# Assessing the Efficacy of Mediation as a Form of Alternative Dispute Resolution (ADR) Mechanism in Nigeria

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## ABSTRACT

This paper presents mediation as a form of effective alternative dispute resolution (ADR) to litigation. The paper adopts doctrinal research methodology of data collection in legal research. The paper highlights the historical context from which the model emerged. The paper explains the contemporary principles and sequences of mediation process, the role of mediator and the dichotomy between mediation and litigation as well as various advantages of the mediation model in contradiction to litigation. In conclusion, the paper recommends the adoption of mediation as efficient and formidable model for settlement of disputes in Nigeria.

**Keywords:** Assessing, Efficacy, Mediation. Alternative Dispute Resolution and Mechanism

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## 1. INTRODUCTION

Conflicts, disputes, quarrel and disagreements are part and parcel of human existence. Conflict is unavoidable in interpersonal relation whether social or business relationship. Huczynski & Buchanan (2007), are of the opinion that conflict is a process that begins when one party perceives that another party has negatively affected, or is about to negatively affect, something the first party cares about'. Conflict is therefore the incompatibility of views, interests or values between at least two persons or groups who perceive some irreconcilable differences (Martynoga & Sielenzak, 2018). Generally speaking, conflict is considered an obstacle to progress, political stability, economic prosperity and overall socio-economic development of any society because of its destructive impact (Abbas, 2018). However, conflict is not altogether bad and most often it is a vehicle of change, it shapes new features and uncovers new skills and emotions. According to Hunt (1981), conflict is "desirable and constructive in any social system" as it can open up different solutions to a problem, encourage creativity, and surface emotive arguments. It is a useful tool of challenging organisations norms, and empowering people so that change can occur. The occurrence of conflict calls for resolution. However, a successful conflict resolution process must address both the actions and perceptions of both parties to the dispute (Ridley-Duff & Bennett, 2010).

Empirically, people solve conflict by seeking for remedy or remedies through differ ways such as informally, privately, through judicial process and in few cases parties may adopt avoidance until the injury created by the dispute fizzle out with effluxion of time without settlement and the parties thereafter forging ahead without allowing the dispute disrupt the normal flow of their activities, most especially, when the dispute has not negatively affected parties' relation (Leung, Fernhndez-Dols, & Iwawaki, 1992; Shapiro & Rosen, 1994; Leung, 1988 & Cropanzano, Aguinis, Schminkel & Denham, 1999). Conventionally, judicial process as a mean of settling dispute are very popular and common in most climes. Conflict is often distinguished from dispute and according to conflict resolution theories, which the ADR movement are based on, have brought new perspectives to dispute resolution and one of the most important insights (Nylund, 2014). While explaining the difference between conflicts and disputes, Nylund noted that dispute is a reformulation and a part of a conflict as it is defined by a lawyer as legally relevant. Conflict is therefore the background of the dispute and is usually much more complex. However, in this paper, the two words are used synonymously.

Disputes are of several categories and dimensions and they do occur in the home, at work, on the street, in the market place and in the course of business transaction as well as in the place of worship. As noted earlier, when dispute arises, the immediate course of action, most often than not, is to seek judicial intervention. However, the problem of court congestion in Nigeria is a serious challenge which has eroded the confidence of average Nigerians in the judicial process. The problem of judicial process in Africa generally was aptly captured by Nwazie (2011) in the following terms: 'despite numerous attempts at modernisation, many African countries are still struggling to establish functional, timely, and trusted judicial systems. Most courts in Africa are fraught with systemic problems, such as antiquated structures.

Countless judges still take notes by hand, as there are no stenographers. Records are archived manually and a reliable computer in an African court is rare, especially at the magistrate courts that handle most cases. The biggest problem, however, is overcrowded courts' docket. Many judges or magistrates have over 100 cases per day on their dockets, a number impossible to adjudicate. The result is that it can takes many years to get to trial and months to have a motion heard. Disputants often express frustrations at the "come today, come tomorrow" syndrome and mounting legal fees for professional representation with each futile court appearance.

Over the years, parties have wallowed for protracted litigations with no hope in sight for the resolution of dispute due to unending adjournment of cases. Litigants have died in the course of their dispute without seeing the completion of it or having the opportunity of reaping the fruits of their labours. It is a fundamental principle of law that when a plaintiff dies, a personal right of action dies with him. Similarly, an action which is *impersonam* also automatically, comes to an end on the death of either the plaintiff or defendant, unless there are other joint defendants (Ese Malemi, 2012; *Akumoju v Mosadolorun* (1990); *Eyesan v Sanusi* and *Pa. Tayo Ojo v. Chief Jerome Akinsanoye* (2014).

It is painful to see litigants dying without completing a case after having spent considerable part of their life and resources prosecuting a case and in some instances, the case dies with such a party. It is against this background that this paper seeks to assess the efficacy of mediation as alternative dispute resolution (ADR) mechanism to litigation in Nigeria. In doing this, the questions which this paper intends to interrogate among others include: How effective is mediation in the resolution of dispute? What are the principles and sequences of mediation process? What role do mediator play in the course of mediation? And, what are the advantages of mediation in contradiction to litigation in contemporary society?

To answer these questions, this paper is divided into seven sections. Following this introduction, the paper undertakes historical overview of mediation. Section three explains the contemporary principles and characteristics of mediation process. In section four, the paper discusses the sequences and techniques of mediation process. Sections five and six analyses the role of mediator and dichotomy between mediation and litigation as well as its various advantages. The last section concludes the paper with recommendation among others for the adoption of mediation as efficient model for disputes resolution in Nigeria.

