THE VANISHING TRIAL AND THE NEW LAWYER

I. THE VANISHING AMERICAN TRIAL

Law Professor Marc Galanter has written extensively on trends he has observed and studied for years. Even with more and more cases being filed each year, the number of trials has declined. Over the past four decades or so, the percentage of cases actually going to trial has gone down and now about 2% or so of the cases actually go to trial.

There are many reasons for this and space does not permit a longer explanation of the phenomenon. These reasons include the cost and expense of litigation which few can afford; cumbersome trial processes; fear of large verdicts; fear and scepticism of trial outcomes (a verdict or judgment is a "crap shoot"); lack of control over the process; use of evidence rules to keep out relevant but helpful evidence; desire for more flexible, less expensive process; limitations on the number of courts available for trials; and an overall decline in the public's confidence in adjudication and the courts.

We also have seen two other significant trends: (1) judges becoming assertive case managers and actively promoting settlements, diverting litigants into alternative processes, etc. and (2) the courts actively building Alternative Dispute Resolution methods into the court process. Example: mandatory mediation for child custody and visitation cases. Judges have embraced "process pluralism" i.e. the notion that there is more than one way to resolve a dispute.

Space does not permit detailed discussion of the "vanishing trial" phenomena. This topic was the subject of a dedicated edition of the Journal of Dispute Resolution in 2006 which contained several articles by legal experts.

II. METHODS OF DISPUTE RESOLUTION

A. The classic trial. Parties go through the pleading phase, discovery phase, motions and finally a trial. This is a triangulated system: plaintiff(s), defendant(s), and trial judge. It is the most expensive, most cumbersome, and often the least satisfactory way of resolving a domestic case. For some cases, it is the only way a dispute will be resolved.

B. "Litigotiation." This is phrase coined sometime ago to describe the process which centers on litigation but negotiations are carried on in varying ways throughout the court process. Many of these cases will settle on the eve of trial. Oftentimes, though, negotiation is premised upon preliminary court rulings, admissibility of evidence or witness problems, and "ultimatums" from the other side. This seems to be the most common system in the daily practice of law.

C. Private arbitration. Although rare in Nevada, it is technically available if both parties agree. See NRS 38.255(3)(h). This is similar to litigation except the parties are hiring a private, third party individual and not using a public official

(judge) to hear the evidence and decide their issues. Arbitration can be binding or non-binding.

D. Mediation. Mediation is a process whereby a third party neutral facilitates settlement negotiations with the parties. Mediation can be either facilitative, evaluative, or transformative. While child custody and visitation mediation is normally done in Clark County without the direct participation of the attorneys, private mediation can involve attorneys as full participants in the process.

A variant of this model is labeled "med-arb", a short hand way of describing a process whereby the mediator tries to settle as many of the issues as possible by mediation and then arbitrates the remainder of the disputes.

E. Private negotiation. This is the traditional method whereby the lawyers and their clients will negotiate at arms length by letter, emails, phone conversations, faxes or face to face meetings.

F. Collaborative process. A divorce is nothing more than a restructuring of the relationships between husband and wife, between them and their children, and a restructuring of their assets, debts and finances. A divorce has three main components: emotional, legal, and financial. The collaborative process utilizes professionals from all three professions working in a teamwork model to resolve the case. The distinguishing feature is that all parties sign an agreement NOT to litigate or to THREATEN litigation as a means of compelling a resolution. The parties sign a participation agreement and if the process fails, the parties must hire new counsel and other experts for the court case. All team members are excluded from further participation.

Note the shifting lines of demarcation between these methods. We are moving from full involvement of the court and a judge to methods that exclude the involvement of a judge or court other than for a prove up of the final divorce. The process moves from a determination by a third party to a process of self-determination and personal decision making.

This is a significant shift from a court centered adversary process where the lawyers take "positions" and argue the law and evidence for their clients to a system of client centered interest based dispute resolution. Courts, lawyers, and litigants are moving from a conflict based system that emphasizes "winning and losing" to a "solution based" system that focuses on the parties' needs, interests, transition out of the marriage, and planning for the future. The adversary system emphasizes differences and often is a rehash of the past whereas the other methods attempt to find ways to resolve differences and reach agreements.

