

Family Law Education Reform Project

ADR Processes in Family Law

ABSTRACT

The use of ADR in family situations is common and wide-spread. The family lawyer must understand the different processes in order to counsel clients and others about the ADR and to select the appropriate process.

ABOUT THE AUTHOR

Christine A. Coates, M.Ed., JD
Dispute Resolution Professional

Christie Coates, an experienced family law attorney, now emphasizes ADR in domestic relations and has been a mediator since 1984 in private practice. She has served as president of the Boulder County Bar Association, on the Colorado Bar Association Family Law Section Executive Council and on the CBA Board of Governors. Named the CBA's Outstanding Young Lawyer in Colorado in 1986, she also has since been honored for her work as a mediator, lawyer and child advocate. A former president of the Association of Family and Conciliation Courts, an international interdisciplinary organization, she chaired AFCC's Task Force on Parenting Coordination which developed model guidelines for parenting coordinators. She has also co-chaired committees for both the American Bar Association's Dispute Resolution and Family Sections. An adjunct professor at the University of Colorado School of Law, Christie is a popular national speaker, trainer and consultant in conflict resolution, high-conflict families, parenting coordination, hybrid processes, professionalism, ethics, and family law. She co-authored Working with High Conflict Families of Divorce (Jason Aronson, 2001) and Learning from Divorce (Jossey-Bass, 2003).

Alternative Dispute Resolution Processes in Family Law

Christine A. Coates, M.Ed., J.D.¹

Summary

Alternative dispute resolution (ADR) processes are problem-solving and conflict resolution processes that are used instead of litigation. The use of alternative dispute resolution processes (ADR) has increased dramatically in the last twenty years in most types of legal cases. Because domestic relations/family law cases have also increased dramatically and are among the highest number of cases filed in our legal system, the use of ADR in family disputes such as divorce, parenting, child support, separation and intergenerational disputes is important in helping to resolve conflict, to limit the number of trials before the judiciary, and to increase the satisfaction of the parties.

Why this Topic is Important to Law Students

- The judicial system and its courts have been swamped by the increased number of domestic relations/family cases that are being filed.
- Many of the parties in family cases are *pro se*, which means they are unrepresented by attorneys.
- Family law cases require timely resolution in order to protect the children, their parents, their property and financial resources and the future relationship of the parties.
- The adversarial process of litigation is costly financially, logistically, and emotionally and tends to create divisiveness between family members who may need to continue to have a relationship after the legal case is resolved.
- Even lawyers who do not practice family law are often consulted by family members and friends about divorce, separation and parenting conflicts. An understanding of ADR processes allows the lawyer to discuss the various options that might be available for problem-solving to allow less acrimonious resolution of disputes.

¹ Christine A. Coates, M.Ed., J.D., an experienced family law attorney, now emphasizes alternative dispute resolution in domestic relations and has been an ADR professional since 1984. The co-author of two books, *Working with High Conflict Families of Divorce* (2001) and *Learning from Divorce* (2003), she is a frequent and popular national trainer and speaker on alternative dispute resolution, family law, parenting coordination and high-conflict families. Ms. Coates is also an adjunct professor at the University of Colorado School of Law.

Current Relevant Issues

1. Continuum of processes to resolve family disputes

- A continuum of processes exists from low to high adversarialness and intrusiveness with negotiation on one end of the continuum and litigation on the other end.
- Except for negotiation in which parties can participate without outside assistance, all ADR processes involve a neutral third party helping the parties resolve their disputes.
- ADR processes are private; court proceedings are not.
- The ADR professional is called a “neutral” because the role is one of helping both or all parties to resolve the dispute in an impartial way.

2. Negotiation

- Negotiation is a process whereby the parties communicate with each other, either directly or indirectly, about the issues in disagreement in order to reach a settlement of their differences.
- The parties’ lawyers often negotiate for their clients in an attempt to resolve all issues without going to trial.

3. Mediation

- Mediation is the intervention in a negotiation or a conflict of an acceptable third party who assists the parties in reaching their own decisions.
- The mediator has no decision-making authority, but facilitates the discussion and communication by the parties about the issues.
- Because the hallmark of mediation is self-determination of the parties, mediation is useful when the parties need to have an on-going relationship or want to terminate their relationship cooperatively.
- Mediation is confidential, private and informal.
- Mediation is the most-prevalent form of ADR in family cases, and many court programs and jurisdictions require mediation as a first step in divorce or family disputes.

4. Settlement conference

- The settlement conference process uses a legal professional who after hearing both sides of a case provides an informal assessment of the situation, advises on the law and legal precedent, and may suggest a settlement.
- The process is confidential and generally voluntary, unless part of a court-connected settlement conference program using judicial officers.

