A Critical Reflection on Some Practical Mediation Sessions with Some Literature Review

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Abstract
This paper is a critical reflection on some practical mediation sessions by the researcher. It gives a brief introduction to mediation. Some previous literatures on mediation are reviewed in support of the observations of the researcher during mediation sessions. The paper is concluded with the assertion that mediation is better than arbitration and lawsuits. It recommends that there should be more mediation centres in the society, and more people should be trained formally on how to mediate between two or more conflicting parties. This may not only be in a formal setting in mediation centres, but also in other informal settings where disputes as much as possible are resolved amicably.

Keywords: *mediation, mediation centre, Alternative Dispute Resolution (ADR), mediator, "mediatees"*

Introduction

After undergoing some postgraduate courses and professional workshops on mediation and alternative dispute resolution, this researcher had the opportunity of being an intern in a mediation centre where he could observe practical mediation sessions for a month. The thrust of this paper is not to write elaborately on the subject of mediation, but to give a critical reflection of the observed mediation sessions by the researcher and review some literatures in relation to the observations. The paper first gives a brief introduction to mediation, and then presents the observations of the researcher as supported by some previous literatures on the subject.

What is Mediation?

Mediation is one of the ancient methods of conflict resolution. In an attempt to define the word "mediation", Wall, Jr., Stark, and Standifer (2001) gave an etymology of "the word ***mediate*** [that] comes from *mediato*, which in turn comes from the Latin noun *medius* (means) and verb *mediare* (separate into halves)". These scholars went further to define mediation in a dispute as an "intervention of a third party unfamiliar to the conflict, trustable, unbiased and intending to be neutral." Serelle (2016) corroborated this etymology and meaning of mediation by saying that the term *mediation* is embedded in the Latin word *mediare* that comprises three meanings: "(i) to divide in two, to separate in two parts; (ii) to act as a mediator, an intermediary (to mediate a conflict between enemies); (iii) to be between, to be between (two things)". In another attempt to describe mediation, it is seen as a method to "conflict resolution that uses a 'third party' intermediary to help the disputing parties resolve their conflict" (Serelle, 2016). Furthermore, Dhiaulhaq, et al (2014) understood mediation to be "a process (formal or informal) in which a third party, called a mediator, facilitates management of the conflict without having the authority

to impose a solution."

As generally conceived, mediation is mediator(s)-driven process that conflict parties (or "mediatees") are to be invited into (Nwaka and Uzebu-Imarhigbe, 2020). Mediation has been practiced, described, studied, prescribed, or proscribed in many areas of life in recent times. These realms include "international, environmental, school, divorce, organizational, consumer, and sexual harassment disputes as well as in other realms" (Wall, Jr., Stark and Standifer, 2001). In fact, as asserted by Serna (2021), mediation "has gained relevance in all kinds of sectors…." For mediation to take place, two processes must mingle. Firstly, the contending groups must ask or allow a third party to mediate, and secondly, the third party must consent to mediate (Wall, Jr., Stark and Standifer, 2001). In other words, mediation is believed to occur when conflicting parties accept the help of "a third party to resolve their differences without resorting to physical force or invoking the authority of law" (Clayton and Dorussen, 2021).

Mediation differs from arbitration. In arbitration, the third party makes the decision about how the conflict should be resolved while in mediation, the conflicting parties or the "mediatees" are guided to decide how to resolve the conflict. Mediation is a key form of conflict resolution known as Alternative Dispute Resolution (ADR) (Dingle and Kelbie, 2013). In the words of Schneider (n.d.), the term Alternative Dispute Resolution (ADR) refers to ""alternative' dispute resolution because it has appeared as a viable alternative to the adversary system, which is the formal name of the American legal system, which has been the normative forum for dealing with disputes in our society." Other forms or types of ADR (apart from mediation) as explained by Nwazi (2017) are arbitration, negotiation, conciliation, and multi-door courthouse. Each of these forms is related to mediation. An institute has referred to Alternative Dispute Resolution (ADR) as "any means of settling disputes other than the court room" (Ukonu and Emerole 2015).

Observations of Some Practical Mediation Sessions

As this researcher engaged in a month-long internship in a mediation centre, below are some of the observations he made. These sessions had to do with marital issues, land/neighbourhood issues, employer and former employee issues, and caretaker/house tenants' issues. From this researcher's observations, most of the observed sessions were based on facilitative mediation or traditional mediation, although some of the cases can be referred to as court-mandated mediation because they used to be court cases, but referred to the mediation centre by law courts. Other identified types of mediation are evaluative mediation, transformative mediation, Med-Arb, Arb-Med, and E-mediation (Shonk, 2021). These observations are supported by what many scholars have written previously on mediation.

In spite of the fact that there are no two mediations, and no two mediators, that are the same (Heintzman, n.d.), yet, some aspects of the observed sessions are similar. What this researcher observed, as pointed out previously by many scholars, is there are various stages in each of these mediation sessions. Some of the similar or constant aspects of the observed sessions are that before any mediation session, there should have been a case lodgment for each case either through walk-in lodgment or referral cases from law court sessions. A case file has to be prepared for the mediator to have prior knowledge of the case he/she wants to mediate. The mediator has to study this case file before the mediation session. This process is supported in an online document (Lack and Goh, 2019).

