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

Booklet IX. Goal Based Negotiation - Planning

Outside the Box[2]

By: Kenneth H. Waldron, PhD and Allan R. Koritzinsky, JD

"My greatest challenge has been to change the mindset of people.
Mindsets play strange tricks on us.
We see things the way our minds have instructed our eyes to see."
(Muhammad Yunus)[3]

Preface

We once again quote Muhammad Yunus because deal-making in our Goal Based Negotiation Model (hereafter, the "Model"), although replete with special knowledge and techniques, is heavily dependent on the mindset of the negotiators and the goals of the bargaining process.

In this Booklet, your authors address the gap between traditional or even semi-modern negotiation strategies and the Model presented in our books.[4] We will first address the

---

1 Our Divorce Conflict Information Series is organized into two Sections: Section One- Understanding the Problem (6 Booklets) and Section Two- Planning the Solution (4 Booklets).

2 This Booklet takes a brief look at Game Theory negotiations, but cannot be comprehensive. However, the principles and techniques involved in Game Theory negotiations are presented in our books, cited in Footnote 4.

[3] Muhammad Yunus is a Bangladeshi social entrepreneur, banker, economist, and civil society leader, who was awarded the Nobel Peace Prize for founding the Grameen Bank and pioneering the concepts of microcredit and microfinance.

[4] "*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*." The latter is in digital form only. See www.unhookedmedia.com.

difference between traditional negotiation and semi-modern negotiation, although we will refer the reader to more thorough discussions of this difference. We will then present the differences between our Model and prior models. Finally, the fundamental mindset of the application of our Model will be elaborated upon in modest detail.

Allan and Ken, your authors, disagreed on the title of this Booklet. Ken favored "Deal-Making Outside the Box" whereas Allan favored "Planning Outside the Box" because of the emphasis on goal-based **planning** in our Model. Allan was more correct in his wording, because fundamentally, our Model suggests that parties and their attorneys are immersed in a planning process, not a bargaining or negotiating process. Ken favored "Deal-Making" because it can not only involve negotiating but also involve a planning process and does not necessarily involve a dispute. Most importantly, Ken thought the wording was more likely to appeal to professionals, who might think of themselves as deal-makers rather than planners. However, Ken agreed with Allan because the most fundamental concept in our model is that divorce is a time for **planning**. Divorce is an unwanted life event that, while highly emotional, is likely to turn out best if post-divorce lives are planned for the purpose of reaching long-term goals.

It is clear that our interest in preventing and resolving divorce conflict is most applicable to divorces when there are children. Only under that condition will the parties necessarily have ongoing contact and a relationship that will last a lifetime. Only by abandoning their children can they end the need for contact. They will communicate. and they will make decisions. They can only control whether and when that is done destructively or constructively.

Our goal is to change the mindset of professionals involved in family law as it applies to divorce <u>and</u> also change the mindset of separated or separating non-married parents.[5]

Readers educated on negotiation theory will recognize some, although not all, of the skills and techniques of our Negotiation Model, but those skills and techniques make little sense without understanding the undergirding mindset. At its root, the Model defines "interests," "values" and "goals" differently and makes fundamentally different assumptions when compared to the traditional model and the semi-modern models.

In developing our Model, your authors' journey began with an analysis of the traditional family law system, applying principles and mathematics derived from Game Theory, a branch of mathematics that focuses on how and why people make choices. That analysis is detailed in our books and briefly summarized in Booklet III in this Series, *What's Wrong with This Picture."* We then set out to design a model based on Game Theory that not only had better outcomes for parties but also met the settlement goals of the professionals involved.

---

[5] For simplicity, we will use "divorce" to refer to divorcing or already divorced parties and also separating or separated parents.

A recent survey of judges, mediators and lawyers found that professionals greatly value settlement chiefly for two reasons: (1) settlement allowed better legal protection of the parties, and (2) settlement allowed for solutions that are unlikely to be provided through litigation. As Attorney Gregg Herman writes in study authored by Ken Waldron and Gregg Herman, "*Lawyers have a saying: a bad settlement beats a good trial*."[6]

Given the current level of theory and practice in settlement negotiation, the question arises: what's new about our Goal Based Negotiation Planning Model? Our books detail answers to this question, but as Allan likes to say, "*What is the elevator speech*?" that is, what is a brief summary of the distinction between our Model and the semi-modern model of negotiation?

This Booklet is our attempt at an elevator speech,
but with apologies,
we are assuming a very tall building!

Brief Introduction to our Goal Based Negotiation Planning Model

Words matter. The literature is filled with words that reflect underlying assumptions about people involved with the legal system. Negotiations and bargaining both reflect an assumption that while parties might not be in competition, they likely have very different interests that need to be resolved. Even in friendly negotiations, words such as "the other side" and "opposing counsel" are frequently used, betraying an "Us-Them" assumption. Even the fact that one attorney cannot represent both parties reflects the assumption that the interests and rights of the parties are presumably in conflict.

One reason Ken liked the term "deal-making" is because in some deals, the interests of the parties do in fact differ.

Example One: Nancy wants to buy a house, and Jennifer wants to sell a house. Nancy wants to pay as little as possible, and Jennifer wants to receive as much as possible. Nancy and Jennifer, themselves or through professionals, might engage in hardball negotiations ("Distributive Bargaining") or friendly efforts to create value and make tradeoffs ("Integrative Bargaining"). (Stay tuned for more about this later.) In addition, Nancy and Jennifer have no long-term relationship to protect. The goal of the deal is to sell and buy a house. If Jennifer is asking $200,000 and Nancy is offering $180,000, in Distributive Bargaining, they have defined their dispute, and the range within which the deal is acceptable to both parties. If engaging in Integrative Bargaining, Jennifer might offer to pay for a furnace as part of the deal, or Nancy

---

[6] Herman, G. & Waldron, K. *Legal Outcomes in Divorce: Are Settlement Agreements Better for Clients than Full Litigation, and If So, What Factors Predict Successful Settlement Negotiations*? (Pending publication).

might offer to pay $200,000 if Jennifer will finance a portion of the cost. These trade-offs increase the value of the settlement for the parties, but ultimately, the goal is to settle on a number.

