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WSSFC 2025

Practice Management Track – Session 5

Can You Negotiate

Presenters:
Gregg M. Herman, JAMS, Milwaukee
Nicholas C. Watt, Kramer, Elkins & Watt LLC, Madison

About the Presenters...

Gregg M. Herman, is a neutral arbitrator and mediator in the Milwaukee office of JAMS, specializing in resolution of family law disputes. Prior to joining JAMS, he practiced family law for many years at Loeb & Herman LLC, Milwaukee, Wisconsin. Mr. Herman was admitted to the Wisconsin bar in 1977 after receiving his law degree at the University of Wisconsin Law School. He served as an assistant district attorney for Milwaukee County from 1977 to 1984. Mr. Herman is certified as a senior specialist in family law trial advocacy by the National Board of Trial Advocacy. He is a past chair of the family law sections of the American Bar Association (ABA) and the State Bar of Wisconsin and a past president of the Milwaukee Bar Association and the Wisconsin Chapter of the American Academy of Matrimonial Lawyers. He served five terms as a member of the State Bar of Wisconsin Board of Governors. He is the founder and was first chair of the Collaborative Family Law Council of Wisconsin and the Divorce Cooperation Institute. Mr. Herman has served as Associate Editor and Editor-in-Chief of the *Wisconsin Journal of Family Law* and is the author of *Settlement Negotiation Techniques in Family Law* (1st and 2nd editions) and editor of four editions of *101+ Practical Solutions for the Family Lawyer*, both published by the ABA Family Law Section. He is a certified divorce and family law mediator, and has been an adjunct professor, teaching settlement negotiations, at Marquette University Law School.

Nicholas C. Watt is a Founding Partner of the Madison, Wisconsin law firm of Kramer, Elkins & Watt, LLC. He received his undergraduate degree from the University of Illinois at Urbana-Champaign majoring in Political Science and minoring in Mathematics. He received his law degree from the University of Wisconsin-Madison. Attorney Watt's practice is concentrated in the areas of family law and general civil litigation. Attorney Watt sits on the Board of Directors for the Solo Small Firm and General Practice Section of the State Bar of Wisconsin. He is also a member of the State Bar of Wisconsin, the Dane County Bar Association, and the James E. Doyle Inns of Court. Attorney Watt is also Chairman of the Board of Directors for The Badger Project, a non-profit, independent, non-partisan, investigative journalism organization focusing on Wisconsin politics and government.

CAN YOU NEGOTIATE?

Wisconsin Solo & Small Firm Conference 2025
Kalahari Resort, Wisconsin Dells
October 18, 2025

Presenters:

Nicholas C. Watt
Kramer, Elkins & Watt LLC, Madison

Gregg M. Herman
JAMS, Milwaukee

I. What is ADR?
   A. Why is it important?
      1. Vast majority of civil cases (98% by many estimates) resolve outside of trial
      2. Increased likelihood of settlement
      3. Not many clients have the stomach or pocket book for cost of full-blown litigation
   B. Different Types. See Wis. Stat. § 802.12
      1. Lawyer-to-Lawyer (direct) negotiation
         a. Lawyers have good rapport
         b. Post-mediation where progress was made but did not cross the finish line
         c. The amount in controversy is relatively low where the cost of mediation or other ADR may not be worth the cost in time for an attorney and half the cost of a mediator.
      2. Mediation
         a. Family Court Services
            i. Child custody and physical placement disputes require mandatory mediation with FCS. Wis. Stat. §§ 767.405(5)(a), 802.12(3)
            ii. Only exception from requirement in custody and placement disputes is if the court finds mediation would cause undue hardship or endanger the health or safety of a party. Wis. Stat. § 767.405(8)(b).
            iii. Attorneys not allowed to participate in FCS mediation
         b. Industry Mediation
            i. Construction – Metropolitan Builders Association in Waukesha https://www.mbabuilds.org/dispute-resolution

ii. Farm – DATCP Farm Mediation and Arbitration https://datcp.wi.gov/Pages/AgDevelopment/FarmMediation.aspx

c. Non-lawyer mediation

d. Dane County Bar Association (other local bar associations?) https://www.dcba.net/resources/case_mediation_program

    i. One attorney must be DCBA member

    ii. Or case must be venued in Dane County or Columbia County

    iii. $100 per party; Dane County and Columbia County Bar members volunteer for half-day mediation

3. Arbitration

    a. Faster (and, therefore, sometimes less expensive) than courts

    b. Has to be contractual agreement between parties.

    c. Strong public policy in upholding agreements to arbitrate. See Wis. Stat. Ch. 788.

        i. Buckeye Check Cashing, Inc. v. Cardenga, 546 U.S. 440, 445, 126 S. Ct. 1204 (2006) (arbitration provision is severable from remainder of contract and separately enforceable)

        ii. Racine Educ. Ass'n v. Racine Unified School Dist., 176 Wis. 2d 277, 281-82, 500 N.W.2d 379 (Ct. App. 1993) (doubts as to the applicability of arbitration clause shall be resolved in favor of arbitration; only positive assurance that dispute is not covered by an arbitration agreement should deny arbitration)

    d. Useful for businesses that may have trade secrets to protect that might be exposed in a public court battle or any party who do not want a public spectacle.

II. Traditional Positional Settlement Negotiations through mediation

A. Developing Starting Position

B. Compromise to Optimal Position

C. Advantages:

    1. Mutual compromise

    2. Feeling that the other side "did not win"

D. Disadvantages

    1. Anger at opening positions

    2. Danger of being bracketed

    3. Feeling of "Game Playing"

III. Settlement Process

A. Opening

1. Who goes first?
   a. Plaintiff Considerations
      i. How much documented information does your client have in their possession?
      ii. Cost of suit versus amount in controversy
      iii. Who are you dealing with? Opposing party/opposing counsel
      iv. Did you send a demand letter prior to filing? If so, you already went first and the response from the other side likely dictates the next move.
   b. Defendant Considerations
      i. Insurance Company in play
      ii. One sided fee-shifting by statute? See Wis. Stat. §§ 100.18, 100.20, 425.308 (Wisconsin Consumer Act), 895.446(3) (civil loss caused by crime).
      iii. Punitive damage claim?
         i. Whether defendant acted maliciously toward the plaintiff or in an intentional disregard of plaintiff's rights. Wis. Stat. § 895.043(3); See Henrickson v. Strapon, 2008 WI 51, 325 Wis. 2d 250, 784 N.W.2d 163.
2. Timing of mediation/negotiation
   a. Typical times
      i. Pre-suit – demand letter
      ii. Early after filing
      iii. Middle of discovery/pre-dispositive motions
      iv. Pre-trial
      v. Post-trial
   b. Considerations
      i. Strength/weakness of case
      ii. How much at stake (cost/benefit analysis with client)
      iii. Client's "principles"
      iv. What information does your client have and what do you hope to receive in discovery?
      v. Disparity in wealth and resources (David v. Goliath)
      vi. Fee shifting provisions in play?
      vii. Working relationship with other attorney (if applicable)