## 2. HISTORICAL OVERVIEW OF MEDIATION

Conceptually, mediation is a consensual process of conflict resolution in which an impartial, independent third party without decision-making power, helps people or institutions to improve or set up relations through exchanges and, as far as possible, to solve their conflicts (Boulle, 2008; Noone, 1996 & Ajetunmobi, 2017). Mediation as a form of dispute resolution model is not all together a new phenomenon. The use of mediation to resolve disputes has a long history and appears in slightly different forms across geographic locations and cultures (Cheung, 2010). The Model has been in play for thousands of years (Stipanowich, 2015). However, the present and evolving global preoccupation with mediation and other techniques for managing conflict was prefigured by developments in the United States beginning nearly four decades ago (Singer, 1989 & Brooker, 2013). The Modern Mediation Movement in the United States of America is said to have increased space from the 1970s, and then transferred to England and Australia in the 1980s and to European civil countries and South Africa in the 1990s. Extra-judicial dispute resolution in the form of mediation is the norm in China. It is firmly rooted in ancient Chinese philosophy.

For instance, civil litigation was traditionally discouraged in China and according to Cohen (1966), an old proverb expresses the ancient Chinese view of a lawsuit thus: "it is better to die of starvation than to become a thief; it is better to be vexed to death than to bring a lawsuit". This explains why in more than two thousand years of Chinese legal history, China had no formal civil procedure law until 1910, when Shen Jiaben drafted the Provisional Da Qing Civil Procedure Law (Faban, 1984). The quiet revolution for use of alternative dispute resolution models in various climes, according to Stipanowich (2014) include concerns about the perceived risks and costs of litigation as well as delays resulting from crowded court dockets, and the desire to empower parties to more effectively achieve a resolution of their own disputes and even sustain, restore or transform human relationships.

Mediation as a form of alternative dispute resolution model has also gained currency in Nigeria over the past decades, and is fast gaining increased public acceptance. For instance, in the pre-colonial times and before the advent of regular courts, Nigerians had a simple and inexpensive way of adjudicating over disputes amongst themselves. People are referred to elders or a body set up for that purpose. The practice has over the years become strongly embedded in the system that they survive today as custom (LCA, 2015). Rhodes-Vivour (2008), observed that mediation, as an alternative dispute resolution (ADR) mechanism is the traditional way of resolving disputes peacefully in agrarian rural based Nigeria. The mediator's authority was hinged on his reputation and the respect accorded to him in the community. In the Nigerian traditional societies, mediation was used as a tool for preserving cultural norms and values. The major advantage of mediation is that it prevents disputes from festering, maintains peace and preserves traditional values. Mediation and other ADR models basically refer to all the ways and methods of resolving disputes outside of the formal judicial process or litigation.

Historically, ADR is of two types. The first one refers to the methods of resolving disputes outside of the official judicial mechanisms. It is a regular feature of the customs of the peoples of Nigeria till date. The second encompasses various informal methods attached to or pendant to official judicial mechanisms. Today, mediation in Nigeria has developed into a more structured process albeit within state legislative frameworks (Lagos Multi-Door Courthouse (LMDC), 2017) Court-annexed mediation takes place when a court directs parties in a pending litigation to seek amicable settlement, or directs them to the Multi-Door Court House. Whatever mediation settlement agreement is reached by the parties is entered as the judgment of the court (Obamuroh, 2018). For example, Section 24 of the High Court Laws of Lagos State provides that for any action in the High Court, the courts may promote reconciliation among the parties and encourage and facilitate an amicable settlement.

The concept of mediation received legislative recognition in Nigeria, in passing, for the first time in section 19 (d) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), which provides that 'the foreign policy objective shall be respect for international law and treaty obligations as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudications'. This provision as could be seeing, relate to the use of mediation for settlement of disputes. However, the section clearly limits it use to international dispute such as dispute between Nigeria and other countries. Hence, aside this constitutional provision, there is no federal laws in Nigeria governing mediation across the entire country, save provisions in the constituent states legislations on the use of mediation for settlement of dispute. Good examples in this context are states with major commercial centers, such as the Federal Capital Territory, Rivers State (Port Harcourt), Delta State, Cross River State and most significantly, Lagos State that have laws on court connected mediation process. The conclusion therefore is that apart from customary mediation, mediation is conducted as a private mediation in Nigeria with few interventions through court-annexed mediation or the Multi-Door Court Houses established by various states in Nigeria. However, the practice of mediation in these court-connected mediation centres lean toward coercive nature of judicial practice as against the consensual nature of mediation process which is the focus of this paper and discussed hereunder.

**3. Principles and Characteristics of Mediation Process**

According to Law Reform Commission (2010), the term 'mediate' is derived from the Latin word "mediare" which means 'to be in the middle' (LRC 98-2010 at 2.25, 2010). However, mediation cannot be defined in precise terms due to its expansion into new dispute arenas and to the increasing involvement of individuals from other professions (Picard, 2000 & Sourdin, 2009). However, in order to avoid being caught in the web of arguments on the meaning of mediation, this paper adopts the three simple, but standard definitions suggested by Ogunyannwo (2016) as follows: Mediation is a *"process"* in which an impartial person, the Mediator, intervenes and facilitates communication and negotiation between contending parties to promote and achieve reconciliation and mutually agreed understanding and settlement. Two, mediation is a private, voluntary and informal process where a party-selected neutral, assists disputants to reach a mutually acceptable agreement and lastly, mediation is a voluntary (unless ordered by a court), non-binding, private dispute resolution process in which a neutral person, helps the parties to try to reach a negotiated settlement. These three definitions, it is observed, captured the essential features and role of an impartial third party, assisting disputing parties to resolve their dispute.

