Improving Mediation:

Macro and Micro

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Education

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B.A., Washington University (St. Louis) J.D., Southern Methodist University CFP, College of Financial Planning Dallas Bar Association Mediation Training E.T.S.U. - 24 hours training in Family Mediation Co-Mediation Training (Dallas Bar Assn.) Advanced Negotiation and Mediation (CDR Associates)

Marriage Dissolution Seminar (State Bar of Texas)

Advanced Family Law (State Bar of Texas) Advanced Negotiation (State Bar of Texas) Advanced Family Mediation (DMS) "Getting to Yes" with Roger Fisher (Harvard U.) Family Law Mediation (DMS) Advanced Mediation Training (AAM) Negotiation Workshop (Southwestern Legal Foundation) Effective Legal Negotiation and Settlement (DBA) Marriage Dissolution Seminar (State Bar of Texas) Estate Planning: Advanced Drafting (State Bar of Texas) Advanced Negotiation Skills Marriage Dissolution Seminar (State Bar of Texas) Advanced Family Law (State Bar of Texas) Advanced Family Law (State Bar of Texas) Advanced Family Law (State Bar of Texas) Advanced Family Law (State Bar of Texas) Advanced Family Law (State Bar of Texas) Advanced Family Law (State Bar of Texas) Advanced Family Law (State Bar of Texas)

2001
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Employment

1980-87 Shields, Blankenship, & Noble, P.C.
1987 Law Offices of Thomas Noble, P.C.
2009 Adjunct Professor - SMU *(Ethics and Dispute Resolution)*
2011 Coaching with Wisdom

Memberships and Affiliations

American Bar Association
Dallas Bar Association
ADR Section (Vice-Chair, 1998; Chair, 1999)
State Bar College (1989-)
Association of Attorney Mediators - past member, past Director
(Co-Chair, Family Section, 1993, 1995; presented *Family Law Mediation,* 1998, 1999)
Society of Professionals in Dispute Resolution - past member
Dallas Family Courts Pilot Project (Chairman of Criteria Team)
International Board of Certified Financial Planners - past member
Institute of Certified Financial Planners - past member
Association of Family Mediators (President, 1995, 1996) - past member
Dallas OK Commission (Treasurer, 1998-1999) - past member

Publications and Presentations

Anticipating Divorce (1990)
How to Resolve Any Family Law Dispute (Dallas Bar Assn., 1993)
Preparing for Mediation. Dallas Bar Assn. (Dallas Bar Assn., 1993)
Do's and Don'ts of Marketing Family Law Mediation (Dallas Bar Assn., 1994)
How to Select a Mediator ("The Advocate", 1994)
The Role of the Advocate in Family Law

*Mediation (*1994) o *Optimizing Wealth (*1995)

The UPL Issue (Texas Association of Mediators, 1995) 0 A*dvanced Family Mediation Training* (DMS, 1995) o *Negotiating Divorce* (1996)

Efficient Resolution of Family Law Disputes (Dallas Bar Assn., 1996) o *Objections to Mediation* (1996)

Optimizing Wealth: Financial Planning For Lawyers (State Bar of Texas, 1996-97) *A Ten Minute Tour Through the Texas Disciplinary Rules of Professional Conduct* (Dallas

Bar Assn., 1997) o *Interspousal Torts: Unique Problems for the Mediator?* (Texas Association of Mediators, 1997) *Basic Financial Planning as part of Your Professional Responsibility* (State Bar of Texas, 1997) *Marriage, Kids, and Money: Evaluating Your Family Law Case for Mediation (*Dallas Bar Assn., 1999; Texas Association of Mediators, 2001).

o *Characteristics of the Master Negotiator* (Dallas Bar Assn, 2000; 2001). O *Negotiating Wise Agreements? (*Association of Attorney Mediators, 2012). *Binding Decision Provisions in Mediated Settlement Agreements* (Dallas Bar Association, 2012).

Not certified by the Texas Board of Legal Specialization

Improving Mediation:

Macro and Micro

Introduction

Wake up and be skeptical! Throw away your soma!

