my understanding of them, I was able to sympathize with Anice, who felt deeply committed to this man, and hurt every time he told her that he still loved her – and who felt that she would have stayed with him no matter what, even if he had outside relationships.

I felt empathy for Marshall, who expressed that this marriage, though it had endured for 12 years, had never completely fulfilled him. He felt excited by the chance to break free and try to have a new relationship which felt more healthy and fulfilling and less co-dependent and suffocating.

My job now was to increase their understanding of each other. Marshall had a better understanding of Anice than she had of his point of view. Once understanding improved, they would be ready to negotiate

the fairest way to divide their house and their possessions.

Anise had to confront the reality that Marshall wanted a divorce. When I helped her to accept this, she was able to negotiate alimony for a period of time, so that she could keep the house and become self-sufficient. Marshall saw the alimony as a way to buy his freedom and it was a great relief to him to be able to do that. They were both satisfied with the terms and their agreement was completed.

**Case 2: Empathy for Both:** Allen and Marge's marriage was ending because of Marge's sexual identity. I empathized with Allen, who, in his early 50's, had to leave his beautiful house. He had to rethink his whole life, in light of her changes. He had felt the marriage was OK. He didn't want a new life, but it wasn't his choice. The old one had been snatched from him.

Marge communicated the excitement and liberation she felt as she embarked on her new life. She said something had always felt “wrong,” and now she didn't have that feeling.

Marge came to mediation believing that she had embarked on a course of self-discovery. But during our sessions, she came to a new understanding of how her journey affected Allen. She ended up giving him a more generous financial settlement, partly to assuage her guilt, and partly to help Allen to also feel that he was getting an opportunity to embark on a new life – one that might hold promise, excitement, even happiness missing from their old one.

It is never simple to determine why a marriage ends. Something was probably always lacking in Allen and Marge's marriage.

Why didn't Allen see that? Why didn't Marge know earlier? The end of the marriage is created by both, just as the beginning was created by both.

**Case 3:** Brad, left to get a newspaper one Sunday morning and did not come back or call for 3 days. He left Helen with 2 young children, without even a note. I could imagine her anguish, and the children's fear. But during our sessions, Helen never let Brad speak!! What he did was not right, but I came to understand that he did the best he could. Something drove him to suddenly leave; something that he felt was equally awful had been done to him or he would not have done this to her.

That is the crux. Most of us are trying our best. We try not to hurt the people we love. But we are imperfect creatures, so we don't always succeed. We hurt, we lash out – and the other may not know that they hurt us. Through understanding, we help people to forgive themselves and each other.

Divorce raises hurdles and complex emotions as you restructure. When navigating these changes, the last thing you want to hear is that your spouse's position is valid.

These feelings are intense when the situation triggers strong response – e.g., one has a new lover, or one left suddenly. The “innocent” spouse might find that the identity as a wronged person becomes compelling.

Neutrality will bring you closer to truth, and truth will help them move forward. ■

\*As forwarded by  
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# FROM STUDENT'S PEN

The Importance of Mediation in Matrimonial Disputes  
By **Simran Mandhyan**

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# The Importance of Mediation in Matrimonial Disputes

By **Simran Mandhyan\***



India is one of the countries with the lowest divorce rates in the world but that doesn't mean people do not have unhappy marriages in India. The Hindu Code Bill, passed during the time of independence had granted equal divorce rights to both men and women. The reason behind the low rates of divorce is because the process of attaining divorce is very long and tiresome. The court provides a reasonable time to rethink about the dissolution of marriage to both the parties. This is so because marriages in India have been granted an extremely sacred status. Other than dissolving the marriage through the legal process, court gives the couples a fair chance to resolve the disputes and give their marriage another chance through mediation.

Mediation helps a great deal in settling marital disputes out of court. Unlike litigation it is not a lengthy and tedious process. It also saves the cost of lawyers and other expenses involved in litigation.

People in India also don't file for divorces because they are afraid of what the society might think about them. They tend to live with their unresolved marital disputes. Mediation is a private process unlike litigation which is a public process. If they settle disputes through mediation they can live together without any issues and don't have to worry about what the society feels.

Mediation is more of an informal process unlike litigation which is a formal process. This ensures that there is no unnecessary stress or tension between the partners.

One of the biggest advantages of settling disputes through mediation is that the mediator assists the parties in reaching to an amicable settlement and since the agreement is entered into between the parties by their own free will, it is final and binding.

