IMPLEMENTATION TOOLS FOR

FAMILY JUSTICE REFORM

GUIDANCE ON DEVELOPING PROBLEM-SOLVING APPROACHES FOR FAMILIES IN COURT

IAALS
Institute for the Advancement of the American Legal System
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These implementation tools were developed by IAALS to support real change on the ground. Each guide is designed to provide the information necessary to help judges, lawyers, court administrators, and others to understand the problems facing our system and the people who use it—and to make improvements that will increase access and bolster public trust and confidence.

This guide stems from IAALS' work alongside the Conference of Chief Justices (CCJ), the Conference of State Court Administrators, the National Center for State Courts, and the National Council of Juvenile and Family Court Judges on the Civil Justice Initiative and the Family Justice Initiative. In recent years, CCJ launched both initiatives—and developed recommendations and principles—to guide state courts and family courts in better meeting the needs of those who need access to the courts, decreasing cost and delay, and improving case processing. IAALS has been a proud and long-time partner in these national civil and family justice reform projects.

As these sister efforts gain momentum, IAALS is working to support courts implementing these reforms by developing a variety of resource guides like this one, in partnership with national experts.

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IAALS, the Institute for the Advancement of the American Legal System, is a national, independent research center at the University of Denver dedicated to facilitating continuous improvement and advancing excellence in the American legal system. We are a "think tank" that goes one step further—we are practical and solution-oriented. Our mission is to forge innovative and practical solutions to problems within the American legal system. By leveraging a unique blend of empirical and legal research, innovative solutions, broad-based collaboration, communications, and ongoing measurement in strategically selected, high-impact areas, IAALS is empowering others with the knowledge, models, and will to advance a more accessible, efficient, and accountable American legal system.

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INTRODUCTION

Family courts operate within a larger court structure that generally reflects the traditional, adversarial approach. However, many factors have required family courts to develop alternatives to the adversarial model, including the nature of the proceedings, the need to anticipate ongoing contact between the parties, child development changes over time, and the diverse array of issues and complexity of families. While most cases resolve short of a contested hearing, a resolution that happens in the "shadow of the courthouse" may still be adversarial. This can exacerbate existing tensions between partners or spouses, and, in cases involving children, can leave children caught in the crossfire of parental acrimony.

The Family Justice Initiative (FJI) of the Conference of Chief Justices and Conference of State Court Administrators, developed in partnership with IAALS, the National Center for State Courts, and the National Council of Juvenile and Family Court Judges, is calling on state courts to change the prevailing ethos for managing family cases. FJI's national recommendations, the *Principles for Family Justice Reform* (Principles),[1] call for a paradigm shift in family courts, centered on a move toward a problem-solving mindset and non-adversarial approach.[2] What that means is finding ways to support parties in addressing underlying conflicts collaboratively during the court-related life of a case—and providing them with the tools to resolve disputes in the future.

At the heart of this overarching recommendation is the deployment of non-adversarial alternative dispute resolution (ADR) options. The Principles are centered on a flexible pathway approach to triage domestic relations cases that matches parties and cases to resources and services.[3] For those cases that do not have full agreement at filing, and therefore do not fit within the Streamlined Pathway, there is the Tailored Services Pathway that has ADR at its core, to create opportunities for problem solving between parties. Where parties cannot or should not problem solve together without court facilitation and supervision, an elevated Judicial/Specialized Pathway is available. While this pathway envisions substantial court- or community-based resources to reach resolution, ADR processes can play an important role in this pathway, too.

Non-adversarial ADR processes are common in many family courts, with mediation being the most common. All 11 of the participating courts in the *Landscape of Domestic Relations Cases in State Courts* study had some sort of mediation program. Program specifics, though, varied considerably across the studied jurisdictions,[4] and not all of the courts had ADR options beyond traditional mediation programs. The FJI Principles recognize the benefit of having a suite of ADR mechanisms that play a role in facilitating problem solving, including conciliation, early neutral evaluation, parenting coordination, and others. Family law disputes range from simple to complex, which sets the framework for why a diverse set of approaches to resolving issues makes sense in these cases.

Further, the Principles reflect and strengthen the growing recognition around the country that rather than provide an *alternative* to traditional approaches, these ADR approaches should be the norm in divorce, separation, and parenting time disputes, in most cases.[5] This marks a change in the prevailing culture, because "litigation is the default for divorcing and separating families. In some places, it remains the first, and often only, recourse."[6] Part of the explanation for this reality is a need for increased education and guidance for courts on establishing ADR processes. We hope this guide will move the conversation forward on that front.

In the family law context, research on ADR is extensive and includes details ranging from what specific practices are most effective to the best ways of measuring both long- and short-term outcomes. This guide, instead, intends to assist family courts in building a menu of robust ADR processes that are responsive to the needs of cases and parties.[7] In this guide we do not make specific recommendations with respect to the structuring of these various processes; instead, we raise key issues for courts to consider in tailoring programs to the needs of the jurisdiction. The first section briefly explores the recognized benefits of ADR for parties in divorce and separation cases, particularly those involving children. We then detail variations in approaches in the context of key considerations for states looking to introduce or expand ADR offerings. The next sections consider in detail two high-impact issues in ADR: domestic violence and self-represented litigants, respectively. Lastly, we look at some of the barriers to implementing robust ADR programs, and conclude by encouraging family courts and family justice system stakeholders to thoughtfully examine existing ADR mechanisms in the context of building a culture of problem solving in family court.

