New Jersey's Civil War in Divorce Mediation

by Curtis J. Romanowski, Esq.

The first step in the process of despising something is to label it. There are countless mediation models, many of which come with their own labels; such as team mediation, transformative mediation, etc. Most of these, and their practitioners, can be described as either facilitative or evaluative in approach. The ideological debate between the members of these two camps is a heated one, which, in many cases, has degenerated into "I'm right, you're wrong" thinking.

Facilitative mediators may describe their role in terms of assisting disputing parties in making their own decisions and in evaluating their own situations. Even when the facilitative mediator is a divorce lawyer, retainer agreements typically contain language to the effect that legal advice and representation are not part of the mediator's job and will not be provided, notwithstanding the fact that the mediator is a practicing attorney. The agreements often go on to advise or even insist that the parties retain their own attorneys to consult during the mediation.

From a facilitative mediation perspective, the observer should not be able to detect that the mediator is an attorney. Interestingly, facilitative mediators who are attorneys are indeed practicing law when they are mediating or even discussing the concept, even if you wouldn't know it by watching them in action. See Ethics Opinions 657 and 676.

Evaluative mediation, by contrast, includes fact-finding and some assessment of how certain facts correspond with the law to yield a likely range of possible outcomes, should negotiations break down. A breakdown of the bargaining process would result in the parties having to resort to their "best alternative to a negotiated agreement;" what Roger Fisher and William Ury have termed the "BATNA".

The parties' BATNA following a failed mediation involves either going to court or to binding arbitration. When an attorney mediator taking an evaluative approach fails to resolve the dispute, the parties can exit the mediation with the benefit of that attorney's assessment of the likely range of outcomes litigation would provide. Non-attorney mediators may not include in their evaluative methodology any legal analysis, education or advice without engaging in the unauthorized practice of law.

Members of the facilitative camp are often heard to describe the classic role of the evaluator to include making decisions and giving opinions with respect to the merits and likely outcomes of disputes, using predetermined criteria to evaluate evidence and arguments presented by adverse parties. The evaluative mediator's tasks would include finding facts by properly weighing evidence, judging credibility and allocating burden of proof, determining and applying relevant law, rules or customs and rendering an opinion.

Based upon that initial premise, some facilitative purists go on to conclude, evaluatively, that the evaluator's tasks not only divert the mediator away from facilitation, but can compromise neutrality in actuality or in the parties' eyes by providing an evaluation or opinion of the case.

Many argue that evaluation promotes positioning and polarization, which are antithetical to the goals of mediation. In the evaluative context, some opine, where the parties go to the mediation anticipating an evaluation of their case, they are more likely to take a positional rather than a collaborative approach to the mediation process.

Criticism

Critics of the evaluative approach suggest parties are more likely to not fully disclose their positions in that context, even though the information provided in mediation is clearly confi-dential

and not to be used in subsequent proceedings unless it is otherwise discoverable. They submit that parties also tend to perceive the lawyers' vs. their own roles in a "classic light", which some describe as one where the lawyer is the decision-maker controlling the process and the client is a passive party who does not participate in the decision-making process.

Facilitative mediation is not without its shortfalls, despite the fact most mediation training under way in New Jersey is currently based on the facilitative model. Despite the urgings of the facilitative mediator that both parties "lawyer up" during the mediation phase, many couples opting for mediated solutions are hoping to avoid or curtail costly lawyer involvement and won't do so until the unsigned memorandum of understanding (MOU) is delivered. Many parties tell their mediator at the outset that all they want is what they are entitled to under the law - nothing more and nothing less.

While facilitative mediators often define their roles to include facilitating communication, promoting understanding of the issues, focusing interests and creative problem-solving, including creative solutions outside the legal normative box, there can be little doubt that most parties want to know what the box looks like.

Eventually, when they hire independent attorneys to review their MOU, some divorcing parties are shown the reality of the shape of the box for the first time. At that point, many are advised by their lawyers that the mediated agreement negotiated outside the box could leave them with little recourse but to live in one!

Another issue, particularly in facilitative mediation, is the ridiculous amount of time and expense that can go to waste when there is no way to get across to the delusional party that a marriage of 30 years with grossly disparate incomes, six kids, undeniable need and ample ability to pay might just be one requiring permanent alimony.

If the mediation breaks down due to one of the parties' legally indefensible position, wouldn't that unreasonable party want to know that Rule 5:3-5 (c)(3), which deals with the award of attorney fees, clearly provides that "the reasonableness and good faith of the positions advanced by the parties" is to be considered by the court in determining the amount of a fee award?

Finding "the way"

In point of fact, neither camp in the mediation wars has a stranglehold on the "the way." For guidance, one may turn to an unlikely source: Miyamoto Musashi's 16th century classic, A Book of Five Rings.

One of Japan's most renowned warriors, Musashi's writings are, by his own description, "a guide for men who want to learn strategy." Few can argue the merits of strategy in the mediation setting.

Musashi was an advocate of using all weapons at one's disposal. He explained the advantages of using both the long sword (worn only out-of-doors) and companion sword (a shorter sword carried at all times and kept at the bedside during sleep).

"This is a truth: when you sacrifice your life, you must make fullest use of your weaponry. It is false not to do so, and to die with a weapon yet undrawn." According to Musashi□s Ichi school, you can win with a long weapon, and yet you can also win with a short weapon. In short, "the way" is the spirit of winning, whatever the weapon and whatever its size - facilitative or evaluative.

Musashi counsels against inflexible preferences. Addressing the best uses of the companion sword, long sword, halberd, spear, bow and gun, he said, "You should not have a favorite weapon. To become over-familiar with one weapon is as much a fault as not knowing it sufficiently well. You should not copy others, but use weap-ons you can handle properly. It is bad for commanders and troopers to have likes and dislikes. These are things you must learn thoroughly."

These are words for the ages. In divorce mediation, our weapons are the tools or approaches and the enemy is the unresolved dispute. Arguments over approach, facilitative or evaluative, are

grist for polarization within our profession. In the context of alternative dispute resolution, such a debate is ironic, at best.

For those of us aspiring to Musashi's wisdom in plying our trade, achieving the "way" to excellence includes:
- Thinking honestly.
- Embracing continuous training.
- Becoming acquainted with every art and approach.
- Knowing the ways of all professions and disciplines.
- Distinguishing between gain and loss in worldly matters.
- Developing intuitive judgment and understanding
- Perceiving those things that cannot easily be seen.
- Paying attention even to trifles.
- Doing nothing that is of no use.

CJR

Curtis J. Romanowski. is a divorce and custody law practitioner in Metuchen, president of the Collaborative Family Institute, L.L.C., and developer of the Progressive Divorce approach to ADR. His column appears regularly in The Matrimonial Strategist.

New Jersey Divorce Lawyer
Romanowski Law Offices
475 Main Street - 2nd Floor
Metuchen, NJ 08840

Phone: (732) 603-8585
(732) 603-0999

Fax: (732) 603-8580

info@divorcenewjersey.com

Serving Middlesex, Monmouth, Somerset, Hunterdon, Union, Essex, Bergen and Ocean Counties.