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Perspectives on alternative dispute resolution for ADR parties and their lawyers.

Perspectives sur la résolution des différends pour les parties et leurs avocats.

September 2016 / *septembre 2016*

Open Mediations?
What Does Harvard Know Anyway?

Douglas F. Best

Open Mediations – conducting mediations in one room, with no breakouts and no mediator meetings unless both sides are present. That is what the highly acclaimed Harvard Mediation course is teaching. Counterintuitive, maybe. Does the approach however have gravitas – indeed! All disputes involve people (whether for themselves or on behalf of the corporations they represent), therefore all disputes involve emotion. In open sessions, emotion based impediments get addressed (with effective mediator management) clearing the way for negotiations in respect of the real issues, which in turn increases the likelihood of resolution.

The Surprise:
To my great surprise, by noon on the first day on a five day course, our class was being told and taught something different than expected:

Conducting mediations in one room, with no breakouts and no mediator meetings unless both sides are present!
How can this be?

Some underlying truisms:

1. all disputes involve people, therefore all disputes involve emotions;
2. with underlying emotions, humans (whether on behalf of themselves or the corporations who they represent), need to vent /deal with them to clear the blockages they cause and to permit necessary focus on the real issues and the settlement of them;

Some Core Principles to this Open (Non-Caucus) Approach:

1. Basic premise: the parties themselves are ultimately in the best position to determine the best solution(s) to a dispute since they are the ones who created and are advancing or living the problem (this focuses on **interest-based** negotiations as opposed to principle-based ones).
2. Fundamental reliance on the power of **understanding**: mediation through understanding (not through coercion). Conflicts are best resolved by working together (in contrast to caucusing), making decisions together, and by uncovering what lies under the level at which the parties experience the problem. As Einstein said: "you cannot resolve a conflict at its own level". Being together helps to foster an understanding of not only the issues but of each other, resulting in fewer incorrect assumptions and less attribution of improper motives or insincerity toward the other side.
3. The mediator's role is to be both active and interactive with the parties and to support the parties in their ability to make choices together based on their growing mutual understanding. A lawyer's role is less active, which, in/of itself, presents challenges.

Approach is Counterintuitive for Lawyers
The benefits and value of this open (non-caucus) approach is inherently challenging for us lawyers to accept. We are law-focused and tend to seek to control the process and our clients. Our default, is positioning and argument – we are trained to persuade decision-makers. However, mediations will only succeed if both (all) parties agree. The open approach has the parties centre stage, not the lawyers. The goal is to identify and expand the pie of favourable outcomes beyond the narrow confines of judge-ordered results.

The Open Approach is (Particularly) Challenging for the Mediator:
Because the parties are in one room throughout, there is a need to manage face to face expressions of: emotion, aggression, stubbornness, and a variety of other frictions. For this process to be effective, a mediator must be skilled in managing conflict. If successful in doing so, however, it is the expression of that very conflict that can serve to enable the parties to move on, to the real issues and in turn, find solutions.

A Draw-Back to Caucused or Closed Mediations:
One of the central problems with caucusing is that it is the mediator who ends up with the most complete picture (some of which must be kept secret/confidential) and is therefore in the best position to resolve it. This naturally lends itself to the mediator urging or manipulating the parties to the end he or she shapes. That process, in of itself, can cause the parties to mistrust the mediator, to the extent he or she seems to be advocating for one of the parties. An open mediation can engender much more trust with its complete transparency in the process.

The Process:
1. Explore what underlies the substance of the conflict. Identify what is truly important to each in the dispute - not only what they want but why they want it. A deal is much more likely to be struck if there is something in it for everybody.
2. Work with the parties to understand what underlies their conflict in terms of how it may have trapped them in their dynamic. Conflicts are rarely just about money. They also have a subjective dimension: the emotions; beliefs and assumptions of the individuals stuck in the conflict. It is critical to understand both dimensions, and their relationship to each other. Put simply: to resolve conflict you must understand it.
3. The "law" naturally still has a place in all of this. However, it is but one component in fashioning (with their assistance of their professionals) the parties' own creative solutions that may differ from what a court might decide – again and ideally so there's something for everybody.

Final Thoughts:
1. While not for all types of disputes, it is suited to more than one might, at first instance, think. It is a real alternative which has a real place. For those with reticence, it is perhaps worthy to note the massive resistance and reluctance 30 or so years ago to mediation generally.
2. It does not have to be all or nothing, and can be altered or adjusted midstream. Mediations can also certainly proceed on a hybrid basis or be entirely closed. The learned mediator skills apply regardless.
3. 3. So, to come back to where I started: "What Does Harvard Know Anyway"? – a lot!

Douglas F. Best is a partner at Miller Thomson LLP, with a commercial litigation practice spanning 30 plus years. He is being retained increasingly as a (Harvard Certified) mediator to assist parties in resolving their disputes.