B. Positional negotiation strategies

        1. Psychology of numbers (why everything costs $X.99)
        2. Knowing the personalities involved
        3. Factual/Legal strengths and weaknesses
        4. Discovery still needed, uncertainty in potential facts
    C. Choice of Process. See Wis. Stat. § 802.12(1)
        1. Lawyer to lawyer – direct negotiation. Wis. Stat. § 802.12(1)(b)
        2. Mediation. Wis. Stat. § 802.12(1)(e)
            a. Advantages
                i. Breaks stalemates
                ii. Offers independent analysis
                iii. Freedom to make offers without fear of it being used against you. Wis. Stat. § 904.08, 904.085
                iv. High likelihood of success
            b. Disadvantages
                i. Mediation over non-legal issues where the mediator is a lawyer.
                ii. Mediation over legal issues where the mediator is not a lawyer.
                iii. Mediation with unrepresented parties where there is a significant disparity in power.
                iv. Facilitative mediation with represented parties.
            c. Choosing the right mediator
                i. Retired Judges – more breadth of experience on many different topics. Good when there is a technical point on potentially obscure law. Can provide an example as to what a judge would rule on the issue.
                ii. Specialized Attorney – family attorney for asset division, commercial litigation for complex contract or business divorce dispute, IP dispute, etc. More experience than judges for most issues. Better at handling emotions.
                iii. Industry expert – construction cases, right to cure, perhaps consider a non-lawyer industry insider
            d. Nuts and bolts
                i. Statement of case provided prior to mediation.
                    - Procedural posture
                    - Factual background
                    - Strengths and weaknesses
                    - Legal considerations
                    - Personalities involved
                    - Relevant Documents

ii. Joint conference with all before mediation (some mediators avoid this to the emotions involved)

iii. Each party has their own room and mediator shuttles back and forth until agreement reached or stalemate declared.

iv. No party is compelled to agree to anything.

3. Arbitration (see above for considerations)
   a. Binding arbitration – third party neutral receives evidence from the parties, including examination of witnesses and provides a binding award, subject to court review under Wis. Stat. §§ 788.10, 788.11. Wis. Stat. § 802.12(1)(a)
   b. Non-binding arbitration – third party neutral provides a non-binding opinion for the parties to use in subsequent negotiations. Wis. Stat. § 802.12(1)(h)
4. Other? See Wis. Stat. § 802.12
   a. Early Neutral Evaluation – third party evaluates the case early to provide initial assessment of merits and suggestions for discovery and potential legal rulings for efficient resolution of the case. Wis. Stat. § 802.12(1)(c)
   b. Focus Group – panel of citizens (private jury) selected in manner agreed upon by parties receives a presentation from the parties, deliberates, and provides advisory opinion about how to resolve the dispute. Wis. Stat. § 802.12(1)(d)
   c. Mini-trial – presentation given by the parties to a panel of persons agreed upon by the parties, where after the presentation, the panel considers the legal and factual issues and attempts to negotiate a settlement. Wis. Stat. § 802.12(1)(f)

IV. Closing the deal

A. Settlement document is treated by same rules as a contract. Paul R. Ponfil Trust v. Charmoli Holdings, LLC, 2019 WI App 56, ¶16, 389 Wis. 2d 88, 935 N.W.2d 308.

1. Definiteness and Certainty
   a. The material terms of contract must be definite and certain in order to be enforced. Ehlinger v. Hauser, 2010 WI 54, ¶57, 325 Wis. 2d 287, 785 N.W.2d 328.
   b. Vagueness and/or indefiniteness in a contract's terms will render it unenforceable. Ponfil Trust, ¶18.
2. Mutual Assent
   a. There must be mutual assent, or a meeting of the minds, as to the definite material terms of a contract. Management Computer

Servs., Inc. v. Hawkins, Ash, Baptie & Co., 206 Wis. 2d 158, 557 N.W.2d 67 (1996)

   b. However, mutual assent is judged objectively based on the terms the parties used in the contract. In other words, the court will not necessarily look at what the parties intended to agree to, but rather what the actually did agree to by the words they used. Id. (citing Marion v. Orson's Camera Ctrs., Inc. 29 Wis. 2d 339, 345, 138 N.W.2d 733 (1966).

B. Thus, make sure all material aspects of the agreement are negotiated beforehand, do not make last minute changes that you think should be assumed by the other side
   1. Payment, liability, process in event of default or breach
   2. Releases – how broad
   3. Confidentiality
   4. Non-disparagement
   5. Restrictive covenants
   6. Representations and Warranties
   7. Conditions precedent, timing of dismissal of filed case
   8. Liquidated damages
   9. Collateral documents needed
      a. Business interest (equity or just assets)
      b. Company resolutions
      c. Real Estate Transfers
      d. Personal property transfer (be specific identifying property!)

C. Get something in writing and signed before everyone leaves the mediation – even if it is not a fully drafted settlement agreement (see attached), although such a fully agreement would be helpful, if possible.
   1. Make sure the document signed at mediation is signed by the parties and their counsel
   2. Wis. Stat. § 807.05 (attached here)
      a. Requires that any settlement agreement between the parties to a pending litigation must be in writing and signed to be enforceable.
      b. Exception to general rule that oral contracts are binding. Kocinski v. Home Ins. Co., 154 Wis. 2d 56, 67, 452 N.W.2d 360 (1990).
      c. Exchanging letters, or fax transmissions, between the parties or counsel can constitute a binding settlement under 805.07 if all material terms are written clearly and definitely and those terms are accepted in a writing signed by a party or their counsel. Waite v. Easton-White Creek Lions, Inc., 2006 WI App 19, ¶7, n.4, 289 Wis. 2d 100, 709.N.W.2d 88.

