FAMILY LAW MEDIATION

AUGUST 29, 2024

TIMING IT: LOOK FOR THE "JUST RIGHT" ZONE

- Tension in scheduling: earlier minimizes litigation costs vs. later permits fully developed facts.
- The "just right" zone: Not so soon that you don't know enough to reach agreement, but not so late that sunk litigation costs impede settlement.
  - Both sides need to have enough information to:
    - Intelligently assess all angles of the case, and
    - Make a difficult decision.
  - Don't sandbag the other side: Likely to undermine mediation.
  - Secure what you need, and produce what the other side needs, before scheduling your mediation.

CHOOSE MEDIATOR WHOSE STYLE WORKS FOR YOUR CASE

Think about style or combination of styles of mediation will best serve your case and client

FACILITATIVE MEDIATION

Facilitative mediation focuses on helping the parties identify their common interests and work towards finding solutions that meet everyone's needs. The mediator controls the process but does not offer any opinions or suggestions.

- Pros: Parties have more options available to resolve differences and have more influence over the outcome. The focus on common interests can lead to creative solutions that benefit both parties. Facilitative mediation can be less expensive than other styles since it requires fewer resources.
- Cons: It may not be effective for cases where one party has significantly more power than the other. Disputes that require legal expertise may not be resolved fully through facilitative mediation alone.

INFORMATIVE MEDIATION

Informative mediation involves a mediator who provides information about legal rights and responsibilities to help parties make informed decisions about how to resolve their dispute. Practitioners often use this style in cases involving complex legal issues. It provides less intervention than evaluative mediation but more than facilitative mediation.

- Pros: Parties have access to expert knowledge to help them make informed decisions. Legal complexities can be addressed without going through a formal legal process. Informative mediation can save time and money compared to going through formal legal channels.
- Cons: Parties have fewer avenues to reach resolution if options are limited by legal complexities. Parties rely more on expert input which can be contradictory. It may not address relational and emotional issues that are *de facto* obstacles to reaching an agreement.

EVALUATIVE MEDIATION

Affording the most mediator intervention of all the mediation styles, evaluative mediation involves a mediator who offers opinions or suggestions based on their expertise in law or other relevant fields. This style is often used in cases where there is little chance of reaching an agreement without outside input. The favorite mediation style of retired judges, professionals often used evaluative mediation in court facilitated settlement conferences.

- Pros: Parties receive expert guidance that can lead to efficient resolution of disputes. Evaluations can provide clarity on complex legal issues. This style may result in faster resolutions compared to other styles since it relies on expert opinions rather than lengthy negotiations.
- Cons: Options are limited to those available from the Court. It may feel less collaborative because the mediator may have more influence over the outcome due to their expertise. There is a risk that one party may feel pressured into accepting an outcome they do not agree with due to deference given to expert opinion.

PREPARE YOURSELF: KNOW YOUR CASE (THE GOOD, THE BAD AND THE UGLY)

- Avoiding getting caught in self delusion: It does not serve you or your client to get so enamored with your narrative that you cannot see your case's flaws or pitfalls.
  - Facts may feel compelling, but may be of limited value if you will have trouble proving them or if the law constrains their use.
  - Law may feel compelling, but may be of limited value if the cases are equivocal or the court has broad discretion.
- The rosiest litigation outcome may not be worth the cost of the fight.
- Try to see your case from the other side, to assure you are realistic in your assessment of its merits and the costs of getting there. No one makes a settlement where they get nothing that they need.
- Prepare draft Settlement Agreement or MOU to fill out as Mediation progresses.