Example Two. In some deals, the interests of the parties do not differ. Jim owns a business, and Mike is an expert on restaurant expansion. Jim wants to expand his small business, a take-out chicken operation, and already has two successful stores. Mike's primary goal is to make more money. They make a deal to work with one another to accomplish Jim's goal of expansion and Mike's goal of building his wealth. The bargaining might not only be dominated by friendly efforts to create value for both of them but also might include some competitive bargaining, such as Mike's eventual share of ownership. However, both Mike and Jim have the mutual goal of a successful expansion. They both win only if their partnership is successful.

Settlement in family law is generally seen as best described in Example One, where the interests of the parties differ and settlement negotiations are the first of potentially many steps in **dispute** resolution. Law and practice make that assumption (namely that the parties have a "dispute") come true because of fundamental flaws in the family law system.[7] Deal-making in that arena is normally in the form of dispute resolution.

Unfortunately, the traditional family law system assumes a dispute:

- where parties often enter the system with what appears to be a dispute,
- where the law and practice inadvertently foment conflict, and
- where the law and practice dichotomize positions and escalate the dispute.

We see things the way our minds have instructed our eyes to see.[8]
We see a dispute because
that is what we assume is the fact and therefore the "truth."

Our Model assumes that the interests of the parties getting a divorce do **not** differ. Yes, a shocking assumption, but one we believe we can prove to be true. In other words, our Model assumes that the following assumptions are not correct:

- that the interests of the parties differ,
- that the legal task is to distribute property, debt, future income and time with children, and
- that the parties enter the family law system with disputes over that distribution.

In this Booklet, we will briefly describe two theories and the various Models of settlement negotiation: Integrative Bargaining and Distributive Bargaining. We will then identify

---

[7] See Booklet III for more on this point.

[8] For more details, see Booklets IV, V and VI in this Series.

the fundamental differences when compared to our Model. Finally, we will focus on how the mindset in our Goal Based Planning Model with Game Theory Principles leads to a very different bargaining approach.

Sitting on the Horns of a Dilemma

The law focuses where the State has an interest. For example, the State has an interest in reducing crime and protecting innocent citizens. An extensive set of laws was developed to deal with crime. With divorce, the State has an interest in the distribution of property, debt, future income, which parent will be responsible for the care of children on what days and times, what major decisions require the input of both parents and how the children will be financially supported. The law is written to address these interests. Therefore, the law puts before the divorcing spouses distributive tasks, which (inadvertently) traps parties into competitive distributive bargaining, promoting and exacerbating divorce conflict (see Booklet III, *What's Wrong with this Picture*).

After Fisher and Ury wrote *Getting to Yes,* most negotiators and mediators adopted an interest-based bargaining philosophy, but found the pressure of the distributive legal tasks coloring those negotiations, forcing negotiators into "*bargaining in the shadow of the law*."[9] Lurking in the background of interest-based bargaining, like the man behind the curtain, were positions on the distributive issues. As a result, bargaining most often was within the range of the BATNA (Best Alternative to a Negotiated Agreement) and the WATNA (Worst Alternative to a Negotiated Agreement), meaning the best and worst likely outcomes if the case went to trial.

The bargaining Model being promoted in our books and undergirding the Booklets in this Series is aimed at applying our Model to divorce conflict not driven by the law, in order to optimize the outcomes for the parties and reduce the chances of persisting destructive divorce conflict. Our first book was reviewed by Bernie Mayer, an expert on conflict resolutions, who is also familiar with Game Theory. In his review, he praised the book, but pointed out that the book applies to people who are rational, which in Game Theory means people who make choices to maximize the value of their payoffs. He then mentioned that not all divorcing people are rational.

Your authors took this as a challenge when creating our Model, because in a great deal of Game Theory research, people appear to make irrational choices. The question was why? Ultimately, we answered that question by concluding:

- We needed to understand the rules of the games; and
- We needed to comprehend the value of the payoffs to those playing the games.

---

[9] Fisher, R., Ury, W. & Patton, B. (3rd ed. 2011) *Getting to Yes: Negotiating Agreement Without Giving-in.* Penguin.

In other words, based on that very Game Theory research, we concluded that people **were in fact** making rational choices, even when they appeared not to be doing so.

We therefore decided to write this Booklet Series, specifically to apply Game Theory principles to cases of divorce conflict in which people appear to be irrational. However, this implies stepping outside the family law system (or at least taking a detour) in order to optimize outcomes. Is this possible?

In order to answer this question, let us look at another example of the same dilemma: Restorative Justice.

The State certainly has an interest in crime. No society can exist for long without rules and procedures for preventing crime when possible, and handling crime after it has occurred. Most law is directed at a process for proving the crime, attributing fault to the criminal, punishing the criminal, and in many instances, establishing retribution. Can the law be side-stepped with a different procedure for handling crime after it has happened and the criminal caught?

