Unlocking the Secrets of Effective Divorce Mediation: Organizing and Sharing 36 Years of Mediator Experience

Larry Gaughan, Presenter

Overview: Every mediation requires a professional plan. Since every divorce mediation has a few (and sometimes many) particular characteristics, no two situations are exactly alike. The starting point is to sort out the substantive (legal) and emotional elements of the dispute. There are tested conflict resolution strategies, but their utility varies across a range of cases depending upon the nature and the depth of the conflict. It's always important to keep in mind the need to get the results down on paper in the most effective ways.

Outline of the Workshop: The workshop is from 1:45-5:00 p.m. on Thursday, March 30. It is in six 30-minute blocks: (1) diagnosis; (2) disclosures; (3) options; (4) teamwork; (5) mediator roles; and (6) drafting. Remember that there are often major differences among the issues and difficulties in divorce mediations.

- **Diagnosis**: Planning a practical strategy and identifying roadblocks.
- **Disclosures**: Making sure the necessary information is available.
- **Options**: Surfacing the substantive options.
- **Teamwork**: Identifying the professionals and others who may be involved.
- **Mediator roles**: Ascertaining what the parties need from the mediator.
- **Drafting**: Getting the results down on paper in the right format.

First Section: Diagnosing the Case

It's easy to misjudge the relative difficulty of a given mediation. Consider the cases that follow:

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

It is important to recognize that just because a conflict appears to be fought out at a distressing level of volume and intensity does not necessarily mean that a settlement is impossible. 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.

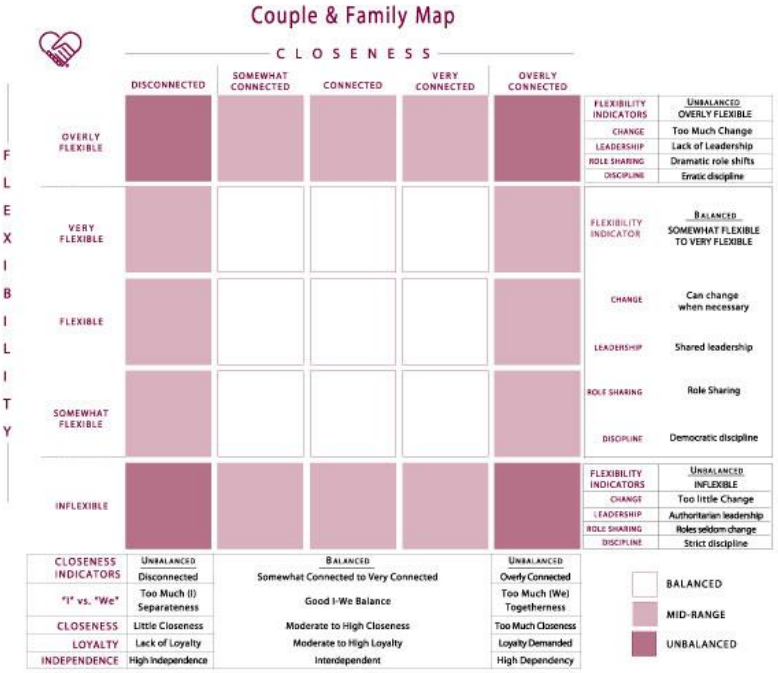
The Nasty's were in their middle 40's and their negotiations were quite obnoxious – insults, put-downs, threats and accusations, all in loud voices. The Nice's were in their late 50's and were ever-so polite in talking to each other. However, the mediator noticed that after each frustrating and unpleasant meeting with the Nasty's, the bottom line of their settlement grew ever closer. With the Nice's nothing ever seemed to budge. The way the Nasty's negotiated was the way they got business done in their marriage, and it actually worked (to a point). But the Nice's stayed frozen in a family system where politeness was required, but family problems never got resolved.

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.

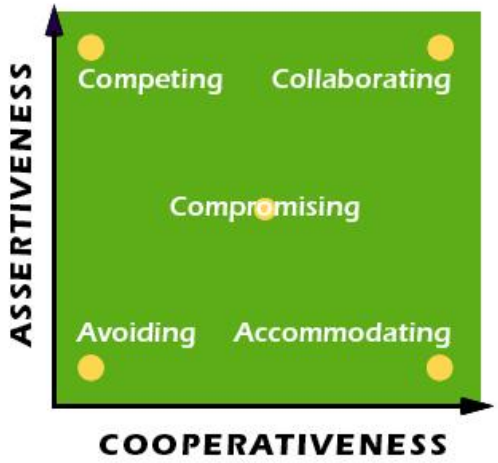
The Nice's might have reached an agreement if the mediator had diagnosed them as being the equivalent to a high conflict couple and moved to a structure of separate meetings with carefully framed discussions of alternative options. This is the same approach that Bill Eddy recommends for the more obvious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

Let's look at how the parties in these two cases fit into two conflict resolution models. Both models are on the next page. The first was developed by Professor David H. Olson of the University of Minnesota, and the second is the Thomas-Kilmann model, which has also been made into a well-known test.

In the case of the Nasty's, both parties were competitors and they were somewhat emotionally enmeshed. But they had learned that eventual compromising was necessary to get decisions made. The Nice's, on the other hand, managed the emotions of the marriage by avoiding conflict, but the rigidity in both of them meant that they were unable to compromise. In the attached Olson model, they were inflexibly disconnected. Even their 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 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, but sufficiently flexible be able to compromise. But they still got divorced.



This model may be compared with the well-known Thomas-Kilmann model of the ways in which different people approach conflict:



The T-K model ends up with the 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.

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 about their case 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 has to do mainly with emotional reactivity, that is, the manner in which 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 the poles there can be flexible negotiating 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 accommodating party may decide to fight for control. It is not unusual for there to be more than one control issue, as where one party controls the finances and the other is fully in charge of raising the children.

For further information on the Thomas-Kilmann Conflict Mode Instrument, see www.kilmanndiagnostics.com. David H. Olson's couple & family map is explained at http://www.buildingrelationships.com/facesiv_studies/circumplex_article.pdf.

