

Kluwer Mediation Blog

The Judge as Mediator: Not for the Faint Hearted

Kenny Aina (Aina Blankson LP) · Tuesday, November 22nd, 2011

Years ago, I participated in a Richard Salem led mediation skills acquisition training for retired Judges and I will never forget the words of a just retired Chief Judge contemplating a career in mediation “ Kenny, you mean I will just listen without telling the parties what to do? Impossible! Not me!”. I have seen several highly intelligent professionals take up mediation accreditation examinations believing they are qualified mediators. However, they struggle during mediation sessions. Of particular note was a retired justice who after a sterling career at the bench decided to take up mediation actively since he still bubbled with ‘youth’. Alas! His first session was quite a frustration and it didn’t get easier with subsequent sessions and he approached me in near frustration as his best efforts seemed to hit the rocks. His story is similar to many including the retired Chief Judge and many friends of mine in active legal practice who decide to pick up mediation as a side kick to their thriving practices. The mindset of several of these otherwise intelligent professionals is that with their rich background in law, mediation should be ‘a piece of cake’.

Why then is mediation seemingly difficult for these highly knowledgeable and academically qualified mediators? There may be several reasons but I have noted that many of them though with qualification in mediation, do not have a mediator’s paradigm at dispute resolution. What then is a mediator’s paradigm? This refers to the posture or perception of the mediator in viewing and resolving disputes before him. Some of these attributes include:

a. Always Neutral: A mediator is never or ought not to be moved at any time towards a party’s position at the expense of the other. This is sacred! Once a party senses prejudice on the part of the mediator, the session is as good as closed. No matter how moving the story of one party is or how unkind a party may have been, a mediator must never appear to favour any one party. Remember, your thoughts influence your acts and this can be read by the parties, so to succeed in the practice of mediation, neutrality is central. For a Judge who has spent years issuing orders, this is certainly no tea party.

b. Empathy: This may sound rather confusing or contradictory to the earlier point but it is not. A good mediator indicates to the parties a measure of passion or understanding of their case. It is a professional empathy that should not tilt the mediator’s approach but indicates understanding enough to engender trust from the parties. This is important because a party needs to open up to the mediator and would not ordinarily do so, unless he feels the party truly cares.

c. Lateral Thinking: The mindset of the mediator does not turn on left and right, wrong and right rather it focuses on reaching or achieving an acceptable resolution amongst the parties. Indeed the all mark of a good mediator is his ability to think out of the box and bring about several scenarios

towards an amicable resolution of a dispute. Straight jacket thinking may be the justice of the courts but it is the albatross of a mediator. Think out of the box and reach a solution not a judgment.

d. Persuasion Not Coercion: A major challenge for my Judge who for over 20 years decreed the obedience of parties before him is that he came into mediation and discovered he had to work at 'client's pace'. He could not reach 'decisions' or 'rulings' on a point like he would do while on the bench. He tried though and he usually hit a brick wall! Remember, mediation is assisted negotiation and you are the facilitator so lead the parties to a solution they are comfortable or agreed to. A mediated settlement is the fruit of negotiation in a perfect world, never make it less!

e. Always Lead: Don't be deceived by the term mediation or the informal nature of the process as to think that the mediation process is just a negotiation that should run its course! If it were so, the parties would not need you! A mediator must always be in charge but without showing it unnecessarily. The session should not be long winding, purposeless or out of control. Not on your watch!! You must guide the parties gently to their true interests in the matter. You must be extremely watchful to avoid psychological intimidation and know when to call a break when the atmosphere gets too charged. Most importantly, a mediator must know when to call a session off if settlement is impossible.

I cannot exhaust all the attributes of the mediator's paradigm but I empathise with Judges the most for nothing in their Judging career prepared them the mediation world. For the lawyer already astute in the litigation process to achieve this paradigm may indeed take some doing as old habits die hard but I am a firm believer that the mediation culture can be cultivated by diligent practice and focused mind management. I hope you try because I know you can!

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