Although Howard Zehr (1990)[10] is credited for the introduction of Restorative Justice (hereafter "RJ"), which in various forms has been practiced in many cultures (e.g., Maori of New Zealand) for generations. Rather than retribution or punishment, RJ seeks a corrective experience for both victims of a crime and the criminal involved. The goal is resolution, not punishment or retribution. In RJ, the victim and the criminal meet, usually with a mediator, and often including other people from the community or associated with the victim and the criminal. Each side gives his or her perspective on and feelings about what happened. Others attending might add their reactions. An interesting outcome of this process is that both the criminal and the victim develop empathic understanding of each other, and the criminal develops a broader understanding of the impact of the crime. The process 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 developing a better understanding of the criminal. For the criminal, recidivism rates improve, that is, criminals going through this process are less likely to commit further crimes.

With regard to the latter outcome, RJ was first tried with delinquents and was thought of as potentially a teaching tool for the underage criminal. The rate of recidivism, that is, the delinquent continuing to engage in unlawful behavior, dropped substantially. 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. The "deal" did need to be sanctioned by the Court, but RJ simply steps out of the legal system (at least at that moment) to arrive at a solution.

---

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

Our Model of divorce negotiation does the same as Restorative Justice.

The focus is entirely different when compared to negotiating "within" the traditional legal system, because distribution is viewed in the context of a long-term plan, not a rights-based decision at the time of the divorce. The divorce settlement still requires judicial sanction, and thus the lawyers involved must submit a Plan to the Court, namely a signed Marital Settlement Agreement (or a final agreement perhaps with a different name) that addresses the distributive legal outcomes. Most important, for the parties, the distributive legal outcomes are temporary tools to jump start their long-term plan to reach life goals. Rather than an "equitable distribution," meaning equal or close to equal, the settlement is "equitable" if and to the extent that it satisfies the long-term plans of both parties, who have been treated fairly and with equal importance. The distribution in the Plan might or might not but equal, but it is equitable, as viewed by the parties.

Here is the good news:
The law does not need to change.
Only the mindset of the parties and their lawyers needs to change.

The negotiation process merely side-steps the law in order to accomplish the parties' jointly held goals. Whether the law could or could not help the parties reach those identical goal is basically irrelevant.[11] In criminal law, the outcomes of RJ accomplish the goal of law by reducing crime and resolving crime that has already occurred. In family law, when people reach agreements through our Model of negotiating, the interests of the State are also met, particularly if ongoing divorce conflict and re-litigation are reduced. The latter outcome becomes possible because part of the planning focuses on protecting and even improving the continuing relationship between parents.

Traditional and Semi-modern Bargaining Models: A Comparison

(1) Distributive Bargaining. The evolution of how these models are labeled is interesting in itself, but for brevity, we will use the current state-of-the-art labels. The traditional bargaining model is currently called "Distributive Bargaining." It assumes that parties come into the family law system with disputes over limited resources: property, debt, future income, time with children and legal control of children. Bargaining involves the "distribution" of those limited resources, and these are Zero-sum Games, where one party getting more means that the other party is getting less. Bargaining is usually competitive and involves tactics that improve chances for one party getting a "win" and indifference to the other party getting a "loss." The bargaining can be civil or hardball, but the fundamental assumptions are identical.

[11] Before the Court approves the final divorce settlement, State law may require certain provisions be part of the final agreement, but it is expected that the lawyers(s) will provide this type of advice to their clients prior to or during the course of the negotiations.

(2) Integrative Bargaining. In relatively recent years, a different model of bargaining made its way into the literature and specifically into the family law system.[12] This semi-modern bargaining model is currently called "Integrative Bargaining. In this model, the concept of bargaining focuses on the interests of the parties, rather than on their positions, including the interests of the other party in the bargaining process. It also includes a more open information system, where creating value, typically with trade-offs, emerges. This bargaining model is also called "Win-Win" negotiating, or "Value Added" bargaining, but the most common current label is "Integrative Bargaining." Bargaining in this model tends to be friendly, cooperative and might include the aim of protecting the long-term relationship of the parties.

As Rishi Batra points out in a discussion of these two models, most bargaining situations include the use of both integrative principles and distributive pressures, which can be like mixing oil and water given the differences in tactics involved.[13] To integrate the two, most authors suggest engaging in Integrative Bargaining as an overall strategy, but being prepared for Distributive Bargaining with some of the issues involved. Integrative Bargaining tends to be preferred, not solely because it is a "nicer" approach, but also because it attempts to preserve or promote a positive post-settlement relationship between the parties. The concept of creating value is also key because the theory rejects the Zero-sum Game assumption of Distributive Bargaining. Typically thought of as "growing the pie" before distributing the pieces, Integrative Bargaining assumes that both parties can achieve greater outcome values compared to Distributive Bargaining, while protecting their future relationship with one another when they have children. Integrative Bargaining often includes the subjective value of "interests" undergirding positions in the process.

Integrative Bargaining faces important obstacles,
because divorce law tends to be distributive, with guidelines.

Property distribution, for example, might have the guideline of being "presumptively equal" or "equitable." Child support is determined by the number of overnights the child is to spend with each parent and with guidelines/formulas when that number is equal. A guideline for the distribution of physical custody, as is true in Wisconsin, might include "maximizing" time with both parents. Often, spousal support is the distribution of future income with guidelines/ formulas. The law and guidelines/formulas might frame limits on the creative range of Integrative Bargaining negotiations. Regardless of the intention of negotiators, the BATNA and WATNA still frame the "settlement box" in which agreements will be reached.

---

[12] Integrative Bargaining was introduced thanks to a number of people thinking outside the box, but too numerous to mention, although Roger Fisher and William Ury are often given credit.

[13] Batra, R. "Integrative and Distributive Bargaining" in Honeyman, C. & Schneider, A.K. Eds. 2017 *The Negotiator's Desk Reference,* DRI Press, Saint Paul, Minnesota: Pgs. 33-41.

