

# Divorce Conflict Information Booklet Series<sup>1</sup>

## Planning the Solutions

### Booklet 10

## Settling Through Mediation<sup>2</sup>

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### Preface: Legal Theory and ADR

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 and 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 tribal wars, brute force or even combat. However, such methods of dispute resolution were violent 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.*”<sup>3</sup> 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.*”<sup>4</sup> 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,*”<sup>5</sup> meaning that litigation worked best on disputes that involved a **public interest** such

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<sup>1</sup> 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. This is the tenth Booklet in the Series.

<sup>2</sup> This Booklet is a brief look at Game Theory negotiations, but cannot be comprehensive. However, many of the principles and techniques involved in Game Theory negotiations are presented in our two books, Waldron, K. & Koritzinsky, A. (2017) “*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 also <http://www.unhookedmedia.com/> and [marriageanddivorce.org](http://marriageanddivorce.org).

<sup>3</sup> Austin, J. *Lectures on Jurisprudence* in Campbell, R. Ed. (1873) *The Philosophy of Positive Law*. J. Murray.

<sup>4</sup> Fisher, R. (1978) *Points of Choice*. Oxford University Press.

<sup>5</sup> 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.

as crime.<sup>6</sup> 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 ADR as “*bargaining in the shadow of the law*,”<sup>7</sup> essentially viewing ADR as an attempt to reach settlement prior to litigation (or while litigation was pending), but often framed by what range of outcomes 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 and settlements, in all forms of ADR, typically were searching for solutions 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.<sup>8</sup> 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)<sup>9</sup> 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, and 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 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 ADR approaches, and the appeals process (i.e., should one be permitted and/or necessary) and so forth.

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

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<sup>6</sup> We will see later that ADR can also be an effective approach to crime. See “Restorative Justice” later in this Booklet.

<sup>7</sup> Mnookin, R. & Kornhauser, L. (1979) *Bargaining in the Shadow of the Law: the Case of Divorce*. The Yale Law Journal, 88(5) 950-997.

<sup>8</sup> 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.

<sup>9</sup> Zehr, H. (1990). *Changing Lenses-A New Focus for Crime and Justice*, Scottdale, PA (1<sup>st</sup> edition).

(or while the litigation is pending). This means the parties must have first attempted negotiation or mediation before being heard by a Judge or decided by a jury. Laws have sanctioned ADR being required in contracts as a means for resolving disputes. A labor dispute must be heard in arbitration, for example, before having the right to be litigated, or in many cases, in lieu of litigation.

## **The Many Forms of ADR**

ADR comes in many forms, with various models, variants in procedure, their own legal guidelines and requirements, ethical principles, qualifications required and training/skills.:

1. **Party-to-Party Direct Negotiations**, with or without attorneys/present
  - a. Face to face; Four-way negotiating
  - b. Lawyer-to-Lawyer negotiating
2. **Mediation**
  - a. Joint meetings with both parties, with or without attorneys present
  - b. Separate (caucus) meeting
3. **Arbitration**
  - a. Binding arbitration
  - b. Non-binding arbitration
  - c. Special Master
4. **Mediation-Arbitration (Med-Arb)**
5. **Early Neutral Evaluation**
  - a. Settlement assistance
  - b. Advisory opinion
6. **Focus Group** (Advisory Opinion)
7. **Mini-trial**
  - a. Presentation to a panel, without a neutral third party
  - b. Presentation to a panel, with a neutral third party who might or might not express an opinion on the dispute
8. **Moderated Settlement Conference** (One or more neutral parties, often a Judge-Advisory Opinion)
9. **Summary Jury Trial** (where a Mock Trial is conducted, where a jury is selected, evidence is presented in a summary fashion, with the “jury” rendering a verdict. This educates the parties and counsel what might happen at a “real” trial.).<sup>10</sup>

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<sup>10</sup> A whole field of digital ADR has developed, called Online Dispute Resolution (ODR). Many disputes are literally handled by a software program. For example, both eBay and PayPal operate online dispute resolution through A.I. (artificial intelligence) programs.

## Mediation Models

Mediation is one of the most used forms of ADR, perhaps only second to Lawyer-Lawyer negotiations. There are three basic models of Mediation and a couple of hybrids.