The Role of a Family Law Attorney in Settlement Negotiations

GREGG HERMAN*

The role of a family law attorney has changed greatly over the years. For example, I was hired by my present firm to be the litigator, as I had been a prosecutor for over seven years. While there was not nearly as much litigation as in my prior job, going to court was a routine occurrence. In addition to multiple trials, temporary hearings over custody and support were regular. The evidentiary skills that I had learned as a prosecutor came in very useful. Since in litigation there is typically a losing party, appeals were a regular part of our business. It seemed we were always either briefing an issue or waiting for a decision.Today, by contrast, it is far more common to accompany a client to a mediation session than to a contested court hearing because the number of contested trials has decreased sharply. As a result, our appellate practice has correspondingly diminished. Although most lawyers need litigation experience, the requisite skill set for a family law attorney has expanded to include skills in negotiations.

To add some objectivity to the above observation, I lead a case law update discussion for the Wisconsin chapter of the American Academy of Matrimonial Lawyers every year. For the first few years, there were an average of seventeen new cases per year to discuss. For the last few years, there were an average of eight new cases each year to discuss. As fewer cases are litigated, fewer are appealed.

Is this a good thing or a bad thing? The bad side is that reported decisions give definition to the law. After all, if a client knows what a court is likely to do, the client is more likely to accept that result, like it or not, rather than

* Gregg Herman, a certified mediator, is the managing partner of Loeb & Herman S.C. in Milwaukee, Wisconsin. He has been active in numerous professional organizations, legislative endeavors, and activities designed to improve the practice of family law and to alleviate the effects of divorce on children.

to fight it and have that result occur anyway. It is far easier to convince a judge to make a certain order if the judge knows any other order would get him or her reversed, or even that a certain order would be "safe" for appeal.

Putting the "A" in ADR

For the individual litigant, the result of settlement has many positives, most particularly the avoidance of the financial and emotional costs of litigation. In any conflict situation, resolution by compromise is almost always better than litigation by warfare. There is a saying among family law attorneys that "a bad settlement beats a good trial." Accordingly, a good settlement is best of all. This concept has led to a new definition of what it means to be a family law attorney. While litigation remains a possibility, it has become a rarity. So, becoming an effective family law attorney requires a familiarity regarding the settlement options and methodologies available.

When this author started practicing family law, the term "ADR" was unheard of. Even then, most divorce cases eventually settled. But the process of getting to settlement, including the threats and intimidation of litigation, is destructive to the ability of parents to co-parent their children in the future. In other areas of law, the future relationship of the opposing parties is of little concern. However, in divorce cases, where there are children—either minor or adult—the future relationship is of great concern as the parents will be forever entwined with each other. The damage done by litigation can carry over and scar the future relationship between parents for many years into the future. Words cannot be unsaid, and the bitterness of hearing partisan advocacy does not go away. The cost—both financially and emotionally—is significant.

While data are really unnecessary, studies have confirmed the value of mediation in improving relationships between parents both during a legal action and afterwards.[1] As stated by the Texas Supreme Court: "For the children themselves, the conflict associated with the litigation itself is often much greater than the conflict that led to a divorce or custody dispute . . . because children suffer needlessly from traditional litigation, the amicable resolution of child-related disputes should be promoted forcefully."[2]

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1. *See* Robert E. Emery, David Sbarra & Tara Grover, *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV. 22 (2005); Joan B. Kelly, *A Decade of Divorce Mediation Research: Some Answers and Questions*, 34 FAM. CT. REV. 373 (1996).

2. *See In re* Lee, 411 S.W.3d 445 (Tex. 2013).

Being a family law attorney involves broader responsibilities than, say, a personal injury lawyer. In P.I. law, the plaintiff's lawyer is trying to get the most money for a client, and the insurance (or defense) lawyer is trying to pay as little as possible. Any effect on third parties is irrelevant, as is consideration of the impact on the future relationship of the parties, as there will not be any. Representation is strictly a matter of dollars. Similarly, in criminal law, most cases involve a prosecutor trying to get a conviction and maximum sentence, whereas the defense counsel is trying to get no conviction or a reduced charge and minimum sentence. In most cases, third parties and future relationships are not considerations.

Mediation

As a result, lawyers began searching for alternatives (the "A" in "ADR"), and mediation came into vogue. It was successful in enough cases that it became mandatory in most custody and placement disputes and prevalent, even if not mandatory, in financial disputes.

The success of mediation can be traced to several aspects of the process. For one, a third party can break an impasse that has caused negotiations to come to a halt. For another, the process injects a fresh viewpoint in the negotiations. Lawyers sometimes get too close to their client's cause and fail to see the forest due to the trees. Parties frequently do not appreciate that there will be another side to all of the issues, with no guarantee that a fact finder will see things their way. Hearing a neutral, independent, and trusted professional give opinions and insight can cause reality to be injected into the equation.

Yet the type of mediation and the nature of the mediator are critical to its success. For example, facilitative mediation, where a mediator merely relays proposals, is of little or no use to family law practitioners. Most lawyers don't need a third party to run settlement proposals back and forth, as in a game of tennis. Evaluative mediation, on the other hand, allows the mediator to offer opinions and suggest solutions to issues. Only evaluative mediation, where the mediator is proactive in the process, is worth the time and expense in family law cases.

The type of mediator to be chosen depends on the issues to be mediated. When the issue involved is child-related, the issues are frequently not legal, but emotional. Arguably, the entire issue of "best interests" of a child is not a legal determination, but a psychological one. The issue of allocation of responsibilities and time is really not a legal one, but a parenting one. As much as lawyers learn a lot by practicing in this area, there are professionals whose expertise is precisely in the area of child development. In theory, at least, both parents want the best for their children. Therefore, it benefits a parent to limit conflict and increase cooperation. In addition, typically both parents can learn something (sometimes, a lot) about child rearing from an expert.