III. THE NEWER METHODS WORK

Mediation has proven itself as a viable alternative to trials. The empirical studies have been done and together with the anecdotal evidence gathered from many mediators and lawyers, it is now generally established that mediation

successfully resolves from 65% to 80% of the cases referred to mediation. In Nevada, we have a ten year history of mandatory mediation with custody and visitation. Overall, there is about an 80% rate of resolution with full or partial parenting plans.

Collaborative divorce rates of settlement range from 78% in California to 94% in other jurisdictions. The collaborative divorce process has been around for only 18 years but it is continuously expanding its reach and is converting many former litigators to its ranks. Older lawyers have witnessed first hand for years the financially and emotionally destructive nature of the adversary system and see a great need for change.

Mediation and collaborative processes have proven themselves enough such that some jurisdictions are now moving theses processes to the forefront as the PREFERRED methods for divorce and the adversary trial is now the last resort method for the majority of divorce cases. Australia went to compulsory mediation as of July 1, 2008. British Columbia, Canada is not far behind. In the United States, North Carolina was the first state to go to mandatory mediation a few years ago. Utah started it in May, 2005 and roughly two-thirds of the cases reach full resolution and 12-16% result in partial settlements.

The world of family law is changing. I had a bill, AB 571, introduced into the 2007 Nevada Legislature that would have provided for mandatory mediation but it did not make it out of committee for timing and political reasons. The present judiciary just will not do anything to fundamentally change the way we do domestic cases in Nevada. Whether that changes in the 2009 Legislature remains to be seen.

It is still a fact though that many cases settle out of court but after how much needless litigation and expense. Our family courts still try only 1-2% of the cases filed each year.

We also must face the fact that over 50% of the litigants are appearing pro se. Even those who can afford legal fees are often loath to hire an attorney because, rightly or wrongly, many of them feel that lawyers just make things worse, not better.

Since many litigants can't afford significant legal fees or don't want to pay substantial fees and courts tend to encourage settlements, this has given rise to a newer breed of lawyer, "the new lawyer", who has skills in negotiating and settling cases and resolving disputes with little or no court involvement.

In the family law world of the New Lawyer, the emphasis is on understanding every one's principal concerns and interests, finding ways to address those concerns, helping the clients through the emotional pain of the divorce, and helping clients **plan** their way through a divorce, instead of the old how are we going to fight our way through this divorce.

More and more family law professionals today are recognizing that divorce and related domestic cases are multi-disciplinary in nature and that expertise from the three main professions (legal, financial and mental heath) are essential to the successful management of a family law case.

IV. THE EMERGENCE OF THE NEW LAWYER

"The New Lawyer" is the title of a recently published book by Canadian Law Professor Julie McFarlane (publ. 2008). She has been studying lawyers, the legal process and family law for several years. She compiled and published the first major academic study on collaborative law and her results were published in 2005.

Some, not all, family lawyers have sensed these evolving changes in the practice of family law and are changing their professional practices to accommodate these changes. They are developing and refining new skills to adapt in the practice.

These are the concerns of such lawyers as seen by Prof. McFarlane:

1. How can family lawyers find a way to settle family conflicts earlier and at a lower cost both financial and emotional to the parties and to the system.

2. How can they find lasting solutions that relate to the practical realities of that family and not just legal rights entitlements.

3. How can they relate their client' legal issues to other questions of child welfare, financial planning, mental health and economic support, etc.

In her book, Prof. McFarlane describes the central characteristics of "The New Lawyer." She contends that the New Lawyer builds on the skills and experience of the more traditional, adversarial notions of legal practice but adds newer skills and practice attitudes to that repertoire. She describes "The New Lawyer" in these terms:

A. The New Lawyer is a **negotiation specialist** who invests significant time and energy in negotiating whether in a face-to-face or third party facilitated environment.

– Negotiation is not simply preparation for trial, a rehearsal of positional legal arguments driven by the prospect of adjudication – it is a complex, independent objective with its own skill set.