**During this time of crisis when India is facing the strictest and longest lockdown ever imposed in the world due to the COVID-19 crisis, the domestic violence cases are going up. The frustration of staying at home all day is leading to more fights and differences between partners. The pressure of working online and salary cuts builds in more frustration and leads to bigger issues. Too much closeness between**

**the couples has turned out to be a relationship killer for those couples also who thought they were satisfied with their marital life. Cases of marital rape are surging. Disruption of each other's personal space has left marriages fragile. But this is a temporary situation and eventually the lockdown will be lifted and life will go back to being normal, the way things were earlier. These cases might put an unnecessary burden on courts if mediation wasn't a popular Alternate Dispute Resolution (ADR) mechanism for resolving marital disputes. Half of these matrimonial dispute cases could be settled through mediation alone. Online mediation through video conferencing might help these couples resolve their disputes in this pandemic time.**

The Indian Mediation Centres however have a lot of room for improvement like appointing better and trained mediators. Law Schools in India should not only focus on litigation but also other forms of Alternate Dispute Resolution forums. The mediators should be provided with necessary training so that they

are better at their jobs and mediation as an ADR is more popularised. In addition to this, mediation centres could also work on their infrastructure. Other issues like pendency of cases, backlog cases and the shortage of mediators should also be addressed.

Last but not the least, creating awareness among people regarding mediation as an ADR mechanism is extremely important. People associate the term 'MEDIATION' as a means for settling marital disputes only but it is more than that it has been introduced in a few statutes as well, like, The Companies Act, Insolvency and Bankruptcy Code, Commercial Courts Act etc. In these enactments provisions are made even for pre litigation mediation by making this process compulsory.


I think its high time people in India start giving 'Mediation' the statutory recognition it deserves.

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**EDUCATION  
IS OUR PASSPORT  
TO THE FUTURE, FOR  
TOMORROW  
BELONGS TO THE  
PEOPLE WHO PREPARE  
FOR IT TODAY.**

**-Malcolm X**



# Euphoria

Chit-Chat with our Confre're  
**Mr. Colin Rule**  
President & CEO, mediate.com

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# Euphoria

chit-chat with our confrère

**Mr. Colin Rule**

President & CEO, mediate.com



**Birthday : October 3rd**  
**Zodiac : Libra**



To begin with, firstly, we heartily want to congratulate you for becoming the President and CEO of Mediate.com.

**Colin Rule:** Let me just begin by saying that I am delighted to be here with the two of you, Pusshp and you. **I am a huge fan of EMW. Delighted to be a part of it in anyway.**

**Mehera:** Sir, you are at present on the Boards of the Consensus Building Institute and the Peace Tech Lab connected to the United States Institute of Peace and you have also served as a Peace Corps volunteer way back in 1995 in Eriteria. It is 21st of September today, which is the International Day of Peace and we are blessed to have you, a trailblazer in the field of dispute resolution.

**Colin Rule:** Thank you so much! Wow, so complimentary. I am delighted to do this work and it's a gift every day. I appreciate your kind words. I could not pick a job that would make me happier. I would even

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do it for free but I guess we all need to figure out a way to pay our bills. I love all the people in the field who are drawn to peace and conflict resolution and they are just lovely. I am so happy to be back at Mediate.com and being able to work with mediators and peacemakers around the globe every day.

I always wanted to be a peacemaker but the word 'peace' is used in so many different ways. Sometimes it's hard to know what peace really means. It can mean something different from one person to another. For me, conflict resolution is practical peacemaking. It is the science of how you help to build peace. **The best definition of 'peace' is not the absence of violence, the best definition of 'peace' is healthy conflict prevention, healthy conflict management, and healthy conflict resolution.** So, we may not use the word peace every time we write an article on conflict resolution but that is what I am thinking when I am thinking about it.

**Q: Sir, it would be great if we start with a message from your side for mediators across the globe and also those thinking of a litigation path, on this day of peace, especially during the global pandemic we are in.**

**A:** Well, we need to think of all components of peace. It is inspiring for me to work with peacemakers around the world. I work at the Peace Tech Lab at the USIP (United States Institute of Peace). USIP has done a lot of thinking on what are the components that undergird peace. That can be, respect for human rights, governmental transparency, freedom of the press, economic empowerment, or even environmental protection. All of these things build into peace. But for me, working on peace, trying to build understanding and connections, and then reinforcing all of these components of civil society that lead to peace is the most important job for all of us on earth. I think every day we are seduced, unfortunately.