Because divorce law is dominated
by distribution with guidelines, formulas and the like,
attorneys and mediators have a gravitational pull
towards distributive legal outcomes.

Thus, while an attorney might believe in and espouse Integrative Negotiation principles, when a case walks in the door, there is a temptation to negotiate with the distributive legal outcome being the primary focus. Thus, Integrative Negotiations and mediations often find themselves in the tension between integrative principles and distributive pressures. Choices become complex because one choice that increases the chances of adding value to the deal for one party might disadvantage the other party in the distribution phase of the case. For example, a mother who has an interest in her child taking the same school bus each morning in order to enhance local friendships with other children challenges the distribution of school nights to the father.

More Regarding our Goal Based Negotiation Planning Model

The first part of our Model is definitional. While somewhat reluctant to do, we describe our Game Theory Model as a bargaining or negotiating model, even though "bargaining" and "negotiations" generally assume differing interests between the parties. However, our Model does <u>not</u> make this assumption, even when parties present that they are in a dispute.

We call our Model "Goal Based Planning"
When describing our bargaining or negotiation Model,
having failed to find better description.
That said, it is our fondest hope that it will enjoy "stickiness" over time!

The assumption of Goal Based Planning is that parties are experiencing a live event that has numerous implications. Some life events are wanted, such as a couple deciding to have children, but some are unwanted, such as the loss of a job. Divorce might be wanted by one spouse but not by the other. Most life events include high levels of emotionalism, again some including positive emotions, some negative emotions and some both. However, the resolution of a life event must take stock of the current situation, decided on long-term goals and then plan how to get from the current situation to the long-term goals.

Even positive life events, such as a move to a new area, are likely to include differences and disagreements. Divorce is no different. Resolving differences and disagreements successfully involves principles and skills in the bargaining process. Goal Based Planning in our model borrows from the field of Game Theory (see Booklets VII and VIII in this series) for those skills.

<u>Caveat</u>: Our Model might not apply to some legal arenas of negotiation. In criminal law, for example, Game Theory might not apply in a case in which a career burglar bargains to get 10

rather than 12 years in prison. Nevertheless, there might be situations even in criminal law in which our Model might apply. For example, in a case where a young criminal would like to live a criminal free life, and the State would have the same goal, our Model might be a better way to accomplish that goal, when compared to the traditional plea bargaining. In Booklet VIII, we gave an example of a criminal case in which a Game Theory approach enhanced the outcome for both the criminal and the State. In that example, a man has committed a repeat alcohol-driving offense. He and the State shared the goal of the criminal becoming sober and not re-offending. The bargaining focused on a Plan to accomplish that goal that did not consider what would have happened had traditional plea bargaining occurred. The Model might also not apply in short-term, single instance transactions, such as a real estate deal, in which the only issue in dispute is who is responsible to pay for a leaky basement.

Family law is somewhat unique in the legal field because of the long-term implications of the decisions made. In contract law, real estate law or in a personal injury case, there might be any long-term relationship involved, or at least one that impacts future lives, but that is likely the exception rather than the rule. In family law, the long-term implications are on the quality of lives of the parties, often for the rest of their lives, and, if they have children, on the quality of their children's lives, which in turn have multigenerational implications. Divorce conflict has effects. Thus, a focus on the distributive tasks, or even on the short-term interests of the parties, can be short-sighted.

Here are a few questions to ask divorcing parents:

- Would you prefer your children to have a 30% percent or a 65% chance of a divorce as an adult? (Real outcomes with amicable divorces and conflictual divorces)
- Would you prefer your children to have a 10% chance or a 25% chance of having mental health or delinquency problems in their teen years? (Real outcomes with amicable divorces and conflictual divorces)
- Would you like your toddler to have a 10% chance or a 50% chance of being suicidal in her early teens? (Real outcomes with amicable divorces and conflictual divorces)

These are long-term outcomes and research-based outcomes for children of divorce, depending on how the divorce is handled by the parents and the professionals involved. Negotiating if a parent gets one more overnight in a physical custody schedule with these long-term implications is different from negotiating the sale price on a new car. In other words, what value would one more overnight each week give if this contributed to significant conflict between the parents' post-divorce and doubled the chance of their toddler killing herself in her teen years?

There are two distinguishing parts to our Model. First, as mentioned earlier, our Model differs from Integrative and Distributive Bargaining in the assumptions made and the definitions of interests, values and goals. One assumption that the Model does not make is that there is only one "right". Marsha asserts that the children should live mostly at her house, except every

other weekend, because having stability at home frees the children up to do well in other parts of their lives. Frank asserts that he wants to be a much more involved parent and that the children will benefit from his active involvement in their daily lives, including school days. Marsha and Frank could recruit numerous professionals to bolster their claim to being "right" or at least "more right" than their spouse. Our Model assumes that both parties can be equally "right." In this example, both Marsha and Frank are equally right. Family stability is not only a factor in success outside of the family for children, but also the involvement of both parents in all aspects of the child's life also predicts success. The question is no longer who is right, or more right; it is what can be done when both people are right.

Our Model also does not assume a dispute between parties, even if the parties appear to have a disagreement. Jon asserts that he wants joint custody, but Carol asserts that Jon was "emotionally abusive" during the marriage and wants sole custody. Superficially, Jon and Carol present with what appears to be a dispute, but in our Model, the professional hears these assertions as information, not positions in dispute. In our Model, professionals assume that this information, in part, defines a starting point and raises potential obstacles to reaching desired goals. The information is that Jon wants to be an active involved parent, and Carol wants the children to be emotionally safe. Implied is that <u>both</u> parents want their children to have a family that is emotionally safe, with two parents raising them. Marsha's perception of Jon might be an obstacle or Jon's interpersonal style might be an obstacle, or both, but they likely share long-term goals. Therefore, their disagreement on positions simply means that planning needs to address the goals and obstacles. Please read on to learn more about Jon and Carol.

