A legal note from Marshal Willick about a proposal being stealthily floated that would cost every Nevada divorce litigant a little more time, money, and aggravation, for no good reason at all.

Mediation can be a helpful tool to dispute resolution. It is often useful in custodial disputes, and adept practitioners use it where warranted for other issues as well. But making it mandatory in every case for every issue will only injure the public by making every divorce longer, more expensive, and more difficult, while leading to worse outcomes for many. The proposal is a bad idea being pushed for the wrong reasons, and it should be killed before inception.

Also: an invitation to our next musical open house, in Section VII.

I. BACKGROUND

There are several ways a divorce can proceed from start to finish. Some are better, some are worse – and for some, it just depends. Understanding those routes to "done" is critical to evaluating the current proposal.

A. TRADITIONAL MODELS: NEGOTIATION, MEDIATION, LITIGATION

Whenever possible, diligent and competent counsel make an effort to negotiate a case to a mutually-acceptable resolution. Of course, this is not always possible: the parties' goals, and even their opinions as to the facts, can be so polarized that common ground can never be found, and insisting on trying to do so is a time-and-money-wasting enterprise. In some cases, a legal contest can and will only end when one party "wins" and the other "loses" as to the point at issue.

This reality is nuanced. First, while many parties believe themselves to be in the category of no-possible-compromise opposition, objective counsel can often, with a full command of the facts and law, see that what appears to be diametric opposition is not really so. It is at that point that a negotiated settlement is possible, on some or all matters.

Second, counsel's adequate command of facts and law might well take some time – for discovery (formal and informal), for detailed evaluation of a client's true (as opposed to apparent or announced) objectives, and for the client to pass through enough of the emotional stages attendant to a divorce to allow that client to be open to accepting advice as to his or her own enlightened self-interest, even where that requires adoption of positions initially rejected in toto. *See gen'ly* Elisabeth Kübler-Ross, ON DEATH AND DYING (Routledge, 1969) (setting out series of emotional "stages" of grief, later applied to divorce: denial; anger; bargaining; depression; and, acceptance (in no specific sequence)).

Sometimes, mediation at some stage, and as to some issues, is useful, as the presence and guidance of a neutral third party can help parties see the possibility of agreement where they might not have otherwise been able to do so. The Family Mediation Center (FMC) has had an excellent success rate in preventing child custody disputes from full litigation by finding ways to mediate child-sharing arrangements that both parties find at least tolerable.

Custody disputes are inherently different from others in that – at least presumably – the parties share a common interest in the best interest of the child, and while they sometime see custodial time as a zero-sum game (i.e., if one party "wins" the other "loses"), they can often be helped to see the more enlightened view of subordinating their wishes to looking out for the child. Also, custody matters are never really "final" – if a custody arrangement does not work out, or events change, it can be revisited.

In contrast, many family law issues ***are*** zero-sum. For division of assets, for example, every dollar can go to one party, or the other, or be split – or be consumed in fees and costs fighting about it – but the parties' interests are inherently opposing. And – usually – financial matters, once final, are final.

Notwithstanding that essential distinction, issues other than custody, in appropriate cases, have also proven amenable to a mediated resolution. Where both parties voluntarily seek a mediated resolution, success rates are pretty good, across multiple classes of cases.

For people just too poor to litigate at all, the UNLV volunteer mediation program provides some mechanism for the resolution of concerns – although putting what might be technical legal issues in the hand of students who (necessarily) have zero real world experience, and even limited formal substantive education, is quite worrisome to many members of the bench and Bar.

On the other end of the spectrum, complex and difficult litigation can sometimes be partially or fully resolved by means of mediation. I have been called on to mediate several financial cases where the sticking point was at root lack of expertise in pension and retirement law and practice; making that expertise available as a mediator allowed the cases to settle, by eliminating both fear of the unknown and unjustifiable expectations. Senior litigators are often brought in to mediate cases for one another on a variety of issues – again, the special expertise of the voluntarily-agreed mediator has proven the key to resolution of those cases.

Of course, for cases that cannot or should not be negotiated or mediated – and they are many – the traditional route of final resolution by way of formal litigation is at the heart of the American legal system, and it is there for many good reasons. The vigorous presentation of opposing viewpoints before a neutral arbiter is designed as a crucible for deriving both truth and justice, and while it has both flaws and limitations, it should not lightly be tossed aside.