BENEFITS OF ADR APPROACHES

With ADR, the parties themselves help to build workable, beneficial solutions with the assistance of a third-party professional. This emphasis on *process* in addition to outcomes is significant in family law cases for several reasons. Conflicts involving parties with children can persist on and off for years as the children grow up and situations change, as compared to other legal disputes where the parties may never see each other again and have no ongoing relationship. Teaching co-parents a problem-solving process, rather than simply solving the presenting problem and creating a reliance on the court to resolve future problems, can make an enormous difference in terms of the ongoing health of the reorganized family and also in terms of resources for both parents and courts.

Parties in family conflicts, especially those with children, will most likely need to have ongoing contact, subject to protections for domestic violence situations. Research has shown that mediation and other forms of ADR can be helpful in managing emotions and improving parental communication, which can guard against potentially negative ongoing effects associated with separation and divorce.[8] By teaching people an alternative way to resolve their differences and assisting them with crafting agreements that reflect their specific needs, ADR processes can change the way parties interact long after the court case is over.[9] The Principles provide:

> Given the far-ranging and long-term impacts that judicial decisions have on parents and children, the court system has substantial reason to encourage parties to reach resolution themselves, with careful attention to the safety of the parties, rather than undergo a full adversarial proceeding and receive a determination by the judge.[10]

When courts offer mediation and related services—and emphasize their value—they also send the message that ADR is supported by the court system and provides a viable alternative to litigation, especially when it is financially subsidized by the court.

CONSIDERATIONS IN DEVELOPING ADR APPROACHES

There are any number of options for how to structure mediation and other ADR approaches, but there are some core considerations that should inform the various approaches.

PRIVACY AND CONFIDENTIALITY

Many ADR approaches reflect the understanding that parties may be more willing to share information with each other if they know the information cannot be used against them in court if they are unable to reach agreement. Other approaches, however, reflect the concern that when time and resources go into a process that does not resolve the dispute, information from that process may be useful to the decisionmaker in a court process. If no agreement is reached in mediation, for example, will the

mediator provide information or make a recommendation for next steps that is shared with the court as well as with the parties? Are the professionals providing the ADR service also mandated reporters of child abuse or other situations? As a result of these competing considerations, some approaches highly value confidentiality and others value allowing the professional and parties to share information more broadly to most effectively resolve the conflict. At the very least, there must be clarity for the parties on these issues. Providers have a responsibility to tell the parties in advance about limitations on confidentiality and make certain that the parties understand what might happen with their information.

MANDATORY OR VOLUNTARY/OPT-IN OR OPT-OUT

Voluntariness—the ability of parties to choose to participate or not—has been considered a key component of many ADR approaches, including mediation. When programs mandate participation, many who would not otherwise choose ADR will have the opportunity to attempt to resolve their disputes, often more effectively and efficiently; at the same time, cases where there is an imbalance of power, domestic violence, or other significant challenges such as substance abuse or mental illness also get included in mandatory ADR programs when some of those cases may be better suited for the adversarial process to ensure key rights are protected with judicial oversight. A key initial consideration in framing an ADR program is whether to take an over- or under-inclusive approach and how to, in either case, guard against the problems that may arise when cases need to be brought into or removed from a particular program or service.

TYPE OF PROFESSIONAL

In developing a program or adopting an approach, a key consideration is what type of professional is best suited to provide the service and what kind of training is critical to ensure success. ADR professionals include those providing mediation, arbitration, and settlement services. Some are attorneys, others are mental health professionals, and still others have been trained specifically in the ADR service being provided but do not fit into any other professional category. Mediators, for example, who have a background or license in mental health may be in a good position to provide information on child development, the impact of trauma or conflict, and offer related referrals or ADR approaches that include recommendations to address a family's underlying emotional or psychological concerns; those with a legal background may be able to provide information about the law and legal processes more easily. Some approaches provide for co-mediators so that parties might benefit from the combined knowledge and experience of different professionals. Additionally, in most jurisdictions, mediators must meet certain training requirements, including a basic 40-hour mediation training. Some are required to take continuing education courses regularly. Decisions about professional requirements and how that impacts the service that is provided are critical in designing ADR programs, and the litigants need to have clear information about what kind of professional is involved in a particular program.

METHOD OF DELIVERY AND USE OF TECHNOLOGY

Traditionally, professionals and courts providing ADR services, especially mediation, have maintained that those services are best provided in person. Providers assert that the benefits of meeting in person include opportunities to build rapport, assess demeanor, and gauge how safe or uncomfortable people may be meeting together, as well as the convenience of having a single, often secure, meeting place that the professional or organization can maintain, which supports confidentiality. However, there is increasing interest in online dispute resolution (ODR) in courts around the country, which generally will not require that all parties be in the same physical place at the same time as the dispute is discussed or resolved. "ODR" is sometimes used interchangeably with the term "ADR," but, in theory, online dispute resolution can refer to any model of digital dispute resolution, including resolution by a judge.