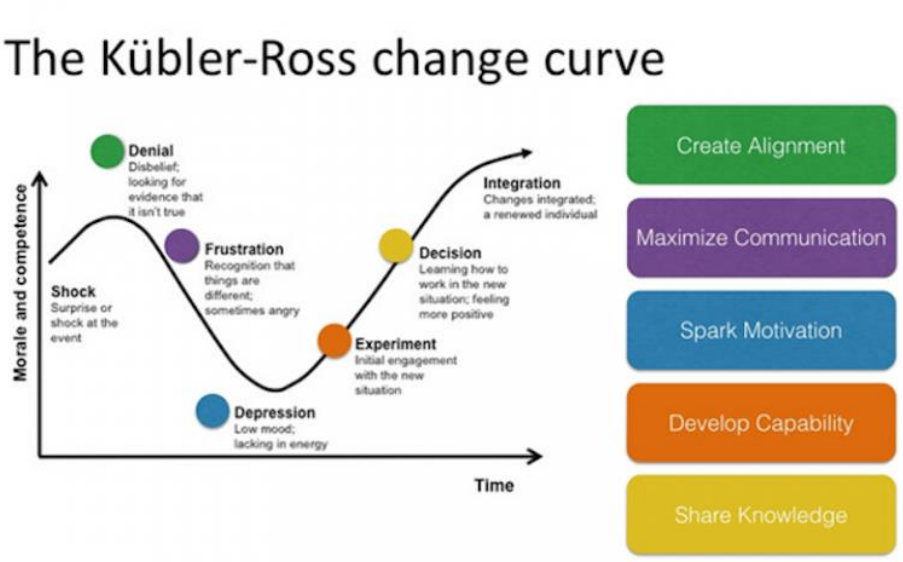
The two people are often in different stages of the divorce process. Here are two different models for looking at that:

The Stages of the Divorce Process

The stages of the divorce process are often compared to Dr. Elizabeth Kübler-Ross' stages of death and dying. However, Dr. Kübler-Ross made it clear that not all of the stages occur in every situation. Also, the stages do not always appear in the same order, and some reappear. Here they are as adapted to the divorce process:

- **Denial:** It's <u>not</u> happening to me! (It's a just a river in Egypt!)
- **Anger:** OK, it's happening to me, and I'm really pissed off about it! I mean <u>really angry</u>!!!
- **Bargaining:** Maybe it doesn't have to happen to me! Perhaps I can talk my way out of it!
- **Depression:** It really did happen to me and I can't do a damn thing about it! I really feel terrible!
- **Acceptance:** It did happen to me, but I have to get on with my life! I think I can do it! I'll stay in touch with my sources of strength!

Here is a creative and original adaptation of Kübler-Ross to the stages of the divorce process. It was developed by Joryn Jenkins of Open Palm Law. She has a very professional and informative website – www.OpenPalmLaw.com.



Here are some other factors that lead to difficult mediations:

Common Divorce Traps to Avoid

The legal process of divorce has many traps for the unwary. Here are a few of the most common ones:

- **Anger takes over:** It's very tempting to be angry about what happened to the marriage. But anger can make you think much less clearly, and it can certainly make your divorce much more stressful and expensive.
- **Obsessing:** Looking backward and turning things over and over in your mind keeps you from making sensible plans for the future. It's also a way to lose lots of sleep.
- **Low self-esteem:** It's easy for your self-esteem to take a major hit as you go through the divorce. Try to stay in touch with your main sources of strength, whatever they may be.
- **Bad advice:** Bad advice about divorce comes from various sources. These include well-meaning friends and relatives, fire-stoking lawyers, and the internet. If you have any doubt, consider finding an experienced lawyer for a second opinion.
- **Vengeance:** "Getting even" can be a very expensive luxury, and not just in terms of what it costs in legal fees.
- **Unrealistic bargaining:** Asking for an unrealistically big settlement seldom works, and makes it more likely that you can wind up in court and then get much less. Conversely, if you are willing to give away too much just to get the divorce, you may get an agreement that you will regret in the future.
- **Not having a sensible plan:** It's not easy to amend your life plan in the wake of a divorce, but it's essential to do so.

Second Section: Appropriate Disclosures

It is not unusual for couples who self-select into mediation to find that both parties are familiar with the family finances. Even in those cases it is important to make sure that each party has the basic financial information.

Here is a sample Financial Worksheet. In an actual case there would be many more rows for the requested information. If you would like the file of a worksheet that can be downloaded and opened in MS Excel, please send me an e-mail. ldgaughan@aol.com

FINANCIAL WORKSHEET

Bank accounts. Provide the following information as to all bank accounts (checking/ savings), savings & loan accounts, credit union accounts, or certificates of deposit established in your name individually or in joint names with any other person(s):

Name of bank or other institution	Type of account	In whose name?	Balance at separation	Present balance
			$	$
			$	$

Investment accounts. Provide the following information as to any money market accounts, mutual funds, stocks, bonds or other securities or non-retirement investment accounts owned by you individually or jointly with any other person(s), including stock options:

Name of institution	Type of account	By whom owned?	Original deposit or cost	Present value
			$	$
			$	$

Defined contribution retirement accounts. Provide the following information as to any ***defined contribution*** retirement plan (where the value of the plan is defined by the "bottom line" in your most recent statement). These include IRAs, SEPs, Keoghs, 401k or 402b plans, profit sharing plans, and other tax deferred retirement investments or accounts owned by you individually, for which the amount of your interest is defined by the contributions made by you or on your behalf:

Name of institution	Type of account (IRA, 401k, etc.)	By whom owned?	Am't of orig. deposit/cost	Present value
			$	$
			$	$

Defined benefit retirement plans. Provide the following information as to any ***defined benefit*** retirement plan (a plan based upon a formula which is based on your years of service and average high salary at the end) to which you are entitled to receive by virtue of your past or current employment:

Name of plan	Date service commenced?	Date service ended?	Paid in contributions
(1)			
(2)			
Years in plan	**Age when full benefits start**	**Projected retirement date**	**Expected monthly income**
(1)			
(2)			

Real estate. As to any real estate titled in your name, individually, or jointly with any other person(s) (including single family homes, townhouses, condos, timeshares, etc.) provide the following information:

Location (address)	S/f, t/h, condo?	How titled?	Original cost	When?	Due on loan(s)?	Present value
			$		$	$
			$		$	$

Life insurance. Provide the following information as to any life insurance policies owned by you or as to which you are beneficiary:

Insurance company	Type of policy	Whose life?	Owner?	Beneficiaries	Face value	Cash value
					$	$
					$	$

Business or professional interests. State the following as to any business or professional entities or interests which are owned by you individually or jointly with any person(s) or entity:

Business or professional name	Legal status (corp, pn, etc.)	% owned	Amount invested	Value of your interest
(1)			$	$
(2)			$	$

Nature of business	When established?	Gross annual income	Annual profit
(1)		$	$
(2)		$	$

Household items. List the major items or categories of household furnishings or personal effects having an estimated value in excess of $500 per item or general category (such as china, silver, antiques, original art, oriental rugs, collections, jewelry, and furs) which are owned by you individually or jointly with any person(s): **[Space for list:]**

Vehicles, etc. Provide the following information regarding any automobiles, pickups, trucks, motorcycles, boats, airplanes or other vehicles which are titled in your name individually or which are jointly titled with any other person(s):

Year	Description (model/type)	How titled?	Purchase price	Amount due on loan	Estimated value
			$	**$**	**$**
			$	$	$

Increase or decrease in value. As to any **substantial** increase or decrease in value in any items of real or personal property listed in questions 1-9 above since such property was acquired, provide the following information:

Description of property	When acquired?	Purchase price	Estimated value	Reason for change
		$	$	
		$	$	

Credit accounts. Provide the following information as to your current credit cards, personal charge accounts, credit loans, and loans and notes payable, including those in your name alone or jointly with any person(s):

Creditor	Why incurred?	When incurred?	Account number	Person(s) liable	Present balance
					$
					$

Separate property. List any property which you consider to be your separate property, in that you possessed it at the time of the marriage or acquired it after marriage through a separate gift or inheritance, or after the date of any final separation:

Nature of item	When acquired?	From?	Gift, inher., pre-marital?	How titled?	Estimated value
					$
					$

Changes in property. Are there any assets valued in excess of $500 titled in your name, individually, or jointly with any person(s), which have been acquired or disposed of since the date of any separation? If so, provide the following information:

Description	Owner(s)	Acquired or disposed of?	Why?	When?	Cost or am't received
				/ /	**$**
				/ /	$

Employers. Give the name of each of your current employers, and for each employment provide the following information:

Employer	Position	Years of service	Pay period	Annual salary
				$
				$

Other income. State any subsidiary source of employment or consulting income, including any bonuses in your current position, and for each provide the following information:

Source or income	Nature of position or type of income	Estimated income	Monthly or annual?
		$	
		$	

Gross income and deductions. What is your pay period - monthly, every two weeks (biweekly), twice monthly, weekly, or other? State your average income and deductions from your primary employment for each ***pay period***:

Pay period	Gross pay	Federal taxes	State taxes	FICA	Retirement
	$	$	$	$	$
Prof. dues	**Overtime?**	**Health insurance**	**Life insurance**	**Other deductions**	**Net income**
$	$	**$**	**$**	**$**	**$**

Secondary employment. State your average income and deductions from any secondary employment for each pay period:

Pay period	Gross pay	Federal taxes	State taxes	FICA	Retirement
	$	$	$	$	$
Prof. dues	**Overtime?**	**Health insurance**	**Life insurance**	**Other deductions**	**Net income**
$	$	**$**	**$**	**$**	**$**

Tax exemptions. State the numbers and names of persons you claim as income tax exemptions: **no. of exemptions** [ ]; names _____
_____

Other sources of income. State your average net monthly income from other sources of income (dividends, interest, trusts, rentals, etc.):

Source or income	When received?	How often?	Estimated monthly amount
			$

Health & dental insurance. Please furnish the following information concerning health and dental insurance coverage for the family:

Name of carrier	Type of plan	Persons covered	Monthly cost	Plan number
Differential cost (difference in monthly cost between individual policy on insured and family policy covering spouse & children) | $				

Safe deposit boxes. If there are any safe deposit boxes, vaults, safes, or other places of deposit or safekeeping in which you have had any money, documents, or other items of personal property during the past two years, please state location and describe all items previously or presently so deposited:

Location	Items deposited	Deposit date	Estimated value
		/ /	$
		/ /	$

Property held for your benefit. If any person, firm, or other entity holds any property for your benefit, describe in full including name and address of holder and description and value of property so held:

Holder	Address	Why held?	What kind?	Estimated value
				$
				$

Debts owed to you. As to any outstanding notes, accounts receivable, or other debts owed **to you** individually, or to you and any other person(s) jointly, provide the following information:

By whom payable	Basis of obligation	To whom payable	Rate of interest	Due date	Amount due
				/	$

Other investments. Provide the following information as to any land investments or partnerships, or oil ventures, joint ventures, and other such investments owned by you

Description	% owned	Title?	Invested	When	Value
			$	/ /	$

A Practical Checklist for Financial Disclosures (For Additional & Follow-Up Requests)

The above Financial Disclosure Worksheet is intended for **initial** financial disclosures in divorce cases. It assumes that verifying documents and additional or follow-up disclosures may be requested as appropriate. This checklist reviews some situations that may raise a need for such further disclosures:

☐ Variable income, such as from bonuses, commissions, self-employment income, income from family/extended family entities, and variable hours.

☐ Additional income, such as overtime, additional employment or self-employment, severance pay, trust funds, family gifts, under-the-table payments, rentals, fringe benefits, unemployment compensation, and disability payments.

☐ Tracing separate property and sorting out commingling.

☐ Recent acquisitions or transfers of assets, and major new indebtedness.

☐ Dissipation, misuse and/or secretion of marital assets.

☐ Valuation issues:
- ☐ Marital business or professional practice.
- ☐ Real estate, including rental and vacation properties.
- ☐ Negative equity and "short sale" issues.

☐ Defined benefit pension data, such as effective dates of service, dates of retirement with benefits unreduced for early retirement, means to calculate benefits, and apportionment of disability & regular retirement income.