In fact, it has been said that any competent divorce lawyer is a bit schizophrenic in practice, attempting at all times to reach a settled resolution, while simultaneously presuming the failure of negotiations and preparing for a contested trial. Those that exclusively pursue one tack – or the other – rob their clients of either opportunity or adequacy.

B. COLLABORATIVE DIVORCE, COOPERATIVE DIVORCE

Dissatisfaction with these traditional tools led to the evolution of what has come to be called "collaborative divorce," which has a few regional flavors, but is essentially team-conducted

mediation with a hammer. Nevada enacted the proposed collaborative law uniform act – one of three States in the United States to do so – as NRS 38.400 *et seq*. It became effective January 1, 2013. Notably, the proposed uniform act has been rejected as bad policy by the American Bar Association – twice.

The law has the saving grace of being voluntary, applying to only those who "voluntarily" sign a "collaborative law participation agreement," and lawyers are required before having their clients sign those agreements to "assess with the prospective party factors that the lawyer reasonably believes relate to whether a collaborative law process is appropriate for the prospective party's matter" – including disclosing to the party what happens if the process fails. NRS 38.535.

Once such an agreement is signed, the parties and lawyers are required to stay out of court and use the collaborative process to resolve the matter. Specifically, they are required and expected to voluntarily disclose all "relevant" financial and other information (NRS 38.525), and to "reach agreement" as to all disputed matters. In practice, such agreements often require the employment of a "team" including one or more psychologists, accountants, financial planners, and sometimes others, who – at the expense of the parties – "participate" in crafting the agreement.

The "hammer" is that, if agreement fails to be reached, or either party files a contested motion before the divorce court, both parties' lawyers (and everyone else involved) are required to withdraw, and are disqualified from representing their clients in any future family related litigation. This provision is enacted in the Nevada statute as NRS 38.510. Discovery also must often start over from scratch, since under NRS 38.550, "collaborative law communications" are for the most part considered privileged, not subject to discovery, and inadmissible in evidence.

On the surface, this seems unobjectionable to most laymen – what is the harm if some lawyer is excluded from a case? Critics note that the financially weaker party, once that process has gone on for awhile, is often financially ***unable*** to "start over" with new counsel, accountants and others, making the process one of legalized blackmail – accept the "agreement," however lopsided or unfair, or face the litigation process with no ability to prevent an even worse outcome.

In practice, this has led to the development of what attorney Gregg Herman of Wisconsin calls "cooperative divorce" – the same process, but with the hammer removed; if the process fails, litigation can begin with the same lawyers in place, using all information developed during the process. Many very good lawyers have announced that such is what they have ***always*** done, without dressing up rational dispute resolution in fancy titles.

The partisans on both sides of the collaborative debate trot out favored financial estimates, with proponents claiming that resolution costs much less than a litigated result, and opponents claiming that the process actually, and rather insidiously, costs a lot more than it appears – often more than full litigation – while permitting backroom results that would never withstand the scrutiny of a neutral judge. I have never seen a definitive study on the economics of the process, either way.

It is in light of this background as to how divorce actually proceeds in the real world that the proposal now being floated is illuminated.

II. THE PROPOSAL BEING SUBMITTED TO THE LEGISLATURE

A group calling itself "the Southern Nevada Dispute Resolution Council" has created a bill draft that would ***require*** the diversion of every divorce case in the State to "local agencies or qualified individuals" to mediate not just all child custody matters, but also "all property, debt and financial issues."

By amazing coincidence, the "qualified individuals" to which all divorcing parties would be referred (for services to be paid by those parties to those individuals) appear to be the same people belonging to the group that drafted the proposal. All financial issues would be referred to "a special master or mediator, appraiser, accountant, divorce financial analyst, mental health specialist or early neutral evaluator." In other words, complex pension, corporate, or business divorce issues could be resolved by a Marriage and Family Therapist having no clue how any of those issues actually work, or even what the terms mean; the most valuable asset of the marriage could be dealt with by someone who could not tell a QDRO from a Q-Tip.