The availability of ODR means some of the long-standing ADR models will be more accessible online or through tele- or videoconferencing. There are approaches that can be taken with technology that have been unavailable in ADR previously, including being able to reduce the time between the conflict and dispute resolution intervention; one example could be with mediators or parent coordinators (arbitrators) being on call at a child's soccer game or a custody exchange where parenting disputes often arise. Additionally, the ability to caucus with parties in separate online chat rooms while simultaneously being able to facilitate discussion in a shared online space offers mediators and those negotiating with parties tools that may not be as readily available for in-person ADR.

Integration of AI-empowered functions with ADR will provide opportunities for parties to be directed toward possible solutions prior to settlement discussions. Solutions involving artificial intelligence may offer evaluative input that can help resolve disputes faster or more effectively. Technology solutions can also help expand the options for families in developing agreements for contact that may be limited to texting or using cloud-based calendars and communication tools; resolving disputes through online platforms or apps where therapists, mediators, attorneys, and others provide assistance;[11] or online courses and workshops designed to provide information on child development or financial-planning options post-separation.[12]

DUE PROCESS AND ACCESS TO JUSTICE

Although ADR may be a preferred process for family disputes, it is critical that the parties not lose access to the courts as these alternatives proliferate. ADR programs are often adopted because of their perceived cost efficiencies and ability to resolve issues quickly, or out of concern that some cases are taking up too many court resources. And in family cases, these approaches are often favored because of their ability to minimize or reduce adversarial posturing between parties. However, the court must always remain accessible and available to assist families in resolving disputes in a more traditional way, for enforcement and protection, if necessary, and to ensure that legal rights, responsibilities, and remedies continue to be available to aggrieved parties. Additionally, courts must remain mindful of the basic due process requirements even of ADR, including notice and an opportunity to be heard, to support public trust and confidence in the legal system, avoid unfair outcomes, and help ensure parties have access to the most effective and appropriate process and resolution.

DOMESTIC VIOLENCE AND ADR

Research suggests that the majority of contested child custody and visitation disputes may involve some history of behavior that would be covered by civil or criminal domestic violence statutes.[13] However, the parties may never raise the issue of intimate partner violence for many reasons, including fear, intimidation, shame, lack of trust of the court system or the professional, or an interest in protecting a loved one or the family from embarrassment. It is also common that the person who has been afraid may no longer be afraid or may not see the issue as relevant to the process. It is possible that the person who has been victimized values the prospect of getting the divorce done and may legitimately value efficiency and finality over some other considerations. However, there is a balance between respecting an individual party's choices and being aware of significant risks to parties, professionals, and courts if domestic violence is not considered or addressed, and many jurisdictions have policies requiring screening, referrals, and other remedies designed to address this prevalent and serious issue.[14]

From ADR's inception, concerns have been raised about whether a process that relies on balancing power, sharing information, confidentiality, and the ability of each party to advocate for his/her position works for situations where there is unequal bargaining power, abuse, or fear. Some jurisdictions provide an automatic "out" for domestic violence as an exception to or exemption from mandatory mediation. Others require that cases involving allegations of domestic violence be mediated only with separate sessions, sometimes held at separate times. Still others screen for domestic violence and other power imbalances before the mediator, with input from the parties, to determine whether mediation, jointly or separately, would be appropriate.

The Principles suggest that rather than a blanket solution in all cases, the steps taken should be tailored to the circumstances of the particular case, if screening reveals a concern. Designed to strike a balance between the self-determination of the parties to play a proactive role in charting their course through the process and the court's responsibility to ensure the safety of the parties, the recommendations note: "The parties' voices should be heard in determining the most effective responses as they know their family best and may have suggestions the court would not have considered."[15] Ultimately, though, "[s]afety must remain the top priority."[16]

As a result, it is critical that all ADR programs implement protocols for handling domestic violence safely and effectively. While litigation does not necessarily preclude parties from being subject to further acts of abuse, the adversarial process tends to be more formal and court proceedings are generally conducted in court buildings that include some level of security. Judges are viewed as having significant authority, and parties generally understand that a third-party decisionmaker is shaping the process and outcome, which can, in some instances, lower the risk of violence. Appropriate screening questions, intake processes, opportunities for separate sessions, and other key elements should be in place when ADR programs are developed. Additionally, given the potential for coercion, especially in cases where parties do not have an advocate to consult with, it is critical that careful thought be given to how programs are evaluated. Courts should avoid evaluating the success based solely on how many agreements were reached or whether mediation was terminated so staff know that safe termination or re-referral to court is supported.

Finally, it is crucial that ADR professionals develop a deep understanding of the relevance of domestic violence to dispute resolution; the Principles call on courts to be trauma-informed and trauma-responsive. An abusive partner may communicate to the other party that telling anyone about the violence will result in

serious or lethal consequences, which can be dangerous for professionals asking about violence as well as any party reporting abuse. The decision to end or leave a relationship can be one of the most dangerous times for victims/survivors who may be attempting to navigate this process with as little conflict as possible out of concern for their safety and the safety of their children or other family members. Given the prevalence of domestic violence and the potential danger in these situations, it is critical that all court personnel and those providing ADR services be well-versed and trained in the dynamics of intimate partner abuse and develop well-considered protocols for screening and intervening.

