Divorce Conflict Information Booklet Series[1]
Section Two: The Solution

Booklet X. Special Issues in Goal Based Planning

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Preface

The vast majority of divorce cases present few obstacles when using a Goal Based Planning approach to bargaining. However, there are divorces that do present special obstacles, which, at first glance, might appear to be beyond the reach of amicable bargaining. In this Booklet, we focus on two special challenges when applying Goal Based Planning.

First, we begin with high-conflict cases- meaning marriages in which spouses are so damaged by the behavior of one another that by the time they divorce, they hate and distrust one another. Second, we explore the use of mediation in cases that get stuck in the bargaining process. Finally, we "put it all together" with an overview.

1. I Hate You, but I Respect You

"Negotiating in a low-to-no trust . . . [situation]
represents a reality when the other side is someone you know well
and with whom you have shared adverse experiences . . .
someone who hurt you, damaged you,
or with whom you have already declared war . . .

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[1] Our Divorce Conflict Information Series is organized into two Sections: Section One- Understanding the Problem and Section Two- Planning the Solution. Each of the Sections has six Booklets.

[2] This Booklet is a brief look at Game Theory negotiations, but cannot be comprehensive. However, for many of the principles and techniques involved in Game Theory negotiations, you are encouraged to read the following two books, written by your authors: "***Game Theory and the Transformation of Family Law***: Change the Rules- Change the Game. A New Bargaining Model for Attorneys and Mediators to Optimize Outcomes for Divorcing Parties." Unhooked Books. Scottsdale, AZ 2015 and "***Winning Strategies in Divorce***: The Art and Science of Using Game Theory Principles and Skills in Negotiation and Mediation." The latter is an online book only. See www.unhookedmedia.com.

[and towards whom you have]
a strong, solid and deep-rooted distrust."[3]
Moty Cristal

Moty Cristal is one of the authors in the large *Negotiator's Desk Reference* (NDR), who focuses on the type of cases that become the persistent moderate- to high-conflict divorce cases that trouble us because of the children in those families. He notes that trust is a key element to successful negotiations and gives a nod to other authors who focus on building or repairing trust. However, he also notes and specifically mentions divorce cases, where in some instances, parties have simply been so damaged that there is little if any trust left, and that in fact, they hate each other. He then asks the question: "*Is successful negotiation to settlement possible in those cases*?" He answers in the affirmative.

We took our inspiration for the title of this Booklet from Moty Cristal, and acknowledge that some of the ideas in this Booklet come directly from his chapter in the NDR. Two of his key ideas are central to successful negotiations in high-conflict cases ("HCC"): First, the paradoxical step of giving parties permission to hate one another, and Second, the principle that every human being, just by being human, deserves respect. He draws that latter idea from the philosopher Immanuel Kant, who asserted that "*persons are owed respect just because they are persons, that is, free rational beings*."[4] Cristal asks two questions: "*Can you respect someone that you hate?"* and "*Can you hate someone that you respect*?" He then notes that by asking these questions, it is an admission that respect and hate are two different things. Finally, he proffers as a "simple" solution to the state of hate:

Respect can replace trust in high conflict cases.

Introduction

In spite of the promise that respect can replace trust in HCC, negotiations must have trust at least in the information being shared. We address this issue below in Show Respect, but before that, we examine the paradoxical instruction that gives parties permission to hate. We then delve into establishing trust in the negotiation process when parties distrust one another, with the Game Theory principle of information management.[5] In cases of hate and distrust, the methods of client control become particularly important in order to minimize the interference of emotions when attempting to reach optimal agreements for both parties. Finally, we explore the task of establishing a functional, if not ideal, co-parenting relationship in cases where parents are preoccupied with the hostile emotional quality of the divorce.

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3 Cristal, M. Negotiating in a Low-to-no Trust Environment, in Honeyman, C. & Schneider, A. K. Eds. (2017) *The Negotiator's Desk Reference,* Vol. 1, 231-248.

4 Ibid, p. 238.

5 In Booklet VII, we introduced information management as a means to establish trust in the bargaining process.

Negotiations in most circumstances occur the first time when the parties have first separated. This gives lawyers, and mediators if involved, a special opportunity to prevent the escalation of conflict, and even to prevent conflict from becoming a culture of conflict in the family. This involves specific skills, not the least of which is diagnosing vulnerable cases at the time of a separation, when the case includes conflict.