Any good mediation involves a fair amount of counseling. Using a mental health professional as the mediator can turn the mediation session into a therapeutic one. In such cases, the therapy may be extremely valuable to quell the emotions and have practicality and rationality prevail. Where the issues are primarily emotional ones (which is frequently the case for custody-related issues), a mediator trained in evaluating and treating emotions can be most effective.

The danger of using mental health professionals as mediators is that the topics may drift into ones that are legal in nature. Sometimes, the dividing line is not very clear. Other times, the line is blurred or ignored by the mediator in order to reach a settlement. The result may be mediators getting involved in substantive issues on which they have little knowledge. The resultant settlement can lead to difficulties down the road.

Co-mediators, one lawyer and one nonlawyer, would avoid this danger, but the cost of mediation then doubles. Still, the extra cost may be worth it, where both legal and nonlegal issues are expected to arise in the course of negotiations.

As valuable as mediation can be in many cases, it is no panacea. For one thing, it is often conducted without attorneys being present. If, as is common, there is a power or knowledge imbalance between the parties, the results may not be equitable. If the issues are financial, using a mediator not versed in taxes or valuation issues may even confuse matters. Most critical, because the goal of a mediator is to achieve a settlement, a power or knowledge imbalance may not produce an impediment to "success," as defined by the mediator. In fact, such an imbalance might even be helpful. After all, if the mediator's goal is to settle a case, an imbalanced settlement is within the definition of success, although the long-term implications may be seriously troubling.

Collaborative Divorce

However, there were cases where mediation was not the answer, or at least the complete answer. So, lawyers formed collaborative divorce groups, seeking to bring a new approach into play. In a collaborative divorce, the parties and the lawyers agree to avoid litigation tactics in general, and court in particular.[3] The "no-court" agreement has teeth in a collaborative

3. Int'l Acad. of Collaborative Prof'ls, www.collaborativepractice.com.

divorce: If the process fails, both lawyers must withdraw and transition the case to litigation counsel. The intent is for the lawyers (and their clients) to avoid the threats of litigation and concentrate on resolution. Many models include a requirement for joint appraisals of all assets, avoiding any formal discovery and mandatory mediation. There may be mental health "coaches" (as opposed to therapists), child specialists, and neutral financial experts involved. All appraisals are joint, and there is transparency to the discovery and settlement process.

The key to a collaborative divorce agreement is the mandatory, mutual withdrawal feature. The goal is to make the cost of failure to everyone so extreme that settlement becomes almost an imperative. The theory is to entirely remove the threat of litigation from the settlement process. The financial cost of trial preparation is completely eliminated. As importantly, the sword-wielding threat of going to trial is eliminated. The result is to lessen (if not eliminate) the bitter taste of the adversarial legal process that may tarnish the parties' ability to co-parent in the future.

Collaborative divorce, however, is not for every case. When there has been domestic violence, mental illness, or substance abuse, it may not work, even when mental health coaches are utilized. In some cases, the threat of disqualification can be used to try to exact a better settlement. In other cases, the lack of a credible trial threat can cause the matter to be prolonged at a considerable emotional and financial cost. Collaborative divorce appears to have survived its most serious threat—an adverse ethics opinion from the Colorado Bar Association Ethics Committee.[4] While initially casting a shadow on a practice allowing a lawyer to withdraw from a case midstream because it might go to trial, a subsequent opinion from the American Bar Association Standing Committee on Ethics and Professional Responsibility, which found that the practice did fall within ethical parameters, has put those fears to rest.[5] As well it should. After all, if parties have been fully advised on the process, why should they not be able to retain an attorney on a limited, clearly defined basis, to avoid further damaging their families through the adversarial legal process?

4. Colo. Bar Ass'n Ethics Comm., Formal Op. 115 (2007) (Ethical Considerations in the Collaborative and Cooperative Law Contexts), *available at* http://www.cobar.org/index.cfmlD/386/subD/10159/CETH/Ethics-Opinion-115:-Ethical-Considerations-in-the-Collaborative-and-Cooperative-Law-Contexts,-02/24//.

5. ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 07-447 (2007) (Ethical Considerations in Collaborative Law Practice).

Cooperative Divorce

Another option, although not yet widely available, is cooperative divorce.[6] While maintaining much of the criteria for a collaborative divorce, such as the commitment for settlement, joint and full appraisals, and voluntary disclosure, it does not include the critical aspect of mutual withdrawal of the attorneys if the process fails. Some see the process as "collaborative lite," while others do not see any difference between a cooperative divorce and a "regular" divorce. While substantively there is little or no difference, by signing an agreement to operate in a cooperative manner, lawyers can allay fears of divorcing parties regarding the roles of their attorneys. Far too many parties choose to proceed without attorneys, fearful that lawyers throw gasoline on the fire. Given the public perception of divorce lawyers, a written promise to operate to resolve issues in an amicable and professional manner can assure parties that lawyers have an important, helpful purpose to serve in these cases.

ADR and the Line Between Advocacy and Compromise

The very real controversy over these forms of ADR goes to the heart of what it means to be a lawyer and the purpose of our system of justice. To some, being a lawyer means to advocate under previous ethical rules and to "zealously" advocate his or her client's position. Because settlement requires compromise, to these lawyers, the advocacy role and the resolution role do not nicely coincide. Moreover, they define their client's interests as purely financial: the more money for their client, the better. "Success" is defined in purely economic terms.

It is here that the term "family" law has its real meaning. As stated earlier, unlike other areas of law, the opposing parties in a divorce often have a continuing relationship after the legal system is done with them. The very definition of "family" no longer means just a nuclear unit of Mom, Dad, and children, but encompasses stepparents, stepsiblings, and all of the extensions that go with them.

In traditional civil litigation, "success" can only be expressed in terms of money. The winner at trial gets a larger or smaller financial judgment. However, there are many whose value system put a different priority level on money. To these people, preserving the well-being of their "family" (defined in the broadest terms) is more important than money.

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6. For a more complete comparison of these processes, see John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280 (2004).

In a family law setting, family relationships are better enhanced by resolution, not litigation. And these relationships are even further enhanced if the settlement process is efficient and effective. There is a huge amount of literature (starting with Fisher and Ury's seminal book *Getting to Yes*),[7] courses, and other educational opportunities for family lawyers to improve their negotiating skills. For the benefit of their clients, becoming an effective family law attorney requires them to do so.