We should be having an ongoing discussion on how we can improve our ADR systems (e.g.

mediation, arbitration, cooperative lawl, and collaborative law). Many are relatively new and deserving of scrutiny. If you are interested in discussing how we can improve family law ADR, please contact me: tom@tnoblelaw.com.

For the most part, I will restrict my comments to mediation in family law cases in North Texas. I will address both the "macro" and the "micro" aspects of mediation.

I will give a brief description of how the mediation system has evolved, state several current problems, and give proposed solutions,

I will encourage you to improve your negotiation skills and provide suggestions on how to do that.

Finally, I will provide a laundry list of practical tips. This is the "micro" portion of the paper, which I have broken down into three levels.

Macro

Reminder - why mediation is effective:

1. People/litigants are more satisfied with negotiated agreements than they are with orders imposed upon them.

2. People/litigants are more likely to comply with agreements than orders.

1 Cooperative law is less well-known than the other three, but, in my opinion, ripe for development. The Legislature has paved the way by passing section 6.604 of the Texas Family Code, authorizing informal settlement conferences. Those who are interested should review *In re Mabray*, 355 S.W.3d 16 (Tex.App. Houston [1st Dist] 2010, orig.

proceeding).

3. If applied properly, mediation should:

a. Save money.

b. Reduce stress.
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c. M**itigate, if not prevent, litigation.**

d. Empower the parties to resolve their own disputes.

Before we evaluate our current application of family law mediation, and as a reminder that the way we mediate now is not necessarily the only way to do it, it may be helpful to review the various competing methods of applying mediation and how family law mediation in this area has evolved.

Empowerment v. Evaluative Models: Visualize a pendulum. On one end, we have a method for dispute resolution that empowers the parties to the greatest degree to formulate their own solutions to their problems; on the other end, we have a method in which the mediator is opinionated, directive, and, in some instances, adjudicatory3.

Near the *empowerment* side of the pendulum, the mediator's function is primarily

facilitative.

Near the *adjudication* side of the pendulum, the mediator is highly evaluative. The mediation is more of a *case evaluation* than a negotiation. In some instances, the mediator may adjudicate some of the issues.

Lawyer v. Mental Health Model: Change the graphic from a pendulum to a matrix. Add to the empowerment axis and the adjudicatory axis, the *lawyer model* and the *mental health model*[4]

In the early days of mediation, mediators applied each of these four models, searching for the most effective mix. As mediation evolved, the lawyer model, modified to suit family lawyers, with its preferences for caucuses, the exclusion of joint sessions, and preparation of the MSA by the mediator instead of the parties, prevailed over the mental health model,

? In my opinion, this is the most important goal. 3 If the mediator/neutral is adjudicating *all issues*, this form of dispute resolution would more correctly be called an arbitration. 4 My terminology. I call this the "mental health model" because many of the practitioners of this model were mental health professionals, although not all were.

exterminating it, for all practical purposes - sort of – temporarily. The lawyer model currently dominates family law mediation. What's wrong with that?

Problems with the lawyer model: One of the primary weaknesses of the lawyer model is that, typically, the lawyers decide w*hen* to mediate, a critical decision in the dispute resolution process.6

Many lawyers delay mediation because they believe that proposing it indicates weakness, because they are scared to settle cases for economic reasons, or because they believe that brinksmanship is an effective negotiation tactic. Under the current system, it is common for lawyers to refuse to mediate until they “complete discovery".*7*

Completion of discovery (1) is expensive; (2) is time consuming; (3) often involves a number of relatively expensive tactical battles along the way; (4) can be illusory; and, (5) if it ever happens, is usually not until the parties are near the time of trial.

The lawyer model has become increasingly evaluative, to the point that one could argue that it has lost touch with the fundamental rationale for mediation. We have evolved from an experimental system with a potpourri of mediation models in the early 90s to a system that (1) now ranks somewhere between highly evaluative and a quasi-arbitration, losing touch with the basic rationale for the mediation process, especially the empowerment aspect:8 (2) is relatively expensive: (3) may be less stressful than a trial, but is still much more stressful than it needs to be; and, (4) may mitigate litigation to some extent, but not as much as it could.

