Perfecting the Craft of Effective Divorce Mediation: Organizing and Sharing 37 Years of Mediator Experience

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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.

Outline of the Workshop: The workshop is in three 30-minute blocks: (1) diagnosis; (2) options; and (3) mediator roles. Remember that there are often major differences among the issues and difficulties in divorce mediations.

- **Diagnosis**: Planning a practical strategy and identifying roadblocks.
- **Options**: Surfacing the substantive options.
- **Mediator roles**: Ascertaining what the parties need from the mediator.

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.

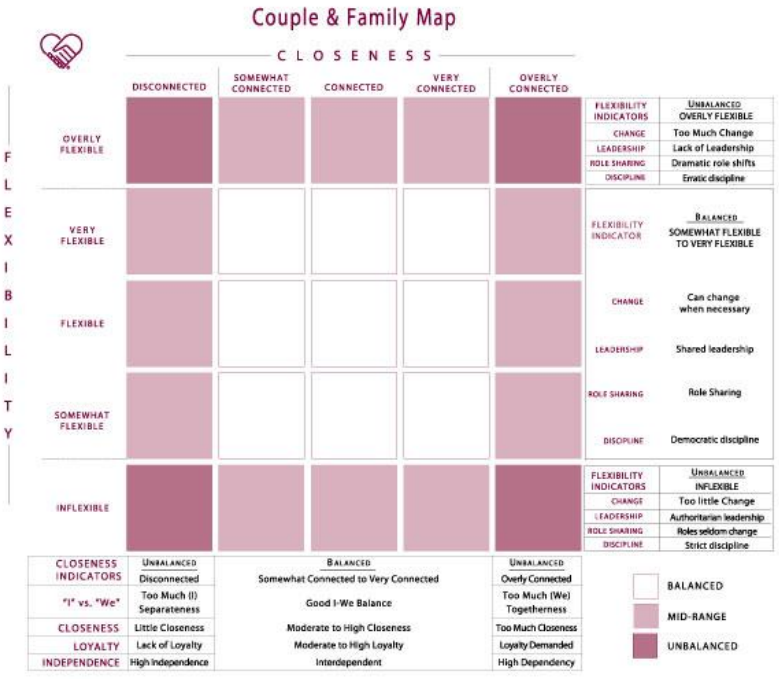
The Nasty's were in their middle 40's and their negotiations were quite obnoxious – insults, put-downs, threats and accusations, all in loud voices. The Nice's were in their late 50's and were ever-so polite in talking to each other. However, the mediator noticed that after each frustrating and unpleasant 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.

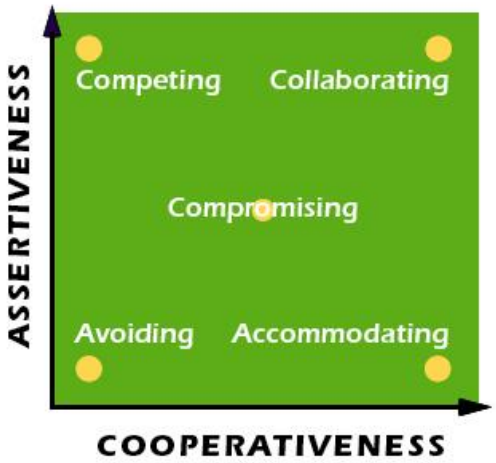
The Nice's might have reached an agreement if the mediator had diagnosed them as being the equivalent to a high conflict couple and moved to a structure of separate meetings with carefully framed discussions of alternative options. This is the same approach that Bill Eddy recommends for the more obvious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

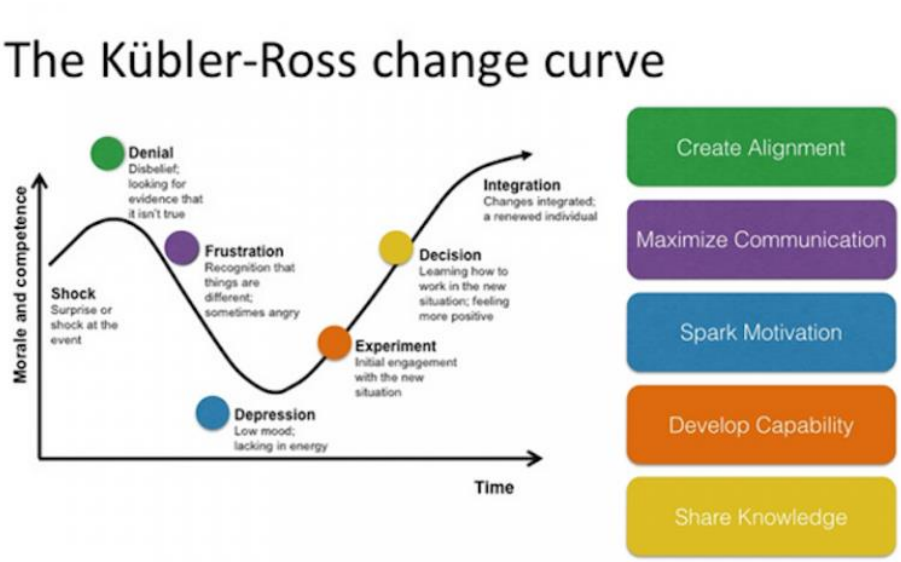
The two people are often in different stages of the divorce process. Here are two different models for looking at that:

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: 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. This chart is not intended to suggest that the right-hand column always reflects the best approach. The law remains relevant since either party can always take the case to court. Also, don't forget that the law often sets appropriate social policies, such as 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.

Third 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.

A Review of Negotiation and 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 main focus of all of these models is to expand settlement *options* and to make them more creative.

Getting to Yes. Find options based on concerns and/or interests rather than positions. Then find objective ways to choose among those options.

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.

David H. Olson. 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.

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. Asking the other party instead to make a proposal can foster the exchange of problem-solving options.

Aikido. Start with finding area of agreement with the other side, and then incorporate these into more balanced and mutual options.

Blaise Pascal. Acknowledge when the other side makes valid points, and then surface options that provide for a more complete resolution of the matter.

Left brain-right brain. Left-brain rationality and right-brain intuition may each produce more limited options than when the two sides work together.

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 particular legal case, they thus become a two-person legislature instead of a two-person court, and have a broader range of options.

Summary. There are many ways to conceptualize options for a negotiated agreement. This article is mainly about *process* options. *Substantive* options can be crucial to the ultimate resolution in many cases. *Process* is about the manner in which the negotiations are managed. Whether one is a negotiator or a neutral assisting negotiations, it's important to be aware of both aspects of negotiating. Either side can become vital to the success or failure of the negotiations.

Two interesting approaches, both of which are in the above list, 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.

A Website about the Divorce Process

The website, www.CreativeDivorce.net, is a public interest website on the divorce process. It is intended for both divorce professionals and members of the public going through divorce. It contains newsletters and articles, and also features useful books and organizations. There are videos of various respected divorce professionals offering their answer to the question, "What is a creative divorce?" Other resources include a link to the Virginia child support guidelines and an Excel financial disclosure worksheet that can be downloaded. Finally, one may also find articles about successful marriage and discernment counseling.