# Divorce Outline

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1. Conflict Resolution Theory & Skills

KEYS TO AGREEMENT

- perspective (assist to be heard)
- beliefs and values (work within)
- interests/positive intentions (find)

FACILITATING THE SHARING OF PERSPECTIVES

Early Notice

Anticipatory Time Framing

Presume Disagreement

Semi-Active Listening

Gentle Inquiry

Summarize Golden Nuggets

Feedback

Refine Summary

Confirm Heard

Acknowledgement of Other?

2. Additional Conflict Resolution Concepts

MORE AGREEMENT CREATION CONCEPTS

Conflict as Evolution
  normalize

Interpersonal and Intrapersonal
  parts theory for dealing with confusion

“Resolution?”
  A convergence of means. Parties only need to agree on what, not why
From Battle to Journey
organizing metaphor

Adjudicatory Model or Myth?
myths of justice, finality, rationality and objectivity

Bargaining in Shadow of the Law
perceptions of law

Other Shadows

TYPES OF CONFLICT

By recognizing the type of conflict you are dealing with, you have an advantage in developing an effective mediation strategy

Relational Conflict
past: express one time. real well
future: what are your future relational interests

Data Conflict
data conflicts have data solutions

Interest-Based Conflict
what we can work with maximize satisfaction of interests presented as positions

Structural (External) Conflict
comrades seeking structural solutions

Value Based Conflict
will not be resolved by words, only new experiences

WAYS OF MANAGING CONFLICT

- Denial/Withdrawal
- Suppression/Smoothing Over
- Power/Dominance
- Simple Compromise
- Integrative Collaboration (enlightened self interest)
- assumptions:
- some common interests
- benefits of sharing perspectives, interests, and intentions
- we face complex challenges which are best addressed through our combined intelligence and creativity
3. ADR Processes

An infinite spectrum of processes

Commonalities and Benefits:

- motivated preparation
- a "hearing"
- capable presentation of the other side
- window of opportunity

EXPERIENCING THE ADR PROCESSES

- Negotiation
- Mediation
- Arbitration
- REVIEW ADR PROCESSES
- Adjudicatory
- Adjudication
- Arbitration
- Court-Annexed Arbitration
- Private Tribunals
- Consensual Processes
- Ombudspeople
- Fact-Finding
- Negotiation
- Interest-Based / Positional
- Distributive / Integrative
- Mediation
- Voluntary / Mandatory
- Facilitative / Evaluative
- Narrow / Broad
- Conciliation
- Mixed Hybrid Processes
- Med-Rec
- Med-Arb
- Mini-Trial
- Summary Jury Trial
4. Negotiation Concepts and Skills

Two basic approaches:

- Competitive/Positional
- Integrative/Interest-Based
  Problem-Solving/Collaborative

Not matter of personality, but substance of approach

two tasks: creating and claiming value

dispute vs transactional negotiation

COMPARE APPROACHES AND ASSUMPTIONS
(in manual)

PRINCIPLED NEGOTIATION (Fisher and Ury)

- separate people from the problem
- insist on interests
- generate multiple options
- decide by objective criteria
- what if other side has "more power"
- inducing principled negotiation - matching, pacing, leading

5. Negotiation Power

What is it?

- relative
- changes
- limited
- real or apparent
- exercise has benefit and costs
- ability to punish or benefit
- enhanced by ability and resources
- increased by ability to endure uncertainty
- benefited by a good negotiation relationship
- depends on perceived batna
- only exists if accepted
Any duty to balance power?

Concepts of competence, empowerment and maximization

6. Being a Mediator

- Science and Art
- Develop Your Tool Box
- Meet Parties Where They Are
- Balance Structure and Responsiveness
- Interdisciplinary
- Impartiality, Neutrality and Balance
- The "Right Way"
- Roles of the Mediator (manual)
- Benefits of Mediation (manual)

MEDIATION CULTURES

Comparing Divorce and Civil Mediation

- Agenda Setting
- Use of Caucus
- Overall Structure
- Attorneys
- Physical Setting
- Recommendations
- Decision to Caucus

the price you pay

strategic, not automatic

reasons to caucus
confidentiality understanding

homework

Subject Matter Expertise / Offering an Opinion

7. Getting Started
See Forms & Resources

A CAPABLE DESCRIPTION OF THE MEDIATION PROCESS

- Define Mediation: *Assisted Negotiation*
- Describe Key Qualities:
  - voluntary
  - collaborative
  - controlled
  - confidential
  - informed
  - impartial, neutral, balanced and safe
  - self-responsible, relatively satisfying