SELF-REPRESENTED AND LIMITED-RESOURCE LITIGANTS

At least 72 percent of family law cases nationally involve at least one self-represented litigant,[17] which means mediators and other ADR professionals often end up playing a significant role helping parties navigate their disputes, access legal information, and manage their cases. Because many litigants will not be familiar with ADR, the court or professionals providing the service may have an even greater responsibility to offer orientation programs, provide referrals to advocacy resources, or otherwise assist parties initially and throughout the process. Access to information or legal advice to assist self-represented litigants in analyzing how solid their position or case might be is crucial for ensuring that these parties can meaningfully participate in processes that emphasize "party autonomy" and "self-determination," as mediation and other ADR approaches do.[18] Even in mandatory mediation, informed consent is considered critical—parties need to understand what they are negotiating, their options, the legal framework, and the limitations on confidentiality. The Principles recommend that courts provide clear, straightforward information to parties about court processes and service options, including the implications of various approaches.

It is similarly important to pay attention to the population seeking assistance with resolving their disputes to ensure that paperwork, websites, and services are accessible. This includes reviewing existing intake sheets and informational brochures regularly to make sure they are in plain English, multiple languages, and are regularly updated.[19] It also means ensuring that the services are provided in the language of the participants or that interpreters are available so that all parties can receive the same, accessible information. Self-help materials that facilitate meaningful access are those that "help parties translate the information into action, to move their case forward, or achieve another goal within the court process."[20] Court systems should consider making sure an individual or team within the organization is tasked with routinely reviewing self-help materials and placing themselves in the shoes of parties who may be going through the process or service for the first time. For example, materials should be screened for jargon and redundancy.

Finally, financial considerations are also key. Some programs have found that charging participants for their ADR services means people show up and take the process more seriously—and may be appreciative if the cost is lower than they would otherwise pay. However, when ADR is mandated, consider whether charging parties is fair and workable given the need to also provide fee waivers so that financially constrained parties can equally participate.

CHALLENGES IN IMPLEMENTING ADR APPROACHES

An important part of this conversation includes an awareness of and strategy around some prevalent challenges in implementing ADR.

As a threshold matter, one of the biggest challenges to implementing ADR in family cases is the lack of popular understanding and recognition of the benefits of ADR. Despite increasing national attention on ADR approaches at the family court stakeholder level, there remains "a deep-seated public conception that divorce and separation are inherently adversarial processes in which disputes are settled in court and parents are represented by lawyers arguing in front of judges."[21] Most family disputes do not end up in trial or are resolved without filing a contested case. For those that do proceed contested at the time of filing, it is not uncommon for parties in these cases to view the issues as unresolvable. By the time these parties file, they may believe there is no alternative other than to ask a judge to resolve the matter since they have been unable to arrive at a resolution on their own.

Courts and programs can address this by providing information on their websites and in person, and offering orientation sessions that cover ADR programs and procedures and the reasons why they are in place—as well as their benefits compared to traditional court options. In communicating about ADR services, courts and providers can engender trust and confidence by highlighting the professional skills and experience of the providers as well as the rules, protocols, and guidelines under which they operate. ADR, like court processes, can be guided by statute or other legal doctrines which can help lend formality and consistency to programs and contribute to greater buy-in from the non-legal community.

Creating a consistent culture around dispute resolution is another challenge to implementing and integrating robust alternative dispute resolution processes. ADR approaches go by a variety of different names, jurisdiction by jurisdiction. There are a number of reasons for this variance, including that alternative dispute resolution is a somewhat unregulated area. While that provides room for creativity, experimentation, and flexibility, which can be helpful in some jurisdictions, this reality can also create some confusion and inconsistency, which can make it difficult for replication and sharing best practices. The more the field can identify certain key, common elements and disseminate information on promising practices, along with common terms that will allow for easier exchange of ideas, the clearer the family law field may become, with ADR options that are most appropriate and can be described to the public with greater clarity.

CONCLUSION

Reframing the management of family law cases around problem-solving approaches rests on the availability of robust non-adversarial ADR offerings. Mediation, early neutral evaluation, conciliation, and other processes provide a fluid and flexible environment in which parties can develop and practice problem-solving skills, both to facilitate self-determined resolutions and also to shape healthy parenting relationships that continue beyond the resolution of the case. Further, by presenting non-adversarial ADR processes as the primary mechanism for dispute resolution in family cases, unless an adversarial approach is mandated given the facts of the case, courts can model a positive decision making process for parties and move away from teaching litigants that the appropriate way to resolve all family disputes is adversarial court involvement. Creating the infrastructure for this culture change and mindset shift will be central to implementing the Family Justice Initiative Principles and to better serving the families who come to our state courts.

APPENDIX: OVERVIEW OF ADR APPROACHES AND EXAMPLES

Recognizing that the traditional litigation approach is often ill-suited to a healthy family reorganization, family courts have implemented various ADR approaches for divorcing families. A key characteristic of all these approaches is that these processes are non-adversarial, whereas in traditional litigation parties oppose each other in court, engage in discovery, produce evidence, and rely on the judicial decisionmaker to craft a final order after litigation.