PREPARE YOUR CLIENT

- This can be the most challenging part of preparing for mediation.
- Parties sometimes seek emotional closure, especially in cases involving family law.
- Closure is a myth. There usually is no litigation “happily ever after.” There is just after.
- Explain benefits of successful mediation versus litigation:
  - Litigation is expensive; mediated agreement reduces costs.
  - Litigation outcome uncertain; mediated agreement brackets risk and outcome is in parties' control.
  - Litigation takes time; mediated agreement ends or confines the dispute.
  - Focus on the future: Mediated agreement lets client get on with their life. Is it more important to be "right," or is it more important to be "done?"
- Often in a good settlement, both parties are unhappy. It is the attorney's task – after taking an honest look at the case – to manage client expectations so that they see the mediation as the business decision it (usually) is, and are looking for closing, not closure.
- Feelings will cloud a client's judgment. Focus on what are the expected benefits to the client from reaching any particular set of settlement terms (contrasted with the expected detriments to the other party), as compared to cost, risk and uncertainties inherent is allowing a third-party to make life-altering decisions for them.
- Help your client understand the risks, the realistic odds of different outcomes, and the cost in time, energy and money of chasing an uncertain result.
- Clients who are informed and realistic, ready to collaborate and compromise, and can see beyond the fight to the enormous relief of getting to the other side, will be most able to resolve their case.

PREPARE THE OTHER SIDE

- Exchange settlement proposals, or at least bullet-point term sheets, in advance. Don't editorialize.
- Exchange mediation briefs.
  - The more you share with the other side, the more they can appreciate your negotiating position and can create mutually beneficial proposals for settlement terms.
  - The more you share with the other side, the more quickly the mediator can help the parties get to resolution.

PREPARE YOUR MEDIATOR

- Take advantage of pre-mediation conference to share insights about client style, needs, back story, obstacles to settlement.
- Mediation Brief:
  - Avoid giving too much background material – only what really is necessary for mediator to understand the issues.
  - Provide history of negotiations to give mediator context.
  - Recite issues that have been resolved, explain issues that need mediator's assistance.
  - Set forth your client's REASONABLE starting proposal for resolution.

CONDUCTING MEDIATION

- Goal: Leave with signed agreement. Have draft MOU/settlement agreement prepared in advance, have technology available to revise in real time.
- Don't confuse drafting/process issues with failure to agree on terms.
  - Select process to be used rather than get bogged down on selection in mediation (e.g., one party propose three professionals [CPA/appraiser/realtor], other party selects one)
- Kick mediator out as needed to reorient client, discuss next proposal.
- Remind client to keep eye on ball – priorities are to minimize cost and risk of keeping in the fight, to reach resolution that both sides can live with.
- Manage (but don't ignore) emotions.

AFTER MEDIATION

- Follow through quickly: Circulate draft documents if agreement reached but not inked.
- If mediation not successful, talk to opposing side to see if resumption after a cooling off period is a possibility.
- Keep mediator in the loop.
  - Seek additional help where needed.
  - Let mediator know when to close the case.
- Consider using private judge to sign judgment – rewards clients and brings finality.