– Effective negotiation requires the development of a communications skill set that is distinctive from adjudicative concepts and tools (persuasion, questioning, listening, building rapport, using EQ).

– To be effective in new dispute resolution processes in family courts the New Lawyer needs to be a skilled and intentional negotiator, including the client in both collaboration and decision making.

B. The New Lawyer is **conflict resolution advocate**, not a traditional adversarial advocate.

– The responsibility of the lawyer is to persuade the other side to settle on the client's best possible terms. This is not achieved by the relentless repetition of positional arguments, not by table thumping and not by hiding motivations or interests. This is done by careful exchange of information, exploration of interests underlying the positions and the development of trusting bargaining relationships.

– The new lawyer role means you have to be in tune to the other side's interests, what is really driving them and what they really need.

C. The new lawyer is not only a technical legal advisor but is more fully described as a **conflict specialist** who understands that law alone is unlikely to be sufficient to fully resolve a dispute.

– The new lawyer understands the potential and the limits of the law in problem solving. People in conflict have many needs and lawyers often cannot meet the most challenging of these needs but they can work with an awareness and recognition of what is historically called "non-legal issues and consequences" meaning the impact of conflict on reason, identity, motivation and goals. Emotional issues are often far more pervasive and difficult than the legal issues.

– A conflict specialist works in a variety of conflict resolution settings and uses conflict resolution skills in each setting to facilitate communications and potential resolutions.

D. Any lawyer can marshal the legal arguments, prepare affidavits, and argue in court. After all, that is what lawyers are traditionally trained to do. The approach of the new lawyer is not in how I can fight or advocate in this case but how can I settle this case.

E. The new lawyer understands the concept of client centered, interest based approaches and moves away from positional arguing. The new lawyer also understands who to work and communicate effectively in settlement proceedings so as to reduce conflict and confrontation while simultaneously knowing how to raise and discuss difficult subjects that need to be addressed.

G. The new lawyer strives to engage in creative problem solving and how to narrow the differences of the parties.

V. INTEREST BASED NEGOTIATIONS

Lawyers normally trained in the adversary mode of dispute resolution learn the art of taking "positions" in litigation and then sticking to them as long as possible. Lawyers and clients taking "positions" do so to define the contours of the dispute and frame or limit the options available to the decision maker. "Positions" tend to be rigid and uncompromising and a client may see abandoning or modifying a "position" in terms of "winning" and "losing."

In negotiations and mediation, we seek to move away from these rigid notions of "positions" and move towards a deeper understanding of the client's personal "interests" in the case and how this can affect both the process of settlement and the outcome of the case.

An example of a "position" is the parent who wants primary physical custody of the children, the other parent to have every other weekend parenting time, and a full assessment of child support. What this parent may be saying in a deeper sense is that "I believe the children need a stable, secure environment and that I will get enough money from you to enable me to provide that environment for them."

The other parent's "position" may be a desire for joint legal and physical custody and a calculation of child support based upon a shared arrangement. What this parent may be saying in a deeper sense is that he/she wants to be a significant part of the children's lives and not merely a visitor and a source of money.

It is important for the lawyers, clients, and the mediator to develop an understanding of the parties' respective interests. Then it is most helpful if each party can address the other party's interests and how to accommodate them in a negotiated agreement.

A mediator may need to dig deeper through dialogue to fully grasp a party's real interests. But a mediator must be careful and not dig too deeply and go where the parties don't want the mediator to go.

Not all "interests" are nice, meaning that a parent may have bona fide concerns about the other parent's negatives such as mental health problems, domestic violence, alcoholism or substance abuse, etc. These and others like them are legitimate concerns and should be addressed. Sometimes one party's "interest" is revenge or spite. In either negotiations or mediation, these are dangerous waters to navigate.