Typical Mediations under Current System:

The universe of family law mediations can be divided in two: (1) both parties show up prepared to close, or (2) they show up unprepared and hope for the best.

Mediators most often complain about unprepared advocates. For those cases, I give advice about preparation below.

5 The mental health model accepted modifications and resurrected itself in the form of collaborative law.

6 Courts will nudge and order mediation but, for the most part, the lawyers control the timing of mediation. I am curious whether most lawyers even discuss this issue with their clients. 7 This is because they see mediators only as "closers", as described below. In fairness, however, many lawyers schedule mediation after they have completed discovery - but for depositions, which is typically the most expensive phase of discovery. BI expand on this topic in my paper, “Binding Decision Provisions in Mediated Settlement Agreements", which interested persons can find at www.negotiatewithwisdom.com.

For most others, it goes something like this:

1. After months of hearings and relatively extensive discovery, the lawyers schedule a day of mediation with a former judge; 2. the mediation begins

with caucusing;9 3. caucuses often last for hours, resulting in an inefficient use of time for first one party and then another; 4. the negotiation is exclusively competitive; 5. this continues throughout the day and sometimes well into the night in a marathon ("bop-til-you-drop") mediation session during which the parties and their lawyers attempt to resolve all issues no matter what the status of the case; 6. the mediator often serves more as a case evaluator than a facilitator; 7. after a long day, the mediator prepares an MSA; 8. feeling pressure for a number of reasons, and tired, if not exhausted, the parties and their lawyers sign an MSA; 9. the MSA includes some form of a binding decision provision ("BDP"), which provides that the mediator will adjudicate drafting disputes that arise between the date of the mediation and the date of rendition.

How do people feel after this experience? If you, as a lawyer, are worn out after a day like that, imagine how your client must feel, he or she who has never been through it before and has much more at stake than you do.

Have we *increased or decreased the overall stress* of those who find themselves in "divorce hell" with no GPS?

7 Specific Problems:

1. By scheduling mediation later, rather than sooner, in the litigation process, we **create *negative momentum*:** a pattern of problem solving through conflict rather than cooperation.

2. By using mediators as ***closers***, in many cases we fail, in large part, to mitigate litigation costs.

3. **Marathon mediations (a) *increase stress*, (**b) fail to allow for **"acceptance time**"10, (C) often result in ***buyer's remorse,*** and (d) violate the ***moderation rule,***

which can be found in every wisdom tradition 11

9 In the orthodox form of the lawyer model, the mediation begins with a "joint session" where all of the parties sit around the table and state their positions and the mediator explains the process.

10 According to Stuart Diamond, "Incremental is best." ("Getting More" at p. 7.).

4. The ***by-the-day approach*** **is relatively expensive.**

5. ***Long caucuses*** **are an inefficient use of resources.**

6. Competitive negotiation styles typically A*cceptance Time* ***increase stress*** relative to a cooperative approach. Acceptance time is an important concept. Everyone **always *violate ethical rules. 12*** **learns** something during a negotiation. It takes **Proposals:** time to digest it and change one's bargaining position accordingly:

7. **Mediators who become adjudicators almost** How do we solve (or mitigate) these problems*?*

1. Early-intervention mediation in which we reframe the role of the mediator from closer to shepherd.

a. Early-intervention mediation gives the “people need time mediator an opportunity to work with the parties to to get used to a new

develop a roadmap to peace, avoiding the problem of idea, concept, or

negative momentum, mitigating litigation costs, and approach."

reaching agreement as soon as possible. (“Negotiate This!"

2. Mediate in multiple sessions of shorter duration. by Herb Cohen at 207). This is a

a. This will decrease the stress incurred in

marathon sessions.

compelling

b. It also allows for "acceptance time", and argument for

negotiating "incrementally", both of which are consensus multiple sessions.

winners when it comes to effective negotiation techniques.