Hence, in a simple terms, Cheung (2010) defined mediation as a form of assisted negotiation, wherein a mediator can bridge the communication gap between the disputants, thereby facilitating a settlement. Also Ajetunmobi (2017), leaned toward its main characteristic of consensuality and posited that 'mediation is a flexible consensual dispute resolution process in which a third-party neutral called a mediator assists the parties in dispute to make decisions and reach agreements. Due to mediation's characteristic, the mediator has no authority to make binding decisions for the disputants. What the mediator does is to use certain procedures, techniques and skills to help the disputants to arrive at a resolution of their dispute by agreement without adjudication. In other words, the mediator only facilitates communications between the parties, and helps them to identify and further define for themselves and for one another their respective interests. In addition, at times, during the mediation process, a matter can be resolved by satisfying some unrelated needs or interest that the mediator is able to identify.

The above features of mediation distinguish it from litigation and other form of ADR models such as arbitration, conciliation and negotiation. For instance, arbitration, which could be binding (Fisher, 2010) or non-binding, involves the presentation of a dispute to an impartial or neutral individual or panel for issuance of a binding (in cases of binding arbitration) or advisory or non-binding decision (in case of non-binding arbitration) (Babalakin & Co, 2004). An arbitrator generally decides after a contest between the parties, while mediator helps people maintain their power over important issues in their lives and also assists them in moving through a difficult conflict process.

Although, conciliation and mediation share similar consensual characteristic and the process is entirely a decision of the parties and not of the third party, i.e. the conciliator or mediator. Also in both cases, the parties appoint a neutral person. In Nigeria, for example, the Trade Dispute Act, 1990 provides for the appointment of a mediator jointly by the employer and the workers for the settlement of a trade dispute. Section 6 of the Act also provides for the appointment of a conciliator by the Minister of Labour where the mediator fails. Due to the similarity between mediation and conciliation, the United Nations Commission on International Trade Laws (UNCITRAL) has recommended that the two be used interchangeably (Brown & Marriot, 1993 & Orojo & Ajomo, 1999). Nonetheless, the usual distinction between the two models is that in conciliation all that the conciliator does is to explore the opportunity for settlement. He is not necessarily a re-conciliator and he has no power to bind the parties. He is not an adviser to the parties, who should turn to their lawyers and experts for advice. He merely provides the environment for negotiation (Orojo & Ajomo, 1999).

His role is to assist the parties establish communication, clarifying mis-perceptions, dealing with strong emotions, and building the trust necessary for cooperative problem solving. Some of the techniques used in conciliation include providing for a neutral meeting place, carrying initial messages between or among the parties, reality testing regarding perceptions or mis-perceptions of parties, and affirming the parties' abilities to work together. Conversely, mediation in its normative form, demands that the mediator be more leading in that he may make recommendations for the consideration of the parties. His role is to persuade the parties to focus on their underlying interests and concerns and move away from fixed positions that often becloud the real issues. His function is to act as a manager, facilitator or broker (Redfern & Hunter, 1991). Lastly, Negotiation is a non-binding proceeding in which two or more participants attempt to reach a joint decision on matters of common concern when they are in actual or potential disagreement or conflict (Lebovits & Hidalgo, 2010). Negotiation tends to be an informal process that does not require a third-party neutral. The parties in dispute attempt to reach an agreement using their negotiating skills and leverage (Ryan, 2005). It involves the conflict parties discussing matters between themselves in a bi-polar relationship.

Even if facilitators are present, communications are essentially between the conflict parties. Although, mediation is equally a non-binding proceeding. However, there is the use of neutral third person who assists the conflict parties in exploring the opportunities for settlement. Mediation is less formal proceeding than litigation and arbitration because of its non-adjudicatory, consensual trait. Mediation can occur at any stage at which the dispute remains unresolved, including before a lawsuit is filed or before arbitration (Mazirow, 2000). In sum total, the essential principles and characteristics of mediation include.

### 3.1 Consensual

The major corner stone of mediation process is its consensual nature. Parties in dispute decide on their own volition whether an accord can be reached, and they control the nature and the terms of it. Mediation is a voluntary endeavour in which the consent of the parties is critical for a viable process and a durable outcome (Ban Ki-moon, 2012). That means that the parties are removed from the coercive atmosphere of litigation. In addition, the parties can leave at any time, can reveal what they want and when they want to. A mediator may also withdraw from a mediation but must provide general reasons for doing so (Menton, 2017). The parties decide the settlement. In mediation, the role of the mediator is influenced by the nature of the relationship with the parties: mediators usually have significant room to make procedural proposals and to manage the process, whereas the scope for substantive proposals varies and can change over time (Ban Ki-moon, 2012).