Moty Cristal provides in his Chapter in the NDR an Assessment Guideline that can be very helpful in identifying cases vulnerable to becoming HCC. William Hodges, in his classic book, *Interventions for Children of Divorce,* also lists predictors of continuing conflict post-divorce.[6] Hodges' two key factors predicting HCC are (1) when parties never had a time in their relationship that was free of destructive conflict and (2) when one of the primary sources of disagreement in the marriage was about parenting. Spouses who had low conflict until about two years prior to the separation, and who did not have high conflict over parenting, usually recover from divorce conflict after one or two years.

The end-game in negotiating potentially HCC is different from those in most divorce cases. As we noted above, trust-building is not an aim, nor is it an aim to reduce the hatred. The aim is to have a settlement that maximizes the payoff values for both parties, particularly in terms of their long-term family and financial goals. Another aim is not only for a functional co-parenting relationship but also protects children from conflict and gets basic tasks done, such as sharing information.

At the time of divorce, it will not be a family without pain. Children will grow up knowing that their parents hate one another. However, if the parents establish a functional co-parenting relationship, this style of family allows for resilience in the children because they have been protected from overt crippling conflict between parents. It also allows for the intensity of the hate to dissipate over time, because there are few new conflicts to keep the hate alive. While not ideal, as this does not repair trust or resolve relationship issues, a functional co-parenting relationship is a good start in the right direction.

The first key ingredient identified by Cristal is that the parties need permission to hate. Please read on to understand this paradoxical insight.

1. Give Permission to Hate

In his brilliant book, Paul Watzlawick introduces a paradoxical principle.[7] He turns fear of making the wrong choices, leading to unhappiness, into an irrelevant factor. He accomplishes this by directing the reader to seek unhappiness, providing specific steps to accomplish this,

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[6] Hodges, W. F. (3rd Ed. 1991) *Interventions for Children of Divorce.* Wiley.

[7] Watzlawick, P. (1993) *The Situation is Hopeless, but not Serious: The Pursuit of Unhappiness.* W. W. Norton & Co.

because it is hopeless never to make bad decisions. This might sound irrational (and counterintuitive), but we all know the game of laying on the floor with others and trying not to laugh. Pretty soon everyone in the room is laughing uncontrollably. We do not fully understand how paradox works, but it does. Now we return to Cristal.

Moty Cristal presents two key ingredients relevant to this issue. The first key ingredient identified by Cristal is that he turns hate into an irrelevant factor by accepting it and even giving a party permission to hate the other party. Read on! Hating the other party is irrelevant because it does not have to hinder negotiations, so there is no problem hating and distrusting. Giving permission to hate also takes hate off the table as a distraction for the negotiator. The negotiator does not have to spend time and effort on managing and reducing the negative feelings and can focus on the issues on the table for negotiation.

There are skills involved keeping the hate from interfering with successful negotiations.

The negotiator must remain neutral on the issue of hate.

Most clients in these cases will try to seduce the negotiator into taking his or her side and join in hating the other party. The negotiator must resist this temptation with clear limits. When the party starts telling stories about the other party to "explain" the hate, the negotiator must side-step the drama. For example, the negotiator might say: "*There usually are good reasons for a divorce, and while you can pay me to listen, there is nothing I can do about it. My job is to help you plan for your future.*" The negotiator is not challenging the client's perspective, but is remaining neutral on the issue of hate. In other words, while giving permission to hate, the negotiator is also isolating the hate from the bargaining issues. This gives the parties an opportunity to focus on the bargaining issues separate from the emotions involved.

Another side-benefit of this approach is that once isolated from the bargaining issues, the bargaining process does not exacerbate the hate. Without feeding hate with new experiences, the negative emotions tend to sate, meaning tolerance develops and the intensity of hatred diminishes. By defining the issues for negotiations as identifying current resources, discussing future goals and designing a plan to get from here to there, both the clients and the attorneys are facing in the right direction: the future. Hate faces in the wrong direction: the past.

2. <u>Show Respect</u>

The second key ingredient identified by Cristal is that the parties, merely by being persons, deserve respect. However, there is more benefit to respect than meets the eye and more certainly than Immanuel Kant considered in his philosophical assertion.