VI. WHAT IS ATNA? (Hint: it is not a large insurance company).

Those who truly prepare well for negotiations or mediation consider the ATNA family in their strategic planning. There are three members of the ATNA family:

1. BATNA – Best Alternative to a Negotiated Agreement.

2. WATNA – Worst Alternative to a Negotiated Agreement

3. MLATNA – Most Likely Alternative to a Negotiated Agreement

BATNA is the best case scenario for what might happen if negotiations fail. For example, in a family law case where custody is an issue, the BATNA for one party might be joint legal custody with the client having primary physical custody.

WATNA is the opposite, the worst case scenario for your client if negotiations fail. In our custody case, the other party gets sole or primary physical custody.

MLATNA is the estimate by the client and counsel what is most likely to happen if the negotiations fail and the case goes to trial. The more likely scenario could be joint legal and physical custody.

Another relative in the ATNA family is EATNAs, i.e. "Estimated Alternatives to a Negotiated Agreement." Even if the parties do not have good options outside of negotiations, they often think they do. This is a perception issue by the client and that is what matters in deciding whether to accept an agreement.

How do you determine your BATNA? First, develop a list of your options you might conceivably take if no agreement is reached, develop the best of your options, and tentatively select the one option that seems best for the client. In determining which option may be "best", the client should consider the cost and feasibility of the option, which option will have the most impact, and which option is more likely to work than the other options.

In domestic cases, the option/alternative to a negotiated agreement is to use another decision making mechanism, namely, either private arbitration or litigation. This entails a cost/benefit analysis. If a client spends a lot more money for litigation, will the chances for prevailing improve enough that the unpredictability is worth the effort.

When considering the BATNA for your client, consider also the BATNA for the other side. What are their options and are they overly optimistic about what their options are in the case.

In settlement negotiations or mediations, parties are influenced consciously or unconsciously by their assessment of their alternatives to a negotiated agreement. If a party feels they have better alternatives, they may push for a more favorable settlement. If the alternatives are worse, they may be more accommodating. Parties often do a poor job of comprehending and assessing their alternatives and have unrealistic and uninformed ideas of what they might obtain without a negotiated agreement.

A negotiated agreement becomes "ripe" for completion when the BATNAs of each party have similar ideas or congruent images of how the dispute will turn out if they do not agree in negotiations and pursue other dispute resolution methods, primarily litigation. Thus, if both parties are fairly close in agreeing that one side would likely prevail on an issue, they are more likely to settle out of court and save the transaction costs (legal fees and expenses).

The goal of negotiations or mediation is to narrow the differences, develop options and compromises and keep the parties moving towards a successful conclusion. It is often said in mediation that you may not get what you want but you could get what you need.

VII. ADVANTAGES OF MEDIATION

1. Mediation can take place in any ordinary conference room. Mediation does not need a million dollar courtroom.

2. Mediation can take place at any time by agreement of the parties, attorneys, and the mediator. Mediation is not tied to or restricted by the availability of the judge or the courtroom. If folks want to mediate after normal business hours or on weekends, they can.

3. Mediation is often far cheaper than litigation. Although the fees and time needed for mediation varies from case to case, we have seen fees for completed cases as low as 10% of the fees for litigation of the case. In the great majority of the cases, mediation saves litigants money.

4. Mediation is far less stressful than litigation. Going to court for a case is very stressful, sometimes so severe that it has adverse health consequences. Mediation generally takes place in conference rooms in informal settings. Discussing disputes in a calm and relaxed setting is much easier on the parties, the attorneys and the mediator.

5. Mediation tends to be interest based whereas in litigation, lawyers and parties take "positions." This tends to be more rigid and uncompromising and makes it considerably harder to settle cases. In divorce mediation, it is often said that "you may not get what you want but you should be able to get what you need."

6. Mediation focuses on ways that differences can be understood and then resolved. Adversary litigation tends to focus the parties on their differences and creates a motivation for that party to "win" or at least "prevail" in the forthcoming trial.

7. Mediation works to reduce conflict and anger whereas litigation often pushes people to go "negative" and make all manner of accusations against each other. While a party may "win" the court case, the real result is often a pyrrhic victory because the parties hate each other when it is done.

8. In divorce mediation, the parties are more likely to cooperate with each other and communicate more effectively post mediation than they are if their dispute was litigated.

