

FOUNDATIONS OF MEDIATION

Presentation by:

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Commercial Mediation



“We have seen that without a credible machinery to enforce the law and resolve disputes people resorted to violence and illegal means... we have seen that the rule of law delayed is lasting peace denied.”

Kofi Annan

Commercial Mediation



An effective judicial system promotes economic growth in several ways:

- ✓ upholds the rule of law, checks abuse of government power, enforces property rights and enforces contracts. This cuts right to the heart of economic practice, growth and development.

- ✓ Delay not only harms the investment climate, it threatens good governance, social order, and peaceable relations.

Commerce & Industry



- Commerce and industry will only thrive within the context of a predictable and efficient dispute resolution mechanism.
- Disputes are inevitable where two people may be found. How handled makes all the difference.
- Unpredictable judicial system slows growth.
- The inability to predict outcomes introduces undue risks in business.

Challenges of our judicial system



- Alien and far removed from citizenry. Cold and unfriendly.
- Too long. Undue delay.
- Too expensive.
- Does not guarantee sustainable peace and destroys relationships.
- Unwanted publicity.
- Prone to corruption.
- Unfriendly to investors

Alternative Dispute Resolution (ADR) mechanisms.



- Range of dispute resolution processes or mechanism, distinct from litigation; Alternative to litigation.
- Anchored in the Kenyan 2010 constitution, clause 159.
- Quest for efficient redress in the event of the inevitable disputes.
- More akin to African traditional method of resolving conflicts.
- Includes:
 - Negotiation, conciliation, arbitration, med-arb, mediation and others.
- Mediation the crown in the jewel.

Mediation



- The process in which independent person assists two or more people or organizations in dispute to negotiate and to make mutually satisfactory decisions on their dispute.
- A form of “assisted negotiation.”
- Mediation focuses on Interests and not Rights. The law focuses on Rights.

Why Mediation is effective



- It will address issues and emotions as well.
- It is voluntary.
- Relatively inexpensive.
- Private proceedings. No publicity.
- Confidential.
- Efficient:

Attributes of a mediator



- Professional: skilled, qualified, experienced, relevant knowledge.
- Integrity.
- No conflict of interest.
- Patience.
- Positively assertive.

Court mandated mediation



- The judiciary has adopted mediation as a dispute resolution mechanism.
- Anchored in clause 159 of the 2010 constitution.
- Not pure (ideal) mediation.
- Pilot project in Family and Commercial divisions. Pilot ends in April 2017.
- A tool to deal with backlog.
- Accredited mediators by Mediation Accreditation Committee ((MAC).

Important skills in mediation



- Active listening.
- Empathy.
- Reframing.
- Tolerance of high emotions.
- Non judgmental.
- Neutral and impartial.
- Persistence.

Caucusing



- The mediator meets separately with each of the parties on confidential basis. Opportunity given to both parties
- To identify outstanding concerns critical for resolution of the disputes.
- To minimize and/or eliminate deadlock by changing the dynamics of the negotiation process.

Caucusing Cont...



- To engage in reality testing with a positional or intransigent party.
- To avoid destructive and antagonistic tendencies in joint sessions..
- To provide recovery time for a disempowered party.
- To re-educate the parties on the mediation process while soliciting their commitment.

The Principle of Self-determination in mediation.



- A mediator shall recognize that mediation is based on the principle of self-determination by the parties. Relies upon the ability of the parties to reach a voluntary agreement and the prerogative of any party to withdraw from the mediation at any time.
- The primary role of the mediator is to facilitate a voluntary resolution of a dispute.
- Impartiality: A mediator shall mediate only those matters in which he or she remains impartial and even-handed

The Principle of Self-determination in mediation.



- Conflict of interest. Never create an impression of possible bias. Disclose any necessary information.
- Acceptable to both parties.
- Confidentiality: Should hold all matters presented in confidence – but the agreement.

Mediation at the workplace



- The cost of conflict at workplace.
- Conflicts at workplace incur significant financial costs, expose the organization to risks and degrades decision quality.

Costs of conflict in workplace



- The high cost of employee conflict. Est. 65%
- Hidden risks partially caused by ignored or mismanaged conflict/lower job motivation
- Workplace violence/sudden explosions/health costs...insurance premiums/absenteesm
- Sabotage/Vandalism/theft.
- Litigation.
- Frivolous whistle-blowing.
- Even seemingly minor, conflicts incur a significant financial cost/loss of skilled employees.

Need for supervisors, managers, and team leaders to be conflict competent



- “First respondent.”
- Need to plan the future not to judge the past.
- To reach and record a balanced, behaviorally specific, mutually acceptable future behavior with regard to the business problem caused by their conflict.
- Not to establish innocence and guilt.

Need for supervisors, managers, and team leaders to be conflict competent



- Not to discipline or punish.
- Not to decide right and wrong.
- Mediation if used for a wrong purpose is sure to fail.
- Hence for managers to be conflict competent.

Managerial mediation should not be:



- Substitute for discipline.
- Substitute for job training.
- Substitute for EAP services (personal crisis)
- To address a poorly defined problem.

When to use managerial mediation.



- Decide to mediate.
- The manager defines the problem (what).
- The parties agreement describes; How the problem will be solved.
- The magic in mediation is to delegate the responsibility and the authority to resolve disputed issues to the employees themselves.

Alternatives to Managerial mediation



- Ignore (wait).
- Threaten (direct).
- Separate.
- Terminate.
- Coach and counsel.
- Mediate.

NB: Each option is appropriate in some circumstances

Guidelines for successful workplace mediation



- No interruption.
- Candid talk about the problem and ideas on how to solve the problem.
- Parties talk direct to each other.
- Focus firmly on the subject matter.
- Allow for venting/strong emotions.
- Hear all sides to the disputes.
- Separate the problem from the people.

Essential Processes in Mediation



- Face to face talking about the problem without interruption long enough to find a solution.
- Two key principles: Cardinal rules.
 - No walk away.
 - No power play.

Breakthrough in Mediation.



- What is breakthrough?
A mutual attitude shift from “me against you” to “us against the problem.”

Planning the context in Mediation



- Location – neutral and private.
- Seating: use a table. Sit at the head.
- Time of day/week. Midweek? Morning?
- Who to attend. Disputants.
- Duration: 90 minutes (ideal).

Agreement



- Written.
- Avoid legal jargon; Plain language.
- Confirms the terms of agreement.
- Clear and to the point on action points.
- Bound in time and dates.
- Provide all the information to assist in performance.
- All the disputants to sign and each to get a copy of agreement.
- Partial agreement. No agreement

The End



Thank you