Mediation—Mediation is the most widely known and utilized ADR approach in family law, especially in child custody and visitation or parenting time cases.[22] Initially characterized as a voluntary process, in many jurisdictions the value of mediation has been thought to be so great that court systems and legislatures have mandated parents to attend mediation in some form prior to litigation. Confidentiality is a key component of most mediation processes, although, in some models, mediators provide information to courts about whether parties reach agreements and may identify issues that have yet to be resolved. While there are variations, fundamentally it is a process that involves parties meeting with a third-party neutral professional (or more than one in the case of co-mediation) who is trained to help the participants identify shared interests and solutions to resolve their dispute. The mediator helps set out the ground rules for the mediation, often with input from the parties, and models creating a balanced playing field where parties are expected to respect each other and the mediator and engage in productive, fair negotiations. As a result, mediators may rate a mediation process as "successful" when there is a final, full agreement—or when the parties learn to discuss their conflicts and communicate more peacefully and productively even if no final agreement is reached.

> Snapshot—Fresno (CA) Superior Court Tiered-Mediation Services: Recognizing the diversity of child custody and the need some judicial decisionmakers have for more information, Fresno Superior Court was one of the first courts in California to implement a tiered approach to mandatory child custody mediation. All contested parenting time cases are referred to a court-based mediator for an initial mediation session. When agreements are reached, those are reported to the court; however, if no agreement is reached, the court has the option of referring the parties back to Family Court Services for a different professional to provide information on the case, such as how the child is doing in school. If the case does not resolve or more assistance is required, the court may again refer the case for a report and recommendation from a professional other than the one who mediated the case originally. These varying levels of service and confidentiality provide opportunities to settle cases combined with services that can support informed judicial decision-making and due process, as any information that goes to the court is provided to the parties and the professional can be called to testify.
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> Snapshot—California's Approach to Domestic Violence in Mediation: California Rules of Court 5.210[23] and 5.215[24] set out a detailed protocol specifically for identifying and handling domestic violence cases in court-connected child custody mediation in all jurisdictions. All cases are required to be screened for domestic violence, and mediators are expected to use best practices for reviewing court files and intake sheets prior to meeting with the parties, to make sure they proceed carefully and safely. Some offices meet with all parties separately first no matter whether domestic violence

has been alleged or identified and only proceed with joint meetings if the mediator determines the situation is safe and that a balanced discussion can be achieved. If domestic violence is alleged, all mediators are required to hold these separate conversations before moving forward. All staff, including those setting appointments, are subject to the rule's admonishment that they "must not respond to a party's request for separate sessions as though it were evidence of his or her lack of cooperation" with the mediation process. Most critically, mediators are prohibited from negotiating with the parties about obtaining or dismissing a restraining order.

California also requires development of local protocols for handling domestic violence in property and financial settlement services, which includes non-child custody mediation. Rule 5.420 guides "settlement services," which includes "voluntary procedures in which the parties in a family law case agree to meet with a neutral third-party professional for the purpose of identifying the issues involved in the case and attempting to reach a resolution of those issues by mutual agreement."[25] Protocols are expected to similarly support screening, safety planning, and separate sessions.

Snapshot—Cook County (IL) Child Relief Expediter: In Cook County, Illinois, a negotiation/settlement project focuses on increasing the issuance of civil orders of protection (Ops) that include appropriate child-related relief (parenting time schedules).[26] The program is offered to litigants in court on a voluntary basis, after the judge and the professional assigned thoroughly screen a case and deem it appropriate to participate. Both parents must agree to participate and can choose to end the session at any time. Services are provided by a "Child Relief Expediter" who has extensive experience working in conflict resolution and domestic violence. The Expediter is neutral, will not take sides or give legal advice, and will not make recommendations to the court about the case. He or she is not neutral, however, with regards to safety and has the ability to terminate a session when deemed inappropriate.

The Expediter facilitates shuttle negotiation between the litigants. Participants are placed in separate waiting areas and are never required to be in the same room during the process. With the goal of helping parents create safe, mutually agreed upon parenting plans, the Expediter helps parties negotiate child-related issues, such as custody, parenting time, communication issues, and limited financial matters. The Expediter does not negotiate the underlying need for the order of protection or the judge's finding that the legal standard for issuance of the order has been met. In addition to the litigants, session participants may include attorneys, advocates, family members, and other support people. Minor children do not participate in the session.

At the completion of the session, if there is an agreement on child-related issues, the Expediter types up the agreement and shares it with the judge. The judge then reviews the agreement with the parties, and it becomes incorporated into the order of protection. If there is no agreement on the child-related issues, or the Expediter terminates the session, the case is returned to the courtroom and the judge makes the decision on the remaining items. Sessions are confidential, with exceptions if there is an imminent risk of substantial harm to someone inside or outside of the session. At the end of the session, the Expediter provides a status sheet to the court and completes a data report for evaluation purposes.

> The program has received very positive feedback from participants including parents, attorneys, advocates, and family members. The program reports that many respondents feel that they were treated fairly during the process and they had not felt that way in court, which enhances victim safety and overall procedural justice. Litigants have expressed that they felt heard and had a say in the outcome related to their shared children. Most expedited cases have resulted in an agreement between the parties that the petitioner believes is safe and appropriate. Even when agreements are not reached, litigants are able to better communicate their concerns to the judge in order for the judge to make informed decisions. Judges have noticed a positive change in the demeanor of the litigants when they return to court.