9. Mediated cases have a significantly lower rate of post mediation court proceedings than litigated cases. Mediation agreements tend to hold up longer and if there are post decree problems, parties that mediated tend to remediate instead of resorting to the court.

10. In family court today, more than half of the litigants are pro se. They are either unable or unwilling to hire lawyers to represent them in court. Pro se litigants are ill equipped to represent themselves. Mediation is informal and is not bound by the rules of evidence or procedure.

11. Mediation can be far faster than court processes. A divorce involves significant personal transitions for the parties and their children. A divorce does not start when the complaint is filed nor does it end when the decree is filed. The decision to divorce may take place long beforehand and the post-divorce adjustments can take months or years.

12. Mediation does not require a large staff and support system for a judge, i.e. a judicial executive assistant, bailiff, law clerk, and a court clerk.

13. In the empirical studies done to date, roughly two-thirds or more cases settle in mediation, sometimes higher. The paperwork needed includes the pleadings, affidavits for prove-up purposes, and a decree of divorce. If more cases are resolved out of court, that will greatly reduce the hundreds of court filings for motions, replies, etc.

14. Divorce is hardest on the children and we see the adverse consequences on children in our juvenile courts, criminal courts, schools, counseling services, etc. Teaching divorcing parents how to co-parent helps reduce the risk to our children.

15. In mediation, the parties often have the choice of selecting a mediator with specialized knowledge and experience suitable to the case. For example, a CPA mediator may be ideal for mediating a case involving substantial assets, tax consequences, trust and estate planning, retirement planning, etc.

VIII. ADVANTAGES OF THE COLLABORATIVE PROCESS

Collaborative divorce is the newest process for resolving divorce cases and it is proving to be a smashing success. A divorce case has three elements: financial, legal and emotional. The collaborative model brings together licensed professionals from three different professions: legal, financial and mental health. Each party is represented by a lawyer and is assisted by a divorce coach. This coach helps the client to understand the emotional processes they are experiencing in the divorce, what to expect throughout the process, and how to communicate and co-parent with a soon to be ex-spouse.

The parties will then employ a financial neutral such as a certified divorce financial planner or a CPA to assist them in developing their financial information, considering possible tax consequences, planning for their future, and assisting in developing the options for dividing their assets and debts and paying for any divorce obligations, i.e. spousal support or child support.

The parties and their professionals sign a participation agreement. All agree that they will not go to court nor will they threaten to go to court in this process. No more ultimatum games. If the process fails, the professionals are all disqualified from representing or working with the client. The client will then have to hire new counsel for any further proceedings. This disqualification requirement forces the parties and their attorneys to work harder at finding solutions and settlements.

In practice to date, the settlement rates range from 78% to 94% and as experience is gained in this process, it is expected that these rates will increase.

Representation of a client in the collaborative model represents a huge change in the role of the lawyer. The lawyer is no longer the "hub of the wheel" who controls the process for the client. The lawyers and the other professionals are all considered part of the "team" working with the couple. In this process, outside experts can be brought in as needed such as a child custody specialist, a pension specialist, mortgage broker, appraiser, etc.

The collaborative process is by far the best model for handling most divorce cases. It is the only model that formally incorporates contributions and participation from all three professional fields in a non-confrontational manner. Even with the participation of multiple professionals, the process is less expensive since no time is spent on preparing court papers, motions, affidavits, etc. and going to court.

There are multiple advantages to the collaborative process:

1. The process is generally less costly than litigation.

2. The process is generally less time-consuming.

3. A climate of cooperation reduces the stress that is part of any divorce.

4. Each party has the assistance of counsel.

5. Each party is a vital part of the settlement team.

6. The team can focus on settlement without the immediate threat of "going to court."

7. The client controls the proceedings.

8. The process is more flexible and more efficient.

9. The lawyers and other professionals are specially trained in this process.

10. Everybody's goal is to resolve the case with a settlement that will work.

11. The process encourages the maintenance of positive relationships with the soon to be ex-spouse and the children.

12. The process is entirely private and confidential. There is no public court record except for the divorce paperwork needed to complete the final divorce.

