Analyzing How Couples Negotiate Divorce Agreements

Using ADR Ideas to Negotiate Divorce Agreements

How married couples negotiate. In negotiating a divorce agreement, it's important to understand how the spouses negotiated with each other during their marriage. If their usual marital negotiations were mostly effective, it's likely that they will find a less adversarial divorce process leading to a fair and workable agreement. Conversely, when the negotiations during their marriage were primarily dysfunctional and ineffective, it's more probable that those marital dynamics will be also mirrored in the divorce process. The result is that they are more likely to experience a destructive divorce – one that is excessively expensive, unduly time-consuming, and emotionally draining, and ultimately may have to be decided by a judge.

Dysfunctional negotiating. Spousal negotiations are dysfunctional to the extent that the spouses are *positional, competitive*, and *inflexible*. All these attitudes not only result from, but also add to, the emotional level of the conflict. If one party has typically avoided conflict during the marriage by acceding to the other's control, that party is likely to take his or her resentment into the settlement negotiations. A party in a dysfunctional marriage who selects an attorney might seek a lawyer who appears to support his or her point of view. If so, that attorney may also be positional, competitive, and inflexible. The adversarial system still encourages such negotiating.

The classic ADR models. Many divorce negotiations are now carried out by means of alternative dispute resolution. The two main ADR modes are mediation and collaborative practice. ADR substitutes *problem solving* as the primary means of negotiating. The classic book that reflects this approach is the 1981 bestseller by Harvard professors Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In*. The authors recommend negotiations based upon the ***concerns or interests*** of the parties rather than their *positions*. They then advocate a ***problem-solving*** focus. Finally, they suggest finding ***objective options*** to resolve the dispute. Their book is an essential basis for most, if not all, ADR negotiating. The three core ideas of ADR are the ones above that are in boldface and italics.

Getting to Yes came out near the beginning of the divorce mediation movement and has been influential in the development of both mediation and collaborative practice. The Harvard Negotiation Project has trained many prominent attorneys and other professionals across America and has published many excellent books. A rich trove of other works on ADR negotiation has also appeared since 1981. Before we consider some of these useful books, however, let's look at a realistic domestic relations case that illustrates the difference between dysfunctional adversarial negotiations and ADR problem-solving.

A problem case - to test out different approaches. Ford and Marisa have been married for 15 years and have three children ages 13, 11 and 7. Ford has a degree in accounting and had started a career in that field prior to the marriage. Marisa has a degree in computer science and has worked in software development and sales. When their oldest child was born, the parties agreed that Ford would be the stay-at-home parent since Marisa's income was already nearly three times that of Ford's. As each child passed toddler age, Marisa urged Ford to resume his career. Ford had not liked his

work in accounting and felt that the children needed his regular presence at home even after they were all in school. The parties increasingly grew apart as Marisa's life became even more centered on her career, while Ford continued to focus his life on the tasks of raising their children. Marisa responded to the marital tension by moving out.

Marisa consulted an attorney, who advised her to seek shared custody and to employ a vocational expert for imputing income to Ford. Marisa was also advised to offer spousal support for only a limited time since Ford had the education and skills to be self-supporting. The lawyer accordingly drafted such a proposed agreement.

When Ford received the draft agreement, he also conferred with a lawyer and received quite different advice. Ford's was told that he should have primary custody of the children and receive spousal support for an extended period without any present obligation to resume a career. His attorney responded to the letter from Marisa's lawyer with a letter stating that the draft agreement didn't furnish a basis for reasonable negotiations. Soon afterward, Ford's lawyer filed a court case on his behalf alleging desertion and set an interim spousal and child support hearing.

The arguments between Ford and Marisa over their future roles had existed for years prior to their separation and had become increasingly frustrating and tense. The post-separation exchanges between their lawyers put the case on a course that could easily lead to full-scale litigation. The four grandparents also took sides in the case. Ford's mother had also been a stay-at-home parent, but both of Marisa's parents were successful professionals. Each lawyer focused on the positions that had been worked out with his or her respective client.

Problem-solving for the problem case. Let's suppose instead that both attorneys decided to try negotiating from a problem-solving perspective. What is the problem to be solved? Ford's attorney might describe it as how to provide stability and proper parental care for the children during a crucial stage in their lives. Marisa's lawyer could define it as how to encourage Ford to take appropriate steps to become self-supporting and to share in contributing financially to the support of the children. Neither side would consider the other's definition of the primary problem, and certainly not the other's positions, to be a primary basis for negotiations.

Starting with an ADR approach. From an ADR standpoint, both above problems would be addressed in the settlement discussions, as well as many related considerations. Ford may indeed need to consider a plan to become self-supporting, but it might include obtaining another degree or credential that could lead to a career more in line with his interests. Marisa may need to develop a practical plan to become more involved in the regular tasks of parenting, including more participation in school and extracurricular activities. A vocational counselor could be asked to assist Ford in his career plans, rather than to serve as an expert witness in support of imputing income to Ford based upon a career plan he left years ago and never wished to resume.