Respect produces better outcomes.

Let us flesh this out a little. Perhaps the most famous Game Theorist is John Nash, because of the book and movie, *A Beautiful Mind*. Nash is one of several Game Theorists who have won Nobel Prizes for their work in this branch of mathematics. Their work applied to real life situations and has improved the areas to which they were applied.

In one interesting application, Harmon Ray applied Game Theory to the construction of nuclear reactors in order to maximize safety. A principle developed by John Nash was that the value of payoffs increases for all involved, if an effort is made to cooperate, first on growing the pie to be shared and second by increasing the chances that all involved will reach their goals. Subsequent Game Theory research confirmed this assertion. When applying mathematics to specific games, research demonstrates that before distributing begins, by cooperating, the value of the total payoffs available can reach 172%. This seems counter-intuitive, but has to do with the preferences of the players and the subjective values at play in the game (see Booklet VIII: Growing the Pie).

A simple example often given is a Split the Cake Game. Assume one player is told that he or she decides on how to split the cake and the second player chooses the first piece. If one looks at just the objective payoff, Player One splits the cake in half and is indifferent to which half Player Two chooses. However, also assume that the cake is marbled with vanilla cake and chocolate cake, and assume Player One prefers vanilla and Player Two prefers chocolate. Now the split might not be in half, but done in a way that maximizes vanilla for one and chocolate for the other. Each party benefits, and if the subjective value of the flavors are assigned numbers, the value of the cake has increased beyond 100%.

In the Cake Example, the value grew because Player One respected the preferences of both players. Even in more complex games and real-life situations,[8] by respecting the goals and preferences of the other party or parties, the total value of the payoff increases, and thereby the value of each settlement package can increase beyond simple distribution.

The best way to be selfish in negotiations
Is also to be altruistic
and respect the goals and preferences of the other party.

Another view of respect in negotiations was provided in a landmark study by Andrea Kupfer Schneider.[9] Her work was extensive, and at the risk of oversimplifying her results, she showed that when negotiators demonstrated respect, respectful behavior, and collaborative

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[8] Most real-life applications of Game Theory have been in the area of economics, although in their masterful work, *The Negotiator's Desk Reference,* Eds. Honeyman C. and Schneider A. K., Game Theory principles are salt and peppered throughout the chapters.

[9] Schneider, A. K. (1992). Shattering Negotiation Myths: Empirical Evidence of the Effectiveness of Negotiation Style. *Harvard Law Review* 7: 143-233.

problem-solving, rather than competitive and sometimes hard-ball approaches, they were the most effective in reaching optimal outcomes for their clients. The message was a simple one: effective negotiators have respectful styles and show respect. This therefore suggests a simple proposition for parties: if you want an optimal outcome, you want to be on a team with an effective (meaning respectful) attorney negotiator.

While being respectful not only sounds "nice," it also increases the value of the outcome for both parties and for the attorneys involved. Being respectful has positive implications, likely to generate the following:

1. A discovery process, which includes rigorous honesty and an Open Information System (See Booklet VII)
2. A bargaining process, which includes listening with understanding
3. Where the interests and goals of both parties are treated fairly and with justice
4. Where rules of conduct are established that are respectful of everyone involved, including the attorneys and where the clients are respectful towards both attorneys.
5. Where the focus is on planning and problem-solving and where left-over marital problems are irrelevant and off limits.

3. Build Trust

In HCC negotiations, the reality is that Four-way Meetings are often unproductive, even with a mediator present, because the parties hate and distrust one another. There might be exceptions if the parties are socially mature and sign on to the tenets of respectful negotiations, but most parties in a state of hate and distrust do not have that much self-control. In addition, these joint meetings often end in reliving arguments that the parties had numerous times during their marriage, with no resolution, or walk-outs. Therefore, successful negotiations in HCC are more likely if the negotiation process is Lawyer-to-Lawyer, but this alternative is not a panacea or applicable in all cases.

If we assume that personal trust building
between the parties will not likely be successful,
and because trust is an essential element to successful negotiations,
perhaps the best we can hope for in HCC
is for the parties to trust the <u>process</u>,
which includes trusting both attorneys.