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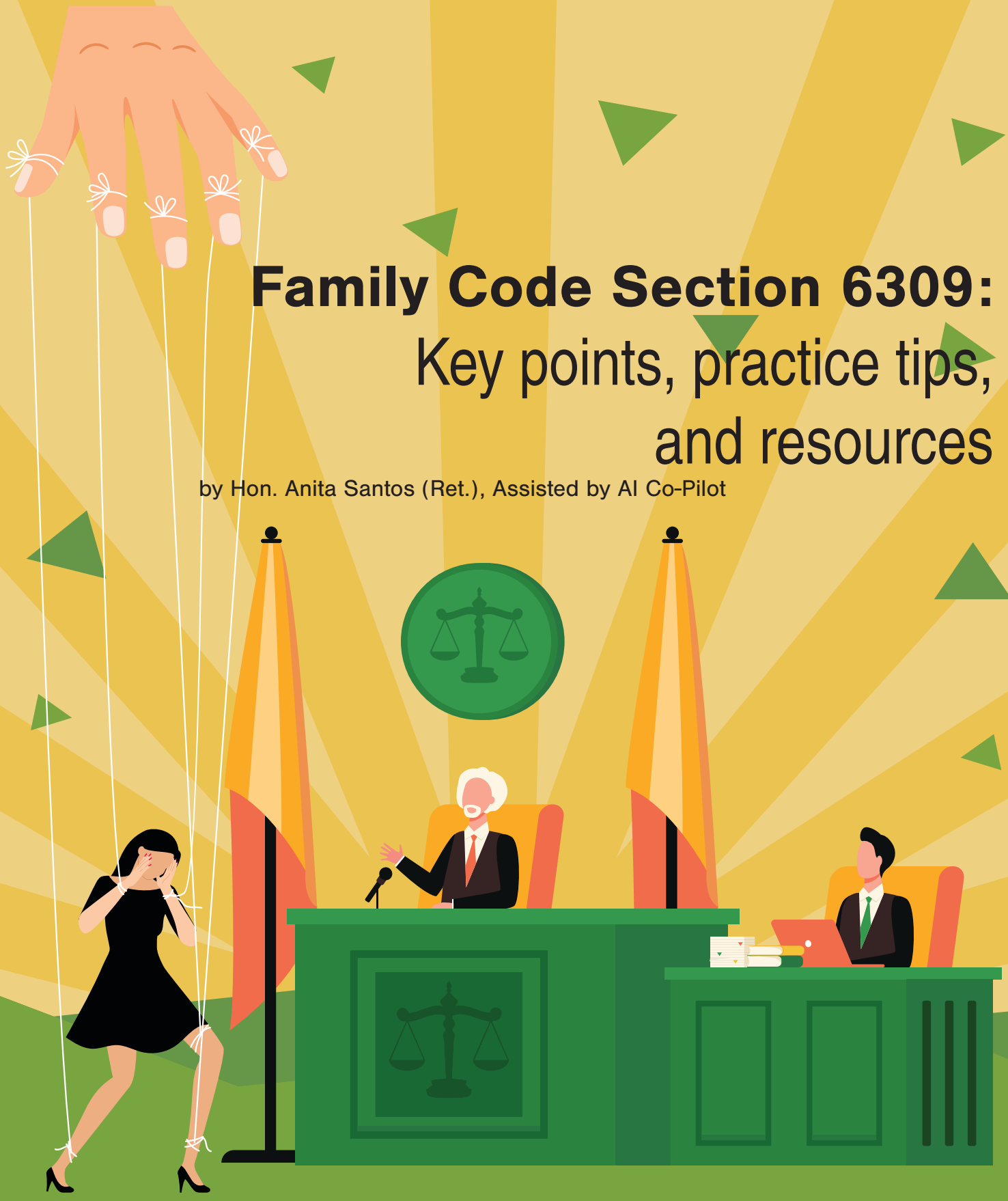
Family Code Section 6309:
Key points, practice tips, and resources

by Hon. Anita Santos (Ret.), Assisted by AI Co-Pilot



LITIGATION ABUSE

The California Legislature recently enacted Family Code Section 6309, under the Domestic Violence Prevention Act (DVPA).

After declaring DV is an *"urgent public safety and public health crisis,"* citing statistics and studies, the legislature enacted Family Code Section 6309[1] to remedy what it described as *"litigation abuse."* The legislature reasoned that domestic violence survivors who seek protection often face ongoing abuse in the form of litigation abuse.

It defined *"litigation abuse as the use of legal or bureaucratic procedures by abusive partners to continue to attack, harass, intimidate, coercively control, or maintain contact with their former partners through the litigation system"* [FC § 6309(a)] and concluded that *"this can lead to severe consequences for survivors, including economic hardship and psychological harm."*

Section 6309 introduces the concept of **pre-hearing discovery** to streamline any domestic violence restraining order discovery, *"intended to expedite the adjudication of requests for restraining orders and prevent abusive litigation tactics."*

To put it mildly, there are concerns about the potential for revictimization through discovery abuse, while others believe that Section 6309 protects against such risks. The law aims to strike a balance between preventing litigation abuse and ensuring each party has the necessary information for their case.