1. **Distributive Negotiations:** Often thought of as “rights-based” mediation, Distributive Negotiation focuses on the relative distribution of what is in dispute to the parties. For example, assume the parties are in dispute as to who will get what portion of the sale of a business. The amount at stake is \$2,000,000. The negotiation is to determine how much each of the parties will receive of the \$2,000,000, meaning how those funds will be distributed. Special cases will also award future distributions. For example, a current distribution might be distributed from the dissolution of a partnership, but also, there might be future distributions as the company expands and grows.
2. **Integrative Negotiations:** Often thought of as “interest based” or “value added” mediation, in Integrative Negotiation, the focus is on the interests of the parties, with the goal, chiefly through trade-offs and considerations for the subjective values involved. I.e., increasing the value of each settlement package. For example, assume the parties own a business property on which they operate a farm machinery repair business. They close the business, but are in dispute with regard to the disposition of the property. One party wants to continue to operate a repair business on the real estate, and the other party wants to convert the land to a hobby farm. They enter Integrative Negotiations in mediation. They determine that the value of the repair equipment is high for the party who wishes to continue to run a repair business, and the land has more value to the party who wants a hobby farm. The obvious Solution: One party gets all of the repair machinery and good will of the business, and the other gets the real estate. If the two parts are not equal, they settle on an equalizing payment or another solution.
3. **Therapeutic Negotiations:** Often thought of as Transformative Mediation, this form of mediation focuses on the problematic emotions in the case and the problem-solving (in)ability of the parties. The goal is to resolve the emotional obstacles to settlement and to enhance problem-solving skills by the parties, so that both are better off going forward in their lives. For example, assume the father of three daughters, and founder of what has become a large company, dies. The three daughters dispute what role they each will play in the future of the company and even whether to keep the company or sell it. Therapeutic Mediation might focus on the manner in which each daughter is handling the loss of their father and the dynamics of the relationships between them, along with developing an approach to decision-making that is more successful in determining their futures.

4. **Hybrids:** Many mediators will attempt Integrative Negotiations, but within the process, at various appropriate times, address emotional issues (transformative), and when addressing other issues, focus on who will get what share of some resource (distributive). For example, in a divorce, the mediator might start with focusing on the subjective values for the parties relative to various pieces of property and time with children. Running into obstacles, the mediator might change the focus to the anger of the parties towards one another and the sadness underlying that anger. Resolving the sadness, the mediator might shift back to an integrative discussion of making trade-offs to increase value for each of the parties, but then come to the sticky point of who will get how many days of custody (placement time) of the children – a distributive task.
5. **Mediation-Arbitration (Med-Arb):** Med-Arb is in a class of its own as a hybrid, combining Mediation with Arbitration. The process begins with mediation, but if the case does not settle on all of the issues, the mediator will then act in the role of arbiter, deciding the remaining issues. The major advantage to this ADR method is that by the time the case reaches arbitration, the mediator has a great deal of information on the basis of which the arbiter can base findings and orders and bring closure to the case (a desired outcome all parties likely share). Knowing that the mediator will become the arbiter, who might deliberately or inadvertently have signaled an opinion, also puts pressure on a party or the parties to settle. A major drawback to Med-Arb is that rather than a sincere effort to settle, the negotiators might attempt to “litigate” the case during the mediation, effectively neutralizing any serious effort to settle through mediation (despite the fact that this ADR model often works) .

**Summary:** Distributive mediation has a long history. Although mentioned in earlier publications, Fisher *et al* are generally credited for introducing interest-based mediation.<sup>11</sup> Most mediators espouse an integrative negotiation philosophy, but have been trained in and can shift into transformative and distributive negotiation processes, when required.

**What all of the ADR approaches have in common is that they allow for parties to negotiate a settlement which the parties believe is superior to litigation.**

If negotiations in any form fails to produce an agreement, the parties always have the option of litigation. Additionally, negotiated agreements have another distinct advantage: a settlement agreement can incorporate provisions unavailable or unlikely to be ordered in litigation.

In 2017, your authors introduced another bargaining Model, which can also be used in Lawyer-to-Lawyer negotiations or in mediation, which is based on Game Theory. Game Theory

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<sup>11</sup> Fisher, R. Ury, W. & Patton, B. (1991) *Getting to Yes: Negotiating Agreement Without Giving-in*. 2<sup>nd</sup> Ed. NY: Penguin.

is a branch of mathematics that studies how people make decisions when strategically connected to other people, who are making decisions, and where there are rules and the outcome depends on the decisions made. In this Model, the focus moves to long-term goals, not short-term interests (i.e., outcomes), and the Model challenges fundamental assumptions in traditional negotiations. Some of the principles in that Model have been presented in Booklets VII, VIII and XII in this Series, where we flesh out the Model in more detail. These Booklets are too short to present the Model as a whole. For that, we refer you to our books, cited in Footnote 2.

