

## KING @ LAW'S DIVORCE GUIDE SERIES

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Out-of-Court Divorce Negotiations in North Carolina



David King, King @ Law

919.706.5322

david@kinglawnc.com

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David King, King @ Law  
919.706.5322  
David@kinglawnc.com  
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## Chapter

# 1

## 1 Why Negotiate

*Most divorce disputes are resolved through negotiations, not trial*

Many spouses start the divorce process with the naïve idea that they will go to one court hearing, tell the judge their side, and instantly get everything they want.

### BENEFITS

▶ Faster, cheaper, easier

✓ Better Outcomes

 Better Co-parenting

Going to court is more like spending a year or two at the DMV. You will prepare hundreds of pages of documents and present your evidence at multiple hearings that are often rescheduled last-minute. If you have children, contentious litigation can make it difficult to co-parent with your spouse. If you hire a lawyer, going all the way to trial can cost \$20-\$30k.

Also, the judge's decision at trial often isn't what you anticipated. Many decisions from a judge are worse for both spouses compared to the deal that could have been negotiated. For example, a judge's decision on dividing a retirement account can cause a spouse to pay 20-30% in taxes and penalties that could have been avoided in a negotiated deal.

For all of these reasons, the majority of divorces are resolved through negotiations, rather than trial. Negotiations often resolve divorce disputes in months instead of years and cost \$1-\$4k instead of \$20-\$30k. Also, negotiations are a mandatory part of litigation.



David King, King @ Law  
919.706.5322  
David@kinglawnc.com  
[Schedule a Consultation](#)

## Chapter

# 2

## 2 Negotiation Formats

*Choose one of four negotiation formats to use*

**N**egotiations can be used with intense, contentious disputes, or with mild to non-existent ones.

However, the more intense the disputes are, the more structure and legal advice is needed for negotiations to succeed.

Most approaches to negotiating divorce disputes involve a similar format. The spouses take turns sharing offers and counteroffers. Each offer includes an accounting supporting a spouse's position on financial issues. It explains how that spouse argues the law applies to their situation and offers compromises or solutions to concerns from both spouses.

The first step in attempting to negotiate divorce disputes is choosing which of the negotiation formats in the sections below are right for your circumstances. The best format for you will depend on how intense your disputes are.


### Informal Negotiations

Informal negotiations is a light-weight approach to low-intensity disputes. With informal negotiations, the spouses do not share detailed evidence or records. They don't hire a mediator or arbitrator. The spouses merely

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#### CHOOSE FORMAT

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 Informal

 Cooperative

 Mediation

 Arbitration

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share offers and counteroffers directly, or through their attorneys. Each offer includes an accounting, legal reasoning, and other materials.

Informal negotiations is overused, because it's comparatively simple, fast, and cheap. However, if your disputes are more intense, informal negotiations may merely cause delays and frustration, poisoning future negotiations. There are no deadlines in informal negotiations and no incentive to make serious settlement offers. So the spouses tend to essentially make the same offer over and over without much compromise.

The ideal scenario for informal negotiations is when both spouses are eager to settle, but the spouses are unsure what terms would be fair. If you are not sure whether there are actually disputes at all, informal negotiations may be the right approach for you. Often, this light-weight option is no longer practical when the spouses take too long to do proper negotiations and disputes have escalated to the courtroom.

## Cooperative Divorce

Cooperative divorce adds a little more structure to negotiations for low to medium intensity disputes. The spouses each sign a contract agreeing to share evidence, meet deadlines, and cooperate in the process. By signing a contract, the spouses show a greater commitment to negotiations and agree to a set of deadlines.

Cooperative divorce can be a polarizing topic among divorce lawyers, because most cooperative divorce contracts prohibit either spouse from starting or threatening litigation, unless negotiations fail. A lot can happen while negotiations are ongoing that can make litigation not only necessary, but urgent.

However, your cooperative divorce contract can say almost anything you want. The spouses do not have to waive their right to litigation. Having real deadlines and a limited number of offers/counteroffers helps push spouses to make more serious settlement offers.

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## Mediation

Mediation is the most common, most effective way to resolve most divorce disputes. Mediation is so effective the courts have adopted it as a mandatory process before trial. In mediation, a neutral mediator shares offers and counteroffers between the spouses and coaches the spouses towards reaching a settlement.

The value a mediator brings to the table is difficult to articulate. However, they are extremely effective at resolving even contentious disputes. Often, the mediator can talk sense into an unreasonable spouse or accomplish compromise the spouses were unable to reach on their own.