7. Roger Fisher & William Ury, Getting to Yes: Negotiating Agreement Without Giving in (1981).

SETTLEMENT SURVEY

Several months ago, my friend, Dr. Ken Waldron, a (semi) retired psychologist from Madison, and I were discussing the importance to children of their divorcing parents peacefully settling their disputes when Ken noted the lack of empirical data on settlement negotiations. Well, that lack of data creates an opportunity to create some, so Ken and I decided to conduct our own study. Although the title does not accurately describe the article, our study has now been published in the State Bar of Wisconsin publication, *Wisconsin Lawyer*: Gregg M. Herman and Kenneth H. Waldron, "Beyond the Divorce: Crafting Successful Settlement Agreements," 93 Wis. Law. 34 (December 2020).

Our study consisted of a survey comprised of attorneys, mediators, judges and Family Court Commissioners. We asked about thirty-one items focused on settlement negotiations, clustered into five topic Groups.

Not surprisingly, most of the responders believe that divorcing clients are better served by negotiating settlements rather than by litigation. We were surprised, however, by several responses. For example, the relationship between the attorneys involved was rated as significantly more important than the influence of the Court in reaching settlement. We would have thought that the influence of courts was actually of higher importance.

Also surprising was the lack of emphasis on training in negotiation and settlement strategy. Since most divorce cases (as high as 90% - and maybe more) eventually settle, I have long been surprised that more CLE courses in family law (again, maybe as high as 90%) include or are dedicated to litigation skills as opposed to negotiation skills. In other words, it seems that 90% of training is dedicated to what lawyers do about 10% (or less) of their time. This anomaly exists notwithstanding the importance of settlement (as agreed in our study) and the existence of substantial literature and available training dedicated to negotiation skills (No, I am not referring to the book “The Art of the Deal”!).

Certainly, a great deal of that disparity is due to a feeling that negotiation skills are intuitive (start high and settle lower or vice versa) whereas litigation skills require substantial training. However, we believe that even experienced negotiators can enhance their effectiveness by learning negotiation skills and strategies.

Our survey, however, reflects the importance placed by those in the family law field of negotiation and mediation skills. So, our article concludes by listing numerous ways lawyers can become better negotiators. Such improved skill is especially critical for lawyers who serve as a mediator or a Guardian ad Litem for minor children. However, all lawyers who try to assist clients not just in reaching agreements, but doing so in a manner most conducive to their client’s future ability to co-parent their children (whether the children are minors or adults), might benefit from doing so better.

in part, during the pendency of a motion to the court to modify or vacate the order.

History: Sup. Ct. Order, 67 Wis. 2d 585, 743 (1975).

807.04 Proceedings, where held; restriction as to making orders. **(1)** Except as provided under sub. (2), all trials, and all hearings at which oral testimony is to be presented, shall be held in open court. The court may make any order which a judge or a circuit or supplemental court commissioner has power to make.

(2) All hearings in which oral testimony is to be presented in an action or special proceeding that is commenced by a prisoner, as defined in s. 801.02 (7) (a) 2., shall be conducted by telephone, interactive video and audio transmission or other live interactive communication without removing him or her from the facility or institution if his or her participation is required or permitted and if the official having custody of him or her agrees. The court in which the action or special proceeding is commenced shall, when feasible, also allow counsel, witnesses and other necessary persons to participate in the hearing by telephone, interactive video and audio transmission or other live interactive communication. The procedures and policies under s. 807.13 shall apply to the extent feasible.

History: Sup. Ct. Order, 67 Wis. 2d 585, 743 (1975); 1977 c. 187 s. 135; 1997 a. 133; 2001 a. 61.

807.05 Stipulations. No agreement, stipulation, or consent between the parties or their attorneys, in respect to the proceedings in an action or special proceeding shall be binding unless made in court or during a proceeding conducted under s. 807.13 or 967.08 and entered in the minutes or recorded by the reporter, or made in writing and subscribed by the party to be bound thereby or the party's attorney.

History: Sup. Ct. Order, 67 Wis. 2d 585, 744 (1975); 1975 c. 218; Sup. Ct. Order, 141 Wis. 2d xiii (1987).

Comment, 2008: This section also applies to agreements, stipulations, and consents reached as a result of alternative dispute methods outlined in s. 802.12. In some cases, such as family law cases, court approval is required for an agreement to be effective.

Note: Sup. Ct. Order No. 05-05 states, "the comments to Wis. Stat. §§ 807.05 and 802.12 are not adopted but will be published and may be consulted for guidance in interpreting and applying the statutes."

Judicial Council Note, 1988: The statute is amended to reflect that stipulations entered into at telephone conferences are no less binding than those made in writing or in court. [Re Order effective Jan. 1, 1988]

When a stipulation did not satisfy this section, summary judgment was improper because there was no factual basis on the record for the decision. Wilharms v. Wilharms, 93 Wis. 2d 671, 287 N.W.2d 779 (1980).

An oral agreement to settle an action that does not comply with this section is unenforceable. Adelmeyer v. Wisconsin Electric Power Co., 135 Wis. 2d 367, 400 N.W.2d 473 (Ct. App. 1986).

This section does not affect procedural stipulations or judicial admissions that dispense with evidentiary requirements. State v. Aldazabal, 146 Wis. 2d 267, 430 N.W.2d 614 (Ct. App. 1988).

The subscription requirement is met by a stamped facsimile signature. This section does not require hand-written signatures. Kocinski v. Home Insurance Co., 154 Wis. 2d 56, 452 N.W.2d 360 (1990).

Contract law is not binding in construing, enforcing, or modifying stipulations, but principles of contract law, including the Uniform Commercial Code, may illuminate a stipulation dispute, even to the point of being dispositive. Phone Partners Ltd. Partnership v. C.F. Communications Corp., 196 Wis. 2d 702, 542 N.W.2d 159 (Ct. App. 1995), 94-2279.

To constitute a stipulation under this section, a statement must be conclusive on the question. The concession of a fact to the court made for strategic reasons and not agreed to by the other party is not a stipulation, and the court need not engage in a colloquy with the parties about it. Fritz v. Fritz, 231 Wis. 2d 33, 605 N.W.2d 270 (Ct. App. 1999), 98-0605.