The first step in building trust is information management. While the parties might not trust one another, they must trust that the attorneys have methods of seeking reliable information. The information must be:

1. **Public**, where all parties (and counsel) involved have the same information
2. **Verified,** where there is proof of facts or opinions by documentation or by reputation
3. **Complete**: where those involved know and understand the steps that led up to the negotiations
4. **Perfect**: where those involved know the payoff values at stake and the implications of various choices

When the parties are in a low-to-no trust environment, the following considerations must be understood and agreed to by all parties:

1. In HCC, there is the natural tendency to view the situation as a Us-Them competitive situation. To build trust in the process, the implication is that the information management must be done with the lawyers working as a "team." Caveat: If it is not clear to the parties that the lawyers are a team in this regard, parties are likely to distrust the process because they will lump the opposing attorney with the other party as one of "them" and not trust the information management as being effective. Both parties must view the attorney team as working on behalf of both of them, at least in the information management aspect of the negotiation process. [Note: This "teamwork" is applicable in both Lawyer-to-Lawyer Negotiations (where the parties are not present) and in Four-Way meetings.

2. In Lawyer-to-Lawyer Negotiations, Bounded Rationality is likely hindered. As we pointed out in Booklet VIII, parties have a great deal of information about themselves and each other, much of which might not even be conscious, which can be taken advantage of in creating client driven solutions in Four-way Meetings. Information in Four-way Meetings can jump to the surface as inspired solutions to particularly challenging problems, thus making what had been unconscious information public. However, in HCC, parties meeting in the same room are likely to get side-tracked by their hatred and their history of pain with one another. In order to allow at least some Bounded Rationality in negotiations, each lawyer must set the stage for the Lawyer-to-Lawyer Meeting, advising that before the lawyers can engage in problem-solving, their clients must begin to think about solutions and share those ideas with their attorneys. In other words, it is still a goal to have client-driven solutions, but the process of getting there is more circuitous. In order for Bayes Rule and Bounded Rationality to be part of the process, it remains critical to bargain sequentially, each party taking turns with proposals and counter-proposals accompanied by the information and goals undergirding the proposal.

3. There is one other advantage in Lawyer-to-Lawyer negotiations in HCC, where the lawyers have separate meetings with their clients: the message can be separated from the messenger. In Lawyer-to-Lawyer negotiations, the lawyers can insert themselves in various ways to keep the focus on issues and possible solutions,

sometimes by changing the language used by their clients and at other times simply by providing evaluations of proposals. The reactions of the parties can therefore be directed to the message (e.g., a proposal), uncontaminated by hatred of the other party.

Establish a Functional Co-parenting Relationship

In HCC, if the attorneys can help establish a functional co-parenting relationship, this will be considered a major success. Such a relationship will have the following ingredients:[10]

1. Good information sharing
2. Flexibility in the schedule
3. Good access to the children
4. Coordination of parenting across homes
5. Procedures regarding decision-making and problem-solving
6. Rules of conduct for respectful treatment of one another

Functional Co-parenting. Functioning co-parenting relationships come in two flavors: High Functioning and Parallel Parenting. In High Functioning, there is an amicable relationship, where the parents have informal but effective information sharing, access and flexibility. Many parties might need assistance in setting this up and in setting up procedures for coordinating parenting across homes. They might also need assistance establishing decision-making and problem-solving procedures, because difficulty in this arena likely played a role in the demise of the relationship as married partners. However, many parents involved in divorce conflict eventually are able to establish a reasonably amicable co-parenting relationship.

Parallel Parenting. In HCC, the parents are unlikely, even with assistance, to reach a highly functional co-parenting relationship. The solution is Parallel Parenting. Although substantially inferior to a high functioning parental relationship, Parallel Parenting accomplishes most of the ingredients mentioned above and protects the children from open destructive conflict. Parallel Parenting is inferior because: it is less flexible, access to children is limited, coordination of parenting across homes is limited to the most important areas of child-rearing, and it is simply a lot more work. Rather than informal systems, formal systems have to be established, which often take much more effort. For example, what can be accomplished in a five-minute telephone call with amicable parents might take going back and forth with emails for a couple of days in a parallel parenting situation. However, to establish at least a functional co-parenting situation, the five tasks and the making of rules can be relatively modest. Contact between parents can be kept at a minimum and still get the basics. Flexibility in the schedule, for example, in a low conflict parenting relationship can be an informal telephone call and request. In a high conflict case, the request might be in the form of an email, following certain rules.

