



Raising Interests for Mutual Benefit

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As society and the laws that govern it become more and more complex, so does the litigation that arises when things go wrong. As a result, the litigation process becomes more and more involved, lengthy, and of course, expensive. In response we are seeing a trend away from the courts and toward other methods of resolving disputes. Key among the alternative methods is *mediation* and now, the emerging field of *collaboration*.

Both mediation and collaboration have grown exponentially in response to those searching for a dispute resolution process which is more timely, more private, more respectful, and less expensive. When conducted as an “interest-based” process, the results are by design geared toward “win-win” solutions.

In mediation, a trained neutral third party works with the disputing parties to help them identify the issues that need to be resolved; facilitates the exchange of information so that everyone is satisfied that they have all the knowledge they need to make the decisions necessary; and then assists the parties in reaching agreement. In addition, it is the mediator’s job is to document the agreement the parties reach. The parties may attend mediation with their lawyers present. But in many areas, especially that of family law, lawyers usually do not attend the mediation meetings. However, at the end of the process, they must provide their clients with independent legal advice and ratify the agreement reached.

In the collaboration process, each party to the dispute is represented by his or her own qualified collaborative lawyer who is specially trained in collaboration and settlement techniques. The focus and commitment of the lawyers and their clients is to reach settlement. The rules governing the collaboration are set out in a written agreement that each of the parties and their lawyers enter into prior to the commencement of the collaboration. Part of that agreement is that there are no

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threats of litigation. In fact the commitment to resolving the issues outside of court is so strong that if the process should break down and the parties resort to the court, the lawyers must withdraw from the case and may not represent their clients in court. Like the mediation process, the goal of the collaborative lawyers is to help the parties identify the issues, obtain all the knowledge required to make decisions, assist in the decision-making, and document the parties' agreement.

In both mediation and collaboration, the disputing parties are present at all meetings where all the negotiations take place. The parties participate in the negotiations, assisted by the mediator or their collaborative lawyers. In the event that expert opinion or advice is required about the values of assets or otherwise to assist the parties, neutral experts are chosen by agreement of the parties, thereby eliminating any battle of the experts. Full disclosure is a hallmark of both processes. Because these processes are designed to be conducted in privacy, with respect and dignity as goals, they have especially gained hold in the area of family law where the parties acknowledge that they will need to have a continuing relationship after the legal issues have resolved, especially where there are children involved. These processes also appeal to parties who wish to protect their privacy, have some control over the timing and length of the process, and resolve matters outside the public forum of a courtroom or the litigation process.

One of the major factors driving the success of these processes is that generally they are conducted as an "interest-based" process as opposed to the more conventional "positional bargaining" process. Understanding the differences between these two processes is imperative.

Most negotiations, whether it is something as ordinary as buying or selling a car or as involved as dealing with the issues arising from relationship or family breakdowns, are positional in nature. People usually come to the negotiation with their own position. At its base, a position is nothing more than someone's idea of their solution to a problem. When two or more parties come to negotiate, each with their own position or solution, and nothing more is known about why their proposed solution is important to them, the only way for the parties to reach agreement, short of one of the parties capitulating completely, is to compromise. A compromise is often reached at the point when the parties become equally unhappy. When that balance is achieved an agreement is often reached.

Looking at the car sale example, both the buyer and the seller usually come to the table with their own position or answer. The buyer's position may be that he or she can only pay \$5,000. The seller's position may be that he or she can't let the car go for less than \$7,000. When nothing more is known, often a sale price is agreed upon somewhere around the middle — perhaps the point where the parties are equally unhappy. However, if we were to understand more fully why the buyer and seller came up with their positions, we may find out that the buyer could actually afford more overall, but could not afford higher monthly payments. We may also find out that the seller needs to be relieved of a monthly payment and may take less if the buyer could take over his payments. With some investigation into what is important

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to each person and some creativity in looking for the answer to each person's concerns or needs, a solution can be found that suits everyone's purpose — a win-win solution.

This approach of interest-based negotiation or mediation is especially successful in family law disputes for many reasons. A person's needs or interests are usually based on his or her particular concern, hope, expectation, assumption, priority, belief, fear, or value. Core needs and interests are non-negotiable. If someone has a concern or fear that must be looked after before they can agree to anything, it simply cannot be discounted, negotiated away, or ignored. This is often a clear relief for the parties. Often a marriage or relationship breakdown is characterized by a period of intense discussion between the parties where each party tries to explain to the other how he or she feels and what he or she needs. Often this is met by rejection or argument from the other person who similarly is trying to express his or her own feelings and needs. An interest-based process of negotiation or mediation is often the first time a party is allowed to have his or her needs or interests honoured. It matters not if it is rational or logical to the other person.

As an example, a party's concern or fear may be that his or her children will love someone more. That person's former partner cannot, in this process, discount that concern by saying that it would never happen, that he or she would never do anything to interfere with the relationship, or that the relationship between the children and the other person could never be damaged. In an interest-based process the need is explored fully and the goal of providing for that need is acknowledged. Simply put, unless the person so concerned has his or her needs and interests addressed, he or she will not say yes to any solution that does not protect those interests.

The advantage of identifying each party's needs or interests is that the parties have essentially set out the parameters any ideal solution would have to meet. The goal is then for the parties to the negotiation, assisted by the mediator in the mediation process, or the collaborative lawyers in the collaboration process, to collectively brainstorm to find solutions that meet all of the parties' needs and interest. Any and all solutions that meet the needs and interests must be looked at. Some end up being patently unsuitable. Others end up being a springboard for further creativity and ideas. As a collective and creative effort, everyone present at the negotiation works on creating a mutually beneficial solution.

One of the greatest advantages of this process is that creative solutions are reached. Rarely do cookie-cutter answers result. The possibilities for solutions are as limitless as the ideas that the negotiators can come up with and, depending on the needs and interests identified, are unique to each negotiation. Each family and its members deserve answers suited to their particular needs and interests and the interest-based negotiation or mediation process is uniquely geared to respectfully achieve these results.



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