

**HOW MEDIATION CAN HELP GET RID OF
THAT UNRESOLVABLE FILE
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Probably you are familiar with the use of evaluative mediations in situations involving insurance claims, personal injury, wrongful dismissals and maybe even in commercial agreements. In these cases the mediator usually tries to work out numbers in an effort to settle somewhere between the opposing positions the parties present. But mediation can offer more.

Most lawyers have one or two files in the drawer which naggingly return to your calendar tickler every once in a while. These are the files which do not fit into the usual mould of litigation, or numbers-based or rights-based settlement. I am guessing there is one in your drawer right now.

Consider pulling it out of the drawer and setting up an interest-based mediation. It may be that the very reason this file has never really experienced the light of day is that the parties have been positional, and you have not found a way to resolve their differences. Or it may be that the issues do not easily lend themselves to legal remedies.

An interest-based mediation has the advantage of moving people away from rights and remedies and into their real underlying interests. In this process, we try to identify the real issues and turn the parties into a team working together to come up with solutions to those issues. This reduces the focus on each other and shifts the focus to solving the problem. You would be surprised how people can actually take real pride in coming up with creative solutions once the heat between the parties is diffused.

Take for example, an ongoing construction dispute. The parties were so hot at each other that they could not even settle the issues that were required to be arbitrated pursuant to the agreement. In a case of that kind, although it is unusual, a mediation has the advantage of bringing the parties together in a co-operative context to work out creative solutions without having to get

directions from a court in a matter that was never intended to go to court.

Speaking of court, consider the following matter. A religious institution owns a building and members have divided into two factions. One faction is in the building, and the other is out and worshipping elsewhere. The Board of Directors is a de facto group of lay members of the inside group, some of whom have never been elected. There has not been an election in over 10 years. The case has been in court for a few years without any real progress.

Does this sound like one of those impossible cases in your drawer? A case like this was brought to me for mediation. Through a series of sessions over a period of time, we have effectively been able to bring the two factions together through representatives working in harmony. We have been able to re-establish criteria for elections, and have dealt with many issues of governance. Effectively, the by-laws are being re-written in the course of the mediation to enact the achievements which have been made in each step of the mediation. Could a court ever make an effective order in such a case?

Another example of an unusual case that was going nowhere in court but that was resolved through a series of meetings and mediation, involved the erection of an over-sized headstone which offended the by-laws of the organization responsible for maintaining the cemetery. The deceased person was a young wife and mother who had immigrated to Canada from a cultural background which is very expressive. Her widowed husband expressed his grief in a permanent form by way of having a very large monument created with features which offended the rules of the organization responsible for maintaining the cemetery. The monument had somehow been erected but from the point of view of the responsible organization, could not stand because it broke not only with tradition, but with its rules and by-laws. It took down the monument. The widower was a member of an association that had rights of burial in the cemetery. He had sued. How could the court unwind the various responsibilities and make any effective order concerning the monument? A series of meetings separately, and together amongst some of the parties, led to a satisfactory

resolution for all. This involved modifications to the monument and its re-erection in a fashion that all parties could live with. At the same time, pre-existing relationships between the various parties were maintained. This is representative of the win-win result that so often occurs in interest-based mediation.

But this type of result is not limited to institutional parties. Take the case of two family members in a serious disagreement over the degree of care necessary for an elder member of the family. Each party had lawyers and there was a significant power differential and life-long differences between the siblings involved. Each of them and their spouses had powers of attorney for personal care in respect of the elder member of the family. Consider the number of ways in which differences could arise in such a case.

Notwithstanding all of the problems faced at the beginning of that matter, through the efforts of counsel the parties were brought to mediation along with their spouses. The first half of the day was spent with each of the parties addressing the mediator and not each other. But by midday the parties were speaking to each other in a positive fashion for the first time in a very long time, and beginning to work together with the mediator to a resolution of their differences. Issues that had been unresolved and made care management difficult for two years, were resolved in one day.

Interest-based mediation can be used not only in situations personal family differences or cultural differences, but also in situations involving different political philosophies, honest disagreements, and legitimacy issues where legal remedies do not really do the job.

If you have some of those unusual types of files sitting in your drawers which need your management, is it not time you considered an interest-based mediation?