Further information is needed to have a thorough understanding of the starting point, but the assumption is that the parties share long-term goals for themselves and for their children. The Model assumes that what is needed is a Plan to go from the starting point to the shared long-term goals of the parties. The Plan will include steps to take to reach the goals, including steps to take to overcome obstacles. The assumption of the professionals involved is that they are planners, not adversaries.

A subtle but important assumption in our Model is with regard to what people want. The Model does not assume that people want more property, more money or more time with their children. Instead, the Model assumes that people want more happiness and less suffering. Financial insecurity is suffering, and a desire for more money is actually a desire to suffer less financial insecurity. However, more money does not always resolve financial insecurity. To be out of control for parts of your children's lives is unnatural and causes suffering. Parents do not feel that they lose that control when their children are in school or at soccer practice, because if they need to, they can step in and do something about a problem. However, in a rigid physical custody schedule, parents can feel locked out and therefore be out of control. This causes suffering. Because our Model focuses on a planning process and on creating a Plan to achieve long-term goals, the perceived outcome is help diminish suffering and to help people attain more happiness.

In the Model, "interests" are more broadly defined than simply legal outcomes or short-term values. To achieve a certain physical custody schedule is not a goal. To have the child have a 65% chance rather than a 30% chance of a successful marriage as an adult is a goal. To prevent multigenerational harm to children is a goal. To reduce the chances of a toddler committing suicide 10 years after a divorce is a goal. To have children do well academically and socially are not goals but rather are usually steps towards a successful adulthood, which is a goal. To reduce the suffering and increase the happiness of divorced parents is a goal.

In one of our examples, to focus on Marsha's interests in having a stable homelife for the children or Frank's interests in being an active and involved father misses the point. Those are their "interests," but are not long-term goals. Listening with understanding requires additional questions. In what way is a stable homelife expected to improve school performance? How is school performance expected to enhance the child's life as an adult? What are the benefits to the child of having a more active father involved in her life? What would you like to hear your child say when she is 25 years old about her parents' involvement in her life?

Marsha's attorney might say: "*Marsha, solid research on the involvement of both parents, not just one, in a child's schooling has been shown to improve grades, better social behavior and reduce behavior problems. If living in your home during the school week, how would you propose both parents being actively involved in your child's schooling? The quality of the father-daughter relationship has been shown in research to be a good predictor of future marital success for the daughter. How can the quality of Frank and your daughter's relationship be improved and protected*?" These are questions aimed at long-term goals, not short-term interests.

A second distinguishing part of our Model is with regard to the definition of "value." Distributive Bargaining focuses almost solely on the objective values involved. Bargaining over spousal support is almost solely focused on a dollar amount– an objective value. Integrative Bargaining expands to include some subjective values. For example, "fairness" receives a good deal of attention in the literature on Integrative Bargaining, which is almost entirely a subjective value. However, the majority of the focus is still on the objective values involved in the deal.

For example, Joan and Bob disagree about spousal support. Joan's argument is that she is the one who worked hard to achieve the success that she achieved. Joan asserts that Bob could have done the same thing. Bob's argument is that he covered at home for Joan's work travel, late meetings and paperwork at home. Both share the "interest" in cutting financial ties with one another as soon as possible. In integrative bargaining, the parties might choose an uneven division of property in lieu of spousal support. In our Model, this might be a poor solution in terms of reaching Joan and Bob's long-term financial goals for themselves and each other. See below for a different approach to the same issue.

Our Model assumes that the values in a particular case have both objective <u>and</u> subjective values that vary with the issues being addressed. Some issues might be almost

entirely dominated by subjective values. A father who had a distant relationship with his own father might be overwhelmed with anxiety at the thought of being distant with his children, which is a totally subjective value undergirding his interests. A mother whose self-esteem is wrapped up
in her role as a parent is a completely subjective value.

As one can see from the above, "goals" are conceived of as quite different from legal outcomes and short-term interests. As we have asserted in other Booklets, this can put parties in direct conflict with professionals. The goals of attorneys, Guardians *ad litem,* Family Court Commissioners, Judges, and even mental health professionals and mediators, might revolve around case settlement- that is, having clear legal outcomes. Once those outcomes are achieved, the case is considered over for the professionals, and to them, the goals have been achieved.

However, for parties,
legal outcomes are tools for accomplishing life goals,
and those tools might or might not accomplish life goals.

A focus on reaching legal outcomes might in fact make reaching life goals substantially more challenging for the parties. Just as a marriage is not a wedding; the marriage is everything that happens after the wedding. A divorce is not a final Judgment; the divorce is everything that happens after the final Judgment. Both a wedding and a final Judgment are merely when the legal status of the parties changes.

Our Model makes different assumptions,
defines interests, values and goals differently when
compared to Distributive and Integrative Bargaining,
and as a result,
leads to a very different process.

Here's our point:

- The process in our Model is one of planning, not negotiating, bargaining or litigating.
- Concepts such as *Best Alternative to a Negotiated Agreement (BATNA) or Worst Alternative to a Negotiated Agreement (WATNA)* not only do not frame the negotiations, but also are irrelevant. They generate important information, because they frame what is likely to happen if the parties fail to settle, but the settlement does not (or better said, should not) consider BATNA and WATNA necessarily as the "bookends," when there is a compromise between the two positions.

