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Mediation and Case Settlement; Two Different Processes

by

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I read an interesting article in the Harvard Negotiation Law Review on comparing, or perhaps more correctly, contrasting the process of mediation and case settlement. I would like to highlight key elements from the article. I found the article quite compelling for me and reinforced why I believe in the mediation process as a better way to achieve resolution.

In a court proceeding we are all familiar with the settlement conference which is a case settlement process. As in mediation, it involves a third party, the judge, who facilitates the discussion, attempting to settle the case. There are however very fundamental differences with this process as opposed to mediation and possibly very different outcomes for the parties.

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To highlight the differences,

1. In case settlement, the lawyers play the key role. The third party (judge) attempts to convince the lawyers of a compromise solution. In mediation, the parties themselves play the key role, not the lawyers, with the mediator acting as a facilitator. It is the parties themselves who are engaged in the discussions, exploring all possible options for settlement. The parties have far more participation in the mediation process.
2. In case settlement, the third party facilitator focuses on a rights based approach to settlement. Too often the focus is on past behaviour, conduct and placing blame. The issues are defined by pleadings, drafted by the lawyers and read by the judge. The discourse is about the other party, most often conduct and blame. In mediation, the mediator engages the parties directly and the process is forward looking not backward looking. The facilitator challenges the parties to talk to each other not about each other. The discussion is non-evaluative and looks to moving the parties forward, working with each other to resolve their issues.
3. In case settlement, the negotiations are positional and rights based. Legal arguments and legal rights are at the forefront of the discussion. In mediation, the discussion is interest based with the mediator exploring interests and needs of the parties. It is interest based negotiation as opposed to a rights based negotiation. Legal rights are discussed but are not the primary focus. The mediator looks to facilitate a mutual respect or acceptance of the others needs, interests, motives in order to have a less adversarial approach to discussions and negotiation.
4. Case settlement does not have as an objective, having the parties gain a better understanding of each other and themselves. The objective is to get the case settled. There is not a collaborative building of information sharing and working together to create options for resolution as in mediation. Most often a resolution is based on compromise that is simply somewhere along the spectrum between competing offers. Too often, a resignation just to get it over with. In mediation, the objective is to create value not just distribute value. Mediation can create options and resolutions that are not limited to remedies available in the court system.
5. In case settlement, the parties listen to a judge, who they see to be in a position of authority and power. They are not empowered in any way during the process. In mediation, the parties themselves are empowered to find solutions to their problems. The mediator assumes no power or authority over them. They are engaged and are given the responsibility to collaborate with each other to find mutually acceptable solutions

Most importantly, what benefits can we say are achieved by the parties after a resolution in either a case settlement or mediation process.

In case settlement, the matter is resolved, they are finished with the court system and paying legal fees. There is however no resolution of feelings, no understanding or trust building that will improve their ability to communicate, get along after or move forward, There may be unresolved feelings of blame, anger and resentment. In fact the relationship may be worse having been unable to explore, talk about, share or understand each other's feelings . They see it as a win / lose outcome that results from positional bargaining. In mediation, the parties have the opportunity to take an active and primary role, listen to each other, search for and work together to create solutions that relate directly to their needs and interests. After resolution they look at the settlement as one they arrived at together and have direct responsibility for creating. They own it. The mediation

process has given them the opportunity to communicate and gain a better understanding of each other. Most importantly, they have a platform from which to continue that communication afterwards and look forward to a new and better understanding of each other.

KAYAKING HAIDA GWAI

Haida Gwaii (formerly the Queen Charlotte Islands) comprises over 200 islands 90 miles off the British Columbia Mainland and 35 miles south west of the Alaskan Panhandle. The area, designated as Haida Gwanas National Park, is often referred to the Galapagos of the North. It is rich in marine life and old growth forests. It is the largest sea-land integrated conservation management area in the world.

The village of SGang Gwaay is a UNESCO World Heritage site and has the largest collection of standing totem poles in the world. It is a legacy to the Haida people who inhabited these islands for thousands of years.

The eight day kayaking tour which Ginny and I did this past summer is a true cultural and spiritual journey as well as an adventure in one of the most preserved, natural wildlife and marine life areas in the world.

I would be pleased to share information about this trip with any kayakers out there that may be interested,



HOW TO BECOME A FAMILY MEDIATOR

As a member of the Board of Directors of the Ontario Association of Family Mediators (OAFM), we offer many services and presentations to our members. One of these is a presentation on how to become a Family Mediator for anyone who may wish more information on the process.

On Thursday November 23, 2017 at 6pm, I will be hosting a presentation by our executive Director at OAFM, Mary-Anne Popescu. The one hour presentation will be at McKenzie Lake. To attend please contact my assistant Leigh Ann Eastwood at leighann@bluewatermediation.com or our phone number 519-670-6726.

BLUEWATER CONTINUES

As of December 31, 2017 I will be retiring from McKenzie Lake. After 42 years of practice I look forward to spending more time on my other outside interests.

I will continue my mediation and arbitration practice as Bluewater Mediation but outside of McKenzie Lake.

There will be no change to my Bluewater email address or the phone number.

I look forward to continuing to provide mediation and arbitration services in family law and estate litigation. Please contact me at malcolm@bluewatermediation.com for scheduling.

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