This section does not provide for a party to subscribe to an agreement through general conduct. A party's assent or approval must be formalized in some way on the document itself. Laska v. Laska, 2002 WI App 132, 255 Wis. 2d 823, 646 N.W.2d 393, 02-0022.

A fax transmittal letter sent by counsel that bore counsel's initials at the conclusion of the message text was subscribed within the meaning of this section thereby rendering the settlement terms accepted in that letter binding on the client and enforceable by the court. Waite v. Easton-White Creek Lions, Inc., 2006 WI App 19, 289 Wis. 2d 100, 709 N.W.2d 88, 05-1688.

When an attorney signed a settlement agreement contingent on the client's consent by noon the following day and the client did not consent to the settlement by the deadline created by the contingency, the settlement was not enforceable under this section. Subsequent actions by the parties cannot fulfill the statutory requirements. Neither the untimely oral assurances by the attorney to the other parties, nor the attorney's call notifying the court that a settlement had been reached, satisfied the contingency set forth in the agreement. Affordable Erecting, Inc. v. Neosho Trompler, Inc., 2006 WI 67, 291 Wis. 2d 259, 715 N.W.2d 620, 04-2746.

Oral settlements are not invariably unenforceable. Gliniecki v. Borden, Inc., 444 F. Supp. 619 (1978).

807.06 Copy of paper may be used, when. **(1)** If any original paper or pleading be lost or withheld by any person the court may authorize a copy thereof to be filed and used instead of the original.

(2) The clerk of circuit court may electronically scan any paper or pleading, as permitted under SCR 72.05, and may discard the original paper or pleading pursuant to SCR 72.03 (3). If the original is discarded, the electronically scanned document constitutes the official court record.

History: Sup. Ct. Order, 67 Wis. 2d 585, 744 (1975); Sup. Ct. Order No. 12-05, 2012 WI 112, 344 Wis. 2d xxxiii.

807.07 Irregularities and lack of jurisdiction over the parties waived on appeal; jurisdiction exercised; transfer to proper court. **(1)** When an appeal from any court, tribunal, officer or board is attempted to any court and return is duly made to such court, the respondent shall be deemed to have waived all objections to the regularity or sufficiency of the appeal or to the jurisdiction over the parties of the appellate court, unless the respondent moves to dismiss such appeal before taking or participating in any other proceedings in said appellate court. If it appears upon the hearing of such motion that such appeal was attempted in good faith the court may allow any defect or omission in the appeal papers to be supplied, either with or without terms, and with the same effect as if the appeal had been originally properly taken.

(2) If the tribunal from which an appeal is taken had no jurisdiction of the subject matter and the court to which the appeal is taken has such jurisdiction, the court shall, if it appears that the action or proceeding was commenced in the good faith and belief that the first named tribunal possessed jurisdiction, allow it to proceed as if originally commenced in the proper court and shall allow the pleadings and proceedings to be amended accordingly; and in all cases in every court where objection to its jurisdiction is sustained the cause shall be certified to some court having jurisdiction, provided it appears that the error arose from mistake.

History: Sup. Ct. Order, 67 Wis. 2d 744; 1975 c. 218; Sup. Ct. Order, 92 Wis. 2d xiii (1979).

Judicial Council Committee's Note, 1979: Sub. (1) is amended to clarify that it addresses jurisdiction over the parties, and not the subject matter jurisdiction of the appellate court. Lack of subject matter jurisdiction of an appellate court cannot be waived. Sub. (1) cannot be used to cure defects concerning subject matter jurisdiction of an appellate court. [Re Order effective Jan. 1, 1980]

This section does not confer jurisdiction on the court to hear an appeal in a criminal case when the appeal is not timely. Scheid v. State, 60 Wis. 2d 575, 211 N.W.2d 458 (1973).

Sub. (2) applies only at the trial court level. It does not confer appellate jurisdiction on the supreme court when an appeal is first mistakenly taken to the circuit court. State v. Jakubowski, 61 Wis. 2d 220, 212 N.W.2d 155 (1973).

Mere retention of an appellant's brief prior to making a motion to dismiss is not participation in the appeal and does not constitute a waiver of an objection to jurisdiction. Prior holdings to the contrary are overruled. State v. Van Duyse, 66 Wis. 2d 286, 224 N.W.2d 603 (1975).

When a claimant timely appealed an adverse worker's compensation decision in good faith but erroneously captioned the appeal papers, the trial court abused its discretion by dismissing the action. Cruz v. DILHR, 81 Wis. 2d 442, 260 N.W.2d 692 (1978).

Sub. (1) does not apply to petitions to appeal under s. 808.10. First Wisconsin National Bank of Madison v. Nicholaou, 87 Wis. 2d 360, 274 N.W.2d 704 (1979).

The court of appeals erred in failing to exercise discretion under sub. (1) to permit an amendment of a notice of appeal. Northridge Bank v. Community Eye Care Center, Inc., 94 Wis. 2d 201, 287 N.W.2d 810 (1980).

Sub. (2) applies to actions for review under ch. 227. Shopper Advertiser, Inc. v. DOR, 117 Wis. 2d 223, 344 N.W.2d 115 (1984).

Sub. (2) permits transfer of a case when the action is originally filed in a court lacking subject matter jurisdiction or when the action is filed in a court of improper venue. Shopper Advertiser, Inc. v. DOR, 117 Wis. 2d 223, 344 N.W.2d 115 (1984).

"Return" is a long-standing term of art that refers to the official record of the body whose decision is being reviewed and that must be filed with the reviewing court in a certiorari action. Because sub. (1) provides that "return" must be "duly made" before the respondent's participation in the action waives jurisdictional objections,

CONFIDENTIAL SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Confidential Settlement Agreement and Mutual Release (this "Agreement") is entered into as of the date of the last authorizing signature (the "Effective Date") by and between Plaintiff LLC ("LLC") and Owner 1 ("Owner 1"), on the one hand, and Owner 2 ("Owner 2"), on the other. LLC, Owner 1 and Owner 2 shall be referred to collectively as the "Parties," and each, individually, as a "Party."