Perhaps an example might help here.[14] In a divorce litigation case involving spousal support, the parties were referred to mediation, in a last-ditch effort to avoid litigation. The attorneys involved had made clear to each of their clients the likely outcome ranges in trial, but the parties continued to disagree. The mediator, familiar with the quality of the attorneys involved, knew that "bargaining" was unlikely to resolve the matter and took a different tack. If the attorneys had not been successful at bargaining to settlement, the mediator was unlikely to be able to do so. He therefore began with a discussion with the parties regarding their long-term financial goals. It became apparent that not only did they have clear long-term goals, but also, they shared an interest in each other reaching goals. They were in agreement on the financial goals with regard to the life styles that the children would have in each home and future opportunities, such as college. They shared the goal of being independent of one another financially as soon as possible, except for child support agreements.

Soon after the mediator facilitated the goal-based planning discussion, the parties began planning, rather than bargaining, and came up with a Plan (though a complex one). It became apparent that they could not reach their financial goals unless the wife earned more money. Still wanting to be financially independent of one another, they developed a Plan in which the husband paid a high level of spousal support for a short-term, so that the wife could be trained in graphic design, and then a diminishing amount of support as the wife built her income, with a termination date when the wife expected to have sufficient income without spousal support to reach her goals.

Continuing with the story, the mediator asked: "*What if the wife does not reach her income goal by the termination date*?" Not surprisingly, given how the mediator handled the matter, an agreement was made to revisit spousal support in mediation if the Plan faltered for any reason. The ex-wife did in fact fail to reach the income goal, and the parties met again in mediation. Because of the sincerity of her effort, the ex-husband agreed to extend support for another period, after which she hoped to reach her goal. Subsequently she did reach that goal, and the support was terminated.

At no point was this agreement compared to a BATNA or WATNA, or any standards of fairness. The Standard against which the agreement was measured was whether or not it was a Plan that had a good chance of reaching goals. The husband did not "compromise" to avoid litigation; he made a sacrifice to reach goals. In fact, his short-term support obligation was higher than his WATNA.

Many of the Game Theory principles and techniques espoused in our two books (written by your authors) were also used in this case – too many to describe here. However, the point is that a planning process was successful where a negotiating process had failed.

---

[14] In order for these Booklets to be authentic, examples are based on real cases in which your authors have been involved, with changes in details to protect the anonymity of the parties.

The mediator did not assume that the parties had a dispute
Therefore, the task was never *alternative* *dispute resolution.*

Switching gears to continue our discussion of "deal-making outside the box," we now address three related topics regarding the traditional family law system and our Model: Strategic Intent, Value Proposition and Standards, and when you read on, you will learn why.

Strategic Intent, Value Proposition and Standards

In Booklet IV, *What's Wrong with this Picture,* your authors outlined three major flaws in traditional family law:

1. that there is no clear customer-based **Strategic Intent**
2. that there is no **Value Proposition** to produce a customer-based Strategic Intent, and
3. that there are vague and ambiguous **Standards** used to measure outcomes, whether in settlement or litigation.

Flaw #1- No Strategic Intent:

In our Model, negotiating attorneys or a mediator, must establish a Strategic Intent that is customer-based. Your authors suggest the following:

Using our Model, the negotiated agreement requires a Plan
that has a high probability of reaching the long-term
family and financial goals of the parties.
The Plan focus is on an optimal outcome for both parties.

Flaw #2: No Value Proposition:

The **Value Proposition** of our Model outlines all of the steps professionals will take to accomplish the Strategic Intent, starting with the first contact with potential clients through the completion of the divorce. Attorneys and mediators have Intake Procedures (recommended by us) that are necessary for the running of their professional business and meeting professional standards, which must be included.

Beyond those intake procedures, we recommend the following Five Steps:

1. First. The first step is to determine the current situation, which might work hand-in-hand with the discovery process that most attorneys employ early on in the case.
2. Second. The second step is to identify the long-term goals of both parties. In Booklet VII, we described the manner in which information is managed in our Model, so the information is public, verifiable, complete and perfect. Thus, in our Model, the

discovery process is not only public and verifiable but also the long-term goals of the parties are made public and complete. This includes disclosure, in addition to objective values, the subjective values of the parties.

3. Third. When children are involved, because the quality of the co-parenting relationship is key to positive outcomes for children and the long-term family experience of the parties, the third step might be to conduct additional discovery. In Booklet I, for example, lacking or lagging skills were identified as contributing to the development of divorce conflict. One of the elements of the Value Proposition is to assess each party for lacking or lagging skills. If there are skill deficiencies, the Plan should include a means for training in those skills.

4. Fourth. Another step might be to assess each party's vulnerability to becoming addicted to divorce conflict (Booklet III), including prevention steps or treatment steps, if needed.

5. Fifth. Another step might be an assessment of parenting skills, which should be part of the preparation for a good Family Plan. Often, separating parents are critical of one another's parenting, many times being correct. Most parenting skills can be learned.

When children are involved,
an essential part of a good Family Plan
is the production of a functional,
even pleasant, co-parenting relationship
and when needed, enhanced parenting quality.[15]

Simple advice and brief Parent Education Programs might be helpful to some parties. However, many parents get good advice and go through Parenting Education Programs, but finish their divorce with a dysfunctional, very unpleasant, co-parenting relationship. The Plan must be more comprehensive and specific to the parents involved, taking this aspect of the divorce very seriously.