Semantics and reframing. Semantics can be important in setting a more neutral tone. "Custody" is an adversarial and competitive term that denotes possession and encourages positions, while "parenting plan" fosters problem-solving. The parties need to recognize that "interests" may often be reciprocal. It is in Ford's interest as well as Marisa's for him to develop a practical plan for a new career. There are ways in which

it is in Ford's interest to have Marisa more involved with the children, and that may also serve the children's best interests if properly carried out. It also may be in the interests of both the parents and their children if Ford and Marisa can agree on a plan for divorce and parenting counseling to deal with the transitions in their lives. The parents may find new ways of relating to each other as their roles change and stabilize. Focusing the discussions on these transitions doesn't automatically settle the case, but it keeps the negotiations on practical details that can be worked out.

The value of ADR experience and ideas. In the real world of divorce practice, even those cases that start with the types of dysfunctional negotiating that mirror how the parties communicated during their marriage often wind up settling. This may simply be a grudging acknowledgment of what a court supposedly might do, or a compromise that leaves both parties unsatisfied. If the lawyers are familiar with ADR principles and can use them creatively, the resulting agreement may very well provide a more lasting and satisfactory framework.

This might seem like a good place to end, but there is much more to cover. It would be a mistake to ignore the richness of the conflict resolution literature that has emanated from ADR experience over the past 35-40 years.

Structural and illustrative perspectives. Books and articles about dispute resolution can be mainly *structural* or mostly *illustrative*. *Getting to Yes* is a structural book in that its central focus is a different way of thinking about negotiating, namely as *problem-solving*. If we understand that basic structure and its two corollaries, *concerns or interests* and *objective options*, we can apply these to the variety of situations we encounter in practice. When a book is illustrative, it consists mostly of a diversity of concrete examples. Although *Getting to Yes* sets up a structure that is easy to remember and apply, it is also illustrative in that it is packed with examples. The book that follows is a superb example of an illustrative guide.

"Changing the Conversation: The 17 Principles of Conflict Resolution"

There is a tricky recurring problem for those divorce professionals who take part in the negotiation of divorce agreements, and the possible solution highlights one of the benefits of ADR ideas. The problem is when clients expect their divorce agreements to be worked out by means of the same kind of negotiating that they had used with their estranged spouses during the marriage. That is, by using the same dysfunctional arguments that demonstrably didn't work then and are unlikely to work now!

An excellent recent book that offers tested ADR techniques as the solution is *Changing the Conversation: The 17 Principles of Conflict Resolution* by Dana Casperson. This book is published in paperback by Penguin Books and is available on Amazon.com. It is one of the several best single books on ADR negotiating since the classic *Getting to Yes*, which is also published by Penguin in its latest edition.

These principles are set up to be easy to read, to remember, and to apply in practice. It provides concrete examples for all 17 principles and furnishes an anti-principle for each. For example, principle number 10 is to "Develop curiosity in difficult situations." Each such principle has a counter-principle, which for number 10 is "Adopt

a rigid stance. Don't try to understand other viewpoints." The book then provides examples of each in an organizational and typographical format that is easy for both professionals and their clients to follow.

Casperson's book can be used as a handy desktop reference. Although the principles in the book are mostly not original with the author, it's a superb compendium of ADR ideas. The very curiosity to consider options that can serve the interests of both sides opens more paths to successful negotiations, as the ADR approach to Ford and Marisa's case demonstrates.

For those of us who have lots of experience with angry, frustrated clients, the anti-principles may seem even more familiar than the working principles. The book demonstrates over and over why the anti-principles are not effective negotiating. It offers some practical suggestions as to how to recognize the emotions involved in the conflict, and for keeping them in proper perspective without ignoring their existence.

Although this book wasn't specifically written for divorce cases, its ideas are almost totally consistent with divorce negotiations. As a general book on conflict resolution, it could even serve as a helpful handbook for marriage counselors, especially since so many of the communication difficulties in marriages are negotiation problems. It takes only about two hours to read the book. Keep it handy and refer to it in the future. Although the book is intended mainly for use in the daily lives of individuals, it is also relevant to more formal negotiating.

I sent a copy of Casperson's book to a collaborative client who had almost completely sabotaged his case by contra-effective outbursts during a tense meeting with counsel present. He read the book and started talking with his wife without counsel present in ways that showed her that he understood her concerns as well as his. After several months passed without hearing from him, he sent me an e-mail saying that they had worked out most of their differences between themselves. The case was then quickly settled with a very fair and balanced written agreement.

The Sagas of Mr. & Ms. Nasty and Mr. & Mrs. Nice

Cases frequently turn out to be easier or more difficult to resolve as they may initially seem. Just because a conflict appears to be fought out at a distressing level of volume and intensity does not mean that a settlement is impossible, and the converse is also accurate. Consider the cases of two couples who met with a divorce mediator at around the same time some years ago (these are actual cases). Let's call them Mr. & Ms. Nasty and Mr. & Mrs. Nice.