☐ Information about separate & marital shares of defined contribution retirement accounts, and the precise nature of certain retirement accounts.

☐ Property rights with special issues, such as stock options or grants, intellectual property rights, and joint ownership with extended family.

☐ Issues as to interim coverage of necessary family expenses.

☐ Credit card or other debt issues over the nature of such expenses.

☐ Tax matters, such as filing status, marginal rates, and past-due taxes.

☐ Longitudinal issues, such as the relative financial contributions of the parties over the length of the marriage, and any issues of misuse of credit and/or excessive expenditures by one or both parties.

Third Section: Surfacing the Substantive Options

Substantive options are those that are reflected in the bottom line of the agreement. It is important to understand both the substantive issues and the emotional components in order to fully strategize the available options.

Substantive and Emotional Issues Affecting Divorce Options

As a lawyer I tend to look first at the substantive issues rather than at the emotional process, although both are important. The classic example of an intractable substantive issue is the post-divorce situation where the parents have a congenial relationship, but one of them wants to relocate the children out of the area for a very good reason. An emotionally charged case is one where the parents keep fighting over a modification of child support even though they are aware that the litigation costs far exceed any benefit that either of them could possibly achieve.

Some cases are both substantively and emotionally difficult. Custody disputes are often more difficult since they involve both uncertainty as to how a court might rule as well as the emotions of the competing parenting roles. Disputes over spousal support often reflect both the flexibility of the law and the divergent emotions relating to the respective personal and financial responsibilities of the parties to themselves and each other as a result of the marriage. There may be lots of money at stake in a case where

the law is somewhat uncertain as applied to the facts, as where a closely held business was already up and running when the parties were married.

There are also emotional reasons why divorce settlements can be difficult. Often these can be diagnosed by considering the marriage as a family system. The first key is to look at how the parties negotiate.

In successful marriages negotiation is flexible and there is no ongoing struggle for control. Inflexibility is not always obvious. If one party has taken charge of financial management or child rearing, the other party may have learned that peace in the family depends on not challenging the "manager." Then when the acquiescent party seeks to get involved in major decisions, he or she is met with annoyance and obstinacy. Both parties then have to deal with the strong emotions that arise when someone finally challenges the family ground rules. This may not even come up explicitly until around the time of the separation.

The family systems problem can be generated by the family history of one or both parties. We all develop ways to act or react in a marriage by either imitating or reacting to our parents. When a parent was controlling or accommodating to an excessive degree, a child may adopt or reject that approach in his or her own marriage. This can result in either an ongoing fight for control over some aspect of the marriage, or where one party chooses to keep giving in. In the latter case, tension only arises when the accommodating party starts to actually negotiate.

Control issues often play out at an emotional level. When an individual's attempts to maintain control over his or her life leads to a repetitive focus on details, the result can be obsessive or compulsive tendencies or worse. At the disorder level ("OCD"), this syndrome can be one of the most serious causes of a "bad" divorce, that is, a divorce where the conflict goes well beyond any rational disagreement over the real substantive issues. The controlling or obsessive party reacts to finding that his or her old means of negotiating no longer work

The next full page contains a comparative chart of the traditional "legal" approach to divorce options and the more creative future directed options that are found not only in mediated divorces and in collaborative practice, but even in many of the most professional negotiations between adversarial attorneys.

However, this chart is not intended to suggest that the right-hand column always reflects the most practical approach. If a case is not settled by negotiations, the only other option is for a judge to decide. When one party to a mediation believes that he or she will obtain a better result from a judge, even after the costs of litigation, the law remains relevant.

We also need to remember that that applicable law often sets for desirable social policies, such as appropriate support for minor children, recognition of the career setbacks to a stay-at-home parent, or the need for a fair division of the property that has been acquired during the marriage.

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 formulate a future 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?

The next article is designed to make American divorce law easier to understand, and may even contain some helpful ideas for family law attorneys:

Demystifying American Divorce Law

A large dark cloud has hung over divorce mediation in the United States ever since the family mediation movement went national in the early 1980's. That cloud has been the idea that mediated settlement agreements somehow could be suspect because they might not accurately reflect "The Law", as if that were a real entity in every concrete case that a judge might otherwise have to decide. It's time for mediators to put a final end to this sort of "shadowboxing".

American divorce law is almost exclusively state law. Although it varies somewhat from state to state, there are also many common features. Most state divorce law is not in the form of fixed rules. Rather, it exists at the level of principles and criteria. A principle is essentially a goal, such as "the best interests of the child". Criteria are lists of considerations. Here is a sample criterion for parenting plans: "The relationship existing between each parent and each child, giving due consideration to the positive involvement with the child's life, and the ability to accurately access and meet the emotional, intellectual and physical needs of the child." To see a full list of such criteria for parenting cases in a typical state, just go online and Google *Virginia Code Sec. 20-124.3*.

It should be obvious that when the law is framed in this way just reading the Code does not automatically decide the case – there is ample room for discretion. Furthermore, one does not have to be a lawyer to understand and apply the list of considerations to a particular case. Often most of the items on a given list of such criteria correspond to common sense and good social policy. Indeed, perhaps the best background for appreciating and applying the statutory provisions on parenting is to be a parent.

Remember also that if an agreement is signed in proper form it will almost always supersede state law. That means that the parties are not only free to make their own determinations based upon the criteria in the Code, but also that they may add to or subtract from those considerations. So for example, most states do not give a minor child the power to make the final decision on the parenting plan, but the parents may agree to honor the child's wishes. In effect the parties become a two-person legislature, and they can make a binding law for themselves by a simple 2-0 vote that is then memorialized in the agreement.

At times the law may seem more mysterious than it actually is, perhaps in part because some lawyers seem to like it that way, just as church rituals were in Latin rather than vernacular languages prior to the Reformation. Fortunately, there is now a strong movement among lawyers and judges that favors legal drafting in clear and understandable English prose. But we still find far too much archaic or otherwise obtuse language in legal documents which muddles rather than clarifies the matters at hand. The worst example in divorce law is the persistence in over two-thirds of American states of using the obsolete and misleading terms "custody" and "visitation". A growing minority of states substitute terms such as "parenting plan" and

"shared parental decisions", which are far less emotionally charged and much more descriptive.