### 3.2 Neutrality and impartiality

Neutrality of the mediator is crucial to mediation process in terms of dealing fairly with the parties in dispute. This means that the mediator will act in an impartial manner, treat all parties fairly and remain neutral as to the content and outcome of the process (Menton, 2017). Fairness is considered a fundamental principle of mediation. Fairness, according to (Shapira, 2012), demands that parties make voluntary, uncoerced decisions without undue influence on the basis of knowledge or informed consent and have an opportunity to consider the implications of their decision In a fair mediation, the parties may terminate the mediation at any time. The fairness of mediation is preserved when participation is not to gain an unfair advantage, when manipulative or intimidating negotiating tactics are not used, and when the parties avoid nondisclosure or fraud (Family Mediation Canada Code, 2013). Fairness is violated when the agreement is grossly or fundamentally unfair, illegal, or impossible to execute, and when the parties do not understand the agreement and its implications on themselves and on nonparticipants (third parties) (Georgia Standard, 2012). Fairness requires the mediator to remain impartial, to avoid conflicts of interests, and to avoid unfair influence that results in a party entering a settlement agreement. Fairness is connected to the quality of the process and its integrity (Shapira, 2012). The concept of fairness means the mediator must resist the temptation to spend more time with the nice party when the other is difficult or unfriendly. He must ensure that questions are phrased so as not to appear critical or judgmental (Institute of Chartered Mediators and Conciliators (ICMC Nigeria).

### 3.3 Confidentiality

Mediation proceedings is not held in public but in private, and is confidential both in terms of (a) private communications between a party and a neutral; and (b) communications that a mediator provides to all parties. This confidentiality belongs to each of the parties, so either one may assert his right to keep all communications and disclosures confidential. The confidentiality is one of the key incentives to mediation (Proctor, 2015). Mediator must first offer confidentiality to the parties, who may also agree to mutual confidentiality. Mediation process is about information gathering and this may involve joint and caucus meetings with parties. During joint meeting with parties, mediator must emphasis the confidentiality of the process. The caucus model is a type of shuttle diplomacy (Proctor, 2015) and this also requires another level of confidentiality.

Caucus meeting provides an opportunity for the mediator to have *ex parte* contacts with the parties to gain insight concerning the needs of each party (Ajetunmobi, 2017). During these *ex parte* sessions, a mediator can apprise about the weak points and can convince them to leave the unnecessary and unwarranted adamancy. Mediator can grab on the focus of the parties on the real issues which are required to be solved (Noone, 1996). No private information shared with the mediator during caucus meeting with one party can be passed to the other party without express permission or authorization (ICMC Nigeria, 2020: 48). However, the settlement agreement that result from mediation processes are not normally confidential.

### 3.4. Without Prejudice.

In mediation, anything disclosed is done 'without prejudice' and cannot be used outside or in later court proceedings should the parties fail to reach agreement. Moreover, any information shared by one party with the mediator is privileged and the mediator must not pass it on to the other party without specific permission to do so. Therefore, the parties do not normally rely on or introduce as evidence in any subsequent arbitral or judicial proceedings any view expressed, or suggestions made by the other party in respect of the possible settlement of the dispute, or any admissions made by the other party in the course of the mediation, or the fact that the other party may have indicated a willingness to consider or accept a proposal for settlement, or any statement or document made by the mediator. In addition, parties in mediation do not usually subpoena or otherwise require the mediator to testify or produce records or notes in any future proceedings (Ajetunmobi, 2017).

### 3.5 Focus on Needs and Interests, not Rights and Liability.

Unlike litigation which determines what happened in the past, why it happened and whose fault it was, mediation looks to the future and encourages parties to consider their aims and objectives in the dispute by re-examining theirs current and their future needs and interests. Hence, the mediator has to try and reorient the focus of the parties toward the future. In most interpersonal disputes, there are two sorts of penalties for failing to agree. The first involves extrinsic costs, represented in pursuing relief through other channels, such as the courts. The intrinsic costs for not settle are those that are inherent in the dispute itself, flowing from the immediate need of the parties to survive safely and sanely in their continuing relationship that will resume at the conclusion of the mediation session. An effective mediation process is the one that help parties to focus on the mutual needs that might be met by an agreement.

### 3.6 Empathy

Empathy is a useful profile of an effective mediator. The mediator must be able to appreciate the fears, history and perceptions of every party that underlay the discussion. Only then will the parties have confidence that the alternative solutions developed by a mediator will not be blind to their needs (ICMC Nigeria). Empathy is a key ingredient in mediation, both in its use by the mediator and the manner in which the process offers disputants opportunities to give and receive it (Irvine & Farrington, 2017). According to Baron-Cohen (2011), 'empathy is the ability to identify what someone is thinking or feeling and to respond to their thoughts and feelings with an appropriate emotion'. When we empathise, we imagine what it feels like to be in that person's mental state. Importantly, we are motivated to respond to another's distress with empathic concern.