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[10] See *Co-Parenting Training Workbook,* by your authors and available at Unhooked Books (www.unhookedbooks.com).

Let us flesh out what this might look like a bit in Parallel Parenting:[11]

1. **Information Sharing:** Typically, information sharing is done digitally, rather than in person. This can be text messages for emergency information and transition information and emails or programs, such as *Our Family Wizard,* for non-emergency information. Exchanging a Parent Folder for paperwork, homework, etc. also works.

2. **Procedures for some flexibility can be established**: This involves two or three simple Steps, again usually conducted by email or text messages, for example, to make a request to go off schedule. Example: First Step, one parent makes a request to go off schedule. Second Step, the other parent agrees or not. Or, Third Step (if needed), the other parent offers an alternative, and the parent making the request agrees or not. Done.

3. **Access to children is structured**. This is usually done by telephone contact, but in some circumstances, other forms of access by other means can be used. Technology helps here with face-time telephone calls, messaging and emails. Parties can agree to one phone call a day after school.

4. **Coordinating parenting is best done through a third party.** A child guidance counselor can work individually with each parent to at least have the major child-rearing tasks coordinated (e.g., toilet training).

5. **Decision-making and problem-solving procedures are put in place**. The procedures provide for limited decisions which are collaborative and which type of problems rise to the level of requiring joint solutions.

6. **Rules of conduct are extensive and situation specific**. General rules of respectful treatment are established for a high functioning co-parenting relationship that are easily adapted to various situations. In Parallel Parenting, rules need to be established for specific situations. For example, a set of rules are established for situations where both parents are at public child-related events (e.g., a soccer match). Another set is established for transitions from parent to parent, and so on.

Lawyers generally do not focus on this aspect of a divorce settlement (establishing a functional co-parenting relationship for the HCC), but they could easily do so. An alternative is to have a Co-parenting Counselor perform this function.

Establishing a functional co-parenting relationship
is as important and perhaps more important
than establishing a physical custody schedule.

Social science research identifies the quality of the co-parenting relationship as having a substantially greater impact on outcomes for children than the schedule. If the parties have long-term goals for their children that require at least a functional co-parenting relationship, as

[11] Ken Waldron has written a *Co-parenting Training Workbook* that can provide the structure for a parallel parenting co-parenting relationship, available at unhookedmedia.com.

most positive outcome goals for children do, then addressing the future co-parenting relationship must be part of the service to be provided by all professionals at the time of the divorce.

Summary. Percentages vary with the research, but approximately 15% of all divorces will end up in persisting, sometimes high conflict, co-parenting relationships, leading at least to suffering on the part of everyone in the family and often to serious disturbance in the children. Those parties usually have reached the point of having already done so much damage to each other that they hate and distrust each other, at a level that is unlikely to change, even with intervention.

The parties might also display lagging or lacking skills (see Booklet I) and prove resistant or incapable of developing those skills. This Booklet has followed the advice of Paul Watzlawick. We turn his phrase a bit, and look at these cases as "*hopeless, but not serious enough to prevent a proposed functional solution*."

Negotiations in these (hopeless but not serious) divorce cases can still be of great service to these parties.

The first step is to assess the case to determine, at least with some degree of confidence, whether the divorce conflict at the time of the divorce is of the type that is likely to persist. As mentioned earlier, Moty Cristal offers an assessment tool in his chapter in the NDR, (cited earlier), and William F. Hodges offers other factors in his work (also cited earlier).

In HCC, we also borrow from Moty Cristal and suggest that the parties not only be given permission to hate, but also that they focus on developing a Plan to reach long-term goals, without attempting to resolve the hatred. Also critical is that the attorneys model respect, for each other, for their client and for the other party. Respect must also be an explicit instruction to the parties, the rational for which is to reach optimal agreements. The necessary ingredient of trust, where the focus is on trusting the process, is accomplished by the attorneys working as a "team" at least in the information management aspect of the negotiations.

More so in these vulnerable families, attorneys negotiating on behalf of their clients should place a good deal of importance on and make a substantial effort to helping the parents establish a functional co-parenting relationship or a Parallel Parenting relationship. Attorneys reluctant to take on this role should have professionals that they can turn to for this part of the divorce process.