C. Scheduling multiple sessions of shorter

duration avoids the inefficiencies of long caucuses. Skeptics will point out that it may require more travel time, but in this age of email, Skype, and cell phone coverage, options other than face-to-face meetings abound.

* Two notable examples are Aristotle's "golden mean" and Buddha's "middle way". 12 See, Texas Ethical Guidelines for Mediators, Rule 12. There are ways to avoid the ethical issues, but I have yet to see an MSA in which the mediator does a good job of navigating around this issue.

3. Improve continuing education about negotiation theory.

a. If you do not understand the difference between competitive negotiation and

cooperative negotiation, you may be committing malpractice. b. If you have not read basic, rudimentary books on negotiation theory, and you

are doing it every day, you may be committing malpractice.

4. We need to get real about the procedure.

a. BDPs are inconsistent with the basic principles of mediation. If the market

place insists on arbitration, whether binding or non-binding, or case evaluation, let's call it what it is. Mediation that concludes with an arbitration kicker in the mediator's boilerplate is a misrepresentation, especially in cases where the mediator insists on it. It is especially unfair to present a proposed MSA to a lawyer at the end of a long day with a BDP that was not a negotiated term and put the lawyer in the position of being a deal killer.

Changing how we apply mediation will require a paradigm shift for both advocates and mediators.

Advocates will have to be proactive about mediation earlier in the dispute (and not rely on the courts).

Advocates should come to the first mediation session expecting that the case will *not* settle that day.

Here is a simple acid test: If you are a lawyer representing a party in a family law dispute and you find yourself requesting a special setting from a family law Associate Judge, that is the time to call a mediator and schedule (a) a telephone conference; (b) a two-hour session; or (c) a longer session.

Mediators will have to change the way they practice; instead of booking only full-day or half-day sessions, they will have to find a way to be more flexible, reducing mediation services to two-hour sessions, when need be, and finding time for more telephone conferences.

In changing their roles from closers to shepherds, mediators will need to change the way they approach their cases and focus more on assisting the parties with developing a roadmap for peace than applying closing strategies.

Judges will have to adjust their policies to the new paradigm.

My approach would result in a blend of the conventional method of mediation and the collaborative model.

Think about it!

Micro

Level 1 - Improving your skills.

Improve your skills!

Negotiation is a skill.

All skills have certain common characteristics:

a. You can improve at any skill. b. The way you improve at any skill is through "study and practice" (or "practice and play"). C. Although you can improve at any skill, you can never reach *perfection.*

OK, but
how?

Tip #1: Join a study group.

Negotiation study groups are a great way to network with colleagues and a painless way to improve your skills. There are three active groups in the Dallas area: a morning group, a lunch group, and an evening group.13 Group support is an effective method for improving.

Tip #2: Self-study

For extreme introverts who want to improve, here is a short list of essential reading14:

1. *Getting More: How to Negotiate to Achieve Your Goals in the Real World,* Stuart Diamond (Crown Business, 2010).

2. *Getting to Yes*, Roger Fisher and William Ury (Penguin Books, 1991).

3. *Influence: The Power of Persuasion,* Robert B. Cialdini (Collins Business, 2007).

4. *Legal Negotiation and Settlement*, Gerald R. Williams (West Publishing Co., 1983).

5. *Negotiate This!* Herb Cohen (Warner Business Books, 2003).

Tip #3: Consider Settlement Counsel.

Settlement counsel - coming to a theater near

you!

13 For more information, see "Negotiation Study Groups" posted at www.negotiatewithwisdom.com. 14 The more ambitious can find a more comprehensive list at www.negotiatewithwisdom.com.

Last year Chris Nowland and John DeGroote spoke to the DBA ADR section about this topic, which, apparently, is getting increasing attention at a national level.

If you have a case that justifies two lawyers, and negotiation is not your strong suit, consider bringing in co-counsel to handle settlement negotiations. That frees up trial lawyers to do what they like to do and avoids the pesky problem of dealing with settlement offers on the eve of trial.