INITIAL CONTACTS

- immediate caucus
- rely on descriptive materials
- separate introductory meeting or phase
- sample contact materials

SAMPLE MEDIATOR’S OPENING STATEMENT

- Introductions
- Prior Contacts
- Define and Describe Process
- Impartiality & Neutrality
- Logistics
- Caucus
- Confidentiality
- Suggested Ground Rules
- Answer Questions
• Joint Commitment

SAMPLE INTRODUCTORY SESSION AGENDA

• Welcome and Introductions
• Today: Introductory, Easy, Educational, Confidential
• Prior Contacts
• Your and Your Situation
• Overview of Mediation
• Fees and Costs
• Attorneys and Court
• Memorializing Progress
• A Next Session?

RESOLVING PRESSING ISSUES

• Interim
• Not Precedential
• Not Admissible
• Retroactive Application of Eventual Resolution

SAMPLE WORKING SESSION AGENDA

• Finalize Agreement to Mediate
• Confirm Additional Process Agreements
• Identify Desired Information & Documentation
• Share of Perspectives
• Identify and Expand Easy Points of Agreement and Shared Interests
• Indentify Respective Interests
• Establish Capable Problem-Solving Statements
• Discuss and Negotiate Issues
• Interests, Positive Intentions, Goals
• Options
• Selection Decisions
• Integration
• Draft, Refine and Implement

ADDITIONAL INFORMATION
8. Communication Skills

- the outcome question
- the evidence question
- cumulating outcomes
- the conditional close
- the reference point process

RAPPORT DEVELOPMENT

Matching

Pacing

Leading

infinite variables

language to use

- *appreciating that* . . .
- *understanding you to feel* . . .
- *acknowledging that* . . .
- *assuming that* . . .
- *respecting that* . . .
- *accepting that* . . .

language to avoid
- *I think*
- *you should*
- *but*
- *however*

Working with beliefs and resistance

**INDIRECT TECHNIQUES**

- Metaphor (journey)
- Analogies within participant realities (work and play)
- Quotes and speaking through another voice
- Normative statements (allow options to be considered)
- Manipulation or Maneuvering?

**REMEMBER THE COMMON GROUND**

- Common Interests
- Interdependence
- Easy Points of Agreement

**9. Overall Problem-Solving Model**

1. Consent to Process
   the process is always negotiable

2. Sharing Perspectives

3. Remember the Common Ground

4. Problem-Solving Agenda
   mutualized, aspirational, problem-to-be-solved

5. Desired Information & Documentation

On each problem to be solved:

6. Interests & Positive Intentions

7. Options

8. Selections

9. Integration
10. Mediative Strategy
Mediators use the following strategies at different times, including the 3 following basic approaches:

Interest-Based Option Development
- rapport building
- information gathering
- interests and options
- harvest easy agreements
- package deals

Hypothesis Generation and Testing
- based on outcomes, interests, principles
- importance of rationale

Doubt and Dissonance
- base on rapport
- mutual and individual

INTEREST-BASED OPTION DEVELOPMENT
- Interests and Positive Intentions
- Options
- Selections
- cummulative arrangements
- modular parts
- easy agreements
- exchanges
- package deals
- priorities
- Integration

HYPOTHESIS GENERATION AND TESTING
- Agreement by Successive Approximation
- Strategic Summarization
- Hypothesis Development
- Hypothesis Testing
- Adjust Hypothesis
- Test Adjusted Hypothesis
- Confirm Agreement
• Integration

DOUBT AND DISSONANCE

• *Creating a Healthy Tension of the Mind*
• Why create dissonance?
• Options?
• Base on rapport
• Assumes people will make the best choice they perceive available

Individual or mutual?