The Nasty's & the Nice's. The Nasty's were in their middle 40's and their negotiations were quite obnoxious – insults, put-downs, bad language, walking out of meetings, threats and accusations, frequently in loud voices. The Nice's were a couple in their late 50's and were ever-so polite and courteous in talking to each other. However, the mediator soon noticed that after each frustrating and unpleasant meeting with the Nasty's, the bottom line of their settlement grew ever closer. With the Nice's nothing ever seemed to budge. The ways the Nasty's negotiated was how they got business done in their marriage, and it worked (to a point). But the Nice's stayed frozen in a family

system in which politeness was required, but long-term family problems were shunted aside.

The surprising outcomes. After the Nasty's signed a quite fair and balanced agreement, Mr. Nasty walked over and gently put his hand on Ms. Nasty's shoulder and asked her to join him for lunch. When the Nice's realized that they weren't going to get any agreement, they stalked silently and separately out of the conference room.

The Nice's might have reached an agreement if the mediator had diagnosed them as being the equivalent to a high conflict couple and moved to a structure of separate meetings with carefully framed discussions of alternative options. This is part of the same approach that Bill Eddy recommends for the more obvious high conflict couples.

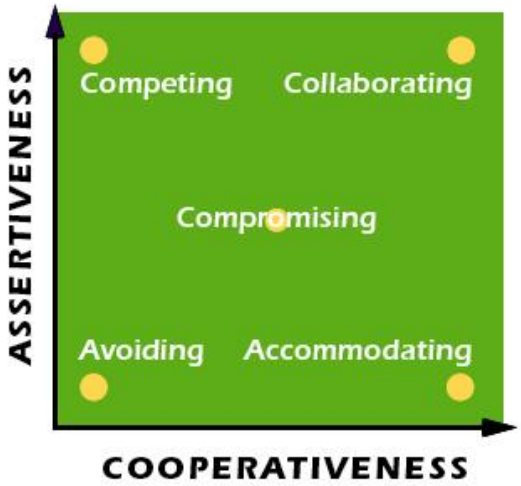
Using conflict models to analyze a case. Let's look at how the parties in these two cases fit into two conflict resolution models, which follow. The first is the well-known Thomas-Kilmann model, which has also been made into a test for personal styles of conflict. The second is a family systems model that was developed by Professor David H. Olson of the University of Minnesota.

In the case of the Nasty's, both parties were competitors and they were somewhat emotionally enmeshed. But they had apparently learned that eventual compromising was necessary to get any decisions made. The Nice's, on the other hand, managed the emotions of their marriage by avoiding conflict, but the rigidity that affected them meant that they were unable to compromise.

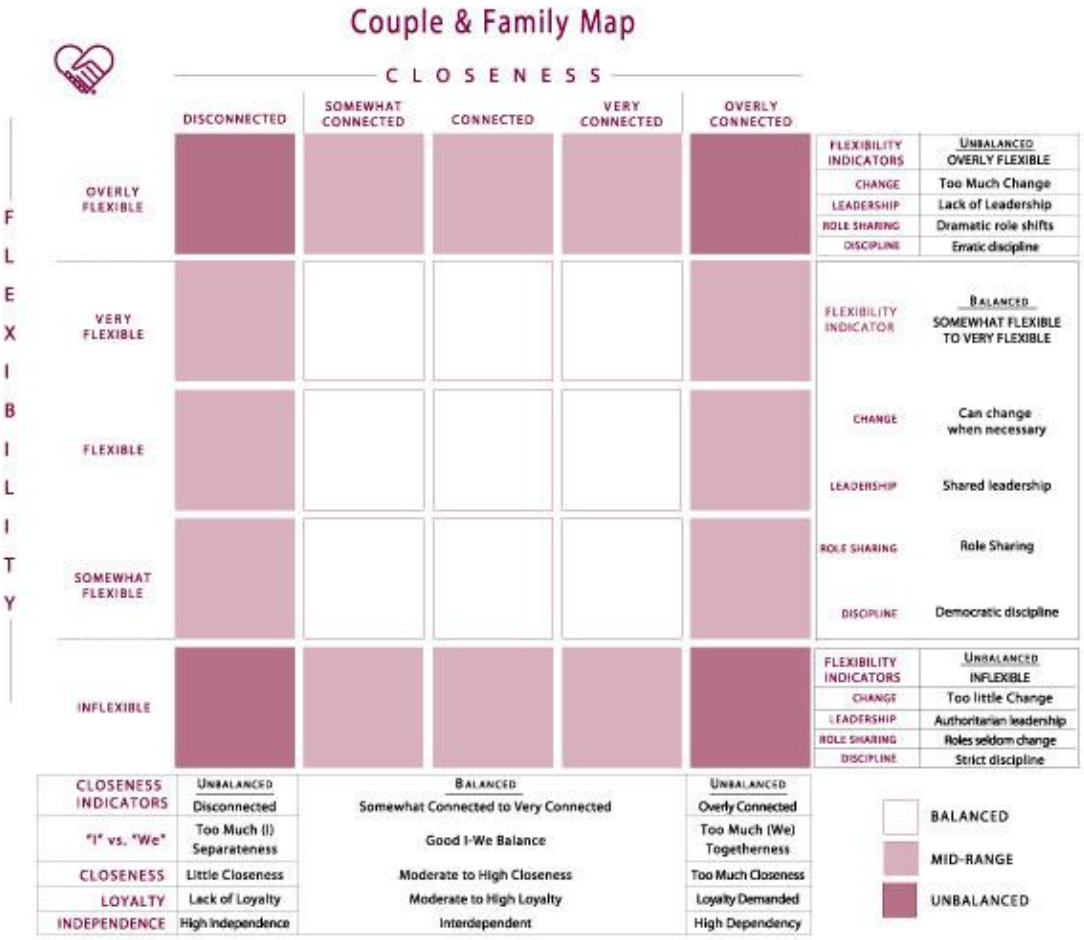
In the Olson model, the Nice's were inflexibly disconnected. Even the politeness with each other was just a way to live with the fact that their marriage had no viable way to adjust to many of the changes that every marriage faces. It came to a head when the separation forced them to confront the need for a settlement. As the Thomas-Kilmann model demonstrates, avoidance is the worst way to deal with conflict. The Nasty's were overly connected (as described in Olson's model), but flexible enough to compromise. Nevertheless, they still got divorced.