A major part of the knowledge and skills of divorce lawyers pertains to adversarial negotiation strategy and litigation. However, these are usually of scant value when the lawyer is mediating. Far too often the adversarial process of divorce leads to excessive expense, delay, and emotional stress. And when the case is concluded, the result may be unsatisfactory to both parties. Then, to add insult to injury, it may be expressed in that horrible form of bad drafting called "legal gobbledygook".

Courts usually have scant experience or expertise to assist the parties in making important future plans. Often they do not even have any jurisdiction in these matters. Litigated cases look backwards, not forwards. For example, if a vocational expert is hired in a litigated case, the purpose is to impute income to a party who may be underemployed, rather than to assist that party in finding a more satisfying and remunerative future career. The case law system that still predominates in American legal education looks to the consequences for what has happened in the past, rather than to creative ideas as to what should happen in the future.

Divorce attorneys do settle probably as many as 80% of their cases out of court. However, often these settlements come only after protracted delays and considerable expense. A major cause of excessive expenses in adversarial cases is the discovery process – requests for documents and interrogatories (questions that must be answered under oath). Full and fair disclosure is of course something that mediators should always encourage. But in litigated cases the scope of discovery requests may far exceed any reasonable or common sense need for relevant information.

Even though legal ethics requires that the clients approve any negotiated settlement, the adversarial process often erodes their sense of self-determination. Too often the settlement is achieved only by means of predicting the probable outcome in court, rather than upon anything based upon the real concerns and goals of the parties. Often little if any attention is paid to either the future relationship of the parties or to their longer-range financial interests. The legal costs to both parties of an adversarial settlement can easily more than erase any benefit to a party of having achieved somewhat better terms.

Because children develop differently at different ages, good parenting is rarely static. The adversarial system is poorly equipped to deal with issues of childhood development. Courts also don't have much expertise in the means to encourage parental cooperation. In fact, the process of custody litigation, which is supposed to serve the best interests of children, may be inherently contrary to their best interests when it erodes the likelihood of effective future parental cooperation. How well the parents can respect each other and cooperate as parents can easily be more important to a child's future than the exact structure of the parenting schedule.

The child support guidelines, which exist in some form in every American state, are a special case. The mediator should always make the parents of minor children aware of those guidelines. They are the most significant area of divorce law that appears to function more at the level of rules rather than of principles and criteria. In every state a court has the power to vary the guidelines based upon statutory criteria, but it will normally be required to explain the calculations and reasons behind any such

variance. In some states the parties may also have to provide an explanation when they deviate from the guideline figures in an agreement. But the parents should also know that in most situations they have the power to reach their own agreement upon a different figure or some alternative manner of handling child support. This can even include a sharing of certain out-of-pocket expenses for the children, in addition to or in lieu of requiring one party to send the other a monthly child support check.

Spousal support is handled quite differently from child support. There are more variables as to whether such support is appropriate and, if so, in calculating how much and for how long. The first consideration is whether there is a large difference in incomes between the parties, and then why such a difference exists. Although some states and localities have guidelines or formulas for spousal support, even those jurisdictions give more consideration to the particular circumstances of the parties. Often the goal is to help the lower income spouse move toward being completely or mostly self-supporting. Every state now authorizes spousal support to be time-limited in appropriate cases, such as shorter marriages. Spousal support ceases at remarriage or the death of either of the parties, and it is generally modifiable if there is a material change in circumstances. Often the most difficult situations involving spousal support are those cases where one party has set aside a career to be a stay at home parent, and then has not resumed a remunerative career after 10 or more years after the youngest child is in school.

Dividing property can at times involve some technical considerations, but the general outlines are usually straightforward. What is to be divided is what was earned as a result of the efforts of the parties during the marriage. So gifts from family or friends, inheritances, and property brought into the marriage are separate property if they can be traced into existing assets. Presently 41 states and the District of Columbia are called “equitable distribution” jurisdictions. The remaining nine states, mostly in the west and southwest, are “community property” states. The main difference is that in the community property states the property that is not separate is divided equally, whereas in the first group there is a list of criteria to determine how marital property is to be divided. But even in these states the division is usually equal unless there are special considerations. Of course the parties themselves can choose to ignore those technicalities. Also, the parties can agree to tradeoffs that a court could not order, such as between a pension plan and house equity.

There are some types of cases that are more difficult to resolve in the adversarial system, and these can also be very difficult even in mediation or in collaborative practice. These cases include parenting cases where the level of emotions between the parents is high. They include spousal support cases where the higher income spouse is unwilling to acknowledge the contributions and career disadvantage of the lower income spouse, or where the lower income spouse is reluctant to take reasonable steps toward becoming more self-supporting. In some cases, problems are created by a party’s unwillingness to provide reasonable disclosures with verification in a timely manner. Cases that involve commingling of marital and separate property can be difficult, as are cases where one party appears to have improperly dissipated marital assets.

Valuation of a closely held business or a professional practice can very quickly become expensive. At times the division of marital debts is a divisive issue where one party has incurred substantial debts that appear not to have been for any proper marital purpose. In mediation the parties in cases such as the ones above can take advantage of the experience of appropriate experts, such as accountants, career counselors, and mental health professionals who have experience with children of divorce. Even in litigation experts such as these are customarily called upon to provide guidance to the court.

The national movement toward no-fault divorce started over 40 years ago, and every state now has at least one no-fault ground. These grounds include separation for a statutory period (most commonly one year), irreconcilable differences, irretrievable breakdown, and incompatibility of temperament. "No-fault" does not necessarily mean that there was never any fault involved in the ending of the marriage, but rather that a fault ground (adultery, cruelty or desertion) is no longer required in order to become divorced. A majority of states have abolished all of the fault grounds, while in a minority of states one or more fault grounds are still available (but are infrequently used). In 21st century America marital fault is mostly either irrelevant to the marital settlement or taken into consideration only when there is a very specific issue of relevance. For example, if a parent has been abusive, there may be a need to consider the effects of that on the children. But for the most part charges of marital fault only make the settlement more protracted and expensive. They often don't produce a compensatory benefit for the party who made the allegations. Zero-sum-game thinking often produces negative results on both sides.

