

**DELHI MEDIATION CENTRE
DISTRICT COURTS OF DELHI**

Guidelines for Referral Judges

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Introduction

In mediation, the key to success depends on Judges referring appropriate cases, which occurs at the very beginning of the process. Conversely, failure is dependent on referring inappropriate cases. It has been seen over a period of time that almost 20% of the cases sent to the Mediation Centre were not fit for mediation as disclosed by the parties/ their advocates. This is a very high percentage and affects the working of the Mediation Centre.

Failure to refer an appropriate case for mediation results in the case having to go through its full course of trial. Therefore, by and large, some objective assessment need to be made in every case by a referral judge. This exercise should not be done in casual manner.

Categories of cases fit for mediation

Certain cases are particularly appropriate for referral to mediation. From the available statistics, it is clear that successful mediation occurs in following categories of cases :---

1 Civil Cases:

- a. Injunctions**
- b. Specific performance**
- c. Civil recovery**
- d. Labour**
- e. Motor Accident Claim Cases**
- f. Landlord/tenant disputes :**

In landlord/tenant matters, restoration of services claims are especially successful, although some eviction cases have also been resolved through mediation.

g. Matrimonial Cases :

Matrimonial cases are much more likely to settle if the parties are educated, the marriage is a shorter one with no children involved, and the litigants are from an urban area. In such cases, the fear of women accepting a monetary payment after a failed marriage is less than would be the case with an uneducated spouse, particularly if there are children.

2 Criminal Cases

Suitable criminal cases include :---

a. Section 406/498A IPC

b. Section 138 N. I. Act.

Selection of Cases

The referring Judge should evaluate all the important factors which in his discretion will facilitate a successful mediation. For example, if it is an older case where the parties have a lower emotional investment, and it involves quantum issues between educated litigants, these factors would strongly suggest that the matter should be referred for mediation. There may be other factors which, in the judges' experience, make a case suitable for a successful mediation.

However, no case should be sent to mediation merely to clear a Judge's docket; it will only delay resolution, result in a failed experience, and end up back on the Judge's calendar.

A referral Judge should select appropriate cases for mediation. In some of the cases U/s 498A/406 IPC referred for mediation at the stage of consideration of application for bail and offer of mediation by one of the parties is used as a ploy to get interim protection. Therefore, in case U/s 498A IPC, the referral Judge must give his assessment that the parties bonafidely wants amicable resolution of the dispute. A referral Judge before selecting the cases appropriate for the mediation should consider following factors :

a. Party Characteristics

costs and time in mediation are not more than litigation
the parties and their advocates have a positive attitudes towards mediation.
Government is not a party to the suit.

b. Case Characteristics

case should not involve complex legal issues, ambiguous precedent, Constitutional issues or Public Policy.
a referral Judge should ascertain whether previous attempts to mediation have failed and why.

Consent

1. It has been found in some cases, that where there are too many parties involved, these are unsuitable for mediation. It is advisable not to refer such cases for mediation unless all the parties have a very positive frame of mind.

2. Section 89 of the CPC mandates referral of a case for mediation only if there is an element of settlement. It is critical for the Judge to

make inquiries which lay the foundation for successful referral. The elements of laying such a foundation are :---

i) Determine whether the parties have consented to mediation and

whether they wish to settle their cases. Do not allow referral to mediation in which there is no evidence of good faith intent to settlement but mediation is intended to delay the legal proceedings. It should be made clear that mediation does not delay the proceedings.

ii) Referral is appropriate when one party has agreed to mediation, and the other party is willing to go to mediation, though not necessarily committed to settlement.

iii) Referral to mediation is proper even when neither party has agreed to settle, but both parties are honestly willing to explore the possibilities of settlement through mediation. However, the referring Judge should believe it could be settled before he refers such cases to mediation.

iv) Lastly, referral is appropriate where neither party has expressed a desire to settle a case, but where the referring Judge should believe that a settlement may be possible. The referring Judge's careful exercise of discretion is critical here. An example of such a situation might involve parties who are unaware of the law, and with the careful attention and time that could be given by a mediator, a case may very well settle with a credible explanation of the law and the damages can be easily worked out.

Conference with the parties

1 Where parties are not open to a settlement, they may be given a copy of the Mediation Centre pamphlet. Sometimes it may be worthwhile talking to the parties for a few minutes. This kind of a discussion can sometimes go a long way in resolving disputes. It helps the parties to think about the benefits of settlement through mediation.

2 As a referring Judge, you should probe the issues with the parties to determine whether the possible terms of a settlement and the identified issues are proper subjects of mediation. For example, where "quantum" issues such as monetary damages can resolve a case, this has a high likelihood of settlement in mediation.

3 The parties should be informed by the referring Judge about the utility of mediation, and they should invariably be given the Mediation Centre pamphlet if they have not already received one.

4. It should be made clear to both the parties that mediation is free of cost and that if mediation process succeeds, the Plaintiff/Appellant will be entitled to refund of court fees.

5. It should be explained that mediation provides a friendly non-adversarial opportunity to talk with a skilled Judge mediator and seek a solution to the entire litigation.

6. It should be emphasized that this is a voluntary process, and it is also confidential.

Schedule of appearance before Mediation Centre

The parties and counsel should be directed to appear in person at the Mediation Centre to schedule a date and time for the mediation.

Production of documents

In the Judges' discretion, the parties should be advised to bring documentation (evidence), if any, to help clarify the issues and facts at the mediation. This will help the mediator to resolve the outstanding issues and will prevent unnecessary delay.

Referral Order

A referral order is an important document which initiates the

mediation, explains ground rules and structures the process. A referral order should contain the following :

(i) A referral order should state relevant statute or rule authorizing a referral Judge to refer parties to mediation.

(ii) A referral order should outline proposed duties and responsibilities of the mediator.

(iii) The parties may be advised to file/submit documents or any other relevant materials before the mediator.

(iv) A referral order should state who is authorized to appear before a mediator. It should be mentioned whether advocates are permitted to appear during mediation proceedings.

(v) A referral order should contain that parties are required to participate in mediation in good faith.

(vi) A referral order should spell out a definite time frame for conduction and conclusion of mediation proceedings.

(vii) A referral order should spell out in unambiguous forms that mediation proceedings are confidential in nature.

Conclusion

1. Please take the time to properly select cases for referral to mediation. Your efforts to do so are extremely important to the success of this programme and to bring about a reduction in your caseload through successful settlements.
2. Do not expect miracles. Mediation process requires a lot of patience and it is necessary for the Judges as well as the litigants to appreciate this.