Thomas-Kilmann model. The Thomas-Kilmann model is about the parties' individual styles of negotiation. It can be made into a sort of family systems model if you place each party on the chart. The position of each party in the model then becomes a starting point for charting their interactions. Their styles of negotiating represent the outcome of their negotiating relationship, with collaboration as the ideal goal.

A positive balance between *assertiveness* and *cooperation* leads to the best outcome, which is *collaboration*, or at least *compromise* (splitting the difference). Too much emphasis on assertiveness leads to *competing*, and over-emphasis on cooperation to *accommodating* (giving in). The worst approach to conflict is *avoidance*, which resolves nothing. For further information and to order the Thomas-Kilmann Conflict Mode Instrument, see the website www.kilmanndiagnostics.com.



<u>Professor Olson's model</u>. The final key to understanding the Nasty's is their ultimate flexibility, while with the Nice's it is their rigid inflexibility, because these tell us more than the Nasty's emotional enmeshment or the Nice's emotional distance.



Dr. Olson's model is research-based and deals with how spouses interact in two dimensions, namely *flexibility* and *closeness*. The *flexibility* dimension has two poles, one where a spouse is "all over the place" in negotiating, and the other where he or she is controlling and unwilling to budge. The *closeness* dimension is mainly about emotional reactivity, that is, the way the spouses keep reacting to each other. At one pole their reactivity may take the form of heated arguments, and at the other it results in emotional distance and avoidance.

In between those poles is where flexible negotiating can take place between two spouses who have a healthy self-other balance in their marriage. This both requires and results in effective communication. When one spouse is controlling and the other generally gives in, often both dimensions are out of balance. When these parties divorce, the party who routinely accommodates may decide to fight for control. It is not unusual for there to be more than one control focus, as where one party controls the finances and the other oversees raising the children. David H. Olson's explains his couple and family map at http://www.buildingrelationships.com/facesiv studies/circumplex_article.pdf.

Diagnostic and Strategic ADR Models

Thomas-Kilmann as a model. Since the early days of ADR, the Thomas-Kilmann test has been a useful tool for diagnosing the main styles of conflict based upon the interaction between *assertiveness* (self) and *cooperation* (other). If these work together, the result is *collaboration* (win-win) or *compromise* (split the difference). If they do not, *competing* is defined as being assertive without being cooperative, and *accommodating* as being cooperative without being assertive. *Avoiding* is the worst mode, since it is neither assertive nor cooperative, and it can easily produce a stalemate that leads to litigation. (The Thomas-Kilmann test can be purchased from their website to administer to oneself, or in proper circumstances, to clients.)

In the prior section on ADR ideas, Ford and Marisa's positions are competitive. Even so, they appear more related to their separate interests rather than to a fixed desire to compete. So even a collaborative outcome may still be possible if appropriate options are presented.

Professor David H. Olson's model. David H. Olson is Professor Emeritus of the excellent Department of Family Social Science of the University of Minnesota. While Thomas-Kilmann deals with conflict in general, Dr. Olson's model is a family systems structure dealing with negotiation in marriages. As we have seen, it evaluates the levels of two variables in each family system - *flexibility* and *emotional involvement*. The flexibility continuum runs from *inflexible* to *chaotic*, and the emotional continuum traces the spectrum of emotional reactivity from *excessively involved* to *rigidly distant*. Effective negotiation takes place in the center of the model, where the couple can negotiate from a state of balanced flexibility and non-reactive emotional responses. Inflexibility is a common and often serious problem in marital negotiating, and this is especially so when it is accompanied by emotional reactivity on either side of that spectrum.