The temptation is to be judgmental of parties in HCC, but in a sense, if we are, we have been seduced into their dynamic – their movie so to speak. Being judgmental and blaming one another can be infectious. Professionals, in order to remain immune, must be respectful, understand that the parties are simply vulnerable, likely because of past experienced embedded

in their personalities, and that by doing so, Negotiators can start these families on a more positive path.

People change slowly over time, and the trajectory of those changes can change with a simple nudge at a critical time, like a divorce. If a person is standing in San Francisco, facing New York, and someone nudges them five degrees (a hardly perceptible change of direction), they will end up in Florida. Lawyers at the time of a divorce have that opportunity to have an impact, and hopefully a positive one.

Introducing Mediation into the Process

Negotiations have always existed between people. A husband and wife negotiate which movie to go to. People who want to start a business together negotiate. Some negotiations fail to resolve a disagreement, become disputes and rise to the level of requiring a dispute resolution process. In the distant past, the resolution of those disputes was often accomplished through brute force, combat or even tribal wars. However, such methods of dispute resolution were a bit brutal and costly. As civilizations progressed, disputes were resolved by leaders, royalty, clergy or wise men. As royalty and clergy lost power, people began to devise systems of law, but law remained primarily the will of the State.

In 1873, John Austin defined law as "*the command of a sovereign backed by force*."[12] However, the "law" developed its own processes and expanded its reach into many different types of disputes, such as torts, contracts, marriages, property, inheritance and even civil disobedience. Robert Fisher (1978) defined law as "*a functioning system for coping with disputes before they become crises.*"[13] In his view, law does not solve substantive problems (end crime; stop broken contracts; stop auto accidents; etc.), but creates a system for dealing with them.

In the 1970's, legal scholars began to assert that the law should involve "*fitting the forum to the fuss,*"[14] meaning that litigation worked best on disputes that involved a public interest such as crime.[15] However, certain forms of Alternative Dispute Resolution (ADR) models, it was proposed, were better suited to handling private disputes. Over time, various models of ADR began to be better defined and integrated into law and legal procedures. One writer referred to

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[12] Austin, J. *Lectures on Jurisprudence* in Campbell, R. Ed. (1873) The Philosophy of Positive Law. J. Murray.

[13] Fisher, R. (1978) Points of Choice. Oxford University Press.

[14] Sander, F.E.A. & Goldberg, S.B. (1994) *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure,* Negotiation Journal, January, 49-67.

[15] We will see later that ADR can also be an effective approach to crime. See "restorative justice" later in this Booklet.

ADR as "*bargaining in the shadow of the law*,"[16] essentially viewing ADR as an attempt to reach settlement prior to litigation, but often framed by what outcome would be expected if the case were litigated. Those expectations ranged from what was the worst thing that was likely to happen if litigated, which became termed the Worst Alternative to a Negotiated Agreement (WATNA), to the best likely outcome, which became termed the Best Alternative to a Negotiated Agreement (BATNA). Negotiations, in all forms of ADR, typically were conducted within this range.

More recently, some negotiation theorists have defined ADR, not as an attempt to prevent litigation, but as a different approach to resolving disputes, more an equal "partner" with and running parallel to litigation.[17] This view frees negotiators from the restrictive predictions of what a Court would do, at least hypothetically allowing for more creative solutions. Restorative Justice (RJ) is a good example.

Although Howard Zehr (1990)[18] is credited for the introduction of Restorative Justice, forms have been practiced in many cultures (e.g. Maori of New Zealand) for generations. Rather than retribution, RJ seeks to have a corrective experience for both a victim of a crime and the criminal involved. The victim and the criminal meet, usually with a mediator, but often including other people from the community. Each side gives his or her perspective on and feelings about what happened. An interesting outcome is that both the criminal and the victim develop an empathic understanding of each other, which ends in a mediated solution, almost always including the criminal making amends in some form to the victim. Victims report positively about resolving their reactions to the crime, and recidivism rates for criminals improve. This is a true "win-win" in an ADR format. Nowhere in this process is the "deal" compared to what would happen if litigated in the traditional criminal legal system.