## **Advantages and Disadvantages of Mediation**

Mediation is conducted differently depending on the case and the mediator involved. However, those forms generally fall into four basic categories, each with advantages and disadvantages:

1. Joint, with parties only
2. Joint, with parties and attorneys
3. Joint, with attorneys only
4. Caucus format

Let us unpack each of these, but first touch on the advantages of joint meetings (regardless of which of the first three categories you are in):

The principle advantage of Joint Meetings is the management of information and its effects on the negotiations. In Joint Sessions, all of those present are operating with the same information, and a skilled mediator can help make information relevant to the negotiations “public” so that everyone involved has complete information. This information exchange includes not only the objective facts but also the subjective values involved. For example, the objective fact in a case might be a salary dispute, but the subjective values involved might be issues of fairness or concerns about the financial viability of a higher salary. By surfacing private information and making it complete, those present develop new beliefs about the situation because they are exposed to the different perspectives involved. In such situations, there is what is called a “convergence of expectations” on solutions, often on optimal solutions for everyone involved (see Booklet VII). This breaks down the “Us vs. Them” moral judgment that can develop in competitive negotiations, where the parties are not face to face with one another.

With these basics in mind, let us look at the various forms of mediation meetings<sup>12</sup>:

1. **Joint, with parties only:** In many types of cases, solutions are best developed by the parties. Attorneys tend to focus on legal outcomes based on law and might have biases for or against some solutions. For example, an attorney might assume that people want more money, when in fact, the party involved might simply want a sense

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<sup>12</sup> We did not include Evaluative Mediation in the above list, but mention it in the next section of this Booklet.

of fairness in the situation. Parties might have a future relationship with one another that will be affected, either negatively or positively, by the legal outcome of the dispute. Thus, the quality of the legal outcome might be more important to the parties in terms of their future relationship, rather than short-term goals. Finally, client-driven solutions take advantage of what is called “*Bounded Rationality*”.<sup>13</sup>

The Scientific Method of making decisions is to gather information, look at the advantages and disadvantages of the options available and choose the best option. However, people rarely use the Scientific Method for making decisions. This is because human beings have a large fund of information stored in their brains, some of which they might not even be aware. They simply make choices that might seem intuitive, but often those are in fact the best choices in the situation. If attorneys are present, they might influence the situation such that the parties make bad choices for themselves. The attorneys do not have the fund of information that the parties have and might steer the parties towards choices that have a legal advantage, but do not fit the situation well for those parties.

The disadvantage of not having attorneys present is that the parties are deprived of the advantages below.

2. **Joint, with parties and attorneys:** If the attorneys do not interfere with *Bounded Rationality* (see Booklet 7), they can provide very helpful guidance, anticipate problems with certain choices because of the legal implications, add choices to be considered based on experience in other cases, and when needed, take breaks to speak with their clients to calm emotions or educate the client about the legal implications of a choice being considered. The attorneys are also made aware of the goals of the clients, and when writing the final settlement agreement, can do so being better informed, when compared to the situation when they would not have been present for the discussion.

The disadvantage of having attorneys present is that they can interfere with client-driven solutions out of a sense of advocacy for the client, excessive focus on legal outcomes and not the long-term goals of the parties, biased assumptions and/or a sense of competition with the other attorney. Attorneys can hijack the process from the mediator (usually inadvertently), based on their training of being a lawyer/advocate.

3. **Joint, with attorneys only:** Typically, mediators only resort to this approach, if and when the meeting with parties is reaching impasse (or the parties have a history of abuse/violence). For example, in Joint Meetings with parties present, assume that a number of issues are settled, but two issues remain where the parties do not agree, because of the emotions involved. The mediator might request to meet privately with

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<sup>13</sup> See Booklet 7.

the two attorneys, where client emotions do not interfere, to work out a solution to the remaining issues. (This function and purpose of this meeting with attorneys only should be fully explained by the attorney to the client before the meeting occurs. At a minimum, this builds trust.) The attorneys can then meet with their clients privately and encourage a settlement on the final issues.