Each participant in the mediation session is required to complete the "Attendance Form" where they write their name, location, status (like appellant, respondent, legal counsel to the appellant or respondent, observant/intern, and mediator), phone number, email address, and signature. The

participants are ushered into the Mediation Room. The mediator as the presiding officer formally greets everyone. He/she gives a brief introduction of the mediation centre and the advantages of mediation over lawsuits. He/she either introduces or allows each participant to introduce themselves. There is allowance to speak the desired language provided there is provision for intermittent interpretation if any of the participants (especially the conflicting parties) does not understand the language. The mediator gives a reason for the gathering.

The mediator also gives some basic mediation rules. In mediation process, while there are some regulatory rules for the mediator, the conflicting parties or "mediatees" also have some rules to abide by. On the part of the mediator, he/she, among other things, has to: listen keenly, be attentive, treat conflicting parties with respect, be neutral, analyze the situation, ask non-threatening questions, be a resource person, and create doubts where need be. On the part of the conflicting parties or "mediatees", there should be no disturbance when the other party is telling his/her story, respect for each other, no foul language, willingness to come to a settlement that might move the conflict forward, talk with, not against, each other, and sign a "Consent to Mediate Form" if need be (Doherty, 2015). Nonetheless, these lists are not complete as other rules can still be explored.

The mediator emphasizes his/her neutrality in the case and asks for the permission of the conflicting parties to continue with the mediation. The importance of the neutrality of the mediator has been reiterated severally by many scholars as cited above. If there is any objection or suspicion of compromise of the mediator's neutrality at this point or any point during the mediation session, the mediator has to step aside and allow another mediator that the conflicting parties trust to continue the mediation. As part of the neutrality of the mediator, the mediator should not accept any monetary gift or favour from, or share his/or contact details with any of the conflicting parties in spite of any attempt by any of the parties to do so. This is explained better in an online document (Agapiou, 2019).

There may be a specific introduction of people in attendance especially the interns and/or observers. If there are new faces from the previous mediation sessions, the new faces specially introduce themselves. These newcomers may be other stakeholders in the conflict that have come to facilitate the resolution of the conflict. There should be sitting rearrangement so that appellants, respondents, and their legal counsels will sit together (possibly facing one another). The mediator will specifically ask each party about their willingness or unwillingness to continue with the mediation session. At this point, there is a need for the signing of the "Agreement to Mediate Form".

The mediator will emphasize the difference between a court session and a mediation session and the fact that the mutually reached agreement at the end of the mediation session will be binding on all parties in the case. This is against the backdrop that contrary to arbitrators or adjudicators who have the power to instruct an ending to a resolution, mediators have no power to force any decision or settlement on the conflicting parties (Avruch, 1998). The mediator has no power to suggest solutions for the conflicting parties. The mediator will also reiterate the fact that anything said during the mediation session is confidential and cannot be used against anyone (whether the conflicting parties or other attendees) anywhere, especially in law courts.

Although the mediator has had a briefing in writing about the case, he/she will still allow each party to tell his/her story openly without any interference from the other party. This non-interference rule is supported in an online document ("The Six Stages of Mediation"). If there are other stakeholders in the conflict apart from the primary conflicting parties, they are also given opportunities to tell their stories. There may be a discovery of other related cases to the case as

the conflicting parties tell their stories. After each party has told his/her story openly, the mediator will attempt to mediate on the case.

There may be break-out sessions where parties can be alone to consult with one another or a party with the mediator (with or without his/her assistants) for private interaction, consultation, and advice. The mediators did this to assist the "mediatees" to describe the problem in terms of negotiable interests and needs rather than non-negotiable positions, and develop a set of ideas for how the interests and needs of both sides can be met simultaneously" (Hanna, 2003). The private session with each party may be a means of giving each party opportunities "to review and react to the opening session" and share additional information with the mediator (Baylor College of Medicine, 2018).

In a situation where a case cannot be resolved amicably in a session, where a higher authority on the side of a party has to be consulted before a decision can be made, or where there is a need for more witnesses or parties to be invited, the case may be adjourned to a later day. The conflict may be resolved amicably at a mediation session. When this occurs, there should be a "Consent Form" to be signed by all parties in the conflict. However, there are cases where one of the conflicting parties may insist that he/she wants the case to be referred back to a law court for "justice" to be attained through a lawsuit. This is referred to by some scholars as "Entrenched conflict in the mediation context" where one or all the conflicting parties "display no willingness to compromise in order to reach a settlement, despite the mediator's best efforts" (Gooderham, 2020).Gooderham (2020) further explained how to effectively manage such entrenched conflict in mediation. Whichever way the mediation goes, there must be a writing conclusion that each party and the mediator will sign and have copies (Heintzman, n.d.).

Conclusion

In conclusion, from the observations of this researcher, mediation is far better and cheaper than a lawsuit. It is also better than arbitration. To corroborate this conclusion, Dunlop (n.d.) highlighted more benefits of mediation. Therefore, more mediation opportunities should be made available to people than how the opportunities are currently. Many people should be trained formally on how to mediate between two or more conflicting parties. This may not only be in a formal setting in mediation certres, but also in other informal settings where disputes as much as possible are resolved amicably. The society will be a better place to live with people living together more peacefully when mediation processes are encouraged.

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