Naturally, the proposal contains restrictive clauses requiring that ***all*** cases be referred to the group of persons fulfilling "standards of training" – which the group proposing the legislation would define – to include themselves.

Fees would be charged to the parties (of course), on a "sliding scale" – but everyone hoping to end their marriage would be required to pass through this economic toll-stop and pay the fee before having access to the courts. Nowhere in the proposal is any discussion of the increase in costs to the court system to administer this program – unless that, too, is to be passed on to the hapless litigants required to complete the step of "mandatory mediation" before proceeding to discovery, negotiation, or litigation of their divorce.

Supposedly, this proposal has received the blessings of "the Outsource Mediation Committee" of the Eighth Judicial District Court. I've reviewed the membership of that Committee, which is indeed made up of respected, respectable, and well-meaning members of the legal community, who I believe are and have been trying to improve the process for the benefit of the public.

That said, it seems that – ***if*** the committee in question has really signed off on this proposal – it has fallen prey to "groupthink" – a term coined by social psychologist Irving Janis to describe the powerful social pressure for conformity that sometimes arises, causing people who should know better to self-censor their views, particularly dissenting opinions, and leading to seeing a proposal as a yes or no proposition instead of examining multiple options for addressing a perceived problem. *See* Michael A. Roberto, *The Art of Critical Decision Making* (The Great Courses, 2009); Irving Janis, VICTIMS OF GROUPTHINK, (Houghton Mifflin, 1982).

Problematically, the proposal would violate existing law – specifically, the provision of the Collaborative Law Act that flatly states that "A tribunal may not order a party to participate in a collaborative law process over the objection of that party." NRS 38.490(2). This statute appears to collide head on with the part of the current proposal stating that "the desire of the parties and/or their

counsel, standing alone, not to participate in an alternative process shall not constitute good cause" (to not be required to pay for the services of the "providers" of those services).

Presumably, those hoping to see an involuntary and inexhaustible line of paying clients forced by law to their door see this conflict as a problem that can be overcome – presumably by amending the model act to remove that impediment to perpetual payment.

There is also no mention of the necessary increase in time to complete every action. No statistics are available, but it does not take a rocket scientist to tell that diversion of every case to mandatory mediation, given enough time for work up, meetings, and a formal report of non-resolution would take several months in the real world. The effect on case-resolution statistics and timing would not be pretty.

III. WHAT IS REALLY GOING ON

A. PROPAGANDA & REALITY

The cover letter from one proponent of the current proposal says that "this bill has been networked a lot in family law circles." That is false.

The Executive Council of the Family Law Section of the Nevada State Bar apparently knows nothing about it. It would seem that no one pitching the proposal ever thought to submit it for the consideration of that group – the broadest-based group of family law practitioners in Nevada, and the group most often tapped for drafting Amicus Briefs for pending cases before the Nevada Supreme Court.

Likewise, the Nevada Chapter of the American Academy of Matrimonial Lawyers – the members of which constitute the bulk of Certified Family Law Specialists in this State – have never heard a peep about the proposal. Ditto the 16.2 Family Law Rules Committee.

But if those who are most knowledgeable and experienced in the field of family law have never heard of this proposal, who are those who have "networked it a lot"? Oh, yeah – the people proposing it, and who would profit from it. The same cover letter claims to have accomplished a "private breakfast meeting" with a member of the Nevada Supreme Court who allegedly promised to support the proposal in front of the legislature. For all our sakes, let's hope the letter was . . . in error, and that no member of our Supreme Court has actually jumped onto that bandwagon.

B. SOME REALITIES ABOUT MEDIATORS, LAWYERS & JUDGES

Despite all the flaws in the "mandatory mediation of everything" proposal, there are some underlying realities, weaknesses, and errors in some of the people involved in the court process that could cause the proposal to get far more attention than it deserves. This convergence of less-than-optimal motivations presents fertile ground for planting a bad seed of an idea for altering the legal process

of dispute resolution.

First, there are mediators in Nevada who have apparently lost sight of the objective of mediation: to reach ***reasonable*** settlement of issues on their actual merits.

These "settle at all costs" mediators have confused the process with the objective, and consider it their job to have an agreement reached – ***any*** agreement, no matter how unfair, legally or economically suspect, or the result of what can only be termed bullying. They proudly announce their "success rate" – but measure "success" as anything that achieves an agreement, no matter the effect on the legitimate legal rights of the parties or any third persons involved.