Early Neutral Evaluation—Early Neutral Evaluation (ENE) is a form of ADR that usually is offered or applied early in a family law case and is designed to help parties resolve disputes by reaching an agreement before undertaking trial prep and related activities associated with litigation. It generally involves the parties meeting with a neutral (in some programs, two neutrals) with expertise in a confidential setting where the professional can work with the parties to identify issues, explore settlement options, and provide an assessment about the merits of each claim. Unlike mediation, the professional in ENE generally provides recommendations and assessments and has greater focus on the possible outcomes in the case. ENE also differs from "collaborative settlement processes" that "seek to take the threat of litigation out of the negotiation process by providing parties with the opportunities to explore their needs and interests without the threat of court."[27]

> Snapshot—Minnesota Early Neutral Evaluation: Two types of voluntary and confidential ENE programs are offered in Minnesota state courts: Social Early Neutral Evaluation (SENE), where there is a custody or parenting time dispute, and Financial Early Neutral Evaluation (FENE), where there are child support, spousal maintenance, and/or property issues. The ENE processes are scheduled after the Initial Case Management Conference, with one evaluator participating in the FENE and two evaluators (one male and one female) participating in the SENE. Each court is expected to employ ways of asking about domestic violence or other safety concerns even if there are no orders of protection or police involvement. Parties (and attorneys, where present) meet with the evaluator(s) and discuss their positions and the case. At the end of the process, the evaluators are expected to let the court know whether a partial or full agreement was reached and the general terms of those agreements. As of 2012, the branch reported that "overall ENE settlement rates in Minnesota range from 60 to nearly 100 percent."[28]

Conciliation—Conciliation has been defined in various ways in the family law context.[29] Today, it is defined by some as differing from arbitration because the third-party professional doesn't make decisions to resolve the case and from mediation because a mediator may simply facilitate a discussion rather than focus on moving parties to reconciliation.[30] In Massachusetts, conciliation professionals are attorneys with three or more years of experience, and the process is defined as follows:[31]

> While conciliation is similar to mediation, they are not the same. Unlike mediation, a conciliator injects their insight and opinions as to how each side might fare in court and how their positions compare with the law. Conciliators provide each side a view of how things might turn out, suggest possible solutions to the parties, and weigh in on the exposures and costs associated with failing to

reach an agreement. In both mediation and conciliation, the neutral dispute resolution professional does not make any binding decisions, such as in an arbitration; although the parties do oftentimes reach an agreement that is then put in writing and signed, becoming an enforceable agreement.

Snapshot—Maricopa County (AZ) Conciliation Court Services: The Maricopa Superior Court offers Conciliation Court Services for married parties who are considering or are in the process of divorce.[32] Conciliation services are initiated by the filing of a Petition for Conciliation, and it is not necessary to have a divorce pending to file the Petition for Conciliation. Both parties are required to attend the conference, the focus of which is to assist parties in making an informed and thoughtful decision regarding their marital relationship. These conferences are conducted by a trained marriage and family professional, are held in private, and are confidential. During the process, no coercion is used to try to force a reconciliation. The final decision regarding the marriage is made by the spouses themselves. After parties complete the conference, they may be referred to community-based services for further assistance if they indicate such an interest.

Settlement Conferences—Finally, through settlement conferences, judicial officers (judges, commissioners, referees, etc.) often play a role in ADR processes, discussing issues with the parties prior to a hearing on the matter. This approach tends to vary by judge and is incorporated into litigation steps in many jurisdictions to allow parties and the court to explore opportunities for settlement, sometimes early and also throughout the process.[33] Confidentiality is not a critical component of settlement conferences since the parties and the judge are meeting together to discuss the case.

Snapshot—Alaska Early Resolution Program: The Early Resolution Program (ERP), available in Anchorage, Juneau, and Palmer, provides self-represented litigants in family law cases with free legal assistance and mediation to help resolve issues and reach settlements without lengthy court trials.[34] Court staff screen newly filed contested divorce and custody cases (including modifications) involving self-represented litigants and pick cases that have a stronger likelihood of settling some or all of their issues. Parties that are selected for ERP are provided with information about the program and a notice to appear at court for a hearing. While attendance at the hearing is mandatory, if either party hires an attorney at any point in the case then the case is taken out of the ERP. Volunteer attorneys and mediators are present to work with the parties to resolve their issues.

The ERP had three main goals when it was first implemented: 1) provide self-represented litigants with assistance from legal professionals at the hearing to help them resolve their issues; 2) resolve and close cases at the end of a hearing, if possible, thereby reducing stress for litigants who can quickly receive final judgments and move on with their lives; and 3) help free up time on congested court dockets for more complex cases. A 2014 review of the ERP lends evidence that these goals are being achieved.[35] The review shows the ERP to be an effective settlement tool in approximately 80 percent of the 800 cases that have been assigned to it within the first five years. Additionally, there was no post-judgment activity in 88 percent of the cases, and in 95 percent of the cases there was either no additional action within one year after the initial hearing, or if a motion was filed it was resolved without a hearing or at only one uncontested hearing.

ENDNOTES

1 Nat'l Ctr. for State Courts, Family Justice Initiative: Principles for Family Justice Reform (2019), https://www.ncsc.org/~/media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Children%20Families/FJI/Family_Justice_Initiative_Principles_Final.ashx [hereinafter FJI Principles].