## 4. SEQUENCES AND TECHNIQUES OF MEDIATION PROCESS

Mediation is a process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), identify the disputed issues, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted (Kumar, 2017). Adequate and effective preparation is therefore critical to a successful mediation. Not only should parties and their representatives be suitably prepared but so too the mediator. Accordingly, investing sufficient time and the right resources before embarking on mediation session will often prove to be determinable of a successful outcome (Della Noce, 2001, Browne & Sime, 2013 & Carneiro, Novais & Neves, 2014). The sequential phases of mediation are of vary degrees. However, the most essentials among other include opening statement, identification of issues, structural discussion of issues, moving the parties to settlement and closure. These stages are intertwined, they are discussed hereunder

### 4.1 The Opening Statement

The first stage of any mediation proceeding consist of an opening statement which sets out the parties a description of all that will follow, including the ground rules for the hearing and the role and power of the mediator. This introductory stage is vital to the establishment of a relationship that will facilitate the rest of the mediation process. It is essential that right from inception that the parties understand clearly the mediator's role, the rules of procedures and the advantages of mediation. The relevant components of standard opening statement should include: introduction of parties and mediator, establishment of mediator's neutrality, impartiality and credential, explanation of mediator's role and explanation of the ground rules that control the conduct of the hearing (Melamed), identification and briefly discussion of benefits of the process. Legal parameters, such as confidentiality and enforceability of settlement, are outlined. Goals and objectives from the mediator's standpoint are also set out ( Blankrnhip & John, 2009-2010).

For instance, if the mediator plans to take written notes, the mediator should let the disputants and advocates know. It is generally a good idea to provide pen and paper for the disputants and encourage them to listen for new information and to take notes, if necessary, while the other is talking. This enables the parties to remember issues they want to discuss without having to interrupt each other (Bullen, 2012). The importance of the opening statement is that it establishes for the parties the procedures that will govern the hearing and simultaneously assures parties of some measure of control over what follows (Cornblatt Alex, 1984-1985). In addition, it helps to put the parties at ease and if done well, convince them that the mediator possesses sufficient confidence and skill to help them effectively. Although, there is no hard and fast rule about opening statement. However, it must be long enough to cover all of the elements clearly and completely, and short enough not to lose the interest of the parties (Kumar, 2017).

### 4.2 Identification of Issues or Problem

Following an opening statement, the second stage in mediation process is to get the parties involved. Each party must be provided with an equal time to talk and the choice of who speaks first is left to the parties, although normally the person who initiates the dispute will speak first (Spencer & Brogan, 2006). At this stage, each party defines the disputes as he or she sees them. Generally speaking, each party's position on each dispute emerges during this step (Craig). The mediator can begin to define an agenda of issues that need solution and confirm that the parties are all working on the same set of facts. The mediator will ensure that each party will have heard the other side and will have understood the opposing position.

The stage is also called 'ventilation' as the parties, locked in bitter dispute, is likely to furiously air his/her grievances. The stage provides the parties' opportunity to express the anger, frustration and animosity attendance on their dispute; it also provides the mediator with his or her first exposure to the nature and history of the parties' confrontation. It is imperative that the mediator listens attentively and keeps interruptions to a minimum. If the mediator needs to ask questions, it must only be for the purpose of clarification. One of the major and perhaps the most important contribution a mediator can provide at this stage is a structure or agenda for the discussion of issues which will reorient and refocus parties' perception of their dispute and to construct workable resolutions for each of the component disputes contained in their massive, overall confrontation (ICMC Nigeria, 2020; Abramson, 2004 & Moore, 1996).

Law plays an important part in this step. A mediator does not give legal advice, however, he is an advocate for clarity. One explanation for the effectiveness of mediation as a technique for resolving disputes is the mediator's ability to perceive the dispute in a different way than the parties. A mediator who simply accepts the statement of the problem in the terms used by the parties locks himself into their perceptions of the dispute, perceptions that are large part of the reason the parties have reached a stalemate and sought outside help. The mediator's role is to ensure the parties understand the law and facts. The mediator is neutral, but is not neutral about getting the law, the issues and the facts on the table. The mediator encourages the lawyers to talk about the law with each other in the presence of the parties and works to ensure that all the parties understand how the law impacts both sides of the issue.

Since mediator's role at this stage is to learn as much as possible about the history and nature of the dispute between the parties and to begin to identify issues and possible solutions. The two major skills required at this stage are listening and questioning skills. Effective listening serves two related purposes: it enables you to be certain that you have heard and understood what the parties have stated and allows you to take note mentally of pertinent things that the parties did not say. On the other hand, questioning skill is essential for mediator's role in fact gathering. He must help parties relax; reduce the adversarial character of the parties' relationship; and re-orient their perspections toward the recognition of mutually shared values and goals (Alfini, 2006).

### 4.3 Structuring of Discussion of Issues

In this stage, the Mediator moves to flesh out the underlying interests and identifying what information is agreed upon by all parties and tests any assumptions upon which the parties are relying. The Mediator can determine items of general agreement (if any) and begin to focus the parties on identifying the interests that lie behind their stated positions, both for themselves and for the others. As hinted above, at this stage, caucus meeting with the various parties may be useful tool for the mediator to adopt for the structuring of discussion of issues. But conducting such separate sessions must be done deliberately and carefully or the mediator will otherwise- perhaps unwittingly- escalate rather than minimise the polarization among the disputants. Where the parties are stuck over issues, the mediator has to employ a range of tactics to break the deadlock, and to keep the mediation moving. Moving the parties away from their entrenched positions to interests, requires a lot of effort on the part of a mediator and the greatest weapon in this regard are various tactics which mediator must employ to help parties overcome the impasse as quickly as possible. Providing guide for this stage, Alfini (2006) listed the following mediator's tactics to deal with any impasse in the mediation process.

(i) **Focus on the Future-** It is helpful to remind parties that they cannot change what happened in the past, but they can decide how they want things to be in the future. As a means of comparison, the traditional litigation process focuses on the past, determining what happened, and who was wrong or right. In mediations involving an ongoing relationship, what happened in the past need only be relevant in helping parties determine how they want to behave in the future.