The principle disadvantage to this model is that distrust can be introduced into the process because the clients do not witness the meeting with the attorneys. Here, the solutions might make sense legally to the attorneys, but not reflect what will work best for the clients. However, if the Joint Sessions were conducted well, where the attorneys have a good deal of information about the parties and their goals, and where the parties trust their attorneys and the mediator, these disadvantages are usually minor.

4. **Caucus format:** The principle advantage of Caucus Meetings, in which the mediator meets separately with the parties and usually with the attorneys for the parties present, is also a different form of information management.<sup>14</sup> For example, a party might have private information relevant to the negotiations, that if revealed to the other party, might disadvantage them if there is a failure to settle and the case goes to litigation. The private information can be revealed to the mediator only, who can keep the information private, but include the information in the negotiation process, where and when appropriate.

Another example of the information management benefit of the Caucus approach involves problems distinguishing between the message and the messenger. A mediator in the Caucus process can reframe a message from a hated or distrusted party so that the other party can hear the message and not react to the messenger. In a Joint session, a party might make a reasonable offer, but because of distrust or anger, the other party might respond negatively, suspecting that the distrusted party has a secret agenda and is trying to gain an advantage. In the Caucus approach, the mediator can reframe the offer in order to make clear that it is in fact a reasonable offer. The focus then is on the offer, not the other party.

**Summary:** Mediation can take different forms, with differing models of mediation theory, different approaches to the meetings themselves, different levels of information management and different points of outcome focus. The flexibility of mediation in this sense allows an opportunity to fit the approach and model to the parties and issues involved. The overriding advantage of mediation hinges on the involvement (and skill set) of the neutral third party. The mediator is neutral to the outcome, that is, the settlement outcome, and focuses entirely on the process to get to an outcome, usually balancing fairness and justice, and with the goal of optimizing the outcome for both parties. The mediator can surface relevant information,

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<sup>14</sup> For simplicity, we will use only “party,” but this will refer to a party and attorney as a team. The party might be acting on legal advice, and this is important.

especially about the subjective values of the parties and their long-term goals, and assure that one party, or even one attorney, does not dominate the process. Where distrust between parties might exist, the mediator is able to establish trust in the process. Most mediators are also skilled in managing the emotions, which might otherwise disrupt the process, and keep the focus on solutions.

### **Training, Preparation and Introduction of Trust**

Some professionals believe that managing mediation is intuitive. However, mediation is not solely intuitive and requires a good deal of training, not only in the law but also in the art and science of mediation. Lawyers often serve as mediators and enter the arena with training in law, but sometimes conduct mediation as participants in the negotiations, rather than as managers of the process. One practice of mediation that we did not describe above is called “Evaluative Mediation,” in which the mediator does participate, at least to the degree of commenting on the merits of arguments or the quality of the settlement. In such a case, the mediator must also have training (and experience) relevant to the issues in dispute. The drawback to this approach is that the lawyer does not have the fund of conscious and unconscious information that the parties have and, instead, might make valuations with regard to proposals that reflect the lawyer’s values opinions, not the parties’.

Mediators vary in effectiveness in large part based on the quality of their training, but also on the basis of preparation for a particular case. Two famous mediations were the Camp David mediations:<sup>15</sup> (1) Camp David 1, in which Begin of Israel and Sadat of Egypt met with President Carter serving as mediator; and (2) Camp David 2, in which Prime Minister Barak representing Israel met with Chairman Arafat, representing Palestinians, with President Clinton serving as mediator.

Lawrence Wright tells in great detail the story of Camp David 1.<sup>16</sup> Most striking was the amount of preparation President Carter did before negotiations began. By the commencement of mediation, he was well aware of the issues at stake, the pressures on Begin and Sadat by the stake-holders lurking in the background, and even researched processes such as using a single document format to pressure the parties at times. Most interesting, Camp David 1 produced a peace agreement that has withstood over 60 years, in spite of the fact that both parties were assassinated (perhaps for the bargain they struck with one another that produced a peace between their two countries). Absent in President Clinton’s efforts at Camp David 2 with Israel and Palestinians was that same level of “Presidential preparation” and not surprisingly, no agreement was reached. Was the difference in outcomes the result of preparation alone? We cannot know, but President Carter’s extensive preparation was likely an important factor, if not a determinative one, in his success. The lesson is that not only a mediator’s force of personality and skill might be the necessary ingredients to a successful mediation, but also extensive preparation is likely necessary to achieve that success.

