**Episode 8: Top Tips for finding or choosing the Right Mediator**

**Chinwe Stella Umegbolu**

**PhD Student**

**Faculty of Business and Law**

**University of Brighton**

**United Kingdom**

**c.umegbolu@brighton.ac.uk**

**Abstract**

I was thrilled to welcome Mrs Nnezi Miriam Ivenso, a lawyer with 13 (thirteen) years, post -qualification experience in active legal practise including Litigation, ADR and Corporate Commercial Practice. She holds a master's degree in Law Financial Services from the University of London, a certified Mediator, enlisted as a Neutral with the Enugu State Multi-Door Courthouse (ESMDC) as well as an Associate Member of the Charted Institute of Arbitrators, (CIArb), United Kingdom. In this episode of Expert Views on ADR (EVA), the following questions were posed and dealt with - what is Mediation, what are the criteria for finding or hiring the right Mediator? Finally, the third question posed- 'whether the mediators are allowed to use only the facilitative or evaluative Mediation, or can they use a combination of the two mediation styles? We concluded by touching on the essential elements and features of Mediation while at the same time indicating the importance of finding the right Mediator.

**Key terms:** **CEDR**- Centre for Effective Dispute Resolution, United Kingdom, **LMDC**- Lagos Multi-Door Courthouse, Nigeria.

**Introduction:**

We understand that some people are not very clear on what Mediation means. They are common misconceptions on what Mediation is. For these reasons, we defined the term mediation with the hope that the outlined definition from two credible mediation institutes would assist potential users and disputants understand Mediation better.

**Definition of Mediation**

The LMDC law 2007, defined "mediation as a voluntary process for resolving disputes with the assistance of a neutral third party who facilitates that dialogue between disputing parties and it helps them privately and collectively to identify the issues in disputes, reach the settlement of this disputes and mutually accept the settlements."

On the other hand, CEDR defined "mediation as a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or a difference with the parties in ultimate control of the decision to settle and the terms of the agreement (TOA)."

The sentiments expressed in both quotation embodies the various features and elements of Mediation while capturing the concept of Mediation. We went on to highlight them and give a brief explanation of what each means as it will help potential users and disputants understand what meditation means.

**1) The Features and Elements of Mediation**

**Flexible Process:**

This means that contrary to the strict formal procedures or process that parties would ordinarily follow in litigation, in Mediation, this is the opposite, there is no formal procedure to be followed. Thus flexibility is one of the main factors that attract litigants and disputants to the meditation process because people feel confined especially where there is a strict formal procedure, thus many times in litigation- they sacrifice justice at the altar of technicality.

**Confidentiality:**

The mediation session's entire process is confidential and without prejudice because parties are given the opportunity to sign the confidentiality clause. In most cases, the confidentiality clause serves as an incentive for making the parties open up and disclose the underlying issues inherent in the matter. That ordinarily they would not have disclosed (if it were in litigation) which most times are the root cause that triggered or led to the disagreement in the first place.

**The Neutrality of the Mediator:**

There is neutrality on the part of the Mediator who is the one assisting the parties. To restate the Mediator is a neutral third party and he stays impartial and unbiased, does not take sides, and just helps the parties reach an agreement. Essentially, what the Mediator does is to assist the parties in working towards a negotiated agreement- this aspect also reflected in the definition of Mediation. However, there is also, a further point to be considered the mediators do not propose an agreement. The parties are the ones who decide what they want as opposed to litigation, where a decision is imposed on the litigants. Thus, in Mediation, the parties are in ultimate control of the process, and they also determine the outcome of whether or not they will be an agreement?

Undoubtedly, because of that, the parties are more likely to uphold the terms or abound by the Terms of Agreement (TOA) reached because they reached the agreement themselves. The discussion in the preceding paragraph has indicated that mediators do not impose any suggestions or decisions; instead, they facilitate communication between the parties. Nevertheless, if one puts that vis litigation, there are so many benefits that meditation has though, this is not to say that litigation is not without its benefits.

**Cost and Speed:**

However, there are times that litigation is not an effective tool or route to take to settle disputes. For instance, some matters have been in court (20) twenty years or (30) thirty years. In some cases the original parties are deceased, and their children or grandchildren will carry on with the case, which must have cost the deceased a fortune and eventually the children.

Given these points, Mediation is faster and cost-effective, because, in most cases under the mediation process, parties settle within a day or two days.

**The Interest of the parties is protected:**

We also pointed out that under Mediation the interest of the parties is well protected unlike in litigation that is more focused on enforcing the letters of the law and the reason is that the court can only give effect to the original intent of the parties, however, the problem with this is that the original intent might with the passage of time changes in circumstances. It may not accurately represent the parties' needs and interest when the disputes occurred.

**Preserves Relationship:**

We ascribed the above-mentioned subtheme as the selling point of Mediation as there is no adversarial tune to Mediation as opposed to litigation/ court where there is a loser or victor. However, in Mediation, the decision or agreement reached is usually one that both parties are comfortable with.

We illustrate that with Professor Goodman's analogy- he stated 'that they are two sisters who lived together and wanted to cook different meals. However, they both wanted to use orange in preparing these different meals. However, there is a problem with that because there is only one orange in the house, and they both needed the whole orange. Ordinarily, if this matter was taken to court, the court will rule that the orange be divided into two so each can get one to use. The problem with that is that half an orange will not make either of the meals they want to prepare. However, in Mediation, which deals with the parties' interest, there is common ground- they both have an overlapping interest: one of the sisters only needs the orange to make an orange juice while the other needs the orange rind to prepare a marmalade. So the sister that needs the juice can say 'okay let me squeeze out the juice, and you can have the rind of the orange 'and vice versa.'