There is a saying, the angels of our nature and the devils of our nature, which means we have an angel on one shoulder and a devil on another. The devil is whispering things, for example, the other people they are not like you. They are mean, bad, and threatening. What we have to do is, we have to ignore the devil and listen to the angel and that is what fundamentally peacemaking is about. It is about appealing to the angel in all of our nature and understanding we are all the same. We are all brothers and sisters, the distinctions that we have in the world, between this country and that country, or this religion or that, they are all artificial. I know I can sound like a platitude but in every single day in every community, every workplace, every school, every government, we have to fight to remember that and to reassure our psychologies that we can get along to build a peaceful world. For me, that is the core work. You can go back to the beginning of recorded history, there have been people who have worked for peace, we have to continue doing this work because it will never end.

**My message to all the mediators and peacemakers in the world is do not lose faith, keep going and we are going to build a better world eventually, if we can stay focused.**

**Q: Sir, you have been a pioneer in the whole landscape of ODR. You co-founded Online Resolution, one of the first ODR providers in 1999. Can you tell us, what was your moment of epiphany, when you felt technology and dispute resolution should be wedded together? Did that happen during your University days?**

**A:** You know, I did have a big breakthrough during my University days and that would be late 80s to early 90s. You can tell by just looking at me that I am a nerd! I mean it as a compliment because I love nerds and I love technology. **My whole life I have been around technology. The personal computer was**

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**invented when I was 10 years old and my mom got me an Apple II+** which at that time was a very powerful computer but it is now less powerful than your watch or your baby monitor. Now computers are much more powerful but I was so excited when I got that first computer. I thought this can change the world. So, I ran a bulletin board, and this is before the internet. It was a dial-up service in my bedroom when I was 10 years old and other people would dial-in via their modems to connect to my bulletin boards and we would communicate and that made a big impact on me. I thought wow, what could happen if the whole world could dial-in to a bulletin board and we could all communicate online. At that time I was interested in peace but I did not know anything about conflict resolution or mediation. But when I went to college, I went to a very small school that was run by Quakers which is a religious group in the US and they believed in inner light. It was a concept that **every person had a little bit of god inside of them** they were very excited about mediation. They thought **every person can see inner light in each other via mediation and work out their problems.** They did training, when I was a sophomore, in mediation and I was lucky enough to get a seat. It was weekend training, as soon as I was trained, I thought this is it. This is what I want to do for the rest of my life because this showed me how I can work for peace. So, I was a nerd, I loved technology, and I also got trained in mediation. Still, nothing was going on between the two, there was no overlap but then I got a job in the field, at the National Institute for Dispute Resolution in Washington, D.C. That was when the internet started to rise and people started to ask how are we going to resolve disputes online? And I thought, I was the perfect person for this. **I love mediation, I love technology,** and I am going to figure it out. I met a few other people like Ethan Katsh,

who were also interested in that topic and we were off to the races. By 1999, the ODR field was launched and that's all I wanted to do with my time and work for ODRs.

**Q: You have mentioned in one of your interviews with the American Bar Association Journal, that ODR began mainly for E-Commerce disputes but thereafter a shift was made to other kinds of disputes like Insurance, Property Tax, Matrimonial to name a few. Taking this further sir, the traditional view holds that criminal cases cannot be settled via ADR mechanisms. What is your view on it? Can it potentially happen in the future?**

**A:** Well Mehera, let me begin my response by saying I can already tell you are going to be an amazing lawyer. It's great how much research you have done. Thanks for the great question! I am what they call an NLM, a non lawyer mediator. My background is in public policy and dispute resolution and not in the law. So I never took a bar exam and I never defended a client but I do teach at law schools like Santa Clara and Stanford and I interact with a lot of lawyers. My feeling always was that dispute resolution is only for civil disputes. Civil disputes are when there are two parties and they have a disagreement which they can work it out themselves. Usually, it's about payment of money or the delivery of services. For me, the criminal side is different. You cannot mediate a dispute between a criminal and their victim. Now, there is restoration justice particularly for low level interactions. For example : If a teenager paints graffiti on a building or if they steal a candy bar out of a store, then you can say, let's have a meeting between the victim, the owner of the store and the teenager who did the crime and then we can have a conversation to try and restore the trust. Also, hopefully, make the criminal understand the impact of their actions. But for cases like robbery, assault, or