Examples of mutual:

two sets of arrangements
exchange environment
hypothetical questions
fact-finding
if you were in our shoes . . .
the "parade of horribles"
the "eight questions"

EMOTIONAL/RELATIONAL MANAGEMENT OPTIONS

• teflon
• relevancy check
• ground rules
• summarization
• normalization
• mutualization
• acknowledgment
• referral

11. Psychology of Divorce
Normalize and/or Refer

ADDITIONAL INFORMATION

Prevalence and Effects
Effects on Children
12. Mediating Parenting Issues

107.101 Policy regarding parenting.

It is the policy of this state to:

(1) Assure minor children of frequent and continuing contact with parents who have shown the ability to act in the best interests of the child;

(2) Encourage such parents to share in the rights and responsibilities of raising their children after the parents have separated or dissolved their marriage;

(3) Encourage parents to develop their own parenting plan with the assistance of legal and mediation professionals, if necessary;

(4) Grant parents and courts the widest discretion in developing a parenting plan; and

(5) Consider the best interests of the child and the safety of the parties in developing a parenting plan. [1997 c.707 Â§1]

107.102 Parenting plans; contents. (1) In any proceeding to establish or modify a judgment providing for parenting time with a child, except for matters filed under ORS 107.700 to 107.735, there shall be developed and filed with the court a parenting plan to be included in the judgment. A parenting plan may be either general or detailed.

(2) A general parenting plan may include a general outline of how parental responsibilities and parenting time will be shared and may allow the parents to develop a more detailed agreement on an informal basis. However, a general parenting plan must set forth the minimum amount of parenting time and access a noncustodial parent is entitled to have.

(3) A detailed parenting plan may include, but need not be limited to, provisions relating to:

(a) Residential schedule;

(b) Holiday, birthday and vacation planning;

(c) Weekends, including holidays, and school in-service days preceding or following weekends;

(d) Decision-making and responsibility;

(e) Information sharing and access;

(f) Relocation of parents;
(g) Telephone access;
(h) Transportation; and
(i) Methods for resolving disputes.

(4)(a) The court shall develop a detailed parenting plan when:
(A) So requested by either parent; or
(B) The parent or parents are unable to develop a parenting plan.

ADDITIONAL INFORMATION

**Mediating Parenting Issues**
**List of Issues**
**Parenting Planning**
**Exchanging Children**
**Children's Rights**
**What Parents Can Do**
**Developmentally Appropriate**
**Erickson's Psychosocial Stages**
**Adler Time Sharing Guidelines**
**Children in Mediation?**

13. Child Support

Two basic ways of calculating:

- child support guidelines
- custom calculations

Oregon Guideline Model

gross income
potential income
basic child support obligation
regular, joint, split custody worksheets
job related child care, medical insurance, uninsured medical costs may be added rebuttable presumption duration of child support

Oregon Division of Child Support

California Guideline Model

net income
number of children
percentage of parenting time
add in child care and health costs

Tax Aspects of Child Support

non-deductable exemptions head of household child care credit

14. Custom Calculation of Child Support

Income
H Net income: ____________ _____ %
W Net income: ____________ _____ %
Combined net income: ____________ 100 %
Budgets
H personal needs: ______ W personal needs: ______
H costs for children: ______ W costs for children: ______
total costs for children: __________
total personal needs: __________

H obligation for children = H % net income x total costs for children
W obligation for children = W % net income x total costs for children
CS = H total obligation - H costs for children; or W total obligation - W costs for children

15. Spousal Support
- lightning rod issue
- legal standard
- comparable suffering standard
- characterize type of support (transitional, ongoing, compensatory)
- understand purposes and goals of support
- amount determination
- duration determination
- assumptions underlying support
- triggers and non-triggers
- charting spousal support
- payment of excess support
- insuring the support obligation
- temporary support
- tax deductibility

16. Custom Calculation of Spousal Support
The following chart and formula may be utilized to assist participants to perform a customized calculation of their spousal support amount.

1. Calculate any shortfall or excess:
   Combined net income: __________
   Less total costs for children: __________
   Amount left for parents: __________
   Less total parents' personal needs: __________
   Amount of "shortfall" or excess: _________ x 1/2 = _________
   (each party's share of shortfall or excess)

2. Calculate basic spousal support "entitlement"
   W entitled to receive: W personal needs: __________
   +/- shortfall/excess: __________
total entitlement: __________

W has: W's net income: __________
Less W's obligation for children: __________
Amount W already has to meet personal needs: __________
Wife's "entitlement" = __________
Less amount wife has to meet = __________
Net spousal support needed = __________

3. Augment basic entitlement with resulting tax liability.
Augment needed spousal support by anticipated tax liability.
e.g., if net spousal support needed = $1,000, tax liability might be 15% federal, 7% state, with
resulting spousal support of 22% additional or $1,220.