RECITALS

WHEREAS LLC was organized on December 1, 2010 as a Wisconsin limited liability company with Owner 1 and Owner 2 each holding a 50% Membership Interest;

WHEREAS LLC and Owner 1 filed a Complaint asserting claims against Owner 2 for [list claims] in County, Wisconsin on October 17, 2024 ("Claims"), County case number 25-CV-10000 ("Action");

WHEREAS Owner 2 timely filed their Answer to the Action denying any wrongdoing as well as asserting Counterclaims against Owner 1 for [list Counterclaims] ("Counterclaims");

WHEREAS Owner 1timely replied to Owner 2's Counterclaims denying any wrongdoing;

WHEREAS Owner 2 dissociated as a Member from LLC, but Owner 2 still holds an Economic Interest;

WHEREAS the Parties desire to redeem Owner 2's Economic Interest in LLC and resolve the Claims and Counterclaims between them to avoid the further cost and uncertainty of litigation;

WHEREAS following negotiations in which the Parties were represented by their own counsel, and specifically in a mediation conducted by [mediator name] the Parties have agreed to settle, compromise and resolve the Action as well as all Claims and Counterclaims on the terms and conditions set forth below.

NOW, THEREFORE, in exchange for the mutual promises, covenants and agreements below, and for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound hereby, the Parties hereby agree as follows:

AGREEMENT

1. General Mutual Release of Claims. The Parties hereby enter into the following releases (individually and collectively, the "Mutual Release"):

   a. LLC and Owner 1 together with their, its, or their respective past, present, and future officers, directors, employees, stockholders, members, managers, parent entities, sister entities, subsidiaries, insurers, predecessors, agents, successors, heirs, executors, administrators, representatives, and assigns (collectively, the "LLC Releasors"), release and discharge Owner 2, together with their respective past, present, and future officers, directors, employees, stockholders, members, managers, parent entities, sister entities, subsidiaries, insurers, predecessors, agents, successors, heirs, executors, administrators, representatives, and assigns (collectively, the "Owner 2 Releasors") from any and all claims, causes of action, suits, demands, rights, liabilities, damages, lawsuits, losses, fees, costs, or expenses of any kind whatsoever, whether known or unknown, including any claims or demands for monetary, injunctive or declaratory relief or attorney's fees, costs and expenses, including but not limited to the Claims asserted in the Action, relating in any way to or arising out of the events and conduct alleged in the Action or from Owner 2's Membership in LLC, but not including claims related to the enforcement of this Agreement. This release specifically applies to all claims arising from or relating to any federal, state, or local law, statute, ordinance, rule or principal of common law or any other doctrine in law or equity, known or unknown, suspected or unsuspected, foreseen or unforeseen, real or imaginary, actual or potential, through the date of this Agreement.

b. The Owner 2 Releasors release and discharge the LLC Releasors from any and all claims, causes of action, suits, demands, rights, liabilities, damages, lawsuits, losses, fees, costs, or expenses of any kind whatsoever, whether known or unknown, including any claims or demands for monetary, injunctive or declaratory relief or attorney's fees, costs and expenses, including but not limited to the Counterclaims asserted in the Action, relating in any way to or arising out of the events and conduct alleged in the Action or from Owner 1's Membership in LLC, but not including claims related to the enforcement of this Agreement. This release specifically applies to all claims arising from or relating to any federal, state, or local law, statute, ordinance, rule or principal of common law or any other doctrine in law or equity, known or unknown, suspected or unsuspected, foreseen or unforeseen, real or imaginary, actual or potential, through the date of this Agreement.

2. <u>Settlement Amount</u>. LLC shall pay to Owner 2, or to their heirs, executors, or administrators if necessary, the total sum of One Dollar ("Settlement Amount") as follows:

<u>[List terms of payment if installments negotiated]</u>

The above Settlement Amount shall be made payable to the Trust Account of Owner 2's attorney and be delivered to: [Firm name, and address].

3. <u>Personal Property Exchange</u>. No later than January 1, 2026, LLC shall transfer to Owner 2 the assets on the signed list of equipment attached here to as Exhibit A in good working order and shall be transferred pursuant to a Bill of Sale similar in form to the document attached hereto as Exhibit B.

4. Real Property. No later than January 1, 2026, and subject to the following conditions, LLC shall transfer to Owner 2, via a quit claim deed similar in form to the document attached hereto as Exhibit C, the property located at [common street address] containing County parcels with parcel identification numbers of [tax parcel number] and a legal description as follows:

[legal description] ("Property")

a. LLC shall be solely responsible for the land contract between it and Vendor dated January 1, 2010, a copy of which is attached hereto as Exhibit D, encumbering, in part, the Property and shall hold Owner 2 harmless for any payments under the land contract.
b. The 2024 property taxes related to the Property shall be prorated by the number of whole days each Party will hold the Property.
c. Owner 1 shall inform the current tenants living in the Property that Owner 2 will be taking possession of the Property as of October 1, 2024 to see if the tenants will move out prior to the expiration of their lease attached hereto as Exhibit E. If the tenants will not move out, then all rights and obligations under the lease shall be assigned to Owner 2 at the time the Property is transferred to Owner 2, and LLC shall also provide to Owner 2 any deposit paid by the tenants to be returned at the conclusion of the lease term. The Parties shall execute any documents necessary to effectuate this assignment.
d. At or before the time of the transfer of the Property to Owner 2, Owner 2 and their spouse, shall execute a Marital Property Agreement similar in form to the document attached hereto as Exhibit F protecting the Property as Owner 2's individual property.
e. LLC has the right to rent the outbuilding on the Property for two additional years, through December 31, 2028 for $5000 per year, pro-rated month-to-month, and pursuant to the terms of a commercially reasonable lease giving LLC the exclusive use of that outbuilding without interference.