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even murder, the notion of dispute resolution does not make sense because you never want to say to the criminal, what punishment would you agree to? So, I always thought there is no fit in the criminal side. But, when I started working with this company Tyler Technologies that works with judges around the country, I had criminal judges come up to me and say that they want to use our tools and I said how would that even work. They explained that what we do not realize is most criminal cases at least in the US are resolved by negotiation and it's a negotiation between the defense counsel, the attorney representing the accused and the government, the public prosecutor because they essentially get into a plea bargaining negotiation. The State will say if you accept guilt, we'll let you spend 10 years and 5 years on probation and then the defense counsel might say well that is harsh, we can accept guilt, and it should be 3 years with 2 years probation. Something like that! It is a negotiation between the lawyers within a court system and if they cannot reach an agreement, they go to a judge, which is essentially a arbitration. So, what I have learnt is that it is going to be a long time to see ODR let's say in murder cases but I do think there are lots of ways that online technology and negotiation can streamline the criminal process, improve transparency, and especially improve consistency. What we see is wide disparities in the US in terms of criminal sentencing. People of color, African-American individuals get much harsher sentences on average than white criminals for the same crime. This is because there is a lot of racism in the US. Often Judges and Prosecutors, when they are negotiating cases on an individual basis, they may not realize how their bias is affecting that case. But there are ways where you can use technology to come in and say that here are a million other cases that are similar to this and these were the outcomes. This can help the

sentences to be more consistent and fair.

**We are very much at the beginning of how ODR technology can help the criminal side whereas on the civil side, we have already come very far. A lot of innovation would be needed to make the system more fair, consistent and it would not be creating negotiation between criminal and victim but it would be the use of technology to make the overall system better.**

**Q: Do you think the ODR regime has strengthened the faith of public in the justice delivery system?**

**A:** I had an opportunity to interact with the justice system around the world. I did a lot of work in the Netherlands. **We launched a system called the *Rechtwijzer*, a family dispute resolution process** and what impressed me is there is very high trust in the Dutch society in the judiciary. For instance, the Dutch judiciary, do not have jury trials. All of their cases are decided by the judges and in the US; we have juries that decide cases. In Netherlands, no one feels that they need a jury trial because of their trust in the judges. In US, there is a lot of mistrust in the judicial system. **We have a lot of crises. We have a crisis in something called 'Pro Se' litigants meaning litigants who cannot afford an attorney, so they have to self-represent in courts.** We know those people get much worse outcomes than people who get representation. These low-income individuals cannot afford competent representation because a lawyer is too expensive for them. So, either they get a lawyer assigned from court or they go to a legal service bureau where they get a lawyer from a non-profit social support agency. But those organizations are often overwhelmed and they turn away 75% of people who come to them asking for help because they do not have enough money. It's not the same thing as having a competent and dedicated lawyer to take your case and argue it. I think we have a sense of

what we call litigation romanticism in the US. We have a lot of TV shows that talk about the courts, lawyers, and how justice is done but when people actually get into the courts, they are often very disappointed. They don't get everything to reach and get to the truth. I think there are many hardworking people in the justice system and I do not want to insult them or their efforts at all, but unfortunately, the governments are cutting money that go into the courts. Every year, they get less and less money. So basically, they are asked to play this very important role in the society but they are not given enough money to do it effectively, which is a big challenge. If you look into the US, there is very low trust in the government. When it comes to polling about Congress, the Senate, the Presidency, our trust is absolutely at the bottom. The courts are little bit better but not that much better because their scene is also politicized. Political leaders are taking their friends and putting them into the courts as opposed to the most competent and best people to play that role. **Trust in technology is higher in the US. If you look at Google, Amazon, or Microsoft, these companies usually get trust of about 30-50%.** Well, that is not great but that is better than the government. So, if you say to someone: Would you go to the government to resolve your dispute or would you go to a private company? Many Americans would rather go to the private company. **At eBay, we built our own justice system and we found that users liked our justice system and 99.9% of the disputes were resolved in the eBay system** and didn't go to the court. We see many people moving to the private sector to resolve their disputes. But I know in India, it is very different. There are very long delays in courts and also there are problems of corruption. The average time for a civil case to be heard in front of a judge can be 10-15 years. That can very much undermine the confidence

of the public. People will do anything they can to stay out of courts because they know it is going to take a long time. Other countries, if you look at Germany, Japan, Netherlands, there is very high trust in the courts and courts are very efficient. Most cases are resolved in 6-10 months and there is high trust in the society towards the courts, around 80-90%. So,