The judicial system's lack of resilience to changes in society is perhaps best illustrated by the fact that in over two-thirds of American states a no-fault divorce still requires one party to be the Plaintiff and the other to be the Defendant. In Virginia some important interim matters between separated couples are still handled by an adversarial fault-based procedural device that was inherited from the British in colonial days and was actually abolished in England in 1857! Other states, such as Iowa, have for decades styled divorce actions in a much more modern format as "In re the marriage of ...."

If the law can be used more creatively, settlements can be opened up to be completely or partially worked out outside of the *legal box* that has been described above in this article. In this context, *legal box* means the customary points of reference of divorce lawyers. Too much of the legal approach is focused on procedural knowledge, adversarial negotiation skills, and client-based strategies. The case system of legal education gives lawyers some analytical tools that are useful in advocacy, but at the same time holds their thinking inside of an analytical box. However, if one looks at divorce law from the perspective of common sense criteria, valid principles, and useful social policy, the legal system can easily seem to be more interesting and more flexible.

There are many areas outside of the *legal box* that are very relevant to the needs of the parties, but which fall outside of the customary expertise of courts and lawyers. Perhaps the most important of these is the need for cooperative post-divorce parenting, based upon an understanding of the studies that continue to appear about children of divorce and the stages of child development. Family systems teaches us that

the post-divorce family remains a family, but one in there needs to be adjustments to new relationships. The stages of the divorce process often do not end with the divorce itself, and a longer term plan for one or both parties may involve a continuing strategy for emotional support.

The need for short-term financial planning through separation and divorce is obvious, and this is often done even in the adversarial process. Almost no longer-term financial planning is ever done in litigated divorce cases. Such planning may not be a primary function of a mediator who is not a financial planner, but should still be addressed as part of the settlement. One or even both of the parties may require career transition assistance. At time debt counseling becomes a crucial part of any future financial plan. Medical coverage and retirement are also essential parts of any financial plan. The mediator must have an understanding of the differences between defined benefit plans and defined contribution retirement accounts, and should be aware of the provisions of Social Security, COBRA, Medicare, and now also the Affordable Care Act.

The mediator's responsibility for post-divorce planning is not necessarily to try to resolve in advance all of the problems that the clients may encounter in their future, but rather to get them thinking about how to face them when they come up. The idea of team mediation may be useful, namely to bring into the mediation process other professionals with the expertise to address any of the specific areas mentioned above. If such experts are employed, an addendum to the mediation agreement may be necessary to fully protect confidentiality.

As mediation becomes more professional, mediators who are not attorneys will search for ways to become more comfortable with the useful knowledge and ideas that may be found inside the *legal box*. Conversely, mediators who are also lawyers will become more creative in taking a broader view of the scope of mediation. Every mediator needs a working set of conflict resolution models. Mediators of any professional background need the "people skills" of successful helping professionals. There are even ways in which mediators can draw on their experience to understand why some marriages succeed and others fail, and how the reasons why a marriage fails can affect the relative difficulty of the settlement. Finally, every mediator and every party to mediation is on some sort of a spiritual journey to find meaning and direction in her or his life.

Fourth Section: Other Professionals and Relevant Persons

The traditional model of family mediation has been three persons – the two parties and the mediator. An early variation was co-mediation, which was often done as a learning process for the mediators, as well as to give the parties the benefit of different points of view. Especially since the advent of collaborative practice, there has become an increasing awareness of the situations where the formal involvement of other professionals in the mediation has been recognized. And in a majority of mediations one or both of the parties may have consulted a separate attorney. At times the attorneys have been present in the mediation sessions. Another model has been the use of an independent attorney to draft the resulting agreement.

Variations on Conventional Divorce Mediation

Since the mid-to-late 1970's, when divorce mediation was getting started as a national movement, the standard model was a mediator and the two parties. The parties' attorneys generally did not participate, but were available for advice. The most common variation was that the was a co-mediator, who was often there partially for a mutual learning process.

Fast forward to the present. Many mediators have handled hundreds of cases, and some even thousands. Partially due to collaborative practice, mediators have become aware of how divorce lawyers, financial specialists, and mental health professionals all have valuable skills and knowledge relevant to the divorce process.

So there can be an impartial financial specialist, or each party can consult his or her financial planner. One or two mental health coaches can be used in a mediation if needed. Each party can bring his or her attorney to the sessions. One variation on this is often effective is in cases where the parties and the mediator have made substantial progress, but one or more sensitive issues remain unresolved. The parties are encouraged to bring their attorneys to a (hopefully) final session with a draft agreement to mark up, and with the expectation that the final issues can then be resolved and the agreement signed.

A mediator is prohibited from recommending the settlement terms based upon a prediction of what might happen in court. But the parties can agree upon a neutral case evaluation from an experienced divorce lawyer or a retired judge, leaving the mediator free to still carry his or her proper role. A neutral financial planner could recommend a settlement to protect the financial futures of the parties. A mental health professional who works with children could make suggestions based upon their best interests.

If a collaborative case gets stalled out, the team could bring in a mediator in a final effort to avoid litigation.

Then there is the form of mediation practiced by consortiums of retired judges. Since these sessions are normally set up with adversarial counsel present, often in the context of an existing court case, and with the temptation to use projections of the court outcome as the driving focus for the settlement terms, arguably they are not ADR at all. They are perhaps better described as conventional attorney settlement conferences with a specialist on court outcomes as a neutral third party. The retired judge in a given case may or may not be fully acquainted with range of knowledge and skills that would be expected of an experienced divorce mediator. But if the goal is just to keep the case out of court, such cases are often settled in this format.

Anytime third party professionals are involved in mediation sessions, it is essential to have a written agreement that includes them under the umbrella of the confidentiality protections for the mediation.

A final option, when a mediation reaches an impasse, is for the mediator to mediate the terms of an arbitration agreement. Most mediators now consider it unethical for the mediator to be the arbitrator, but the mediator can assist the parties in finding a suitable third party for that role.