Another key characteristic of mediation is that it's scheduled for a specific day (or sometimes two). This means you'll know by the end of that day if your case is settled or going to court. It also provides a powerful incentive for the spouses to make serious settlement offers to avoid the courtroom.

## Arbitration

Arbitration is ideal when the spouses couldn't reach an agreement at mediation, or the spouses are so hostile they are unlikely to agree on anything, even with a mediator's help. Arbitration isn't actually a form of negotiation. The arbitrator acts like a judge and makes a decision on how your divorce disputes will be resolved.

It may seem counter-intuitive, but hiring a judge through arbitration is usually cheaper than going to a government court and using a judge funded by taxpayers. That's because the cost of just paying a judge is less than the cost of delays, bureaucracy, etc. at government courts.

Also, arbitrators often spend more time on your case and make better decisions than government judges. Mediation is far more popular than arbitration even for many intense disputes. Most people feel more comfortable with a deal they agree to through negotiation, instead of having a third-party make unpredictable decisions about their divorce.

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David King, King @ Law  
919.706.5322  
David@kinglawnc.com  
[Schedule a Consultation](#)

## 3 Inviting Your Spouse

*See if your spouse is willing to participate*

Generally, everything discussed in this guide requires voluntary participation from both spouses. Both spouses benefit from finding an alternative to courtroom litigation. However, it can be difficult to agree on a negotiation method when the spouses do not get along or are not cooperative.

You've probably argued with your spouse already over the phone, email, or text messages. However, you may not have formally invited them to a specific structured negotiation process. Here's an example invitation message you can use as a draft:

“I spoke to an attorney, David King, and he suggested we try to resolve our disputes through a voluntary negotiation process called mediation. Would you be willing to ask your own lawyer about mediation and circle back with a decision on whether you'd like to schedule one together? It does require that we share evidence/records and split the costs of the mediator.”


Be patient and give your spouse space. Your spouse's own lawyer is more likely to persuade them to participate in negotiations than you are. However, if your spouse does not respond, eventually you'll need to set

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### STEPS

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 Lawyer

 Patience, Space

 Deadline

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a deadline. The deadline is when you'll start litigation if your spouse has not agreed to participate in negotiations instead.







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David@kinglawnc.com  
[Schedule a Consultation](#)

## 4 The Negotiations


*Successful negotiations rely on preparation, knowledge, and compromise*

In most cases, long before a scheduled mediation or arbitration, the spouses share evidence and records. For example, you'll typically share bank statements, tax returns, and other financial records. This allows each spouse to prepare an accounting showing how the law applies to the marital finances, and to prepare other materials for negotiations.

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### STEPS


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 Share evidence

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 Prepare

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 Forecast

The negotiation itself is based on each spouse forecasting how an impartial judge would apply the law to their circumstances. Instead of going through the trial process to find out what a judge actually decides, the spouses reach an agreement that's similar to what a court would likely order anyway.

Naturally, each spouse will genuinely anticipate a judge would make a decision favorable to them if they went to trial. However, the cost and burden of litigation makes both spouses more willing to compromise to reach an agreement. You can think of this concept using the following formula for the lowest settlement you should take:

Value of your claim (e.g. \$100,000 in alimony)

Times the probability a judge will award it to you (e.g. 80%)

Minus the burden of getting that decision from the judge

For example, say Jane believes she has an alimony claim worth \$100,000, while her husband Joe believes a judge is more likely to award only \$10,000. At first, it doesn't seem like these spouses are likely to reach an agreement, because they are so far apart.

But then, Jane admits there's only an 80% chance a judge will agree with her high alimony claim. Additionally, Jane figures going to trial would cost her \$20k in legal fees and \$20k worth of her time and energy. We can calculate the lowest offer Jane should accept as follows:

\$100k anticipated value of the alimony claim

times 80% chance a judge agrees with her

minus \$40k for the costs and burden of litigation

$$100,000 * .08 - 40,000 = \$40,000$$

In this example, Jane might be willing to settle for less than half of her overly-optimistic expectation from a judge. Meanwhile, her husband Joe will also pay more than he believes the alimony claim is worth to avoid the risk, time, frustration, and cost of going to trial, using the same formula.

Entire books have been written about divorce law. Even more books have been published about negotiation strategies. However, I'll summarize the books and training I've received on negotiations as follows: patience, empathy, logic, and compromise.

You'll also need to come to the negotiation table with knowledge of what the law is and how it applies to your circumstances. This can be done by hiring a lawyer. However, King @ Law also offers other guides focused on different areas of law, such as alimony, equitable distribution (property/debt), and children.

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