Once a mediator loses sight of the fact that "no agreement" is a superior option to "a terrible agreement," that mediator is part of the problem.

Next, and sadly, there are more than a few lawyers who would gladly shuck the responsibility of actually doing their jobs to discover, prepare, and present facts and law in exchange for sitting through a process of "mediating" a resolution run by others and hoping that the outcome is good enough for their clients – as long as the fee meter keeps running while the client is subjected to it.

These are the same types of lawyers who drag out discovery to milk a case, or who remain so ill-prepared, doing so little to prepare their cases, that they settle on the proverbial court-house steps having no more knowledge or insight than they would have had concluding the case many months and too-many thousands of dollars earlier – whether by negotiation, mediation, or litigation. The most recent attempt to deal with that brand of laziness – the "front-loading" procedures in the new NRCP 16.2 – went into effect January 1, 2013; we'll see if the desired effect is realized.

Finally, more than one family court judge has quietly confessed exasperation and frustration with the parade of proper person litigants who show up not having any idea what they want or how to present their cases, and consuming vast amounts of judicial time on "utter nonsense." More than half of all cases now have an unrepresented party on one or both sides, and that makes the prospect of sending such litigants elsewhere a tempting possibility.

Are there family court judges who would just as soon see ***every*** case, irrespective of the merits or representation by counsel, shipped off to "others" for resolution (right or wrong, intelligently or ignorantly)? Unfortunately, probably, yes. Judges who have command of their cases and courtrooms by mastery of their craft will not want to see family law disputes resolved where no one can see what happened, and no one can reliably protect the weak from the strong. Only those who would dress up laziness or inattention to duty in the cloak of some touchy-feely aspiration to "alternative dispute resolution" would embrace a proposal to impose such a gantlet.

The naked truth is that people forced to participate in a process where the unqualified make substantive decisions in fields about which they are nescient is merely abusive of the public, and almost certainly unconstitutional. *See*, *e.g.*, *Boddie v. Connecticut*, 401 U.S. 371 (1971) (U.S. Supreme Court ruled that a state statute that required the payment of fees as a condition precedent to access to the courts denied due process of law).

And then there is the practical dimension. Diversion of cases to a mandatory mediation process at the beginning of a case – prior to the time that experienced counsel would feel that parties might intelligently settle their disputes, and before adequate discovery has been conducted to even know what the merits might be – is a disaster (actually, untold thousands of disasters) waiting to happen.

But that is exactly what the proposed legislation would require, ignoring the reality that in a great many cases, mediation would be a farce until ***after*** sufficient discovery has been done to allow the weaker party to gain sufficient information to negotiate meaningfully. At that point, regular litigation might well be the superior means of completing a case, in terms of time, money, and likelihood of a legally correct result.

IV. WHAT SOME OTHERS THINK

Once the "mandatory mediation of everything" proposal was uncovered and circulated, some opinions started coming in.

One senior litigator with whom I have occasionally locked horns was in full agreement with my analysis, adding that "it would be far better to give a court the option to refer all financial issues to mediation; to make it mandatory will provide no benefit to the divorce process." This attorney, who had taken the time to be certified as what he called a "so-called Collaborative Divorce Attorney," expressed that he did "not think the Collaborative approach to dispute resolution is appropriate for a large number of cases that pass through our Family Court, and it is not appropriate for the vast majority of the type of 'higher end' cases . . . ."

This is one of the lawyers who reported that he found "the collaborative process to be more expensive and time consuming for my clients than it would have been by simply engaging in the more traditional litigation divorce process."

Another wrote in that while he did "a lot of mediation work and am a big believer," the concept of "'forced' or 'mandatory' mediation is not mediation at all." He added the sad observation that "there are a group of lawyers in the State who want to make a living as 'mediators.' They came out in droves in connection with the foreclosure 'mediation' program and then complained vehemently that they didn't get assigned enough cases. They can't generate enough work on their own, [and] so rely on court appointment to make a living."

That attorney added that "while I do believe the State's public policy should encourage people to seek resolution of their disputes, I do not believe that mandatory forced mediation at a time when one party often has substantially more information (and thus power and leverage) is the answer."