At this point in time, most jurisdictions in the United States, and most other western nations, include ADR in the law. The law might define who is qualified to conduct various ADR approaches, what the legal obligations of that person are, the range of issues that can be addressed in that approach, whether or not the Court can order any ADR approaches, and the appeals process, should one be permitted and/or necessary.

ADR has become so endemic to the justice system in the United States that Court rulings and legislative law have generally required some ADR participation before qualifying for litigation. This means the parties must have first attempted negotiation or mediation before being heard by a Judge. Laws have sanctioned ADR being required in contracts as a means for

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[16] Mnookin, R. & Kornhauser, L. (1979) *Bargaining in the Shadow of the Law: the Case of Divorce.* The Yale Law Journal, 88(5) 950-997.

[17] For example, Cohen, A. (2017) *Negotiation as Law's Shadow.* In Honeyman, C. & Schneider, A.K. Eds. The Negotiator's Desk Reference, Volume 2. DRI Press, 79-86.

[18] Zehr, H. (1990). Changing Lenses-A New Focus for Crime and Justice, Scottdale, PA (1st edition).

resolving disputes. Many labor disputes must be settled by arbitration, for example, before having the right to be litigated.

In spite of the fact that both Allan and Ken have performed mediation with and without attorneys representing parties involved, we both view mediation as an addition to bargaining when attorneys are involved. However, that is only true when the attorneys do not attempt to use mediation as a means of resolving positional disputes. Some attorneys, in our experience, will "load the dice" by coaching their clients how to argue positions in mediation.

Mediation in our model is simply the use of a neutral to facilitate the planning process. One advantage of mediation, for example, is that it is usually conducted with both parties, and sometimes their attorneys, present. This allows a neutral to establish rules, such as having sequential bargaining, and to raise information about goals underlying proposals. A mediator might also, in the perception of the parties, be more likely to surface subjective payoff values. A mediator asking, "*Why is that important to you*?" might appear to be less challenging that an attorney asking the same question.

In our Model, mediation is introduced to parties when the advantages of having a neutral conduct goal-based planning might overcome what might at first appear to be impasse in the Lawyer-Lawyer negotiations. Attorneys can, in mediation help their clients remain focused on their long-term goals. One party might make a proposal that on the surface appears reasonable, and the other party might accept. His or her attorney can remind the client of a goal that the proposal being made fails to take into consideration, thereby keeping the focus on accomplishing both parties' goals. Attorneys can also play key roles in helping the clients follow the rules of mediation (e.g., taking turns speaking). Hearing one's own attorney ask a client not to interrupt and to hear the other person out is much more palatable to the client that the other party saying the same.

In brief, Goal Based Planning can be very helpful with a mediator in some cases, but the principles derived from Game Theory and presented in earlier booklets in this Series still apply. The power of the process, with the addition of a neutral mediator, can overcome impasse in a case that seems stuck.

Putting it all Together

The booklets in the Divorce Conflict Series aim high. The first six booklets focus on understanding divorce conflict. We have looked at the sources, including human nature, disagreement resolution skill weaknesses, (unintended) contributions by the traditional family law system and the self-fulfilling prophecy and even the potential addiction of divorce conflict. We have emphasized the importance of reducing divorce conflict, when possible, with an eye to the quality of the post-divorce co-parenting relationship. We then introduced our Goal Based Planning Negotiation Model, undergirded by Game Theory principles, as a solution. The solution is founded on two premises: (1) Goal Based Planning can lead to optimal solutions for

divorcing parties, thereby helping them reach long term goals for themselves and their children; and, (2) Divorce can be a solution to marital conflict, leaving parties to lead post-divorce healthy lives and provide the family experience for their children that most parents would like them to have.

These booklets touch the surface of the Goal Based Planning Model. Our books, "Game Theory and the Transformation of Family Law: Change the Rules- Change the Game. A New Bargaining Model for Attorneys and Mediators to Optimize Outcomes for Divorcing Parties." Unhooked Books. Scottsdale, AZ and "Winning Strategies in Divorce: The Art and Science of Using Game Theory Principles and Skills in Negotiation and Mediation," introduce other Game Theory principles that can also be very helpful and provide much more detail with regard to the application of our Model to real cases.

We hope that these booklets are helpful and that we have wet your appetite for applying Goal Based Planning to real cases.