(ii) **Use of Humor-** People become more flexible when they are laughing because laughter often reveals some comfort with oneself and the situation. However, humor should never be used at the expense of anyone involved in the mediation.

(iii) **Integrative Solutions-** If the mediator helps the parties and their advocates to identify their interests (not just their positions) and think creatively, they may be able to identify issues in which they both can achieve the 'win-win' solution that they want.

(iv) **Establish priorities and Trade-offs-** Not everything that the parties or their advocates present at mediation will be of equal importance to them. Helping them identify which items are most important will help them see that other items are less important. This may yield greater flexibility and ideas regarding items to 'trade-off'.

(v) **Use of role Reversal-** Helping parties and advocates see the situation from the other person's perspective is often very helpful. This technique is most useful when meeting separately with the parties and they are able to react with greater honesty.

(vi) **Point out possible Inconsistencies**- A mediator should not evaluate the merit of parties' positions, but he should point out the inconsistencies within comments or proposals that have been made by the mediator.

(vii) **Identify Constraints on others-** Everyone operates under some constraints- be they economical, psychological or political. Proposed solutions must account for these constraints or the solution will not be acceptable. Assisting the disputants to see each other's constraints may be useful in helping them understand the dynamics at work in reaching an agreement and lead to greater creativity.

(viii) **Be the Agent of Reality-** The mediator should never force the parties to settle their dispute or any portion of it in mediation. The mediator may, however, help the parties to think through the consequences of not resolving the dispute in mediation. The parties may want to consider monetary costs, time lost, relationship issues, and the uncertainty of a court outcome when evaluating the acceptability of the proposed settlement terms so that their decision to settle or not is as informed as possible.

(ix) **Appeal to past Practices**- Sometimes the parties will have had a prior good relationship. In such cases, it may be useful for the mediator to explore with the parties how they have resolved similar issues in the past. If the parties have no prior relationship (or no positive prior relationship), this will probably not be a useful technique.

(x) **Appeal to commonly held Standards and Principles-** Sometimes both parties will express a common theme, for example, to be treated respectfully or that they are concerned about the "best interest of their child" (in family mediation). While acknowledgment of this notion will not solve their issues, it is often helpful for the mediator to point out so that they do agree on some matters.

The above techniques can help trigger flexibility. The mediator may select a place for the parties to begin their discussions, but quickly discover that resolving it is more complex or difficult than originally envisioned. The mediator can deploy several different approaches for generating options for agreement as described above (American Arbitration Association, 2010).

### 4.4 Moving the Parties to Settlement

A successful structuring of issues that led to dispute enables the parties to make discernible progress, compatible with their interests, on issues in the dispute and bringing sharper focus remaining areas of disagreement. The purpose of this stage is to generate as many options for solutions that the parties can think of.

The ground rules are that the parties do not evaluate or criticize the ideas as they are posted and we do not attribute the ideas to any party. The options are then distilled down to those that will satisfy the parties' interests and needs. One of the mediator's most important tasks is to identify clearly the differences between parties, not camouflage them. There are many ways to persuade people to change their positions. Although, the list of strategies the mediator might rely on is hardly exhaustive, however, few of the tactics to getting parties to settlement include using alternative discussion of the issues and proposed solutions according to the respective vulnerabilities of the parties. For instance, some people become very stubborn when they believe they are winning, thus, when they think they are getting what they want, they decide they want everything, thereby making compromise virtually impossible. But everybody is vulnerable, to some extent, on some issues. Identification of vulnerability of parties is a useful tool to generate movement by exposing the unreasonableness of a stubbornly held position.

Often, the cause of recalcitrance is the parties' unwillingness to let go of bitter accusations about past conduct. The mediator has to try and reorient the focus of the parties toward the future. Similarly, in most interpersonal dispute, there are two sorts of penalties for failing to agree. The first involves extrinsic costs, represented in pursuing relief through other channels, such as the courts. The intrinsic costs of not settling are those that is inherent on the dispute itself, flowing from the immediate need of the parties to survive safely and sanely in their continuing relationship that will resume at the conclusion of the mediation session. Hence, the mediator needs to identify mutual needs that might be met by settlement. An example might be the mutual enjoyment of a shred driveway that will result from the settlement of a dispute (ICMC, Nigeria).

To a large extent, every successful mediation is a prolonged bartering session. Parties seek fulfilment of their important needs, in whole or in part, in exchange for concessions in those areas of need that are less important, hence, the critical importance to the mediator of knowing each party's hierarchy of need. You cannot leave one party's prime need unmet and expect major concessions in return. The idea is to get party A to meet party's B's major needs in return for fulfilment of party A's prime needs. This is the basis for a successful trade-off. A mediator must be the agent of reality. He sometime can persuade parties to drop such demands by being the agent of reality (Alfini, 2006).

**4.5 Closure**

Closure is the last process in mediation. Mediation may end in several ways. For instance, it may terminate when the parties have resolved all their issues, or when they have resolved some issues and decided to take the others into a different forum such as arbitration or litigation. It may come to an end when one party simply walks out of it saying that he/she does not want to continue with mediation; or when the mediator decides that it is inappropriate to continue with mediation as there is no reasonable prospect of resolution, or otherwise, unethical to continue with mediation. Hence, closure envisages both, successful and unsuccessful outcome(s) (Kumar, 2015).