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<sup>15</sup> The Camp David Accords occurred in 1977 and 1978.

<sup>16</sup> Wright, L. (2014) *Thirteen Days in September: The Dramatic Story of the Struggle for Peace*. Knopf Doubleday.

Successful mediation efforts rely very heavily on the skills of the professionals conducting the effort, which reflects both the personalities of the professionals, but perhaps more importantly his or her level of training. Equally, or perhaps more important is the preparation that the professionals do prior to negotiations in a specific case. However, perhaps the key ingredient in successful mediation is trust.

## Trust, Trust Building and Trust Repairing

As Francis Fukuyama points out in his classic work, the foundation of trust is complex and very different for different people.<sup>17</sup> Fukuyama especially notes that there are significant cultural influences on who is trusted and who is not. He also points out that whole societies can be ranked from low-trust to high-trust. Additionally, as Ray Lewicki points out, trust and distrust are independent of one another.<sup>18</sup> We can trust another person and distrust them at the same time, depending on the issues involved.

For example, we might trust a negotiator to be honest, but distrust a number that he or she provides. Lewicki also points out that we might trust a negotiator, but have the trust broken, at least temporarily, at some point. Finally, in negotiation environments, trust can be high- to low- to no-trust. In low to no-trust situations, the parties often also hate one another, which we see too often in divorce cases (see Booklet XI).

Trust building is possible in many situations, and repairing trust, when broken, can occur when the parties to the negotiations wish to do so and when the mediator is skilled in both trust building and trust repairing. However, there are also cases in which there is low to no-trust, where the parties are resistant to building or repairing trust. In some of these cases, the parties hate one another and are unlikely to change that feeling. Negotiations are possible, even in no-trust situations because the mediator can build trust in the process, not between the parties.

The mediator handles the trust issue with Information Management. In a Game Theory approach to mediation, there are four aspects to information management in a mediation environment:

1. Public vs. private
  2. Verified vs. unverified
  3. Complete vs. incomplete
  4. Perfect vs. imperfect
- Information is **public** when everyone involved in the negotiations has the same information, and private when relevant information is possessed by one or some, but not

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<sup>17</sup> Fukuyama, F. (1995) *Trust: The Social Virtues and the Creation of Prosperity*. Simon and Schuster.

<sup>18</sup> Lewicki, R. Trust and Distrust (2017), in *The Negotiator's Desk Reference*, Honeyman, C. and Schneider, A.K. Eds., DRI Press. 201-216.

all of those involved.

- Information is **verified** in one of two ways (though sometimes both): by documentation and/or by reputation. Documentation can involve physical documentation or witnesses, but the point is that there is external proof. An assertion can also be verified if the person making the assertion is trusted by reputation.
- Information is **complete** when both parties to the negotiation are aware of all of the facts leading up to the need for negotiations. When relevant information leading up to the negotiations remains private, the information is incomplete.
- Information is **perfect** when all of those involved in the negotiations are aware of the payoffs and implications of any settlement choices that they make. A payoff can be a negative or a positive implication or outcome.

**By assuring through procedures  
that information is public, verified, complete and perfect,  
the mediator is able to build trust in the process,  
which sidesteps distrust between the parties.**

Although the “hate” between parties might not abate, a respectful process minimizes the harm done to the outcome. Therefore, another role of an effective mediator is establishing and enforcing rules with regard to respectful behavior.

As a side note, ADR research suggests that a major element to trusting an ADR process includes that the parties view the process as having been **fair** and **just**. Thus, management of the process must take steps to ensure fairness (e.g., where everyone is given an opportunity to speak), and just (e.g., where everyone and everyone’s interests were treated equally). Trust of the process hinges on trusting the managers of the process, and much of that depends on the impression of fairness and justice.

Trust can be a major obstacle to reaching pareto-optimal agreements<sup>19</sup> when the parties are engaged in distributive, competitive negotiations. If the parties have low to no trust of one another, they are likely to infuse unrealistic high trust in their own attorney and ascribe unrealistic low trust in the other party’s attorney, making settlement difficult and the chances of impasse, and therefore litigation, high. In such situations, mediation can have an enormous advantage in order to enhance the parties trusting the process as having been fair and just because of the effective management of information.