2 FJI Principle 1 provides: "The court must lead case management. In domestic relations cases, this requires directing a problem-solving approach." This includes supporting parties learning how to resolve future disputes more effectively while addressing the issue in contention. Note also that, "[t]he problem-solving mindset does not abdicate the court's ultimate responsibility for managing family cases." *Id*. at 2-3.

3 A companion document to the FJI Principles sets forth best practices for this triage pathway approach that can be adapted to fit local realities. Nat'l Ctr. for State Courts, A Model Process for Family Justice Initiative Pathways (2019), https://www.ncsc.org/~/media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Children%20Families/FJI/Family_Justice_Initiative_Pathways_Final.ashx.

4 As part of the FJI *Landscape of Domestic Relations Cases in State Courts* study, IAALS collected qualitative, contextual information on domestic relations court and case processing in the study jurisdictions. This research found that more often than not, mediation in study courts was mandatory for parties in contested domestic relations cases, particularly for disputes over custody and visitation issues. Mediation requirements were less common across courts for property disputes, but some courts either mandated mediation for all disputed issues in a domestic relations case or had opt-in mediation services available for disputes over financial issues. For the most part, these services were made available through the court (some for free; some for a fee), although a small number of courts referred parties to external, court-approved mediators. Inst. for the Advancement of the Am. Legal Sys., Family Justice Initiative: Qualitative Court Profile Research (2018), https://www.ncsc.org/~/media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Children%20Families/FJI/Family%20Justice%20Initiative_%20Qualitative%20Court%20Profile%20Research.ashx [hereinafter FJI Court Profiles].

5 Some commentators have suggested a reframing of the term 'alternative dispute resolution' to highlight these processes as the primary mechanisms through which disputes are resolved, as opposed to being framed as an alternative to the normal process. *See*, *e.g.*, Andrew Schepard, Marsha Kline Pruett & Rebecca Love Kourlis, *If We Build It, They Might Come: Bridging the Implementation Gap Between ADR Services and Separating and Divorcing Families*, 24:25 Harv. Negot. L. Rev. 31 (2018) (suggesting "Primary Dispute Resolution" or "Collaborative Dispute Resolution"); Michael Buenger, Executive Vice President, Nat'l Ctr. State Courts, Remarks to the ABA Dispute Resolution Section Spring Meeting: Rethinking the Delivery of Justice in a Self-Service Society (Apr. 10, 2019), https://www.ncsc.org/~/media/Files/PDF/Newsroom/ABA-Dispute-Resolution-Buenger.ashx ("Alternative suggests something other than; perhaps a lesser thing; perhaps even that thing you do because you cannot do the ideal. It can easily be case in pejorative tone. The term is binary in tone just as it is binary in effect…. we need to transition our language, or programs, and our systems away from notions of 'alternative' dispute resolution and toward a more encompassing and holistic notion of dispute resolution services offered by the courts. A menu of options, if you will, not defined in terms of alternatives but defined by litigant needs."); *FAQS*, Super. Ct. Cal, Cnty. of San Mateo, https://www.sanmateocourt.org/court_divisions/adr/family_law/faqs.php#what (last visited Aug. 22, 2019) (noting that "some people call it 'Appropriate' Dispute Resolution.").

6 Nat'l Ctr. for State Courts, Family Justice Initiative: The Landscape of Domestic Relations Cases in State Courts 2 (2018), https://www.ncsc.org/~/media/Files/PDF/Research/CivilJusticeReport-2015.ashx [hereinafter FJI Landscape Study].

7 The Appendix contains a high-level description of the most common types of alternative dispute resolution methods along with examples of these processes as implemented.

8 Joan B. Kelly, *Family Mediation Research: Is There Empirical Support for the Field? (An Update)*, Mediate.com, https://www.mediate.com/articles/KellyFutures.cfm (last visited Sept. 27, 2019) (presenting an abbreviated version of a longer article printed in 22 *Conflict Resolution Quarterly* (2004)).

9 For example, between September 2013 and November 2017, an interdisciplinary out-of-court model developed by IAALS operated to provide separating and divorcing families a comprehensive set of legal and therapeutic services, without ever having to go to court. Evaluation data collected by IAALS "demonstrates that the Center's efforts to create positive outcomes for families and help them plan for their futures was a resounding success." Logan Cornett, Inst. for the Advancement of the Am. Legal Sys., Divorcing Together: Report on an Interdisciplinary Out-of-Court Approach to Separation and Divorce 3 (2019), https://iaals.du.edu/sites/default/files/documents/publications/divorcing_together.pdf.

10 FJI Principles, *supra* note 1, at 2.

11 For example see Julie Jargon, *When Parents Divorce, Apps Can Reduce the Child-Custody Acrimony*, The Wall Street Journal (Apr. 30, 2019, 5:30 AM), https://www.wsj.com/articles/when-parents-divorce-apps-can-reduce-the-child-custody-acrimony-11556616602.

12 Families Change provides age-appropriate information to help parents, teens, and kids process a family break up. Offering content authored with input from counselors, psychologists, and lawyers, the site was developed in collaboration with the California Judicial Branch. Families Change, https://www.familieschange.ca.gov/en (last visited Aug. 22, 2019).