13. The needs of the children and the ability of the parents to co-parent are priorities in this process.

14. This is an open process that encourages a full and cooperative exchange of relevant information and financial data.

15. This process prepares the parties and their children for their transition into the future. It focuses on transition and future planning instead of reliving the past and blaming the other party.

16. The final decision making is in the control of the clients. The lawyers and other team members can only advise; no judge or arbitrator makes the decision for the parties.

17. The emotional energy of the client is not spent on fighting and arguing.

IX. HOW TO PREPARE FOR A SUCCESSFUL NEGOTIATION OR MEDIATION

Mediation does resolve roughly two thirds of the cases that go through the process. While not every case is suitable for mediation, most cases will settle in mediation. Lawyers should screen clients for mediation suitability. If the client has serious mental health issues (like clinical depression), drug or alcohol problems, personality disorders, or domestic violence problems, mediation may not be appropriate.

Another screening issue is readiness and timing for mediation. Some clients are highly distraught and emotional at the beginning of a divorce and may not be in an acceptable mental condition to start a mediation. Some clients may be too motivated by anger in the beginning and are bent on revenge, not resolution. Others may be so distraught that they will agree to anything the other party suggests just to "get it over with."

In short, the early screening by the lawyer is done to assess the client's emotional readiness, cognitive ability, be future focused, and have a listening ability.

Here are some practical tips that will enhance the chances of a successful negotiation or mediation.

1. Obtain the fundamental financial information needed such as mortgages, credit cards, secured debts, loans, etc. and some idea of the value of assets.

2. Develop a list of major issues and concerns that need to be discussed at mediation. Advise your client to "let go" of unimportant issues.

3. Establish a collegial working relationship with the attorney for the other party. This doesn't mean you can't disagree on issues or your views of the parties. Both of you are in this process together to see if an agreement can be reached.

4. Impress on your client the importance of full voluntary disclosure of all assets and debts. A requisite degree of trust is essential to a successful mediation.

5. Be prepared to discuss the early and/or temporary arrangements for payment of marital debts and expenses during the separation phase while everyone is preparing for and participating in the mediation process. Who is going to live where? Who will take care of the children for the time being?

6. Work with the client to start developing a series of options prior to mediation. This is nothing more than a list of possible options for the parties to consider. Do not develop fixed "positions" as the issues in mediation since that tends to polarize people and significantly reduce the prospects of a mediated settlement. It is not about winning and losing.

7. Do not create unrealistic hopes or false expectations in your client about the outcome of mediation. Encourage the client as well as yourself to approach mediation with an open mind. There will be ample opportunity to flesh out the factual information in the mediation and consider various options.

8. Select a mediator with skills, knowledge and experience appropriate to your case. It is unwise to hire a mediator with a mental health background (MFT, etc) to mediate a case with substantial assets, tax consequences, etc.

9. Determine in advance what kind of mediation scheduling you think is appropriate to the case. Some mediators will meet for 60-90 minutes maximum for each session; others will schedule a mediation for a half or full day.

10. Be courteous at mediation. Emotions may run high and feelings may be raw. Keep the mediation civil. Good mediators will let your client express himself or herself but in respectful ways. Avoid personal attacks on the other party or counsel.

11. Be sure that there is agreement in advance on who pays for the mediation services.

12. In between sessions, review the case with your client, gather more information or documents as needed, re-evaluate any positions or points of view, and prepare for the next session.

13. Consider co-mediators or team mediation where there are multiple difficult issues and different experts may be needed to co-mediate a case.

The actual mediation itself should include food and beverages. There is something to the old Biblical adage about sitting down and breaking bread with your adversaries. Food can be snack foods of various kinds. People feel more relaxed when they can nibble at will throughout the process. Beverages include water, possible soft drinks, coffee, tea, etc.

The mediator should sit at the head of the table. This has symbolic and psychological importance and puts the mediator into a position of authority. The mediator is seen as a true neutral and not being on the side of the other party.