By far, the best predictors of outcomes for children are the (1) quality of the co-parenting relationship and the (2) quality of parenting in each home. A third factor that plays an important role is the inherent resilience of the child, but as Robert Emery has pointed out in his many publications, many children are resilient and able to do reasonably well, even with poor quality parenting or a poor co-parenting relationship. However, those children experience a good deal of pain in their lives and substantially diminished satisfaction with their lives. Many

[15] In Booklet XI, we discuss cases in which the parties hate and distrust one another at a level that is unlikely to improve. The goal in those cases is to have a functional co-parenting relationship. Details are provided in that Booklet.

also have what Judy Wallerstein labeled “sleeper effects,” that is, destructive effects that do not show up until their adulthood.

Just like with planning the family issues, after discovering the current financial situation and clarifying the long-term financial goals of the parties, a Value Proposition must address the steps to get from the current situation to the goals, including how to overcome obstacles and perhaps even deal with uncertainties. This too might include assessing for skill weaknesses in dealing with money or work, and including steps to correct those weaknesses.

For example, in a Pre-marital Agreement, the parties agreed to keep the wife’s gifted or inherited asset separate from community property. Because of the length of the marriage and other factors, the parties ended up in a dispute about this asset. In “rights based” or distributive negotiations, the focus is on whether the husband has a “right” to some value of the asset or whether the wife has a “right” to the whole asset. In our Model, the asset is seen as part of the current financial picture. If some of the asset is needed by the husband, which will help both parties reach important goals, then it is used. If the parties can reach goals without using the asset, then it remains the wife’s sole property. “Rights” are “irrelevant” in a goal-based planning approach.

This example will have many shaking their heads in disbelief, but only if it is assumed that having more money leads to less suffering and more happiness. Having a plan for both parties to reach long-term goals might be a more effective way to reduce suffering and increase happiness.

Remember our earlier point: that Game Theory research has shown that a blend of selfishness and altruism leads to the most satisfying outcomes.

Flaw #3: Vague and Ambiguous Standards:

Once the Plan is developed and fleshed out, specific and unambiguous **Standards** should be applied. In our Model, Five E's are identified as Standards: **E**ducated, **E**ffective, **E**quitable, **E**quilibrant and **E**nvy Free.

Educated: where the parties been educated with regard to the law, the implications of their choices, elements of the Plan and the goals of the process of the Model (e.g., that the Model focuses on optimizing the outcome for both parties, not just one).

Effective: where the agreements are specific, thorough and likely to help the parties reach their goals. If future decisions must or might be made, a procedure for those decisions should be outlined in the Plan.

Equitable: where the long-term family and financial goals of both parties been effectively included in the planning.

Equilibrant: where the agreement cannot be improved at least for one party without diminishing value for the other party. For example, a tax accountant might be retained to consider restructuring the deal to provide additional tax savings.

Envy Free: where neither party would trade his or her settlement package for the package that the other party is receiving.

If any of these Standards are not met, it may be appropriate to continue with the planning process. Any agreement that is too fragile to stand up to these Standards should fall apart during the negotiation process because it is likely not a good/effective Plan. It is best that this happen before, not after, the divorce Final Hearing.

Don't Fall for Our Ten Traps

In Booklet IV, *What's Wrong with this Picture,* our "Ten Traps" in the traditional family law system are identified. These can and often do trick parties and even professionals into making self-defeating choices. Deal-making "outside of the box" should include familiarity with these Tricks, educating parties on the temptations of these Tricks and implementing the antidote to the Tricks (for more detail on the traps, see Booklet III, *What's Wrong with this Picture*).

Trap #1: The parties are directed to and often pressured to focus on short-term legal outcomes, not long-term-life goals.

Antidote: From the beginning of the case, the focus should be on long-term life goals. Formulating the wording of the legal outcomes as part of a Plan can only be accomplished when the manner in which the legal outcomes support the Plan is clear. Positions on legal outcomes are taken at the end of the negotiations, not the beginning.

Trap #2: The current family law system turns Non-Zero-Sum Games of parenting and financial planning into Zero Sum Games regarding a custody schedule and distribution of property and future income.

Antidote: The schedule is only a small part of a Parenting Plan. There has to be a clear understanding of who is expected to be responsible for the children at what times and on what days, but this schedule does not inherently limit parenting involvement in the children's lives, how decisions about the children will be made and all other aspects of parenting. Likewise, when adults have a major life event, often part of that event is changing financial plans, setting new financial goals and making sacrifices to reach those goals. A divorce is simply a major life event, which requires serious planning, which often includes short-term sacrifices.

Trap #3: The current family law system assumes that disputes exist and that the interests of the parties are in conflict.

Antidote: Change the assumptions as described earlier in this Booklet and assume the parties do not have a dispute- just different views of how to reach their presumed joint long-term goals.

Trap #4: Children are treated as property in the current family law system.

Antidote: A physical custody schedule does not necessarily mean that parents "own" their children at certain times and do not "own" them at other times. Parents are not always with their child, such as when the child is in school, but start with the assumption that each is a parent 100% of the time. The same can be true following a divorce.

Trap #5: Selfish strategies permeate the current family law system.

Antidote: Game Theory research and Negotiation Theory clearly indicate that a balance of selfish concern and concern for the other spouse (altruism) create the most value in a divorce settlement for both people, both by adding value and by developing a Plan for both parties to reach long-term goals.

Trap #6: Winning on legal outcomes is most important.

Antidote: Who wins on a legal outcome is generally irrelevant to the futures of divorcing spouses and their families. An exception would be if one legal outcome better facilitated a good long-term Plan for both parties, but where they disagreed which one was "right" and thereafter "won" regarding that outcome.

Trap #7: Escalating anger and blame, rather than resolving sadness, permeates the current family law system.

Antidote: Anger and blame are secondary/defensive emotions, covering sadness, fear and insecurities. Anger and blame only go away when primary/core emotions are addressed and resolved.