Family Code Section 6309(c)(1) provides that the court may grant a request for discovery only upon a showing of good cause. The court's interpretation and application of the "good cause" requirement is the obvious point of contention and potential legal challenge. Section 6309 requires the court to consider several factors, including the importance and relevance of the information sought, the likelihood of obtaining the information through other methods, the potential delay in the hearing, and the potential for inducing trauma.

Key points of Family Code § 6309:

1. Limited civil discovery is permissible in DVPA proceedings. [FC § 6309(e) & (f)]
2. Discovery is not "of right" but may be permitted *"only for good cause shown."*[2]
3. A party may seek such discovery at the evidentiary hearing, but not before, and can be requested orally or in writing.[3]
4. The court has vast discretion whether to permit such discovery and the terms and conditions under which it may be pursued.[4]
5. Nothing in Section 6309 precludes or inhibits counsel from meeting and conferring in advance of the hearing about discovery nor to agreeing to permit such discovery.
6. Among the tools available to the court is to start the hearing, receive a portion of the evidence (e.g., the Petitioner's case in chief) and then suspend the hearing for a short duration to permit appropriate discovery.[5]
7. If granted, the discovery is limited to the *"least intrusive methods and the minimum number of items reasonably necessary to secure the requested information."*[6]
8. The abuse survivor (the language used in the code) is entitled to a copy of the police report.[7]

Types of Discovery that May be Permitted by the Court:

1. **Interrogatories:** In the context of a domestic violence case, interrogatories are likely to ask the respondent to list all instances of alleged abuse or to explain their relationship with the petitioner.
2. **Requests for Admission:** The requestor might ask the respondent to admit that they sent threatening text messages on a specific date.
3. **Requests for Production of Documents:** In a domestic violence case, this could include medical records, police reports, or text message histories.
4. **Depositions:** One party may depose the other to gather more information about the alleged abuse.

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Family Code Section 6309

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5. **Financial Discovery:** Reminder, if support is requested as part of the DVPA action, limited financial discovery is already required (the FL-150 and requisite attachments).

Remember, the stated goal of prehearing discovery under FC § 6309 is to expedite the adjudication of requests for restraining orders and prevent abusive litigation tactics.

Tips and Strategies:

1. Meet and confer regarding discovery!
2. Prepare a detailed and concise discovery plan/opposition—individualized and fact specific that includes an offer of proof supporting the request.
3. Attach proposed, customized discovery that is precise and targeted - do not use boilerplate forms or language.
4. If a deposition is sought, explain why written discovery requests are insufficient and outline the areas of inquiry, proposing the least intrusive means (e.g., virtual forum, time limit).
5. Articulate how you will minimize the delay needed to obtain the discovery.

California DVPA Resources:

1. **Judges Guide to Domestic Violence Restraining Orders** (2023)[8] This guide provides a comprehensive overview of restraining orders, including those under the DVPA. It covers everything from the definition of abuse to jurisdiction and venue considerations.
2. **Case-Annotated Compendium of California Domestic Violence Laws** (2023)[9] This compendium provides an annually updated list of about 600 DV-related laws in California, including case annotations.
3. Judge Lawrence P. Riff, Los Angeles County Superior Court, **A New DVRO Law Allows Limited Civil Discovery but with Careful Checks and Balances (2024)** *Daily Journal*[10] This article provides a comprehensive discussion on the practical aspects of Family Code Section 6309.

Setting aside the debate regarding the intent versus the result of this legislation, it is here and we are bound to implement our best practices. Let's do so!

››***Hon. Anita Santos (Ret.)*** *joined ADR Services, Inc. as a neutral after 10 years in the judiciary as a Commissioner, then Judge in Contra Costa County, presiding over diverse family law cases including domestic violence matters. Prior to her elevation, she was a sole practitioner in an active and successful family law practice. Case Manager: katyteam@adrservices.com*

This article was reprinted with permission from the Contra Costa County Bar Association (CCCBA). It was originally published in the July 2024 issue of Contra Costa Lawyer magazine, a publication of the CCCBA. You can view the original online here: https://www.cccba.org/article/family-code-section-6309-key-points-practice-tips-and-resources/