In case of successful outcome, settlement terms are reduced to writing leading to a formal agreement between the parties. In order that this mediated agreement becomes legally enforceable, it must be duly signed by the parties and mediator (Brooker, 2013 & Aina, 2012). The settlement may also contain an implementing or monitoring mechanisms for the current as well as future differences or conflicts that may arise. Where the mediation ends without settlement terms being agreed, there are no specific formalities. Some mediators conscientiously persevere in assisting the parties to reach agreement despite the imminence of ending the process. Mediators encourage the parties and advocates to consider returning to mediation (with the same or different mediator) if they think it would be helpful.

The process finally ends on a positive note with the mediator's concluding address in which he thanks the party for their time and effort at the mediation (Stulberg & Love, 2008).

## 5. MEDIATOR' ROLE

Mediation is distinguished by the presence of a neutral third party whose tactics are essential for the settlement's success (Senan, Alzaghrini & Srour, 2018). As discussed earlier, mediator is any third party individual or an employee of ADR provider who is acceptable to the parties to a dispute resolution proceedings and who has no official, financial, or personal conflict of interest with respect to the matter at hand. The mediator is neither a judge nor an arbitrator; he/she is not an adjudicator, nor someone who imposes a resolution or a settlement upon the parties. Instead, the mediator acts simply as a 'midwife assisting in the labour and birth of a settlement. In relation to skills, the nature, context and complexity of dispute often dictate the qualifications of a mediator.

The presence of a qualified mediator as neutral party is essential if the parties in dispute are not able to reach an agreement themselves. The mediator is responsible for controlling the session, maintaining a friendly atmosphere, and reducing the gap between the two parties, uses various tactics to reach an amicable settlement. The mediator aims in the session is to create a trust atmosphere between the parties and tackle the core of the dispute in order to solve the problem using an advanced integrative approach (Alfini, 2006) The mediator, from the beginning of mediation shall attempt to facilitate voluntary resolution of the dispute by the parties, and communicate the view of each party to the other assist them in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and generating options in an attempt to solve the dispute, emphasizing that it is the responsibility of the parties to take decisions which affect them; he shall not impose any terms of settlement on the parties (Senan, Alzaghrini & Srour, 2018).

In the process of mediation, the consent of the party and the mediator is very essential for the successful mediation as the parties cannot be enforced to settle the disputes through mediation and the proposals of the mediation is also not binding on the parties (Mediation Process and Techniques). The mediator also uses his opening statement as a chance to gain the trust of the parties by detailing her/his experience in mediation and the success rate reached in mediations. Furthermore, the mediator is ethically required to disclose any past professional or personal relationships with any of the parties, if they exist. In this case, continuing the mediation is subject to obtaining the parties' consent. Disclosing relationships prior to mediation is important to gain parties' trust and guarantee a stable progress and a permanent solution (Mediation Process and Techniques).

As a neutral third party interventionist, the mediator is uniquely placed to assist the disputing parties with, or do, the following:

i. **A Manager of the Process:** providing firm but sensitive control, convening confidence that it is all worthwhile, and giving momentum and a sense of purpose and progress (Pinkley et al, 1995 & Sheppard, 1983).
ii. **A Facilitator:** helping the parties to overcome deadlock and to find a way of working co-operatively towards a settlement that is mutually acceptable and sustainable (Senan, Alzaghrini & Srour, 2018).
**iii.** **A problem Solver:** brings a clear head and creative mind to help parties construct outcome that meets their needs.
iv. **A Sponge:** that soaks up the parties' feelings and frustrations and helps them to channel their energies into positive approaches to the issues

v. **A Scribe:** who writes or assists in the writing of the agreements, checking that all issues are covered and that all terms of the agreement are clear'
vi. **A settlement Supervisor:** checking that settlement agreements are working and being available to assist if problems occur and
vii. **A settlement Prompter:** who, if no agreement is reached at the mediation, will help parties to keep the momentum towards settlement.

## 6. DICHOTOMY BETWEEN MEDIATION AND LITIGATION

Mediation is a process by which two parties work towards an agreement with the aid of a neutral third party. The third party retains process control but does not exercise decision control (Goldman, Cropanzanno, Stein & Benson, 2008). Litigation on the other hands, is a process in which the courts allow the disputants to control the process but retains control over the final decision (Nlyund, 2014). Mediation and litigation are forms of dispute resolution mechanisms. However, litigation is conventionally used and conventionally accepted, but mediation is slowly becoming more recognized as an effective tool in dispute resolution. The distinction between the two processes contemporarily is that mediation and other forms of ADR mechanisms such as arbitration, negotiation, conciliation, mediation-arbitration and the likes were evolved to resolve many of the problems associated with litigation.

The growth of mediation, according to Nylund (2014), outside the courts, has been dependent on three concurrent developments namely: dissatisfaction with the legal process for creating good results, dissatisfaction with cost and delay of court procedures and the increased legislation on arbitration making arbitration more expensive and less flexible. Mohammad (2014), listed delay, prohibitive cost of litigation, procedural complexities, backlogging of cases, corruption in judiciary, want of efficient, independent and dutiful judges and lawyers as other reasons for the development of ADR mechanisms as against litigation (Menkel-Meadow, 2006).