**I think not every country has the same attitude about their courts. Every country has different needs but I think ODR is going to be an important way through which we can create transparency, improve access to restore the trust of people in courts. This way they would know that they can go on their phones and can get a fast and fair resolution where the process was just and the outcome was appropriate. If we do it right, we will be able to significantly improve upon the delivery objectives of the court system.**

**Mehera:** Exactly! That's how I feel. Because when it comes to ADR or going to the court, whatever the mode is, time is of the essence. We can only strengthen the faith of the public if there is timely resolution of their disputes. And as an old saying goes, justice delayed is justice denied.

**Colin Rule:** It is absolutely true! If you say to someone I have built a perfect court system and it is going to deliver a fair outcome but you have to wait for 15 years in order to get it. The person would say it does me no good and it doesn't matter if it is a perfect process. I cannot wait that long. I hear stories in India of elderly people who are injured in a fall and it's not their fault, they slipped, and they file a court case and it takes so long that they end up passing away. Their children go through those cases and pursue them. So, how is that justice? If something happens to me that is unfair and I have to wait so long for justice to happen, and it happens after I die, that is not justice. It's exactly as you have said, justice delayed is justice

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denied. The good news is that in India, the government, they see that ODR is promising and they know they have to fix the problem. I see people in position and great authority who are eager to use technology in a creative way. So, that is very encouraging to me. I don't see it in the US.

“India is the most exciting geography in the world for ODR and the fastest moving geography for ODR. A billion people are going to get access to ODR at scale in India. Mr. Modi government is moving incredibly quickly in that direction, so that is very encouraging. The whole world is watching and I am sure when it's going to happen, it will happen the right way.”

**Q: Sir, you also lecture at Santa Clara Law School. What is your teaching methodology like? Do you incorporate your personal experiences to interest the students?**

**A:** Thank you for asking this question. I just finished my class at Santa Clara yesterday. **I get to teach with my good friend, Janet Martinez** who runs the conflict resolution program at Stanford Law School. Yes, **I bring in a lot of my personal experiences** because I am working in ODR every day, so what I want to do with my students is show them what is happening. We do a lot of different exercises like video mediations, text based asynchronous mediations. We actually do algorithmic resolution where we resolve mass claims and build calculators to figure out how you can deliver fast and consistent resolutions across classes that may have thousands of people. We also look at all of the cutting edge ODR platforms around the world in family, landlord-tenant, commercial cases, etc. It's an intensive class; we do it on Friday, Saturday, Sunday, all day each day. I find it's better than doing just 1 or 2 classes a week for a whole semester. **It's really fun and inspiring to meet the law students and hear their ideas.** We ask them at

the end to design an ODR process and **they have surprised me with some of the things they have designed.** I have seen designs for video game dispute resolution, designs for disputes over cracks in the sidewalk, designs for drones. Once you give the tools of ODR to students and you say go build a system, they are very creative in what they come up with. So, I love teaching these classes because I learn from them as much as they learn from me.

**Q: In one of your interactions, you called yourself a non-lawyer mediator. Sir, is it necessary have a law degree to become a mediator?**

**A:** So, when I first started doing this work in the early 90s at the National Institute of Dispute Resolution, all of my bosses there were lawyers. **I went into the office of one of my mentors, a man named Tom** and I asked him Tom, do I need to be a lawyer to be a mediator? **And he said you need to be a lawyer 10 years ago, but now the field has opened up so you do not need to be a lawyer.** Thanks to him for that advice, because it led me to do the Peace Corps in Eritrea and then go get a degree in Public Policy and **I think the reason why I am doing the work I am doing now is because I am not a lawyer. As we say in Silicon Valley, I think that is a feature and not a bug, that I think from a public policy perspective instead of a legal perspective. Some of the best mediators I have met are not lawyers.** Often, they come up through the helping professions like a minister- a religious figure, psychologists, psychiatrists, or a social worker. **They take a very different orientation to the work they do than what a lawyer does.**

Lawyers do not see themselves as psychoanalysts. They are very much focused that we need to find a resolution, what is the law, etc. but if you bring someone up who is trained in psychology and counselling, they can ask more personal questions. If someone gets

upset about something, they can pursue that. They can say, tell me, why do you seem upset about this? **I think wherever you come from, you can bring in your experiences and there are some disputes actually for which you should not have a lawyer to resolve them.** There are other type of mediators who should approach it. **So, I think anyone can be a mediator no matter where they come from, they bring in their background to the work that they do.**

**Mehera:** Every professional adds value to the process. I also feel, as lawyers or law students, we start to think in a straitjacket manner, in a certain way. That is not always desirable, we need to get the best of all the worlds we are in.