In the prior problem (the case of Ford and Marisa), their lives have taken them in separate directions, but it does not appear that their differences are based mainly on

emotional reactivity to each other. Their personal goals in life have become quite different, but they still have the common goal of properly raising their three children. If each of their legitimate interests can be addressed, there is no essential reason for them to be inflexible.

Other useful ADR approaches. Many excellent ADR ideas are relatively simple to remember and carry out. For example, *EAR* (*empathy, attention, respect*) is simply an encouragement to negotiate with civility, since even highly conflicted parties react more positively to civility. (This acronym was developed by Bill Eddy.) *Aikido* is a Japanese martial art that relies on using an opponent's strength defensively. In a negotiation, it starts with finding a point of agreement with the other side, and then integrating that into a more balanced proposal that does not appear to harm the other side. A similar tactic was postulated by the 17th century French mathematician, Blaise Pascal. It also starts with acknowledging any valid points made by the other person and then fitting them into one's own broader plan. If Ford and Marisa can each be aware of the other's definition of the problem, then they can talk about future transitions that deal with their shared as well as different interests. These are ways to find creative options, and they work even better when done with EAR civility.

Judicial and legislative models. Basic legal theory provides another kind of analysis. Divorce courts tend to look backwards within the scope of their jurisdiction, which often is not broad enough to resolve all the problems in the case. Courts are not set up to solve problems+, but rather to resolve disputes by means of authoritative decisions. They often lack the full power to order appropriate future solutions. When an agreement solely attempts to replicate what a judge might do, the parties essentially function as a *two-person court*. Unlike courts, legislatures are responsible for making sensible rules for the future. Thus, when the parties decide instead to act as a *two-person legislature*, they can put their future planning into a written agreement, even though a court may lack the power to achieve the same result. These future-oriented discussions can address such matters as financial planning, parental cooperation, vocational and educational planning, and tradeoffs among different categories of property. These agreements generally supersede state law. A court will often lack both the expertise and the jurisdiction to respond fully to the coming transitions in Ford and Marisa's case, since an optimum agreement for them needs to include creative future planning.

Developing an ADR *attitude*. It is not easy to summarize the details of the best ADR negotiating styles and techniques. Beyond structural models and acronyms, they reflect an *attitude* toward negotiating that is only acquired by studying numerous examples of how they work in practice. While remembering tag lines is important, they are more useful when we are familiar with the illustrative details. Two of the best such books are *Nonviolent Communication: A Language of Life* by Marshall B. Rosenberg and *Difficult Conversations: How to Discuss What Matters Most* by Douglas Stone, Bruce Patton & Sheila Heen of the Harvard Negotiation Project. There are many others.

ADR ideas in daily lives, and in marriages. Books like these and *Changing the Conversation* are written to be useful in daily interpersonal relationships, rather than being expressly framed for divorce negotiations. Courts are not well-equipped to manage ongoing human relationships. Even when there are no children of a marriage,

and especially when there are, effective negotiations require working relationships. All the participants in a process that seeks a fair and workable agreement must be aware of the full range of tested negotiating styles and models. Since many communication problems in marriages are basically negotiation problems, we should analyze them in that light. When we observe how adversarial divorce negotiations may have resulted from dysfunctional communicating in a marriage, this demonstrates how the adversarial divorce system may magnify those differences. ADR negotiating, both in the attitudes it fosters and by means of its models and examples, offers ways to break this cycle. It also gives us some tools to make changes in the existing divorce system.

ADR negotiation is here to stay. There will always be some cases that have to be litigated. Negotiation, however, is not just the wave of the future, it is the tide of the present. We know that a substantial majority of all divorce cases are settled by agreement, either by spouse-to-spouse negotiations, family mediation, collaborative practice, or (most frequently) by attorney managed negotiations. Litigation has become the "outlier."

Lawyers are picking up on ADR. Some of the best divorce lawyers are intuitively skilled in the use of ADR ideas and may have taken some related courses, although they may not have thought of them as ADR. It's time for all the various professionals involved in negotiating divorce agreements to acknowledge their shared interests, even as these diverge professionally. Change takes time, and when it's a paradigm change, it comes from how people interact rather than from new laws telling them what to do. Such a process change requires adjustments in attitude on the part of both divorce professionals and their clients. It doesn't require a legislative mandate.

Finally, this segment is not intended to ask experienced divorce attorneys to abandon negotiation tactics that may have achieved positive results in settling their cases. Rather it is about being aware of (1) other useful ways to diagnose these cases and (2) other options for negotiating agreements. There is no supervening reason why some of the negotiating ideas and skills that have been used successfully in mediation and collaborative practice could not also be used effectively in conventional divorce negotiations. In fact, many respected family law attorneys have successfully used ADR ideas in their practices for many years. Since most attorneys in divorce law practice settle a high percentage of their cases by agreement, they may thus take this as a welcome to the shared world of ADR.