5. Early Neutral Evaluation (ENE)

- ENE is an ADR process that has been used in civil cases for some time, but which is new to the family ADR continuum.
- In ENE, the attorneys or parties, if unrepresented, present the basics of the dispute to a neutral evaluator or evaluators who give an assessment of the strengths and weaknesses of the case to the parties. The evaluators then facilitate negotiations to help the parties resolve the dispute.
- The process may use a team of a legal and a mental health professional in parenting disputes or issues.
- The parties retain the right to reject the evaluator's assessment and either resolve the dispute in a different way, or terminates the process with no settlement.
- The process is confidential and voluntary.

6. Arbitration

- In arbitration the agreed-upon neutral holds an arbitration hearing to make a decision based upon the evidence and testimony presented by the parties.
- Unlike civil or commercial arbitration, arbitration awards in family case are not totally binding because the court always retains the right and responsibility to review decisions of arbitrators in family issues. The standard of review is determined by state statute or state case law.
- Arbitration is less formal than litigation, but follows the general structure of a court hearing. When parties are represented, their attorneys usually participate as advocates.
- The process is voluntary and confidential except for the arbitration award which may be submitted to the court for confirmation.

7. Mediation-Arbitration (Med-Arb)

- In med-arb, the parties begin in mediation with the neutral. If the parties are unable to agree on a settlement, the same neutral third party acts as an arbitrator of the remaining issues.

- This hybrid process, which is often used in family cases for post-decree parenting issues, is selected when parties are concerned that they will not agree upon resolution of an issue or issues in mediation, but they do not want to go to court.
- The advantage of med-arb is that the process always results in a decision which can be submitted as an arbitration award to the court for confirmation.

8. Parenting Coordination

- In parenting coordination an experienced mental health or legal professional assists high conflict parents to implement and clarify their parenting plan and with prior approval of the parties and/or the court in some jurisdictions, makes decisions within the scope of the court order.
- The parenting coordinator (PC) is appointed for a period of time, often one or two years, and is available and responsible for helping parents or guardians resolve parenting disputes during the appointment period. The authority of the parenting coordinator is restricted as the PC cannot make decisions that change the intent of the parenting plan that has been ordered by the court.
- Parenting coordination is used when mediation has been unsuccessful or is inappropriate.
- The decisions of the PC are reviewable as in the arbitration process with the standard for review determined by state statute or state case law.

9. Current controversies in the use of ADR in family cases

- Many states do not require special training or experience in the various ADR processes, and quality may suffer.
- The use of ADR in situations in which domestic violence has been alleged or when one party is more powerful than the other may be inappropriate because of the inability of the victim or less powerful party to negotiate or communicate effectively.
- Lawyers have resisted ADR in the past because of encroachment into their “turf” and because of concern about non-lawyers with little legal knowledge serving as neutrals in legal cases.
- Concern has been expressed that when the processes are not provided free or at low-cost by family courts or states, parties who cannot afford to pay for ADR services may receive a different level of justice.

10. Implications for Family Law practitioners

- Family lawyers are first and foremost problem-solvers. Understanding ADR processes helps the lawyer select the process and the ADR professional that would be most effective in helping their clients resolve the dispute.
- The family lawyer's role as an advocate for the client changes depending upon the ADR process selected. The family lawyer must know the most effective methods of advocating for the client in the different processes that maximize the opportunity for success.
- ADR has been found to be effective in the family courts in reducing judicial time spent with cases and financial and relationship costs to the parties, and in promoting creative resolution of family disputes. The family lawyer must understand not only the current forms of ADR but be aware of new processes as they are being introduced into this dynamic field in order to effectively represent their clients.
- In some states, lawyers have an ethical obligation to inform their clients about ADR. An understanding of the process is essential for the lawyer to avoid unethical behavior.

Additional References

- AFCC Task Force on Parenting Coordination (2005). Guidelines for parenting coordination. *Family Court Review*, 44 (1), 162-181. Also available at afccnet.org.
- Kruse, E. (2008). ADR, technology, and new court rules – family law trends for the twenty-first century. *Journal of the American Academy of Matrimonial Lawyers*, 21, 207- 223.
- Moore, C. (2003). *The mediation process*. Updated and Revised Third Edition. San Francisco: Jossey Bass.
- Pearson, Y., Bankovics, G., Baumann, M., Darcy, N., DeVries, S., Goetz, J., & Kowalsky, K. (2006). Early neutral evaluations: applications to custody and parenting time case program development and implementation in Hennepin County, Minnesota. *Family Court Review*, 44 (4), 672-682.
- Schepard, A. (2004). *Children, Courts and Custody*. Cambridge: Cambridge University Press.
- Schepard, A. (2007). Kramer vs. Kramer revisited: A comment on the Miller Commission report and the obligation of divorce lawyers for parents to discuss alternative dispute resolution with their clients. *Pace Law Review*, 27. 677 – 707.
- Sullivan, L. (2006). ADR offers what the bench cannot. *Michigan Bar Journal*, 85. 16-18.
- Taylor, A. (2002). *The handbook of family dispute resolution*. San Francisco: Jossey Bass.