Negotiating Divorce Agreements:
A Review of Contemporary 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.

One constant factor in the American divorce process is that over 90% of divorces are resolved by agreements on the legal elements of the divorce. Those matters were not ultimately decided by a judge whenever the parties reached an agreement, but the substantive basis of many such agreements 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 ought to be managed is also changing.

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 the optimum process.

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. These are fully discussed in two interrelated articles in the center of the Home page of the divorce agreement website, www.CreativeDivorce.net. All articles and outlines on the website that are cited in this article should be treated as an integral part of the article, and not as just footnotes.

Although a structure based upon these two categories is a logical 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 lawyers, but "theory" can also refer to a useful means to organize and apply the practical experience of different professionals. This then is practitioner's theory, not just postulated academic hypotheses.

Systems 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 theory, and even family systems theory, to divorce negotiations. I was introduced to systems theory 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 pioneers in applying systems theory to psychiatry. During that year I had the opportunity to observe a number of real cases in which his family systems theory was used in effective ways to resolve serious family problems by using relationship strategies.

Process 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 no interest in how legal decisions were actually made. 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 a disaster relief situation.

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 Betty Thompson in Arlington. 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.

The advent of ADR broadened the scope of divorce negotiating, especially as attorneys started to take mediation training, and also with the advent of collaborative practice. Even though lawyers may still use litigation strategies to bring pressure on negotiations, the differences between negotiating a divorce agreement and litigating a divorce case are obvious. In the United Kingdom, one is done by solicitors and the other by barristers. The training of each of them has to be relevant to their separate professional roles.

What happens when an ADR case ultimately winds up being litigated? Mediation solves this problem by making it unethical for a mediator who is an attorney to be involved in any way in the court proceedings. Collaborative practice prohibits the parties' separate attorneys from being counsel in the court case. In each case, the litigating counsel who take over the case may still do substantial negotiating as the case remains open to being settled as well as litigated. Unlike British lawyers, an American family lawyer in conventional practice must be prepared to perform these two quite different and somewhat inconsistent roles.

This article does not advocate that a family law attorney who starts a case with negotiations should never represent that client in court if the case is not settled. My point instead is that when the lawyer routinely performs these two somewhat divergent professional roles in the same case, he or she should have at least as much if not more specific training in negotiating as in litigating. In one case, the attorney's job is to convince the other party, while in the other it's to convince a judge. The two roles are not nearly as similar as they once seemed.

Since negotiating and litigating are distinct attorney roles, and given that law school and CLE courses are still much likely to favor the latter, then it's certainly appropriate in this article to focus upon the separate contours of the former. This idea is reflected in the two separate articles that are featured side-by-side on the Home page of www.CreativeDivorce.net. The first article assumes the perspective of conventional negotiating by divorce lawyers, and is entitled *What ADR Professionals Can Learn from Litigating Divorce Lawyers*. This article about the structure of such conventional negotiating also includes some ideas drawn from ADR. The other article, *Using ADR Ideas to Negotiate Divorce Agreements*, carries this quite a bit farther. That article explores the range of practical negotiation ideas developed in the ADR movement over the last 45 or so years. The juxtaposition of these two articles is meant to encourage referral to both of them, rather than to create an either-or choice.

Now let's consider some additional perspectives on the "solicitor" role of the divorce lawyer coming from systems theory and process theory, starting with the former. The starting point for systems theory is to identify the participants in the system and ascertain their relevant sources of guidance. Obviously this means the parties themselves, but 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 becomes especially important to identify the participants in a client's system when 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 rather 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.

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 understanding, 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 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 serious mental condition.

There are four different process ways of reaching divorce agreements: (1) spouse-to-spouse negotiations; (2) family mediation; (3) attorney negotiation; and (4) collaborative practice. These are featured at the top of the Home page of www.CreativeDivorce.net. Clicking on each mode brings up its primary features, its benefits, and its risks. One can easily observe how much the roles of the involved professionals differ from one mode to another. A separate chart that compares conventional legal process options with ADR options is available on the right sidebar of the Home page.

The sources of guidance for legal advice and strategy are also 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 variances. 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, retirement, taxes, bankruptcy, and immigration, should be considered elements of a broader system.

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 VSB Conference. It was fascinating to observe and pass on the many important statutory and case law changes in Virginia 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 in regard to negotiations. Remember that divorce negotiations also constitute a definable separate process, one of reaching decisions in the context of a relationship system. In order 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 in order to construct a meaningful analysis leading to an effective strategy.

There are many ways to analyze the effects of the divorce process on the process of negotiating. On the right sidebar of the Home page of the website there are three brief outlines of common process issues: (1) *The Emotional Stages of Divorce*: (2) *Common Divorce Traps to Avoid*; and (3) *Reflections on the Elements of Litigated Divorce Cases*.

Cases may frequently turn out to be not as easy or as difficult as they may seem. A classic comparison between a manageable case that initially appeared to be nearly impossible, with a seemingly simple case that turned out to be quite intractable, is posted on the website under "Articles." It's entitled *The Sagas of Mr. & Ms. Nasty and Mr. & Mrs. Nice*. The article provides an analysis of those two cases using the well-known Thomas-Kilmann model of the different ways people approach conflict, which is then compared with a model of negotiating in a family system developed by Professor David H. Olson.

The relationship among professionals in the process of negotiating divorce agreements continues to change, especially as it affects the roles of the family law attorneys who are involved. This is especially so in collaborative practice, where the attorneys on each side are considered to be part of a team that includes each other as well as the mental health coaches and financial specialists that may be involved. In conventional divorce practice, the negotiating lawyers don't think of themselves as a team, but at least they are expected to observe civility now more than in former years. It's not unusual for experienced adversarial divorce lawyers to settle cases more effectively because of a positive professional relationship with each other.

The single defined area in which some lawyers appear the most reluctant to modernize their practice regarding divorce agreements is in the actual drafting of those agreements. Much of this drafting is initially done by paralegals who are assigned to use archaic constipated office form files. A strongly worded article entitled *It's High Time to Draft ALL Divorce Agreements in 21st Century English* is posted under "Articles" on the website. It was published in the Fall 2013 issue of the Virginia State Bar's *Family Law Quarterly*.

It's vitally important that the resulting agreements, which should be the capstone of the negotiation process, be properly integrated into that process.

This means that it must always be drafted in clear understandable modern English prose, not legal gobbledygook, and open to editing. Professor Fred Rodell inveighed against the pomposity of legal drafting at Yale Law School back in the 1930's. In the mid-1950's my law professors tried to teach me bad legal drafting. What I learned about good drafting I got instead from a book I bought and from my TAC officer in Air Force ROTC, who always insisted on brevity and clarity. Why is it that sixty years later I still see divorce agreements that begin with "Witnesseth," followed by a string of run-on paragraphs each starting with "Whereas." Aargh!

This article is intended as a review for family lawyers of the range of skills and knowledge relating to the negotiation of divorce agreements. My public interest website, www.CreativeDivorce.net, is devoted to the contemporary and creative process options for resolving divorce cases without litigation. The outlines and articles on this website that have been cited above are each intended to be an essential part of this article. They should not be treated as just footnotes. If any parts of these seem like "old hat," then just scan-read them and go on to the next section.

Feedback is appreciated. Just send me an e-mail to ldgaughan@aol.com.

Larry Gaughan, August 23, 2017.