If the mediator is not barred from drafting the mediated agreement in the particular jurisdiction, he or she should consider doing so. However, the agreement should be drafted in clear readable prose so that the parties can participate in the editing process. If the mediator is an attorney, he or she should avoid the archaic and constipated form files that even some of the otherwise most respected law firms still use.

Mediation has evolved in many ways since the early days of Jim Coogler, John Haynes, Steve Erickson, Marilyn McKnight, Judy Wood, Virginia Stafford, Mark Lohman and others. Steve, Marilyn and Mark are still mediating. But the field of divorce mediation has expanded thousands of times over, and is continuing to do so as we still keep asking the question, "How do we structure this mediation so as to make it the most likely to result in a fair and workable agreement for our clients?"

Fifth Section: The Roles of a Divorce Mediator

A professional divorce mediator is required to fill a number of different roles, and these vary widely from case to case.

The 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 of effective divorce mediation. Most mediators come from one of three quite different professional backgrounds as 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 base. 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 if it is focused on the goals and realistic options of the clients. 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 as needed or requested some useful information relating to the process so long as it is impartial and accurate, and does not constitute legal or financial advice.

Personal attributes of the mediator. Every mediator needs to be an active listener, and to have respect, empathy, a sense of humor, and an ability to reframe.

The structure of mediation. Every mediation requires sufficient disclosures and proper preparation. 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, the actual 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.

One of the process options for a divorce mediator is to take a business approach to the issues. Here's what that entails:

A Business Model for Divorce Agreements

There are family businesses, but can the family itself be analogized to a business? In some ways it can. Looked at from an unromantic point of view, a modern American family has three functions. It's (1) an emotional unit, (2) a financial and property unit, and (3) a basic social unit. The family owns property, it earns and spends, usually it has some ground rules (often these are unspoken, but nevertheless important), and it has the basic goal of helping children become productive self-reliant adults.

The business of families is to support each other emotionally and financially and to maintain stability for its members in an ever-changing world. Families interact with society in many different ways. The husband-wife relationship is a defined partnership. Indeed, the law often treats a family at the time of dissolution as if it were like a business partnership. The commodities of the family unit are *money, property, and labor*. A premarital agreement is also a sort of partnership agreement. If there is no premarital agreement (there usually isn't), the legal system effectively imposes one through its laws on financial support, property, and custody.

Even where a married family doesn't run a family business as such, it may still be useful to consider the application of sound business principles in its dissolution. The dissolution of a business partnership is often focused on what each partner contributed to the responsibilities to the partnership and where the dissolution leaves him or her. So a business model for family dissolution can focus on framing and supporting the career plan of the stay-at-home partner. If the family runs an actual business, the goal of course is to keep the business sound and productive.

Dr. Ed Farber has suggested the validity of a business approach to parenting issues. If an essential business of the family is to raise the children to be self-supporting and to lead satisfying and useful lives, then we need to consider a businesslike plan to reach those goals. This involves continued parental responsibilities post-separation. Immature fights over parental control detract from the plan, so the parents must find ways to work together to support and protect the one continuing aspect of their family business. There needs to be a plan to make this work effectively.

Another approach is to have a mindset based upon the Japanese martial art of Aikido. Aikido is also consistent with the ideas of the 17th century French philosopher and mathematician Blaise Pascal (1624-1663), who counseled that the best way to win an argument was first to acknowledge the strength of the opponent's position, but then to point out other elements that are also relevant in addressing the matter.

Martial Arts and Divorce Negotiations

When most people think of martial arts in the context of negotiating divorce agreements, they probably have in mind something like arm wrestling. It's time to take a fresh look at another model, namely the modern Japanese martial art of Aikido (pronounced "eye-KEY-dough"). Aikido was created by Morihei Ueshiba (1883-1969) as a synthesis of martial arts, philosophy and spirituality. It means "the way of unifying (with) life energy" or "the way of harmonious spirit." In this millennium it has become a worldwide movement.

The most basic idea in Aikido is successfully to defend yourself against an opponent, even a vicious one, without harming that other person. Watching this happen in practice is like observing a form of ballet, even though the conflict may be serious, such as an opponent with a knife. Another element of Aikido is to divert the opponent's strength so as to make it actually work against the attack. The end result is to transform a struggle to win into a situation in which both persons recognize a mutual interest in collaboration.

In this way, Aikido is not dissimilar from the interest/concern based negotiating advocated in the famous book by Roger Fisher & William Ury, *Getting to Yes: Negotiating an Agreement Without Giving In*. One looks beyond the other's position to learn his or her underlying interests and concerns. Thus begins a search for objective principles that can lead to a collaborative resolution, or at least a compromise. Put another way, the goal is to reinforce both the assertive and cooperative inclinations of the parties in a manner that promotes their collaboration, as in the Thomas-Kilmann model.

There are many ways to use this approach in custody cases, where often nobody really wins. Many child psychologists these days believe that respect and cooperation between the parents is generally more important to their children's future than any particular parenting schedule. If the issue can be transformed from who is the better parent, or what schedule is best, into a discussion of how the parents can find ways to work together, collaboration becomes possible. "Assuming that what you just said were to take place, how can we then …?"

There are many other examples of how the negotiations are transformed when the issue is facing the future rather than sorting out the past. Does this approach always work? No, since there is nothing that always works in divorce disputes. An "Aikido mindset" just gives us a few more options.

Sixth Section: Properly Drafting the Results

Divorce agreements are often badly drafted, and the bad draftsmanship comes from mediators who are lawyers and those who aren't. Attorneys far too often draft from outdated and constipated form files that use to much legalese. Mediators who aren't lawyers often miss technical points. The article that follows is a cantankerous article I wrote that was published in the Family Law Quarterly of the Virginia State Bar Family Law Section. It ends with a one paragraph course on proper legal drafting. It's sad when a mediated agreement fails to get signed because of the drafting.