Systems and Process Perspectives

Identifying the negotiating system(s). The starting point for systems analysis is to identify the participants in the system and ascertain their relevant sources of guidance. Obviously, this means the parties themselves, and it also includes the professionals and other people whom they may rely upon for advice. This list of possibilities varies widely from case to case. On the professional level, it may include financial advisors, mental health professionals, ministers, and physicians, as well as other lawyers. Other sources of advice and assistance may be extended family members, close friends, neighbors, and work associates.

It is especially important to identify participants in a client's system as they become a source of competing or questionable advice, are "enablers" for the parties, or apply pressure on a party or counsel regarding the negotiations. Divorcing spouses often have a variety of sources of professional guidance, and at times these produce competing advice. An impartial financial planner may provide a quite different plan for both spouses than might be expected from a financial planner retained by one of them. Similarly, an individual therapist for a child might support a different parenting plan from that of a professional doing an impartial custody evaluation. A settlement plan based upon prediction of a judicial outcome may differ substantially from a coordinated future financial plan.

The impact of emotions. Emotions often flow freely in a divorce system. There are three quite different kinds of emotional reactions to divorce, and it is important to separate them. The three main types of emotional responses are: (1) emotions that need empathy, and perhaps counseling, to assist a party in working through the divorce process; (2) emotions that adversely affect a spouse's ability to prepare for and to participate realistically in negotiations; and (3) emotions that reflect a mental illness or a personality/character disorder. These categories are not exclusive. A party who is positional, competitive and inflexible can make negotiations difficult for everyone, but he or she may still need professional counseling to manage day-to-day stress or to deal with a more troubling mental condition.

The nature of legal guidance. The sources of guidance for legal advice and strategy are diverse. The formal legal sources include the family law code and the case law interpreting it, as well as counsel's experience in prior cases. Many of the most important substantive provisions in statutory divorce law are in the form of criteria or general standards, rather than rules. The main exception is the child support guidelines, and even there we find general criteria for varying the rules. Spousal support and child custody are obvious examples of areas in which the law is framed to allow at times rather wide discretion and flexibility. Divorce law and procedure, as well as some of the laws dealing with property, businesses, retirement, taxes, bankruptcy, estates, immigration, should be considered elements of a broader system.

Elements that impact on the negotiation process. For family lawyers, clearly a practical knowledge of the applicable family law in one's own state is the most important basis for their professional practice. I became fully aware of this during the 25 years I gave the lecture on "Recent Developments in Virginia Family Law" at the annual Virginia State Bar Conference. It was fascinating to observe and pass on to these audiences of lawyers the many important statutory and case law changes during that time. The divorce process underlies the related legal process. As such, it may involve a range of extralegal issues that relate to and affect the legal process, and especially regarding negotiations. Remember that divorce negotiations also constitute a definable separate process, one of reaching decisions in the context of a relationship system. To diagnose the relative difficulty of a given case, it is of course essential to understand the substantive legal issues involved. Then we surface the practical settlement options. Almost always it is also necessary to understand the system and process context of a case to construct a meaningful analysis leading to an effective strategy.

Review of Some ADR Dispute Resolution Models

The last 35-40 years have been an active period for testing out new ways of negotiating agreements to be used in settling divorce cases. This article is an outline of some of the most useful of these models. The focus of all these models is to expand settlement *options* and to make them more creative. Here is a review of some of the main ones:

Getting to Yes. *Problem-solving,* not adversarial is the most basic theme of "Getting to Yes." Focusing negotiations on defining and solving a problem makes it easier to surface *the concerns and interests* of the parties and to avoid positions. It promotes a climate for *creative options* and opens the possibility of finding objective means to choose among them. The three basic elements of this approach are in italics.

Window of tolerance. Most people have a safety zone where they can be open to hearing and considering ways to resolve problems. It's a zone between FIGHT on one side and SHUT DOWN on the other. It can also be a zone of greater flexibility. Getting someone in that zone and keeping them there is important, but it can be difficult. The best way to do this is to create an anxiety-free environment that avoids confrontation.

Thomas-Kilmann. When both parties are negotiating from a positive mix of assertiveness and cooperation, they can collaborate on mutually beneficial options, or at least find compromise options that will settle the dispute. If they avoid the conflict nothing ever gets resolved.

David H. Olson model. The best negotiated options in a family system result when both parties have balanced flexibility and are not just reacting to each other based upon their emotional enmeshment or emotional distance. Inflexibility of even just one party means serious problems in negotiating, especially when there are strong emotions.

EAR. Civility usually produces more creative options. Even highly conflicted parties may react more positively to *empathy*, *attention*, and *respect*.

So, make a proposal! Creative options are rarely generated by criticism. Bill Eddy suggests asking the other party instead to make a proposal, which can then foster the exchange of problem-solving options.

Aikido. Start with finding areas of agreement with the other side, and then incorporate these into more balanced and mutual options. Acknowledge when the other side makes valid points, and then surface more complete options.

Legislative and judicial models. Courts mostly look backward and focus on solutions within their often-limited jurisdiction. Legislatures pass laws designed to solve problems for the future. If the parties broaden the scope of negotiations beyond their legal case, they become a two-person legislature instead of a two-person court.