Trap #8: Deductive decision-making is encouraged from the beginning of a divorce in the current family law system.

Antidote: Paradoxically, in legal theory, one advantage of a legal system is that it breaks the unmanageable big issues into bite-size manageable pieces. However, bargaining often does this backwards and starts with the big issues. Choices tend to be optimal when the issue being addressed is a single, simple issue. Building an optimal agreement by solving each single simple issue one at a time leads to a better Plan.

T**rap #9:** The day of the final Judgment of Divorce is the end of the case for the parties, as well as for the attorneys, mediators, judges and other professionals involved.

Antidote: Professionals and parties should approach a divorce as the beginning of the parties' lives, particularly when there are children. Even when there are no children, getting to a healthy goodbye and not being troubled by a past marriage should be a planning goal.

Trap #10: The attribution of fault and blame has a long history in the current family law system.

Antidote: For many hundreds of years, divorce was seen as a sin against God. This view worked its way into law, and fault had to be proven to break a marriage contract. In the late 1960's and in the 1970's, the law (in many/most States) declared that divorce is to be a "no-fault" legal event. Parties often enter the system blaming one another for the demise of their marriage, and that long legal history tempts professionals to get on the band wagon and look at fault. This drama ignores reality: all relationships end: most after the first date, many more after a dating period, quite a few more after marriage but while both spouses are still alive. Some relationships end by the death of one or both spouses.

Social anthropologists tell us that on average, about 30% end after the marital commitment, in some form across cultures and across time. In other words, a divorce is

normative: a common way that relationships end. Perhaps it might be of some useful interest for parties to figure out whose fault it was so that they do not make the same mistakes in the future, but finding fault and blaming in the legal process of a divorce is destructive and irrelevant to making a good Plan for people's futures.

Catch Conflict Early, Before It Becomes an Addiction

In the literature, intractable conflict is called a culture of conflict, but in Booklet IV, we posit that conflict can actually become a process addiction, much like pornography, gambling, video games and shopping. In an addiction, the reward centers in the brain get hijacked. The behavior creates a craving, but brings no real pleasure. In fact, as the addiction develops, engaging in the addictive behavior comes to dominate people's lives at the cost to themselves and others, including their children.

The path to a process addiction is well understood as is the path to intractable conflict. Most experienced attorneys recognize (and all attorneys can learn to recognize) people on the path to addiction and have an opportunity to redirect them by referring them to a mental health professional who understands intractable conflict and addiction. Some Co-parenting Programs address the human vulnerabilities undergirding process addictions with the use of Cognitive Behavior Therapy principles and emotional support.

If the goal of negotiations is to produce a Plan that helps divorcing spouses achieve long-term goals, then identifying and treating a burgeoning case of intractable conflict is critical. Few situations cause as much long-term suffering as does a high conflict divorce. Simply requiring parties to attend a three-hour Parent Education Class is usually insufficient to prevent this problem.

Another assumption in this Model can be summarized in the trite idiom, "*It takes two to tango*." Ideally, both divorcing parents can avoid the self-destructive path towards conflict addiction, but if only one parent does, the situation is much improved. High conflict divorce is a "*toxic dance*" in which <u>both</u> parents play a role. One parent can escape the dance, whether or not the other does. Part of the planning process, therefore, might involve steps to help at least one of the parties step off the toxic dance floor.

Mindset Summary

In this Booklet, we addressed the mindset undergirding the Game Theory Model of deal-making. This Model makes use of a number of skills and techniques, also derived from Game Theory, to help shape the deal into a Plan that optimizes the long-term outcomes for both parties. Those skills and techniques are detailed in our books, cited earlier in this Booklet. However, without a Game Theory mindset, those skills and techniques are useless. To summarize, the Mindset:

- Assumes that the parties have similar if not identical long-term financial and family goals, and therefore, do not inherently have a dispute
- Assumes that the parties can disagree and both be right
- Assumes that people want more happiness and less suffering, not more money, more power or more time with children
- Assumes that optimizing the settlement outcome for one party is best achieved by optimizing the outcome for both parties
- Defines "value" as a Plan to reach long-term goals, not as achieving short-term interests
- Defines "compromise" as sacrifices required to reach goals, not as "giving in"
- Supports Value Propositions focusing on a customer-focused Strategic Intent, with concrete Standards by which to measure success
- Understands that marital and divorce conflict reflects lacking or lagging skills that can be taught, and are not an untreatable pathology
- Avoids falling for the "traps" in the traditional family law system that promote competitive Distributive Bargaining
- Promotes as one of its goals an improvement in the relationship between the parties- if without children, a healthy goodbye, and if with children, a functioning co-parenting relationship
- Recognizes the major pitfalls in a divorce, including the dangers of intractable conflict and addresses those in the Plan.
- Employs a special approach to low-to-no trust situations in which parties hate one another. The approach includes structuring a functional co-parenting relationship (parallel parenting).

In human history, the Period of the Enlightenment involved seeing the world through a completely different lens, one that redefined problems in a way that has led to solutions. Disease was no longer seen as God's will or punishment for sins, but as the outcome of biological processes. Family law began to shed the shackles of divorce being a "sin" and therefore someone's fault, in the late 1960's. This has begun to redefine divorce (or unmarried parents living separately), but has remained a largely static culture that would do well to change.[16]

The required primary change which will make a difference
in the traditional family law system is to change
the mindset of the professionals serving the divorce population,
which will allow the evolution of techniques
and strategies to develop.

[16] See Booklet V.

Game Theory informs us of skills and techniques that can be applied to family law, but those are only relevant if the professionals involved develop a very different mindset.

This new Mindset is key to deal-making outside the box!