**Colin Rule:** I completely agree. **Many of my favorite mediators are reformed lawyers.** They spent many years in practice and they thought about things like lawyers do. But then, they became mediators and they realized that they had to unlearn some of what they had learnt in law school and practice. But I'd also say the approach lawyers take can be very helpful too. When I worked at National Institute of Dispute Resolution, I would get calls because I answered the outside information requests and many times there would be lawyers calling me saying, please help me I am very unhappy in my job. They would say that I became a lawyer to help people solve their problems and now I feel my job is to make problems worse so that my firm can make more money and we can bill more hours. And then, I would hook people to mediation trainings and I know people now, decades later, who followed it and are very glad that they did it. It is much more satisfying in the heart to resolve disputes and build understanding than to just feel like you are the person making the dispute worse or escalating it or engaging in a combat. Polls show that lawyers in US are one of the least happy white collar professions. They get very sad because it's

a hard life to constantly fight and fight. Often, many of them know that there is an easy resolution available but either their parties do not want it or they have a financial incentive to not go for that easy resolution. **I am eager for lawyers to think more expansively about their roles and to think about lawyers as peacemakers.**

**Q: Do you think there is still a long way to go to equate ODR with traditional face-to-face ADR mechanisms?**

**A:** Well, one of my friends told me that Covid-19 has done more to the ODR market in the last 6 months than I have in the last 20 years because overnight this virus has got us to the point that we cannot get together face-to-face. So, really all ADR has suddenly become ODR. Even people who do not prefer the online system and prefer face-to-face, are now contacting me saying how do I set up my Zoom, or how do I do online caucuses. I think we all have been thrown into this by necessity and now we are realizing that it actually works pretty well. Satisfaction numbers and the success rates are similar for online processes as they are for offline. Now, I think the party expectations have changed and the virus when it hopefully goes away, and we get back to a time where we can meet, I would still think why can't we do this online? I feel it's more convenient and I can be at my best and it's more flexible. We have made a huge leap forward in terms of how many cases. I have always felt that ODR and ADR are the same thing. ODR is just ADR with a little technology involved. So, this transition has been accelerated but the two fields share the exact same objectives. They just have different tools in the toolbox.

**Q: ADR has been successful in trimming down litigation in the past few decades. Do you feel out of all ADR forums, mediation is the most appropriate?**

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**A:** No, I don't feel that way. I think mediation is a very powerful tool. One of the problems with the dispute resolution field is that we have become a little too focused on mediation. I think sometimes we recommend mediation in cases where other approaches could be better. For instance, when I started at Mediate.com, we had a side Arbitrate.com but we had not developed it very much. We were very focused on mediation. But now, we have built up Arbitrate.com because I think arbitration is very important. **I think arbitration and mediation, they work together.** Sometimes they even overlap. We have processes like Med-Arb and there are some cases which are better resolved via arbitration.

**I don't think that it's necessarily true that mediation is always better. Now, I also feel that we overlook negotiation because most disputes are resolved through negotiation. If you talk about 100% of disputes, I would say 95% of them are resolved through negotiation, and maybe 3% via mediation and 2% through arbitration. So, we need to think expansively.**

The thing about dispute resolution is we paint from a broad palette. If you and I have a dispute, and we say, you know what let's play a game of checkers and whoever wins the game gets the money. Guess what, that is ADR, because it is not a judicial process rather we have come up with a process that we like. We don't teach classes on how to play the game of checkers in dispute resolution but if we have a pathway to resolution that works for our parties even if it is not something we know a lot about, we need to encourage that. I think we need to be very innovative and paint from a broad palette when we design our dispute systems, and mediation is one very vivid color on the palette but it's not the only color. We need a full rainbow of options to help fit the forum to the fuss. I love mediation and that's what I have chosen to do with my life but it is not the only color.

