



Lawyer Mediator, Non-lawyer Mediator – Who is better?

: ANIL XAVIER

After the advent of “modern” mediation, there has always been a debate as to who is the better mediator – the “Lawyer Mediator” or the “Non-lawyer Mediator”? Some conflict resolution professionals have even advocated that Non-Lawyer Mediators should not be allowed to practice mediation. On the contrary a section of professionals believes that Non-lawyer mediators are better.

But the fact remains that whatever be the opinions, non-lawyer mediators has brought their own strengths and attributes, many of which are not possessed by lawyer mediators, to the process of mediation. It is also a fact that there are outstanding mediators who happen to be lawyers.

Mediation – practice of law?

Almost all countries prohibit the unauthorized practice of law by lay persons. Does mediation constitutes “practice of law”? The core activity of the mediation process, viz., impartially facilitating discussions and negotiations by or between two or more parties in a dispute, is definitely not “practice of law”.

Non-lawyer Mediators lack “legal knowledge”.

The main drawback attributed to Non-lawyer mediators is that they lack legal training and thereby they are severely restricted in their ability to successfully mediate disputes. The reason being they cannot accurately assess the strengths and weaknesses of each party's case. And, if a non-lawyer mediator were to evaluate the likely outcome of a potential case and voice his opinion on it, it would constitute legal advice and as such an unauthorized practice of law! And therefore, since non-lawyer mediators cannot employ this technique, they cannot effectively mediate.

Now it has been accepted globally that a mediator is not giving legal advice and not apprising the parties of their legal rights. At most the mediator can do is to direct the parties to seek legal advice. By doing so the mediator maintains his proper place as a neutral third-party merely attempting to improve the lines of communication between the parties.

We have also seen that due to the legal training that a lawyer-mediator has received, it has often created an adversarial mentality, where one side stands in stark contrast to



the opposing side, resulting in the inability to explore unique solutions that “law” is unable to consider.

We have also come across situations where lawyer-mediators have embraced mediation, not out of the passion for dispute resolution, but as a mode to build-up rapport with the judges, in case of court-referred mediations or to network with the parties – indirectly a method of client-touting, which is highly alarming.

So, what does possessing a law degree actually do for the mediation process? According to most experts, it does very little.

But as stated earlier, it is also a fact that there are outstanding mediators who happen to be lawyers. But are they outstanding because they are lawyers or because they have managed to expand their vision beyond the narrow focus which the law gives them?

Delivering Justice.

We have to keep in mind that lawyers are not the only people capable of delivering justice. Lawyers did not create “the Law” or “Justice”.

No matter how sophisticated the clients are, they approach lawyers or courts with stories of injustice and not stories about the law. Lawyers or Courts could solve those “injustice” only when a right and a remedy exist. If you don't have a right, there's no remedy. On the contrary, Mediators are trained to look for, capitalize on, and synergize the parties' mutual personal or commercial interests in an attempt to resolve disputes that lawyers reduce to “legal cases”.

The aim or purpose of mediation is to bring in all “aspects” or “skills” to create something better than a litigated resolution can deliver. The Mediators have to remove the rigid formalities and legal rules that often infect and hinder mediation. The parties have to concentrate on the issues at hand and explore unique solutions that courts are unable to consider. Mediation is a way of bringing people together privately to try to work out what they “really” want to achieve and to explore creative ideas for a settlement without prejudicing any later legal options if they prove necessary. This is the beauty and power of mediation.

Origin of Mediation.

We should not forget that the system of mediation was not evolved by legal experts. The concept of dispute resolution or “mediation theory and practice” was invented by



village elders, sociologists, community activists, psychologists etc. So let us give credit where credit is due – to these “Non-lawyer” mediators who evolved a system of rendering justice without attending law school. Of course, not forgetting the fact that modern mediation was evolved and developed in 1976 by a gathering of legal scholars and jurists.

In the modern day mediations too, we have to acknowledge the contributions made by non-lawyer mediators in the field of professional mediation. For eg., the field of “divorce mediation” and “community mediation” have substantially benefited from the involvement of non-lawyer mediators. We cannot turn a blind-eye on the fact that mediation has developed due to the frustration people had by a legal system which “was too formal, adversarial, expensive, and inflexible”. In response to these frustrations, mediators – both lawyer-mediators and non-lawyer mediators – worked in the creation and development of many mediation programs that remain intact today.

Limiting mediation to lawyers and retired judges significantly hurts the entire mediation process and negatively impacts the people that mediation intends to help, viz., The Parties.

Mediation; as a profession.

The expectations of parties of legal services are changing. The new requirement is “resolution” and not “litigation”. Mediation is now being projected as a truly global profession. Time has come to abolish the distinction between lawyer-mediator and non-lawyer mediator. There can only be “Good Mediators” and “Less good Mediators” – Mediators who can engage with a wide range of issues and those who can’t. To emerge globally as a profession, Mediators need to be accepted based on competence, qualification and credibility, regardless of their background.

The main reason which hinders the acceptance of Mediation as a true profession is the lack of a credible high-level qualification, training, professional conduct etc. Continuing Professional Development has to be more visible, organized and relevant. Code of ethics and conduct, process of disciplinary proceedings in case of ethical transgression etc. would add to credibility.

The users of mediation should not only understand it, but believe and trust in it for mediation to grow.



Role of IMI.

The International Mediation Institute (IMI) at the Hague set up in 2007 has taken efforts in defining, benchmarking and implementing global standards of practice, training and conduct of mediators. Its initial role is to credential quality mediators worldwide, enabling them to be easily identified through a search engine.

IMI Certification is designed to provide and address the seven elements:

Q-U-A-L-I-T-Y, Qualifications, Understanding, Acceptance, Leadership, Inspiration, Transparency and Yardsticks.

Conclusion.

Whether, you support the “Lawyer-Mediator” or the “Non-lawyer Mediator”, the fact remains that basically you support mediation. As stated earlier, whether you are a lawyer-mediator or a non-lawyer mediator, the intention is to help parties resolve their conflicts – without the rigid formalities and legal rules that hinder resolution. The requirement is to gain the acceptability and trust of the parties.

To develop the concept of mediation as a global profession, it is the right time for us to work together and share our views and insights for promoting and developing the profession more effectively. So join the movement of IMI, become IMI certified and help evolving global standards of mediation practice, training and conduct of mediators.

Anil Xavier is a lawyer and mediator. President of the Indian Institute of Arbitration & Mediation (www.arbitrationindia.org), he is also a member of the Independent Standards Commission of the IMI.