



Romanowski Law Offices

Eleventh Hour Divorce Facilitation

by Curtis J. Romanowski, Esq.

Mediation and most other forms of alternate dispute resolution are typically employed in advance of the Court process. Mediated agreements, for example, might limit the parties' involvement with the Court to placing the Matrimonial Settlement Agreement on the record, voir dire on the agreement and cause of action, and putting the divorce through on an uncontested basis.

Eleventh hour divorce facilitation, shortly before a scheduled Trial date, differs greatly from divorce mediation convened early on in a case. When mediation is attempted before any litigation begins, the parties often attend without their attorneys. The mediator tries to help the parties reach an agreement by promoting a resolution of the issues.

In such situations, employing the widely used facilitative mediation approach, the mediator must be very careful not to provide legal advice to the parties. This is difficult, particularly where the mediator is an attorney. Although attorneys usually do not attend mediation before or during the early stages of litigation, it is generally advisable for the parties to consult with legal counsel prior to participating.

Later in the litigation, attorneys are usually a part of the mediation or facilitation process. This is also true of Progressive⁷ Divorce and Collaborative Law approaches. This allows the mediator/facilitator to approach things in a somewhat different way. The mediator/facilitator can be creative in discussing alternate resolution options with the attorneys, as well as with the parties. The attorney mediator/facilitator does not have to be as concerned regarding the perception by a party that the mediator is giving legal advice when the parties' attorneys are in attendance.

The mediator/facilitator, employing a form of shuttle diplomacy, can caucus with each side individually, allowing separate discussions to take place in confidence. This is particularly important with Trial coming up and the need to preserve the unknown elements of certain litigation strategies.

Shuttle diplomacy also allows the mediator/facilitator to buffer non-productive emotional responses, particularly since emotions often run high this late in the litigation. Separation is usually mandatory where there are Domestic Violence restraining orders in place, and advisable where there are power imbalances between the parties.

An eleventh hour mediation/facilitation can bring a fresh outlook to the case. By the time a case is on the brink of trial, even the attorneys may be emotionally involved or overly sensitive to the issues in the case. The parties are usually well entrenched within their respective positions. The mediator/facilitator has a fresh viewpoint, more objectivity and less ego investment in a particular set of positional aspirations. The relative lack of competitive motivation and fear of loss on the facilitator's part breeds creative thinking and problem solving.

Opportunity for solution advancement always accompanies neutral third party assessments and observations during the course of pending divorce and custody matters. This is one of the reasons why Early Settlement Panel projects in use in many States have been so successful in fostering case settlement. In some cases, an adversary may be providing inaccurate legal advice to the client. In other cases, an attorney may have a client who will not listen to advice. The mediator/facilitator can help in both situations by providing a competent outsider's prospective.

While the list of advantages characteristic of cooperatively derived solutions to disputes is as long as the list of disadvantages associated with litigated outcomes, the costs and trauma of litigation can never be overlooked as an important reason for opting out of it.

Taking Your Case to Eleventh Hour Mediation/Facilitation

The first step involves deciding what variety of mediation style is best suited to the particular case, as well as what the professional qualifications of the dispute resolution professional should be. Some mediators are practicing family lawyers; some are not. Facilitative mediators view their role as empowering the parties to reach a resolution without imparting their viewpoints, while evaluative mediators take a more direct approach and will participate actively in the resolution of the issues. This is particularly true where the mediator/facilitator is a family lawyer. Generally, the latter style is likely to be the most effective in a case which is going to mediation on the eleventh hour.

Both before and following the selection of the dispute resolution professional(s), clients should be oriented to how mediation/facilitation works, both generally in specific. Clinging to bargaining positions must be discouraged and even identified as one of the reasons settlement had not already been reached. Clients should be directed to concise, understandable texts and articles on effective negotiation and conflict negotiation practices. They must likewise be given guidance concerning the manner in which they should communicate during and problem solving sessions, in order to avoid unproductive exchanges and personal slights.

Clients should always know their ultimate objectives, and what the value of each is to them, now and in the future. They should always be challenged whenever their perception of relative value might be distorted by the tensions of the current situation.

Once the eleventh hour mediation/facilitation session has been scheduled, clients and attorneys alike must set themselves up for success by preparing and committing themselves to adopt attitudes and behaviors consistent with the spirit and objectives of collaborative problem solving. Sun Tzu's *The Art of War* and Carl von Clausewitz' *On War* should be shelved in favor of the counterpoint of Christ, Buddha and Gandhi, to name but a few.

- CJR

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