Tip #4: Watch re-runs of Columbo.

Two of the top negotiation gurus in the country agree that if you want to be a great negotiator, act like Columbo, the TV detective made famous by Peter Falk.15 No time for books and groups, no money for settlement counsel? Kick back with a glass of wine and a Columbo DVD.

For those interested in improving their negotiation skills, particularly in family law cases, I have posted, and continue to post, information on my negotiation site.16

I have even developed an app to assist you.17

Level 2 - Dealing with the specific case.

Tip #5: Prepare.

1) Prepare your client:

1. Introvert or extrovert?

2. Emotional state?

3. Understanding of issues and strategy.

2) Prepare a competitive) negotiation plan:

1. Time and space

2. Opening offer:

i) Who makes it?

1s See, e.g. "Negotiate This!", p. 280. 16 See, e.g., "Improving Negotiation Skills: Secrets of the Masters" posted at www.negotiatewithwisdom.com. 17 Home page, www.negotiatewithwisdom.com

ii) Will it act as an "anchor"?18

iii) What is the most/least that you can justify?

iv) Best time to make it?

v) Concession strategy (second, third, and fourth offers)

vi) End game: How badly do you want to close?

3) Prepare the mediator: Sending the mediator materials about the case usually jumpstarts the mediation process.

Tip # 6: Expect multiple sessions in complex cases. Patience wins!

Tip #7: Take your printer. You can purchase a portable printer for next to nothing. It comes in handy during a mediation for a myriad of purposes (e.g. printing proposals, spreadsheets, MSAS).

Tip #8: Recognize the difference between cases in which the parties will have a relationship after the mediation and the ones that do not. It's one thing to be a hard bargainer when the parties are splitting and will never see one another; it's another if they will run into each other at the PTA meeting in a week or two.

Level 3-at mediation

Tip #9: Insist on reasonable caucus time. Nothing can be more miserable for a lawyer than waiting three-four hours on a mediator while trying to make small talk with a moderately insane client in a small room with no windows, waiting for a plastic box with a soggy sandwich. And, then, there is the client's perspective! Let your mediator know that you expect a report back in an hour, two tops.

Tip #10: If you cannot settle the entire case in the first session:

1. narrow the issues; or agree to a temporary order; or 2. see if you can develop a "roadmap" for peace, which may take the form of a pretrial order.

Tip #11: Be wary of MSAs.

1. Never forget how irrevocable an MSA is.

2. Don't let the mediator prepare the MSA.

18 "Anchor" is an example of negotiationspeak and what you can pick up from studying the theory. Essentially, it means that studies have shown that agreements reached come out closer to the first offer than the counter offer, leading to the conclusion that a first offer acts as an "anchor". Therefore, despite co**nventional wisdom** to the contrary, it may be smart to make the first offer. *See, e.g.,* "Negotiation Genius" by Malhotra and Bazerman (Harvard Business School, 2007), p. 27.

3. Never sign an MSA after a long day, especially in complex cases.

4. Beware of BDPs.19

5. Beware of “tie breakers".

6. If you want to arbitrate, prepare an arbitration agreement.

Conclusion

The current method of using mediation to resolve family law disputes fails to do what mediation was designed to do. I have identified seven specific problems, which need to be addressed.

We can solve a lot of these systemic problems by: (a) early-intervention mediation; (b) reframing the role of the mediator from closer to shepherd; (c) improving continuing education about negotiation theory; and (d) getting real about our ADR procedures.

Changing the system will require a paradigm shift by advocates, mediators, and judges.

Negotiation is a skill we all use every day. We can, and should, consistently strive to improve.

If all else fails, you can get reruns of Columbo on Amazon.com.

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Be skeptical of everything, including this.

Happy negotiating!

19 For a complete discussion on the problems of binding decision provisions in mediated settlement agreements, see my paper on "Binding Decision Provisions in Mediated Settlement Agreements" posted on www.negotiatewithwisdom.com.