Summary. There are many ways to conceptualize options for a negotiated agreement. This segment is mainly about *process* options. Whether one is a negotiator or a neutral assisting negotiation, it's important to be aware of both aspects of negotiating. Either side can become vital to the success or failure of the negotiations.

A Review of Contemporary Negotiating Strategies

After a sharp rise in both marriages and divorces during and immediately after World War II, divorce rates dropped and stabilized, and then rose sharply through the 1960's and 1970's. By 1980 divorce had become one of the most important fields of conventional law practice and remains so despite a slow but steady decline in the numbers of both marriages and divorces in the 21st century. Since 1980 the ADR (alternative dispute resolution) movement has also become an important factor in how the legal process of divorce is managed in the United States.

Putting the courts "out of business." One constant factor in the American divorce process is that the legal details of most cases are resolved by agreement rather than by a judge. Even so, for decades the substantive basis of many such agreements has too often depended upon assessments of what the outcome in court might have been. In this century, however, and especially in the last decade, ADR has influenced both the process and scope of many negotiated settlements. The public perception of how divorces are managed is also changing.

Updating styles of negotiating. Since both public and professional attitudes about the process of divorce are in a state of transformation, divorce lawyers have the freedom to update their negotiating strategies. The framework for these negotiations can be broader and less legalistic as attorneys perceive a wider range of available choices for both the negotiating process and the substance of divorce settlements. As ADR ideas are integrated with conventional negotiating skills, litigation becomes even less likely. Although litigation will always be available for the cases that just can't be resolved by an agreement, negotiation is increasingly seen as the optimum process.

The two main negotiating styles. It's now possible to identify a diverse range of viable sources of ideas for effective negotiation strategies, but these are most useful in practice if we can organize them into a coherent framework. This is what is known as a *structural* approach. For example, we can define the two main organizational categories as (1) conventional negotiating by divorce lawyers and (2) ADR negotiating.

Two analytical models. Although a structure based upon these two categories is an organizational point of departure, there are two other constructs that can further illuminate the paths to effective negotiating. These are *systems theory* and *process theory*. The term "theory" turns off many professionals, but "theory" also refers to a useful means to analyze and apply the practical experience of different professionals. This then is practitioner's theory, not just postulated academic hypotheses. Arguably the terms *analysis* and *models* are more descriptive than *theory* for our purposes.

Systems analysis. *Systems analysis (or theory)* is the study of the interactive effects of relationships. In science an example is Albert Einstein's theory of general relativity, and in the field of sociology Herbert Spencer's theory of social Darwinism. Family systems theory arrived later, mainly in the second half of the 20th century. To date there has been very little direct effort to apply systems analysis, and even family systems theory, to divorce negotiations. I was introduced to systems analysis in 1979 when I had the privilege of a year-long fellowship at the Georgetown University Family Center. The director at that time was Murray Bowen, M.D., one of the great pioneers in the creation of family systems theory as a separate branch of psychiatry. During that

year I observed videos of many real cases in which family systems analysis was used effectively to resolve serious family problems by using relationship strategies rather than individual diagnosis and therapy.

Process analysis. *Process analysis (or theory)* is the study of how decisions are made in systems. The first major application of process theory in legal education was the Hart & Sacks materials that were introduced at Harvard Law School in 1958. These were case study materials, but of a very different type from appellate decisions. They consisted of real cases in which an examination of the decision process extended well beyond appellate cases and the content of specific statutes and regulations. These cases were designed to reveal the full range of factors in decision-making, much like the case studies used in MBA programs.

Most of my professors at the University of Montana Law School in the mid-1950's had little interest in how legal decisions were actually made, except for their analysis of appellate court cases. Fortunately, I was able to take some graduate courses in political science at the same time. I particularly remember a course in public administration that used case studies in much the same way as the Hart & Sacks materials. One was a study of the evolving roles of U.S. Foreign Service officers in Indonesia as the country made the transition from being a Dutch colony. Another was about the experiences of the Army Corps of Engineers in dealing with the problems of bureaucracy and competing interests in flood control in New Orleans.

When I became a member of the University of Virginia law faculty in 1964, one of my colleagues was already using the Hart & Sacks materials in his courses. During the year I spent at Georgetown in 1979-80, I also worked as counsel to the law firm of the legendary Betty Ann Thompson in Arlington, Virginia. Betty introduced me to the realities of the adversarial divorce process. In that same year, I became a close friend of O.J. "Jim" Coogler, a former state senator from Georgia who was the founder of the national movement for divorce mediation. Thus, my introduction to ADR. Having Jim Coogler, Murray Bowen, and Betty Ann Thompson as mentors during the same year was a priceless experience for me.

