

**EMERGING CONCEPT OF MEDIATION IN CRIMINAL JUSTICE SYSTEM**

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**Abstract:**

This paper takes a look to the criminal mediation is an emerging reality for betterment, this article explores several of the central questions and concerns that attend criminal mediation. The process which has grown organically needs to ensure safeguards for all concerned, particularly, the criminal defendants who participate in civil and criminal mediation with the belief that all communications are confidential.

**Key words-** Mediation, Criminal Justice System, Mediator, Court, Victim Offender Mediation, Settlement, Plea Bargaining.

**1. INTRODUCTION**

Mediating criminal cases is no longer a vague concept. Limited to only juveniles, non-serious adult criminal cases & so called "Victim- Offender" programmes from major murders to average possession cases an increasing judges and attorneys are turning to mediation as a method of resolving felony cause.

**A.WHAT IS MEDIATION?**

The definition contain two common elements (1) a third-party neutral who helps to facilitate a dispute, but who (2) lacks power to dictate the resolution. The Limited power of the third party neutral over the outcome is a product of the central emphasis in mediation to ensue parties self-determination. Defining mediation as "a Process in which an impartial third party, who lacks authority to impose a solution, helps others to resolve a dispute or plan a transaction.

**B. MODELS OF CRIMINAL MEDIATION**

The restorative justice model and case management evaluative model have emerged in the context of criminal cases, each with different focus, different philosophies, and a different bargaining scheme. Most of what has been written about mediation in criminal arena discusses restorative justice programmes such as victim offender programmes ("VOM"). Just as a continuum exists in the ADR Spectrum. One also exists between restorative and retributive justice.

VOM Programmes historically have focused on restorative justice approach, while traditional criminal law focuses on the retributive justice under the retributive model crime is a violation of the laws of the State, and the State is viewed as the victim to whom the offender owes an obligation to suffer punishment. Retributive justice is designed to answer the questions; What laws were broken, who broke them and how should the law-breaker be punished. In contrast, the restorative model sees the actual victim of the crime as the party to be made whole and the offender is held accountable by taking responsibility for his or her actions. The goal of restorative justice is "to repair the harm that crime causes."

**1. RESTORATIVE JUSTICE MODEL: VICTIM OFFENDER MEDIATION**

The Restorative justice model is "relationship-driven" focusing on healing and attaining closure. It demands accountability to obligation. It creates obligations to make things right. Restorative justice involves the victim, the offender and the community in search for solutions which promote repair, reconciliation and reassurance. Restorative justice as a framework for dealing with crime on its aftermath offers great possibilities for changing the focus of criminal justice from simply incarcerating wrongdoers to focusing on the needs of victims. On repairing communities and on holding offenders accountable in meaningful ways. The goal of restorative justice is, thus, to resolve criminal conflicts in ways that both the victim and the offender accept as fair.

## **2. VOLUNTARY SETTLEMENT CONFERENCING/CASE MANAGEMENT MEDIATION**

Where VOM is “relationship-driven” with an emphasis on restoration, the case-management model is “settlement driven”, Judicial mediation, or what some case “Muscle Mediation is a case management tool which assists the parties in the risk analysis process. The case management model focuses on fostering settlement saving governments money and reducing bargaining dockets. Case management mediation provides “another window in the courthouse besides jury trials?”

Another goal for some advocates of case management criminal mediation is that inserting a neutral third party into a failed plea negotiation may also regulate. The potential abuses or mishandling of cases. Examples: Overzealous police who overcharge incidents, prosecutors who refuse to bargain with defence counsel on cases which “should settle”, and defence counsel who fail to properly..... a case need a “nudge from a judge” to help the defendant understand the strengths and weaknesses of the case and any options available.

### **C. JUDGES AS MEDIATORS.**

The field of criminal mediation has grown organically based on request from either the assigned judge or the parties. During this growth, little attention has been given to the qualification for criminal mediators. Thus far, extensive criminal experience & expense seem to be the deciding factors in selecting a person to conduct criminal mediation.

The lack of training for mediators in the Criminal Context is a major concern. Just as in Civil Mediation, mediators in the Criminal arena must be trained. Experience as a judge (or as a criminal litigators) is not sufficient to make one a good mediator. Subject matter expertise is only one of the relevant qualifications of a good criminal mediator.

1. **TRAINING IN MEDIATION:-** Mediators in Criminal arena should be required to secure at the very least, basic mediation training (Preferably focusing specifically on mediating the criminal case and requiring continuous training courses.
2. **EXPERIENCE IN MEDIATION:-** Experience is also largely accepted as a helpful screening device for mediator selection. It is an aspect of the mediator’s background that has been shown to co-relate most with effectiveness in reaching settlement.
3. **EDUCATIONAL DEGREE:-** The ideal mediator for most prosecutors and defence counsel is someone who can assist them in evaluating the strength and weaknesses of their cases. Only someone with significant criminal law experience, built atop a law degree holder, can do this.
4. **POTENTIAL FOR UNDUE COERCION:-** Judicial mediators must recognize the potential coercive effect their presence may have on defendants or their counsel. The judicial mediator is expected to assist the participants with risk analysis, to bring a voice of objective reason to the table, to protect the defendant from coercive tactics, to persuade the participants to settle and to preserve the integrity of the mediation process and ultimately the criminal justice system.

### **D. DEFENDANT AND DEFENCE COUNSEL CONCERNS: WHAT DOES MEDIATION OFFER DEFENDANTS AND HOW SERIOUSLY DOES IT THREATEN WAIVES OF CONSTITUTIONAL RIGHTS?**

ADR must be seen as having very deep roots in criminal justice system. Most Criminal cases are resolved prior to trial, most through the plea bargaining process. During plea bargaining, the prosecution and the defence counsel negotiate the specific charge and sometimes the corresponding punishment. Thus, the process generally involves the state offering the defendant various “charge bargaining concessions” and sentence bargaining concessions. The parties often negotiate both the specific charges and the corresponding punishment. In accepting a plea, defendants waive certain constitutional rights, including their right to a trial by jury with the assistance of counsel, their right to confront witnesses, and the privilege against self incrimination.

### **E. PROSECUTOR RESISTANCE.**

The prosecutor has a unique role in criminal justice system. It has been said that “Prosecutors are the hub of the CJS.”As the gatekeepers of the CJS, they must seek justice, not merely to convict , using their vast power judiciously. The prosecutor’s clients are “an amorphous entity of the ‘people’,”

‘state’ or ‘government’. The prosecutor must balance their multiple roles in a fair and equitable manner.”

#### **F. LACK OF EFFECTIVE PRIVILEGE RULE**

States, which are using criminal mediation no less than civil mediation to resolve cases, need to look at mediation privilege rules and determine whether they adequately protect the process and the parties.

Since Criminal mediation is taking root, States must determine which mediation communications should be protected and ensure that all mediators, including judicial mediator, are bound by confidentiality. Mediators, Lawyers, and their clients must know the limits of any existing mediation privilege rules and whether they apply to criminal cases.

**CONCLUSION:-** it is important that the dialogue for criminal mediation continue, despite the need for caution. Courts generally favour settlements in both the civil and criminal arena, and for similar reasons. Settlements are less resource intensive, reduce litigation, provide certainty and closure and lessen the costs for the courts and the parties. In the criminal context, courts, governments, prosecutors and public defenders expend fewer public resources when cases settle before trial.

It also brings with it the advantages of plea bargaining, such as closure, certainty, cost savings and the minimization of media coverage in high profile cases.

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