## **Our Game Theory Model of Mediation**

In Booklet 4, “What’s Wrong with this Picture,” we analyzed the traditional family law system using Game Theory principles and discovered three fundamental flaws and what we

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<sup>19</sup> A pareto-optimal agreement is one that cannot be improved for either party, given the limitations of the issues being negotiated and applies to Integrative Negotiations, in which the negotiators attempt to add value to the settlement packages of all of the parties.

called our “Ten Traps,” which promote self-defeating choices by separating parents and substantially increase the chances of increasing divorce conflict. The flaws were that there was no clear customer-based **Strategic Intention** in the legal system, that there were no clear **Value Propositions** built into the system to achieve positive outcomes for divorcing parties, and the **Standards** used to measure outcomes in the legal system are vague and ambiguous. The Ten Traps were:

**Trap #1:** The parties are directed to and often pressured to focus on legal outcomes, establishing competitive negotiation, rather than reaching long-term family and life goals, establishing cooperative planning.

**Trap #2:** The current family law system turns Non-Zero-Sum Games of financial planning and parenting into Zero Sum Games.

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

**Trap #4:** Children are treated as property, with time with the children distributed, in the current family law system.

**Trap #5:** Selfish strategies (without altruism) permeate the current family law system.

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

**Trap #7:** Escalating anger and blame, rather than resolving Deep Feelings (e.g., sadness, fear, anxiety and insecurity) permeates the current family law system.

**Trap #8:** Deductive decision-making, rather than the more effective inductive decision-making, is encouraged from the beginning of a divorce in the current family law system.

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

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

The first step in applying Game Theory to mediated negotiations is correcting the “**flaws**” and countering the “**traps**” with more sensible assumptions.

### **Correcting the Flaws in the Current Family Law System**

A mediator must have a clear customer-based Strategic Intention, because this

guides the process. What is the service being offered? We propose that the **Strategic Intention** include the following:

1. The parties have a realistic financial Plan in place for reaching long-term financial goals. The distribution of property, debt and future income will be the tools for reaching their long-term family and life goals, rather than goals themselves.
2. The parties have a realistic Plan for sharing parenting responsibilities that provides the family experience that the parties believe will lead to positive long-term outcomes for their children, consistent with their long-term family and life goals.
3. The parties agree to rules and procedures that will lead to a positive co-parenting relationship, in order to accomplish long-term family and life goals for their children.

The **Value Proposition** is the design of a process in order to achieve the Strategic Intention. The design is somewhat case specific, but includes the following steps:

- a. Flesh out the current situation for each of the Strategic Intentions above. In traditional divorce, this would be the discovery process. However, traditionally, discovery tends to focus on financial facts, only touches on parenting issues, and often does not address the co-parenting issues at all, which might be the most important obstacle to achieving a successful settlement. The financial information sought tends to be limited to the financial issues to be addressed in the legal system; discovery is likely to be more extensive in this model because the standard is not the legal agreement, but rather the long-term financial plan.
- b. Fleshing out the current situation with the co-parenting relationship, which involves assessing skill weaknesses (see Booklet I)
- c. Understanding and assessing the emotional issues at play<sup>20</sup>:
  - (1) Deep feelings (e.g., insecurity, fear, anxiety and sadness, etc.) and
  - (2) Defensive emotions (e.g., getting angry or blaming or emotionally running away, by getting cold and distant, etc.)
- d. Identifying a clear and concise long-term financial and parenting goals of the parties. The parenting goals include the family experience that the children will have and specific outcomes for the children.
- e. Implementing the steps that will lead from the current situation to the long-term goals, including listing obstacles and steps for overcoming those obstacles. Those steps will include the required legal outcomes, including:

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<sup>20</sup> Managing feelings and emotions is key to all of the skills we advocate for the spouses in order to have a successful marriage and/or a sensible divorce.

- (1) A list of which decisions shall be joint decisions, a procedure for making those decisions, and a procedure for changing the list as conditions change.
  - (2) A schedule for who is legally responsible for the children on which days and at which times.
- f. Regarding these steps, they will also include solutions to obstacles and procedures for a successful co-parenting relationship. These might include:
- (1) Steps to learn skills that are lagging, including importantly resolving primary emotions.
  - (2) Steps to improve weaknesses in parenting skills.
  - (3) Establishing rules of conduct. Successful relationships are based on one of two cornerstones: effective communication or mutually understood rules. In more divorces, effective communication, if not already present, is unlikely to develop, if only because there is substantially less incentive for doing so if divorced. Therefore, the step is to design rules that lead to respectful treatment of one another.
  - (4) Having a clear open communication system in which information is regularly shared. This will include information sharing and procedures for coordination the parenting across homes (e.g. how to teach responsibility with chores and routines).
  - (5) Having procedures in place for having flexibility in the schedule.
  - (6) Having procedures in place for resolving problems and conflicts as they arise.
  - (7) Bolstering disagreement resolution skills.