Models of Negotiating Strategies

Comparative Chart of Process Options for Divorce Negotiating

The chart that follows is designed to cover a range of situations where there are substantial differences between traditional and ADR methods as to how divorce agreements are negotiated. The chart intended to be descriptive. It shows two columns of alternative process approaches. *Do assume that any element from either column is always the exclusive or even the best process choice*. This book is about the mindset behind negotiating strategies and how to generate relevant practical options. It is not appropriate simply to dismiss state family law out-of-hand as irrelevant. Despite its obvious shortcomings, our system of family law does impose sensible responsibility in many situations. However, the optimum divorce law process is slowly moving in the direction of the right column.

Comparative Chart of Traditional and Creative Future Directed Process Options for Divorce Agreements

Traditional Legalistic Process	Creative Future Oriented Process
Looking backward to determine the present consequences of past actions or inactions; based mainly upon past or present events/situations. ("Judicial" approach.)	Looking forward to formulating a plan that is fair and workable and seeks to meet the legitimate needs and goals of each of the parties. ("Legislative" approach.)
Legal reasoning from appellate cases, details of statutes, and trial experiences.	Also, subjective considerations as suggested by the client(s) or by a relevant professional.
Guidance from the legal profession and other lawyers; reliance upon legal sources (mainly statutes and appellate cases).	Ideas also from other relevant sources, such as mental health professionals, financial planners, and accountants.
Zero sum game; if one party gets more, the other gets correspondingly less.	Search for creative ways to "expand the pie" to accomplish a win-win result.
Keeping clients focused; managing difficult clients and not losing control.	Understanding how the stages of the divorce process affect clients' responses.
Vocational specialist used to impute income to an unemployed or under-employed party.	Career counselor to help a plan a career and suggest relevant employment opportunities.
Equitable distribution based upon statutory criteria for dividing property.	Single impartial financial planner to help both parties plan sound financial futures.
Accountant hired to trace commingled property or dissipated marital assets and present evidence for one side.	Impartial accountant hired by both parties to help negotiate issues of commingled or dissipated assets.
Evidence presented in court to establish that one parent is more experienced and competent than the other.	Impartial evaluation by a skilled mental health professional or use of a parenting coordinator to aid parental cooperation.
Use of traditional terms such as "custody" and "visitation".	Use of terms such as "parenting plan" and focus on cooperative future parenting.
Use of civil discovery court procedures to obtain information and documents when a voluntary exchange does not suffice.	Contractual agreement to exchange information and documents that are reasonably necessary to the process.
Litigation and negotiation strategies; use of court procedures to influence settlements.	Cooperative strategies to seek common ground and to achieve win-win solutions.
Formal detailed drafting based upon a tested office formbook.	Drafting in understandable modern English; collaborative revision process.
What is a court likely to do?	What is a fair and workable settlement?

Elements of Effective Divorce Mediation

Divorce mediation became a national movement in the late 1970's. Forty years later we are still trying to sort out the elements that produce the most effective results. Most mediators come from one of three quite different professional backgrounds as either family lawyers, financial specialists, or mental health professionals. The starting point for most mediators continues to be their own professional field of origin. It's time to take a fresh (and broader) look at the skills, knowledge and personal attributes of divorce mediators:

The essential knowledge bases. Ideally every mediator needs to acquire the following categories of professional knowledge: (1) the legal framework of divorce; (2) the emotional process of divorce; (3) the fundamentals of financial planning; (4) tested conflict resolution strategies; and (5) the principles of non-directive counseling. Each of the first three of these emanates primarily a different profession that the other two.

Mediator skills. Mediator skills are centered on the last two of the above categories of knowledge - conflict resolution strategies in the context of non-directive counseling. Counseling is non-directive when it is focused on the goals and realistic options of the clients. It requires active listening on the part of the mediator. A mediator also needs an ability to identify and separate out the legal, financial and emotional factors in each case to determine the primary factors that drive the conflict.

The mediator as educator. The mediator can provide useful information relating to the process as needed or requested, provided it is impartial and accurate and does not constitute legal or financial advice.

Awareness of professional limitations. A mediator who is an attorney may not fully appreciate the impact of emotions and financial planning on the negotiations. A mental health mediator may treat an issue as emotional when it is more about the substantive and financial differences between the parties. A financial mediator may not be fully aware of the effect of state family law on planning and may overlook aspects of the emotional context. These emphasize the importance of treating family mediation as a distinct profession and of continuing education to fill in the gaps.

Personal attributes of the mediator. Every mediator needs to be an active listener, and to have respect, empathy and a sense of humor. The ability to do creative and practical reframing is often useful.

The structure of mediation. Every mediation requires sufficient disclosures and proper preparation, as appropriate to the needs of the case. Agendas are worked out in a collaborative manner. The mediator enforces civility in the process.

Drafting the results. The mediator drafts either a memorandum of agreement or, if appropriate to the mediator's professional background, the actual legal agreement. Drafting in clear understandable non-legalistic English prose is an essential mediator skill, because tuning up such a draft in a collaborative manner becomes the capstone of the process. There are far too many office form books and computer files that promote archaic and constipated drafting. It's important that mediators of every professional background consider how to integrate draft agreements into the mediation process.