It's High Time to Draft <u>All</u> Divorce Agreements
In 21st Century English

At my age of 80 and having been a lawyer for 56 of those years, I can look back on many dramatic changes in family law. Especially in the past 35 years or so, Virginia family law has gone through three major revolutions – substantive, procedural/process and technological. The fourth wave, which I will call the consumer revolution, is now on the move but hasn't yet reached its crescendo. It will, and we need to be ready when it comes. The goal of this article is to encourage all family law practitioners who haven't already done so to bring their drafting of divorce agreements into the 21st Century.

For many of my colleagues the notion of readable legal drafting has long since caught on. I have learned many useful things over the years from reading agreements drafted by other family law practitioners and from edits done by my clients. The movement among lawyers to draft in clear, simple and direct prose is by no means new. I was lucky enough to become a part of it before I graduated from law school. But sadly even a few of the best and most professional family law firms I know still appear to have some very outdated formbooks.

My law professors tried hard to teach me bad drafting. Fortunately, I was taking Air Force ROTC while I was in law school in the mid-1950's, and it was my TAC officer who taught me how to draft. He would hand back something I had turned in by saying, "Gaughan, you write like a goddamn lawyer. Do it over." When I was an Air Force judge advocate, the officers I worked for constantly reminded me that everything I wrote had to be clear and concise.

How often do we still see "Witnesseth"? Recitals are by rote, starting each run-on paragraph with "Whereas" and ending it with a semicolon. Lots of unnecessary stuff. The need for provisions averring "no connivance" and "no condonation" went out with the advent of no-fault. Why waive *dower* and *curtesy* since they were abolished many years ago? How does it add to the credibility of lawyers that we still use archaic terms such as "herein" and "aforesaid", or even "hereintobefore"?

Why call the parties "the Husband" and "the Wife", since they won't be that for most of the life of the agreement? (H & W sound awkward when those terms come up in a post-divorce hearing, but "John and Mary" will still be John and Mary.) As for "the minor children" – kids have actual names. Why have a long title for the agreement when "Marital Settlement" says it all? Remember that you will be copying the title into other documents.

There is no inherent requirement to write out the words for a number and then follow it with the Arabic numeral in parenthesis. Numbers are frequently changed as negotiations go on and documents get edited. So as the Arabic numerals get changed in an edit, the words may remain the same, and thus this practice creates the very problem it was designed to solve. At the very least it makes editing in new numbers more difficult. So use only Arabic numerals – and proofread.

The problem is that too many of us still don't think enough about contemporary drafting. Don't we realize that most clients these days actually want to be able to understand what they are signing? Often they also want to be part of the editing

process, and generally they should be. (OK, I will admit that an occasional client may feel that an agreement is an inferior product if it is understandable!)

We all have busy practices, and none of us is lazy. The problem is our office formbooks. Check yours for Latin and 18th & 19th century English, for readability, for conciseness, and for totally unnecessary or outdated provisions. When did your office formbook last get a critical review? Good legal drafting, like everything else in family law, is a lifelong learning process. I am never completely satisfied with my own model forms. Are you with yours?

When I taught civil procedure at Washington & Lee Law School in the 1970's, I would give my first year students a drafting assignment very early in the course. Every time I would get back lots of "legal gobbledygook" and I would ask where it came from. The answer was of course some formbook. So I would say, "Let me demonstrate now how most lawyers approach formbooks." I would drop to my knees, raise my arms above my head, and then touch the palms of my hands to the floor three times. Their next assignment would be to draft something else in plain English without using a formbook. If the result then turned out to be too plain, we kept working on it until "Clear and Understandable" met and shook hands with "Precise and Accurate".

No, we're not lazy, but it's seems easier to copy from an outdated formbook than to use more natural clear and concise language. How many of us have seen an agreement with three or so pages of hypotheticals about what happens if one party doesn't cooperate with the agreed sale of the marital home? Consider this alternative: "Once the Reston house has been listed for sale, each party shall cooperate with the listing agent in properly maintaining and showing the property and in giving good faith consideration to reasonable offers of purchase." Then if you think there could be trouble with those standards being carried out, add a simple arbitration clause.

We need to be more concerned about provisions that are becoming increasingly offensive to many of our clients as society changes. "Custody" most commonly means that someone is a prisoner. We visit animals in zoos, not our own children. These terms also need to be taken completely out of the statutes, and some states have already done this. Let's instead draft provisions about important parental decisions and the parenting schedule. Also, why spend pages in agreements lecturing parents about things they already should know? And if they don't know how to be cooperative parents post-divorce, do you really think that lots of verbiage in the agreement will fix that? Maybe a few precise and focused provisions might, but not a barrage of formbook language. If nobody reads it, what good does it do?

I have a concrete suggestion, especially for family law firms with perhaps four or more lawyers. Have a formbook contest in your firm every week or two. Start by taking three or four existing and related boilerplate provisions. Ask everybody, including your paralegals, to do a redraft of those provisions. See who can do the best job of consolidating, clarifying and simplifying those provisions, while still retaining the core of what you need them to say. The winner of each round gets a gift certificate to a good restaurant, and maybe a nice pen for the overall winner. Don't ever again let your formbook claim an objective validity it by no means deserves. Keep revising it on a regular basis until your whole formbook is fresh and accurate.

Weed out unnecessary, obfuscating, and outdated provisions. Limit the use of those clauses that may be offensive when used with clients to whom they don't apply, such as inserting a bankruptcy clause when the clients are financially responsible. Do these things even if you think your firm doesn't really need to (pardon my pun) "reform" its formbook? You will learn a lot in the process and be glad you did. If you are in a smaller firm or solo practice, share with your friends. And before you start, go online to see where the term "boilerplate" comes from if you don't already know.

Let me leave you with a one paragraph course in drafting modern divorce agreements. Here goes:

> Choose a simple title. Use the parties' and children's formal first names (or nicknames if they prefer). Stay in the active voice. Eschew archaic words. Translate technical terms. Avoid repetition and obtuse language. Keep sentences and paragraphs short. Stay clear of long provisions dealing with hypothetical situations that are unlikely to occur. Use general terms where appropriate. Be specific where you need to. And always, always try to be clear and concise.

It's all right to start with a template, formbook or form file, but it's essential to do three things: (1) translate it into clear and readable English; (2) adapt it to the needs of your particular situation; and (3) keep in mind the above paragraph. Good luck!