### **Countering the Traps in the Current Family Law System**

Finally, correcting the flaw of Standards, we suggest Standards derived from Game Theory regarding agreements reached, slightly modified to fit family law. (i.e., our “**Five E’s**”):

- a. The parties are **E**ducated, in terms of the legal outcomes and implications of those outcomes and in terms of how to have a successful marital and co-parenting relationship (if you have children).
- b. The settlement agreement is **E**ffective, in that it spells out the steps well and in unambiguous language.
- c. The agreement is **E**quitable, not only in terms of the objective values involved but also that the interests and long-term goals of the parties have been treated fairly.
- d. The agreement is **E**quilibrant, where the agreement optimizes outcomes for both parties and cannot be improved such that one or both parties can have better outcomes without diminishing the value of the settlement package for the other party.
- e. The agreement is **E**nvy Free, where neither party would trade his or her settlement package for the settlement package of the other party.

Having a clear Strategic Intent, with a Value Proposition that enables achievement of the intent and clear Standards by which to measure the settlement package counters many of our Ten Traps are critical component of our proposed Solution.

### **Antidotes Regarding several of the Traps in the Current Family Law System**

Special attention must be paid to antidotes for several of the Traps.

1. Even when parties come into mediation with the appearance of a dispute, the mediator does not assume a dispute exists. The reason for this is that the parties might be focusing on legal outcomes or even short-term interests, without fully exploring their long-term financial and parenting goals, which in most cases are similar if not identical. Legal outcomes and short-term interests are tools for reaching long-term goals, not goals in themselves.
2. The mediator is in the business of helping parties plan, not resolving disputes. A successful financial and parenting plan assumes that both are Non-Zero Sum Games. For example, a parent might say, "I want 50/50 custody. I want to be actively involved with my children and help guide their futures." The operative phrase is not the first, which at the beginning of a mediation can be ignored. The important phrase is the second.
3. The day of the final Judgment of Divorce is not the end of the relationship, if there are children, but the beginning of post-divorce relationship, which lasts a lifetime.
4. The mediator understands that the results of good research suggests that the best settlement packages for each party can best be achieved by working to optimize the outcomes for both parties. Most parties will be most satisfied with a "deal" that helps both of them reach long-term goals.
5. The wording of a settlement agreement on the legal outcomes is the last step, not the first. The wording has the purpose of accomplishing and formalizing the Plan, not settling positional disputes.

### **Summary**

Settling family law cases through the use of mediation is complex. There are several models of mediation which reflect the philosophy and training and personality of the mediator. Most mediators ascribe to Integrative Mediation, dealing with distributive issues, and at times, helping to resolve emotional obstacles and teaching problem solving skills.

However, a mediator can also be negatively affected by assumptions and "traps" in the current family law system. A mediator can also be as focused on the settlement of legal outcome disputes as parties.

We have proposed a Bargaining Model based on Game Theory, which attempts to address

flaws in the current legal system and has fundamentally different assumptions that are antidotes for the “traps” of that system.

Our focus in this Booklet, and in others in this Series, has been to reduce the incidence of destructive divorce conflict. However, because these Booklets are relatively short, we have mostly focused on the mindset involved in accomplishing this goal. Executing that mindset involves a number of skills and techniques. For those, we refer you to our books, cited earlier in this Booklet (see Footnote 2).

Mediators are in a special position to be helpful to divorcing parties. Although some parties begin the divorce process with mediation, sometimes without attorneys involved, most enter mediation because they have already begun a pattern of divorce conflict and have been unable to negotiate a settlement.

Mediators have the opportunity of turning a burgeoning case of persistent life-damaging conflict into a more positive direction. However, in order to do so, the mediator must go beyond attempting to settle disputes on legal outcomes, applying the principles presented in this Booklet. The goal must shift to having financial and family plans to reach long-term goals.

Your authors are serious proponents of settling cases through mediation. Hopefully the readers of this Booklet will chose this alternative to settle their case.