The dichotomy between mediation and litigation are many and in-exhaustive. However, few of the distinguishing features of mediation could be seen from its established advantages over litigation and these include.

i. **Outcome:** Mediation, unlike litigation does not create binding agreements unless the parties consent to it and the Mediator has no say in the outcome. Court proceedings as well as judgment therefrom is binding and determined by the third party call the judge;
ii. **Time:** Depending on the skill of mediator, mediation process period, may be as short as 1-2 days, meanwhile litigation takes longer period because of backlog of cases in Courts' docket;
iii. **Cost**: As against mediation, litigation involves huge amount of cost which include: the court fee, lawyers` fee, money to collect certified copies of the judgment, decree or order and other incidental costs due to long period of conclusion;
iv. **Confidentiality**: Mediation proceeding and outcome are strictly confidential, while litigation involve public hearing and publication of outcome in form of judgment to serve as precedent for future and similar proceedings (Proctor, 2006; *Alhaji Gaji v The State* (1975) *Edibo v. The State* (2007) *Chime v Ude* (1996)and *Oyeyipo v Oyinloye* (1987);
v. **Formality:** Mediation is very informal while litigation is formal, rigid, strict evidential and procedural rules are prescribed. In mediation, a third party, the mediator, facilitates the process but parties are in control of content and outcome. However, in litigation, a third party, the judge controls the

outcome of proceeding, parties have no control over the choice of judge, language, times, venue of proceedings and procedural rules;

vi. **Remedies**: Mediation involves wide ranges of remedies with assistance of mediator, parties need not confine themselves to strict legal remedies, creative remedies are possible. In litigation, legal remedies are very strict, hence, creative remedies are not possible but judges can grant remedies which arbitrators cannot e.g. injunctions, security, subpoena, etc;

vii. **Degree of Parties satisfaction with Outcome:** The degree of parties' satisfaction with the outcome of the process is very high in mediation because parties work together to reach settlement unless there is allegation of lack of independence on mediator, mediation is also a win /win outcome. Meanwhile, in litigation, parties' satisfaction with the outcome of the process is low because judgment is imposed by court, also litigation is win/lose outcome;

viii. **Effect on the relationship of Parties**: Parties relationship in mediation is preserved in mediation, while litigation has high chance of destroying relationship because it can be very acrimonious (Alfini, 2006);

ix. **Communications**: Mediator usually communicates with one party without the presence of the other during the process known as 'caucus'. Strict, *ex-parte* communications with judge only allowed during *ex-parte* hearings, parties to communicate with each other through their respective lawyers (Ajetunmobi, 2017); and

x. **Certainty of achieving Settlement:** With assistance of mediator, mediation may result in achieving settlement of dispute than in arbitration; however, this depends heavily on skills of mediator as mediation may also end without parties reaching a settlement agreement. There is certainty on getting a judgment at the end of trial in litigation. The only problem is that party or both of them may not be satisfied with the outcome, in which case, the aggrieved party may appeal.

## 7. CONCLUSION

Mediation, has shown in this paper is voluntary, confidential, non-binding and informal process as against litigation which contain a lot of strict procedural rules. Although mediation is a non-binding process. However, a successful mediation process that result in parties' agreement is binding as enforceable as contract. Thus, in mediation, the mediator, helps disputants reach a mutually acceptable agreement. The parties and the mediator would then sign the agreement to constitute a binding and enforceable contract. Litigation, on the other hands and the word over, is always a result of complaints and grievances of various kinds.

Parties to litigation approach the court to resolve their grievance and seek remedies to harm done to their rights, persons and or property. However, the long and protracted nature of litigation seems to have defeated the entire purpose of litigation as parties in their deepest desire always seek timeous responses to their dispute. It is evident in this paper that there are situations in which parties might have spent their entire lifetime chasing a particular case before the courts, but never live to see the end of the case, let alone having the opportunity to reaping the fruits of their labour. Failure of litigation to meet parties' aspiration in the resolution of their disputes led to the development and growth of other ADR mechanisms in leap and bound and mediation is one of such models. Mediation has gained tremendous recognition the world over as an effective method for resolution of dispute. The efficacy of mediation as a form of alternative dispute resolution model is evident in the principles and characteristics of mediation, the sequences and techniques of the process, the role of mediator as well as dichotomy between mediation and litigation.

Mediation is also cheaper, cost-effective and faster than litigation. Above all it helps parties to maintain and preserve their relationship. A careful observation and use of the model will therefore result in better resolution of dispute by parties. It should be noted that in spite of the various advantages and efficacy of mediation in the resolution of dispute, few hindrances to the wholesale adoption of the model in the resolution of dispute could be attributable to lack of direct statutory provisions to guide the process in some countries and worldwide laxity granted to parties to simply walks out of the process irrespective of the stage reached in the process; or when the mediator decides that it is inappropriate to continue with mediation midway to the process.

To overcome these lapses, this paper recommends the enactment of a comprehensive mediation statute in Nigeria, requiring a mediator to disclose detailed information regarding the mediation process as well as the roles and responsibilities of the parties and the mediator to checkmate frivolous withdraw from on-going mediation to defeat the process. There is also urgent need to increase public sensitization on the existence of the model and training on the importance of mediation as effective means of dispute resolution. It is equally important to establish the practice of mediation as a separate and distinct entity from the courts as opposed to court-connected mediation owing to the fact that the existing court connected mediation in Nigeria is gradually going toward coercive and adversarial characteristics of litigation. In the final analysis, this paper strongly recommends the adoption of mediation as effective and formidable model for resolution of disputes in Nigeria.

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