

Kluwer Mediation Blog

The Deal Maker's Dilemma

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Femi, a guru at brokering transactions recently got caught with the mediation bug and decided it was a path he would like to thread in his professional sojourn. Immediately he picked up some books and read up material on mediation after which he boasted to me that given his transactional experience and acumen, mediation would be a piece of cake! Well from the experience shared with me, it was really a piece of cake though the size was so large he could not really bite!

With a commercial dispute as Femi's first go at mediation, he felt he was on home turf and so could 'wing' this quite easily. Once the parties made their opening statements and given what he knew from his research of the case he immediately saw a possible solution which was 'win/win' for everyone on the table and he decided to guide them "gently" to this solution. However a party in the process seemed either deliberately refusing to see the end game or chose not to tow this path even though the option would land him very generous profit on the transaction. Frustrated to his wits end, Femi adjourned the process for the day and came to the club to cool off! As I listened to him, I immediately could see a common trend with corporate lawyers who venture into the mediation practice:

(a) The Solution Driven Mindset: Most transactional lawyers are paid to help clients solve problems. They listen to the problem with an analytical mind which immediately begins to work out a solution. When the solution is discovered, an opinion is immediately sent to the client or he is engaged to begin implementation. This is what he is trained to do and what classifies him as one of the best in his field. This is not so with mediation. In mediation the mediator ought to listen with an open mind without aiming to solve the problem but to discover the interest of the parties with the aim of guiding them to the realisation of those interests and these need not necessarily be commercial though the positions of the parties is steeped in commercial terms.

A mediator must dig beyond the legal arguments, commercial points to discover sometimes hidden personal interests which may be masked in highly sophisticated lingo without which a solution may be impossible to reach. The mediator must realise that he is not a consultant hired to solve the client's problem but a facilitator helping both parties reach a mutually acceptable solution. The solution need not be 'fair' in the mediator's viewpoint but freely acceptable to the parties and realistically workable. He ought to ensure that the process is at all times parties driven. In summary, the mediator must be comfortable to 'lose control' of the solution and be willing to go along with the parties on their voyage to a solution.

(b) The Quicker, the Better?: The deal maker is one that has a keen concept of time and seeks to

ensure the deal is closed at the earliest. When not representing any of the parties, he sees himself as a broker and the most important stage for him is the bargaining. The parties feelings may be massaged but only to the end that the deal is done, this is not so with mediation. In fact some parties may view the mediator as being too slow as they seek to skip the exploration stage and jump into a bargain. Most of the bargains are preconceived positions of the party which aims to get the best solution for their side and not to meet the interest of all sides on the table. The mediator must not get into this quick win trap and rush into a 'solution' but must lead the parties through the process of mediation ensuring that the parties freely and voluntarily reach their own solution. In fact as Femi shared his woes I asked if he would talk with the parties to have me join in on the session which they graciously accepted. By a careful questioning of the parties, it was discovered much to Femi's surprise that the issues driving the dispute are not commercial but a personality clash with a history far older than the current dispute and once this was brought up and resolved, the parties were more willing to openly discuss the present challenge and reach a solution quite different from what proposals were on the table the day before.

Before you say it, I admit that not all disputes are as dramatic and not all solution are this easy but learning the patience of the mediation process is fundamental while remembering never to compromise the process. I wish to hear from you on what challenges you may have faced in mediation which were traceable to skills of your earlier or dominant profession.

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