13 *See*, *e.g.*, Connie Beck et al., Intimate Partner Abuse in Divorce Mediation: Outcomes from a Long-Term Multi-cultural Study 4 (July 2011) (reporting on a comprehensive study that provides "strong empirical support for previous estimates that most couples attending divorce mediation report some level of IPA."); Jud. Council Cal., Ctr. for Families, Children & the Courts, "Snapshot Study 2008: Summary Findings," *Research Update* 11 (May 2010) (finding that in 52 of studied families, one or both parents reported physical violence in their relationship.).

14 Cal. R. Ct. 5.215 (setting forth domestic violence protocol for Family Court Services); Cal. R. Ct. 5.420 (setting forth domestic violence procedures for court-connected settlement service providers).

15 FJI Principles, *supra* note 1, at 6.

16 *Id*.

17 FJI Landscape Study, *supra* note 6, at 20.

18 Jan C. Murphy & Jana B. Singer, Divorced From Reality 136-37 (2015) (noting that while traditional mediation may work for some, "reformers should also consider endorsing new models of mediation in which mediators play an expanded role educating parties and evaluating alternatives, so that unrepresented parties can experience the benefits of mediation without substantial risk.").

19 IAALS released a companion piece, authored by Lois Lupica, with guidelines to help courts implement the FJI Principles recommendation that courts develop "[s]elf-help materials that facilitate meaningful access" which means helping parties translate the information into action, move their case forward, or achieve another goal within the court process. Lois R. Lupica, Inst. for the Advancement of the Am. Legal Sys., Guidelines for Creating Effective Self-Help Information (2019).

20 FJI Principles, *supra* note 1, at 8.

21 Schepard, Pruett & Kourlis, *supra* note 5, at 59.

22 California, the largest court system in the U.S., began mandating mediation in contested child custody cases in 1981. Today, most states mandate, fund, or refer parties in family law cases to mediation in one form or another. In the private sector, mediation for all issues (property, financial, and parenting time) has been in place for many years but has been less widely adopted by court systems. *See also* FJI Court Profiles, *supra* note 4.

23 Cal. R. Ct. 5.210.

24 Cal. R. Ct. 5.215.

25 Cal. R. Ct. 5.420.

26 While the name "Expediter" implies that the speed of the process and its potential to alleviate the pressures of a heavy docket are the principal rationales for the process, the court's focus is on helping parties obtain safer and more detailed child-related provisions in OPs and greater compliance by respondent-parents. Telephone interview with Child Relief Expediter, Domestic Violence Division, Circuit Court of Cook County (Feb. 25, 2019).

27 Joanne J. Paetsch & John-Paul E. Boyd, An International Review of Early Neutral Evaluation Programs and Their Use in Family Law Disputes in Alberta 5 (2016), https://prism.ucalgary.ca/bitstream/handle/1880/107429/Early%20Neutral%20Evaluation%20Processes%20in%20Alberta%20-%20Oct%202016.pdf?sequence=1.

28 Minn. Jud. Branch Policy, Policy N. 520.1: Minnesota Early Case Management (ECM) and Early Neutral Evaluation (ENE) Best Practices For Family Court 2 (July 1, 2012), http://www.mncourts.gov/Documents/0/Public/Early_Case_ManagementEarly_Neutral_Evaluation/ECM-ENE_Statewide_Best_Practices_520.1_(final_5-17-12).pdf.

29 Historically, it was offered as a service focused more on reconciliation than divorce, providing an opportunity for married parties to explore options for resolving their differences prior to deciding that the court should assist them in ending their marriage.

30 *Family Law Conciliation Lawyers*, LegalMatch, https://www.legalmatch.com/law-library/article/family-law-conciliation-lawyers.html (last visited Aug. 22, 2019).

31 *Conciliation: What is the Advantage?*, Next Phase Legal, https://www.nextphaselegal.com/blog/conciliation-what-is-the-advantage/ (last visited Aug. 22, 2019).

32 *Conciliation Court Services*, Jud. Branch of Ariz., Maricopa Cnty., https://superiorcourt.maricopa.gov/family/conciliation-court-services/ (last visited Aug. 22, 2019).

33 *See* Stephen H Sulmeyer et al., *The Interdisciplinary Settlement Conference: A Grassroots Alternative for Resolving High-Conflict Parenting Disputes in Lean times*, 53 Fam. Ct. Rev. 632 (2015), http://sulmeyermediation.com/wp-content/uploads/2018/04/Sulmeyer_et_al-2015-Family_Court_Review.pdf (settlement conference approach implemented in Marin County, California).

34 *See* Stacey Marz, Faster, Cheaper & As Satisfying: An Evaluation of Alaska's Early Resolution Triage Program (May 2016), https://www.ncsc.org/~/media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Children%20Families/FJI/Faster%20Cheaper%20%20As%20Satisfying%20An%20Evaluation%20of%20Alaskas%20Early%20Resolution%20Triage%20Program%201.ashx.

35 *Id*.

"THE COURTS OF THIS COUNTRY SHOULD NOT BE A PLACE WHERE RESOLUTION OF DISPUTES BEGINS. THEY SHOULD BE THE PLACES WHERE THE DISPUTES END AFTER ALTERNATIVE METHODS OF RESOLVING DISPUTES HAVE BEEN CONSIDERED AND TRIED."

– Justice Sandra Day O'Connor (Ret.), United States Supreme Court

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