5. Right of First Refusal. After transfer of the Property pursuant to paragraph 4, above, Owner 2 shall be prohibited from selling the Property for three years, or until January 1, 2029. After that time, Owner 1 and/or LLC, shall have a right of first refusal to meet any offer to purchase the Property. Upon any bona fide offer to purchase the Property, Owner 2 shall inform Owner 1, in writing, of the terms of that offer within 30 days. Owner 1 and/or LLC shall have 90 days from Owner 2's written notification to match the offer and close on the purchase of the Property. Owner 1 and/LLC' right of first refusal shall not apply if Owner 2 sells or transfers the Property to one or more of their children. However, under that scenario, Owner 2's obligations to honor the right of first refusal will pass to those of their children who then own the Property and Owner 1 and/or LLC's right of first refusal shall be retained and honored by Owner 2's children and Owner 1 and/or LLC's right of first refusal will inure to the benefit of Owner 1's son, through Owner 1's son's lifetime. The Parties acknowledge that this right of first refusal is intended inure to the benefit of Owner 1 and their son and that this right of first refusal shall not apply to LLC in the event neither Owner 1 nor their son retain an interest in LLC. The Parties acknowledge that Owner 2's obligation to honor the right of first refusal will also pass to their spouse, if Owner 2 predeceases

their spouse and the spouse takes possession of the Property as a result. In such a scenario, the obligation to honor Owner 2's right of first refusal will also flow to the children of Owner 2 and their spouse upon the spouse's death should they still own the Property at their death.

6. Redemption of Owner 2's Interest in LLC. No later than January 1, 2026, and concurrent with the transfer of the Property in paragraph 4 above, Owner 2 shall complete documentation necessary to relinquish and/or redeem their entire interest, including their Economic Interest, in LLC, similar in form to the documents attached hereto as Exhibit G.

7. Final Taxes. For tax purposes, the partnership in LLC shall have ceased as of July 1, 2025. Each Party hereto is responsible for payment of their own taxes and no additional distributions beyond the Settlement Amount will be made to Owner 2 for tax purposes.

8. No Warranty on Tax Consequences. Owner 1 and LLC do not make any warranty or representation regarding the tax consequences of the individual Settlement Payments or total Settlement Amount, if any. Owner 2 and the Settlement Payments payee, expressly agree that Owner 1 and LLC are not liable for any taxes, interest, or penalties that the IRS or any other taxing authority, court, or tribunal determines must be or should have been paid in connection with the receipt of the individual Settlement Payments or total Settlement Amount. The Parties collectively agree that, unless otherwise specifically noted in this Agreement, each Party is responsible for any tax consequences arising from the transactions contemplated herein.

9. Non-Assignment. The Parties covenant and warrant that they have not directly or indirectly assigned, transferred, encumbered or purported to assign, transfer or encumber to any person or entity any portion of any claims, causes of actions, demands, rights or liabilities of any nature released under this Agreement.

10. Non-Admission of Wrongdoing. Nothing in this Agreement should be construed as an admission of wrongdoing or liability on the part of any Party.

11. Confidentiality. The Parties agree to keep the terms and conditions of this Agreement confidential unless disclosure of this Agreement is required by law or is necessary to prosecute or defend an alleged breach of this Agreement. The Parties may share information concerning the Agreement only with their legal counsel, spouses, financial planners, accountants, and/or tax advisors as necessary or as otherwise required by law. The Parties agree to instruct all individuals whom they permissibly inform of the nature, terms and/or conditions of this Agreement of its confidential nature and to obtain a pledge from those individuals to maintain the Agreement's confidentiality. The filing of this Agreement with any court shall be done under motion to that court to keep the Agreement and its terms under seal, protecting the Agreement's confidentiality vis-à-vis any third parties. The Parties' mutual promise to each other constitutes consideration for the agreement to maintain confidentiality. The Parties agree and affirm that this confidentiality provision is a material term to the Agreement.

12. [Add restrictive covenants – non-competition, non-solicitation, non-disparagement – here if specifically negotiated as part of settlement and release]

13. [Add liquidated damages clause for violation of confidentiality or restrictive covenants here if negotiated]

14. Governing Law. This Agreement shall be governed by, construed, and interpreted in accordance with the laws of the State of Wisconsin.

15. Severability. In the event any provision of this Agreement shall be held to be illegal, invalid or unenforceable under present or future laws effective during the time of performance, the legality, validity and enforceability of the remaining portions of this Agreement shall not be affected, and those remaining portions shall be construed to effectuate the intentions of the Parties.

16. Entire Agreement. This Agreement, and the Exhibits of collateral documents hereto, constitute the entire agreement and understanding of the Parties. Upon any disagreement in terms between this Agreement and the collateral documents attached hereto, the terms of this Agreement shall control. The Agreement may not be changed, altered or modified, except in writing and signed by the Parties. This Agreement may not be contradicted, varied or modified by parole, extrinsic, or other oral evidence. This Agreement is intended to resolve all issues between the Parties as it relates to the Lawsuit and conduct giving rise to the Lawsuit.

17. Stipulation for Dismissal. The Parties collectively agree to submit a stipulation and proposed order for dismissal of all Claims and Counterclaims in the Action, with prejudice and without costs to any Party, no later than 10 days upon the transfer of the Property and redemption of Owner 2's interest in LLC.

18. Reliance and Consultation with Counsel. The Parties affirm that they are entering the Agreement freely, knowingly and voluntarily and agree to its terms and conditions, which are contractual and not a mere recital. The Parties represent that they have read the terms of the Agreement, understand those terms, and have had a full and ample opportunity to review the terms with counsel prior to signing. The Parties further represent that no promises, threats, inducements or other agreements have been made or entered into by them or anyone else, other than those enumerated or set forth here, to obtain their signatures or agreement to the Agreement's terms.

19. Not Construed Against Any Party. The Parties agree that the terms and conditions of the Agreement are the result of arms' length negotiations between the Parties and that the Agreement shall not be construed in favor or against any of the Parties by reason of their participation in its drafting.

20. Authority to Bind. Each individual executing this Agreement on the part of a corporation, limited liability company, partnership, or any other entity acknowledges and affirms that he or she has the authority to do so and can bind such entity to the terms of this Agreement.

21. Counterparts Permissible. This Agreement is entered into on the date to which the last signatory below signs this document. A facsimile or scanned signature shall be enforceable as an original for execution of this Agreement, and it may be executed in identical counterparts and joined together to bind the Parties.

[SIGNATURE PAGES FOLLOW]

IN WITNESS WHEREOF the Parties agree to the foregoing Settlement Agreement and Mutual Release.

Dated: October ___, 2025.	Dated: October ___, 2025.
________________________________	________________________________
LLC	Owner 2
By: Owner 1	
Its: Member	

Dated: October ____, 2025.

____

Owner 1, individually