4. Share net tax savings
Consider augmenting spousal support by 1/2 tax savings.
e.g., if husband's tax rate is 28% federal and 9% state, H tax rate = 37%; Wife's taxes are 15% of
federal, 7% of state, W tax rate = 22%. The difference is 15%, which divided in half - 7.5%, so
wife's total support = $1,220 + ($1,220 x 7.5%) = $1,311.57.

17. Property & Debt Division
Legal Context
• equity states (marital/individual)
• community property states (community/separate)

5 step approach
• disclose
• characterize
• value
• determine reimbursements
• divide

Quantity and Quality Considerations
Identify Desired Outcomes and Criteria
Values and Valuation Dates
Personal Property
inventory
value
higher gets value
auction if both want at that price
Marital Home
IRAs, 401Ks and pensions
Bringing the Parties Together
money judgments
division of proceeds on sale of home
Charting property and debt division
ADDITIIONAL INFORMATION
Mediating Property & Debts
Community and Equity States
Oregon Equity Standards
California Community Property Standards
Quantity and Quality
Marital Home
Valuation Dates
Establishing Values
Personal Property
Retirement Interests
Bringing It Together

18. Tax Issues
You want to be able to refer folks for tax advice when appropriate.

- divorce itself not a taxable event
- tax filing status generally - joint/individual
- head of household filing status
- child care credit
- exemptions for children
- child support
- spousal support
- temporary spousal support
- property division generally
• marital home capital gains exposure
• mortgage interest and property taxes
• past tax liability

ADDITIONAL INFORMATION

Tax Issues

19. Drafting the Agreement
• Getting the job capably done
• Work product alternatives
• Memorandum of Understanding
• Marital Settlement Agreement
• Stipulated Modification of Decree
• Informal Agreements
• Avoiding the unauthorized practice of law
• Legal Advice and Review
• Rely on outside attorneys to draft?
• Co-Mediation / Partnering

ADDITIONAL INFORMATION

Drafting the Agreement
Infusing Legal Capacity
Rely on Outside Attorneys?
The Memorandum of Understanding
Issues for the Mediating Attorney

20. Appropriateness for Mediation
• private sector/public sector
• some measure of screening - capacity
• domestic violence screening
• standards
• reasonably able to represent interests
• make reasonably informed decisions
• free from intimidation or coercion
• voluntary process and agreements
• when in doubt, act on concerns

how can mediation be configured to create capacity for both parties?
• reporting abuse, or not

21. Mediation Ethics
Which Standards Apply?
profession of origin, state mediation association, ACR/ABA/AAA/AFCC

For what purpose?
aspirational, minimal, liability measure

Informed Consent
• Self-Determination
• Voluntary
• Rights to be Informed, Disclosure?
• Impartiality, Neutrality
• Prior Contacts
• Prior Professional Service
• Subsequent Professional Services
• Substantive Bias
• Confidentiality
• Caucus
• Fees

Define and Describe Process

Encourage Legal Counsel, Advise Legal Review

Legal Advice and Legal Information
• Capacity
• Balance Power?
• Fairness or Reasonableness?
• Drafting
• Unauthorized Practice of Law
• Court Appearance?
• Co-Mediation, Attorney with other?
22. Theoretic Model

How do you bake bread?
3 ingredients: Direction, Flexibility and Safety

- Desired Outcomes
- Interests
- Positive Intentions

*Give Direction to Agreement*

- Intrinsic Attraction to Agreement
- De-positioning
- New Perspectives
- Doubt and Dissonance

*Create Flexibility and a Desire to Move to Agreement*

- Principles
- Standards
- Criteria
- Rationales
- Rationalizations

*Provide an Explanation (rationale) that makes agreeing Safe and Adaptive*

23. Developing A Practice

- Don't Quit Your Day Job Yet
- Niche
- Plan
- Existing Networks
- New Networks
- Stationary
- Yellow Pages
- The Internet
- Display Ads
- Press Releases
- Articles
- Presentations
- Mailings with Qualifiers
- Qualify for Panels
- Additional Professional Education

Online Training Manual

Career Development
Building a Practice