**Q: You are an accomplished author, so it is safe to assume that you are an avid reader. What genres of books do you like to read?**

**A:** Well, I would say my favourite book right now is – Dispute System Design : Preventing, Managing and Resolving Conflict by Lisa Blomgren Amsler, Janet K. Martinez and Stephanie E. Smith. It has so many good pieces of advice for dispute system designers. But, I also like to read fiction and many of the fiction books I like to read actually are about conflict as well as resolving it. I find that most literature, good books or movies are fundamentally about conflict and trying to resolve that conflict. So, when I put the glasses on, of a conflict resolver, I see it everywhere.

**Q: Sir, what qualities do you feel make you the perfect leader, entrepreneur, teacher, mediator, and change-maker all in one?**

**A:** I am definitely not the perfect, all of those things. All I am doing is just trying to make a contribution. **I feel I am trying to stand on the shoulders of giants who created this field, my heroes. The mothers and fathers that created dispute resolution and again in the US, we talk about people like Frank Sanders, Roger Fisher, Howard Raiffa. I read their books and they have inspired me, they make me want to do this work.** Unfortunately, many of them are not with us anymore but I feel I have this opportunity to take that torch like the Olympics and run with it for a little bit and eventually I am going to give the torch to someone, probably you Mehera, because I would become old. **We are all just a part of the chain of history, and you can go back in time and find great peacemakers all the way through history that can inspire you.** I think we can carry that torch for a little bit and we can move it forward and hand it on. What else can you ask for in life? So, there is definitely no perfection here.

**Every day I try and do the best that I can and**

**I fail many times but if we can succeed a little bit more than we fail, then that is great. One thing I tell my kids is that don't work to impress your peers, rather work to impress your heroes!**

**Q: What according to you sir, are the three best qualities every mediator should possess?**

**A:** One of the things which I have learnt in my mediation work, is **mediators have to be better listeners than they are talkers.** Power of the mediator comes from being able to really hear the parties and make sure the parties know they are heard. And that's hard for me because I love to talk, and that is probably one of the reasons I am not as good a mediator as some others. So, the first is that you have to listen more than you talk. **Secondly, I think, mediation is like jazz. You have to be able to improvise.** Jazz musicians are incredible talented musicians, they can probably do anything. Instead, they come in and they start with an idea and they let the idea take them in a different direction and they innovate. **They make it up as they go along. So, that is the beauty of mediation, we have to be open.** It's not like playing a symphony that we have written before, it's like listening to other musicians and reading the moment which is basically reading the needs of the parties, reading the culture, and being able to respond in the right way. And I think we need to be good improvisers- we have to listen and improvise. **And I'd say the last thing that mediators have to do is you have to understand yourself. One of my teachers in mediation, he talked about reflective practice.** Being a mediator is like looking out of the window at night, where you can see through the window what is going on the other side but you also see a reflection of yourself on the window. **You have to be able to watch yourself because sometime something will happen in mediation and you may get a little biased.** You may say, well, I don't like what that party

did or I think that what they did was cruel, that starts to enter your head and it can affect the way you mediate. **This can undermine your neutrality and fairness.** So, we always have to be able to watch ourselves while we participate. And that is the interesting thing about online, as I am talking with you, I can see a video of myself. **Summing up, the three characteristics are: Reflective practitioner, Improviser, and Listener.**

**Q: Are you a foodie? What is your favourite dish?**

**A: My wife is a trained chef and she has written several cookbooks. Her name is Cheryl Sternman Rule. Her last cookbook was called 'Yogurt Culture'**

and it's about yogurt around the world. There is a lot about yogurt in India. My friend Chittu Nagarajan gave us good recipes for Raita. I love my wife's cooking. Also, I love the food in India. I love Idli Sambhar and Curd Rice.

**Colin Rule:** Hi Mr. Modi. You are doing great work. Keep it up!



**Pusshp Gupta**

INTERVIEWED BY  
**MEHERA KOACHER**  
Member, Young Volunteer Team  
E-Mediation Writings (EMW)

In Presence of **Pusshp Gupta**  
Coordinator-in-Chief  
E-Mediation Writings (EMW)



knowledge

Your perspective is always limited by how much you know. Expand your knowledge and you will transform your mind.

perspective

Bruce H. Lipton

mind