Against this backdrop, in Mediation, parties can make concessions and compromise. In other words, there are no losers or winners in the mediation process. Instead, it is a win-win situation for both parties. The parties go home happy. It is essential to point out that we also revealed that under the International Mediation Institute (IMI). They have this open feedback digest in their Mediator's profiles where the previous parties can pen down or leave their feedback on their mediators' performance instead of the recommendation or short biographies captured by the mediators or institutional bodies. We agreed that this is a reasonable practice and a good practice as it has the same effect as a review. However, at the same time, we pointed out that it has a drawback or a disadvantage. Some recalcitrant parties or difficulty parties can leave horrible comments that would affect the mediators, or the institutes practise.

**2) The Criteria for choosing or finding the right Mediator:**

In furtherance, to the whole process, parties must find a mediator that is the right fit for the particular disputes that they are trying to resolve because for a mediation to be successful, it is vital that the parties can trust the Mediator and that they are comfortable around the Mediator.

For instance, in the Multi-Door Courthouses, when a dispute is referred to them, they choose the Mediator from the panel of neutral that they have or find the most suitable Mediator to handle the matter and the mediators are to sign a disclosure form indicating if there is a conflict of interest and if there is then they will appoint another mediator for the party. Though that does not stop the parties from indicating the Mediator that they would want to mediate their matter, in some cases, the parties with the help of their lawyers would choose the mediators they want. In so doing, they have to consider certain things. Some of the criteria that parties can take into consideration when finding or choosing the right Mediator are as follows:

a) **Area of Practice:**

The party should find out how much experience the Mediator has in that particular area of dispute. For instance, if it is a family dispute or a work-based dispute, they would want to know if the Mediator has handled those kinds of disputes in the past and then follow that up.

b) **Experience:**

It makes sense for parties actually to want an experienced mediator. Having an experienced mediator is vital for resolving disputes expeditiously. In other words, if the parties can ascertain how many cases the Mediator has handled and how many were successful, then that would save them cost and time.

c) **Professional Training:**

Another crucial consideration is the professional training for mediators. Parties should look at for or ask for the type of training that a mediator has had in the past. For instance, has the Mediator received a formal professional mediation training and for how long? Did the training the Mediator undertake met the international standard? What type of certification does he or she have? These questions are fundamental, and an upshot from this subtheme is the Mediator's educational background or professional background.

d) **Mediator's Educational / Professional Background:**

We pointed out that some parties are more comfortable with an engineer handling their matter if, for instance, they have a dispute centred on or around construction, they will feel more confidant or comfortable if the Mediator has a first degree in civil engineering.

e) **Subject Matter Expertise:**

This subtheme is related to the aforementioned first consideration and professional background. One of the focal points here is that parties need to determine if the Mediator is an expert in the particular area of the dispute that has arisen or if he has the necessary knowledge of that particular industry. Because in some situations, the specific knowledge of that particular industry can make the mediation process more efficient. Though this is a bit objective, people who believe subject matter expertise are not of primary importance generally but except in specialised areas like environmental disputes, maritime, and very technical disputes. Now, asides that they are some other people who believe that is not important at all- whether the Mediator has the subject matter expertise as long as the Mediator is well trained in Mediation and has an experience as a mediator.

However, it is actually up to the parties to determine whether or not the subject matter expertise is essential because they know or better understand the disputes than anyone else.

d) **The Mediation Philosophy or Approach employed by the Mediator:**

We agreed that they are different approaches that mediators can employ or use, and in the same vein, some mediators are passive and they guide the parties, while some mediators are not. Thus the mediators can employ different styles, so parties should consider the different approaches and see what works best for their matter and choose accordingly.

**3) Whether the mediators are allowed to use only the facilitative or evaluative Mediation, or can the mediators use a combination of the two meditation styles?**

We pointed out that there are different types of mediation styles/ philosophy or approach. Nevertheless, in regards to this discourse, we concentrated on facilitative and evaluative. We also indicated that it boils down to the disputes' nature in some cases, the Mediator might prefer to employ both of them or employ one of them.

**Conclusion**

We concluded that valid points raised in this discourse are crucial factors that would nudge potential users and disputants to Mediation. We also identified that finding the right Mediator is essential for resolving disputes expeditiously and effectively because making a mistake in choosing the wrong Mediator could affect the desired outcome.

Finally, once disputants have made a wise decision about their Mediator's choice. It is to be noted that they must bear in mind that the process is entirely voluntary; hence they can choose to disengage from the process as long as they have not signed the Terms of Agreement (TOA).

To hear the full version of this episode, [click here](https://anchor.fm/chinwe1/episodes/Episode-8-Top-tips-for-finding-or-choosing-the-right-Mediator-eo0jvh).

**Reference:**

The LMDC Law 2007

CEDR Mediation Handbook, 7th edition.

Professor Andrew Goodman, Orange Analogy cited at the Enugu State Multi-door Courthouse: Mediation Advocacy & ODR Awareness for Lawyers webinar held on the 30th September 2020.

International Mediation Institute (IMI) <https://imimediation.org/resources/background/choosing-right-mediator/> accessed 22nd December 2020

Chinwe Umegbolu, “Why Mediation? A Critical Review”  (Research Gate 2019)