Another experienced practitioner wrote in, describing a program started in Santa Cruz County, California, called the "Conflict Resolution Center," which apparently provides mediation services using ***volunteer*** mediators for those who self-choose to opt-in for that service, and noting up front that those cases most appropriate for that service are those "that have lower financial and legal complexity."

Interestingly, what has not been seen from the "true believers" in the local community pushing the proposed legislation is any similar voluntary program offering those services to those that want them – which would not line their own pockets. That silence speaks volumes.

This should not be perceived as a "high-end versus low-end" dispute. One attorney who provides legal aid for the poorest in the community, pro bono, wrote in stating that with the number of family court judges currently on the bench, "there are enough resources to adjudicate the cases that do not settle (as most do already) through the processes already in place." That attorney added that given the courts, the Senior Judge mediation program, and the UNLV mediation program, "We don't need more deadlines, oversight or unnecessary procedures."

V. WHAT SHOULD BE DONE, AND HOW

Alternative Dispute Resolution (ADR) is a wonderful thing – in moderation, and where appropriate. An adjunct volunteer mediation process, to be coordinated through the Family Mediation Center, and mediated by volunteers anxious to show their faith in the viability of the process by way of contribution of their time for that process, would be a wonderful pilot project.

I can hardly wait to see how many of those pushing the current proposal will volunteer for that task, as an alternative to being handed an assembly line of guaranteed, court-mandated fee-payers anxious to check the box required for court access so they can actually begin the process of dissolving their marriages.

Judges seeking to deal with proper person litigants who don't have any idea what to do or how to do it might want to set up a mediation program through which ***selected*** cases could be referred, in the hopes that the parties might at least learn enough to better participate in the court system, even if they did not resolve their disputes. As with the Santa Clara program, the cost of such a process should be as close to zero as possible.

VI. CONCLUSIONS

Some integration of a mediation program beyond child custody issues – preferably staffed by volunteers and ***strictly*** limited to those parties and cases that could and would be expected to benefit from it – would be worthy of a pilot project. A legislative mandate to force every litigant to mediate every issue, however? No way. As with the "covenant marriage" schemes that flashed in the pan in various States a few years ago, the current proposal would mainly provide just one more thing for people to have to pay to escape.

The proposed legislation would be an unmitigated disaster for the great majority of persons involved in family court litigation. Between the parties, it would result, virtually without question, in a massive increase in unjust enrichment on the one side and back-room oppression on the other. In the public sphere, it could hardly help but create both an increase in unjustified public expenditures and increased backlogs while providing a mechanism for unjustifiable profiteering by the unqualified

for their own personal enrichment.

In short, this proposal is a stinker, which should be consigned to the dustbin of bad ideas immediately.

VII. AND NOW FOR SOMETHING COMPLETELY DIFFERENT: A MUSICAL OPEN HOUSE: JANUARY 17, 2013

The Willick Law Group is pleased to extend an open invitation to an intimate concert with guitarist Muriel Anderson, January 17, from 5:30 to 8:00 p.m., here at the Willick Law Center, 3591 E. Bonanza Road, Ste. 200. Refreshments will be served, and the music starts at 6:30 p.m.

Ms. Anderson, the first woman to win the National Fingerstyle Guitar Championship, and founder of the Music for Life Alliance charity, is stopping in Las Vegas before traveling to host the famous "Muriel Anderson's All Star Guitar Night." She is an engaging performer whose obvious joy of music and facility across musical genres is admired by audiences – and other guitarists – worldwide.

For some other details about Ms. Anderson, see her website at http://murielanderson.com/. A good time should be had by all. We would love to see you here.

VIII. QUOTES OF THE ISSUE

"Moderation in temper is always a virtue, but moderation in principle is always a vice."
– Thomas Paine.

"Politics is the conduct of public affairs for private advantage."
– Ambrose Bierce, *The Guinness Book of Poisonous Quotes* 240.

"Sunlight is the best disinfectant."
– Supreme Court Justice William O. Douglas

"Now some they do and some they don't,
And some you just can't tell;
And some they will and some they won't,
With some it's just as well."
– Supertramp, *Breakfast In America* (A&M, 1979).

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